

71 FLRA No. 134

UNITED STATES
DEPARTMENT OF THE ARMY
ARMY CORPS OF ENGINEERS
NORFOLK DISTRICT
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL NO. 1028
(Union)

0-AR-5448

ORDER DISMISSING EXCEPTIONS

April 22, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

I. Statement of the Case

In this case, we decline interlocutory review of an arbitrator’s threshold arbitrability award where the raised exceptions, even if granted, would not advance the ultimate disposition of the case.

Arbitrator Elliot H. Shaller issued an arbitrability award finding that neither law nor the parties’ collective-bargaining agreement barred the Union’s grievance, and that the Union had standing to pursue its various claims related to overtime compensation. The Agency filed exceptions to this award prior to a hearing on the merits of the grievance. Because resolution of the exceptions would not obviate the need for further arbitration proceedings, we dismiss them as interlocutory.

II. Background and Arbitrator’s Award

The Union filed a grievance alleging violations of several federal laws and regulations, including the Fair Labor Standards Act (FLSA),¹ the Federal Employees Pay Act (FEPA), Title 5,² certain Office of Personnel Management (OPM) and

¹ 29 U.S.C. §§ 201-219.
² *Id.* §§ 5541-5550b.

Department of Labor (DOL) regulations, and two articles of the parties’ agreement. The grievance alleged, among other things, that the Agency failed to: properly designate employees as non-exempt under the FLSA; compensate employees for different types of overtime; and allow employees to choose between receiving compensatory time or overtime. The Union sought several remedies, including re-designation of employees to FLSA non-exempt status, backpay, liquidated damages, and interest.

After the Agency denied the grievance, the parties submitted it to arbitration, where the Agency raised a threshold challenge to the arbitrability of the grievance. The parties agreed to present arguments on this issue to the Arbitrator “prior to a merits hearing.”³ The Agency argued, among other things, that the parties specifically excluded “FLSA status and deliberations” from the negotiated grievance procedure and that the Union did not have standing to bring the grievance on behalf of the whole bargaining unit.⁴ The Arbitrator found that, while there was “ambiguity” in the parties’ agreement,⁵ it did not “clearly indicate that FLSA status claims [were] excluded from the [negotiated] grievance procedure.”⁶ He also found that the Union had standing to file the grievance “on behalf of the entire bargaining unit.”⁷ Therefore, the Arbitrator denied the Agency’s claims and found the grievance arbitrable.

On December 19, 2018, the Agency filed exceptions to the arbitrability award, and, on February 25, 2019, the Union filed an opposition to the Agency’s exceptions.

III. Analysis and Conclusion: The Agency’s exceptions are interlocutory, and it has not demonstrated extraordinary circumstances warranting review.

In its opposition, the Union argues that the Agency’s exceptions are interlocutory.⁸ The Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration.⁹ However, the Authority has determined that interlocutory exceptions present “extraordinary circumstances” that warrant review when their resolution will advance the ultimate

³ Award at 2.
⁴ *Id.* at 8, 11.
⁵ *Id.* at 20.
⁶ *Id.* at 17.
⁷ *Id.* at 20-21 (citing 5 U.S.C. § 7121(b)(1)(C)(i); *U.S. Dep’t of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619 (2014) (*White Sands*)).
⁸ Opp’n at 5.
⁹ 5 C.F.R. § 2429.11; *U.S. DHS, U.S. CBP*, 65 FLRA 603, 605 (2011).

disposition of the case by obviating the need for further arbitration.¹⁰

Here, at the request of the parties, the Arbitrator considered arbitrability as a threshold matter and did not reach the merits of the grievance still before him.¹¹ As arbitrability of the grievance was not the sole issue submitted to the Arbitrator for resolution, the award is not final, and the Agency's exceptions are interlocutory.¹²

