

**71 FLRA No. 140**

UNITED STATES  
DEPARTMENT OF THE ARMY  
U.S. ARMY AVIATION CENTER OF EXCELLENCE  
FORT RUCKER, ALABAMA  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1815  
(Union)

0-AR-5419

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DECISION

May 6, 2020

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

**I. Statement of the Case**

The Union filed a grievance challenging the Agency's decision to bar a Union representative from the Agency's premises, a U. S. Army post. At arbitration, the parties' stipulated issues pertained to alleged violations of the grievance procedure of the parties' collective-bargaining agreement and Department of Defense and Agency regulations. Arbitrator Daniel R. Saling issued an award finding that the Agency did not violate the relevant Department of Defense and Agency regulations but did violate the Federal Service Labor-Management Relations Statute (the Statute).<sup>