Nevertheless, the Agency argues that extraordinary circumstances warrant review because its exceptions would "obviate the need for further arbitral proceedings."¹³ In this regard, the Agency makes two related arguments: (1) the award fails to draw its essence from the parties' agreement because the parties excluded "FLSA status and deliberations" from the negotiated grievance procedure;¹⁴ and (2) the award is contrary to law because the Union does not have "standing to bring [a] representational grievance under the FLSA."¹⁵ But these exceptions exclusively concern the grievance's FLSA allegations. Thus, even if we granted them, the Arbitrator would still have arbitrable claims before him, including those based on FEPA, Title 5, associated DOL and OPM regulations, and the parties' agreement.¹⁶ Therefore, resolution of the Agency's exceptions would not conclusively determine whether any further arbitral proceedings are required in this matter.¹⁷ Accordingly, we find that the Agency has failed to demonstrate extraordinary circumstances that

warrant review, and we dismiss the Agency's exceptions as interlocutory.¹⁸

IV. Decision

We dismiss, without prejudice, the Agency's exceptions.

¹⁰ *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (Member DuBester dissenting); *see also U.S. Dep't of the Army, Nat'l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 523 (2020) (Member DuBester dissenting) (finding extraordinary circumstances when "exceptions could conclusively determine whether any further arbitral proceedings are required").

¹¹ Award at 2.

¹² *Compare U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 850 (2012) (finding that a "separate hearing on a threshold issue does not operate to convert the arbitrator's threshold ruling into a final award"), *with White Sands*, 67 FLRA at 620-21 (finding award to be final when *only* issue submitted to arbitration was arbitrability of grievance).

¹³ Exceptions Br. at 9.

¹⁴ *Id.* at 36-37.

¹⁵ *Id.* at 12; *see also id.* at 30-31 (arguing group claims are forbidden by OPM regulations).

¹⁶ *See* Award at 2-4 (listing allegations and requested remedies); Opp'n at 5 (noting that grievance contains other allegations beyond FLSA claims).

¹⁷ *Compare U.S. DHS, CBP*, 70 FLRA 992, 993 (2018) (Member DuBester concurring) (interlocutory review denied when granting exceptions would not obviate the need for the arbitrator to resolve the merits of the grievance), *with U.S. Dep't of Educ.*, 71 FLRA 516, 517-18 (2020) (Member DuBester concurring) (granting interlocutory review where resolution of exception "could conclusively determine whether any further arbitral proceedings [were] required").

¹⁸ The Agency raises additional contrary-to-law arguments and argues that the Arbitrator exceeded his authority and that the arbitrability award fails to draw its essence from the parties' agreement. We do not consider these additional exceptions for two reasons. One, the Agency could have, but did not, present some of those arguments to the Arbitrator. *See* Exceptions Br. at 25 (award contrary to "expeditious processing" requirement in 5 U.S.C. § 7121(b)), 39 (fails to draw essence because grievance was not processed consistent with agreement), 56 (contrary to public policy of expeditious grievance processing); *see also* 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Local 2846*, 71 FLRA 535, 536 (2020) (declining to consider arguments that party could have, but did not, raise to arbitrator). Two, the Arbitrator has not ruled on the merits of the grievance or awarded any remedy to the Union or particular employees. Thus, the merits award – when issued – could render the remaining exceptions moot. *See* Exceptions Br. at 28 (award contrary to principle of sovereign immunity), 44 (fails to draw essence because agreement limits the remedial period), 52-53 (exceeded authority by permitting claims of those whose employment started after, or terminated before, grievance was filed); *see also* 5 C.F.R. § 2429.10 (the Authority "will not issue advisory opinions"); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Tallahassee, Fla.*, 68 FLRA 863, 865-66 (2015) (finding it premature to resolve exceptions when arbitrator had not yet made necessary findings); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 330 (2003) (declining to consider exceptions that may be mooted by subsequent award).

Member DuBester, concurring:

For reasons expressed in my dissenting opinion in *U.S. Department of the Treasury, IRS*,¹ I disagree with the majority's decision to expand the grounds upon which the Authority will review interlocutory exceptions. However, because the award before us does not constitute a complete resolution of all of the issues submitted to arbitration, I agree that the Agency's interlocutory exceptions should be dismissed, without prejudice.

¹ 70 FLRA 806, 810-11 (2018) (Dissenting Opinion of Member DuBester).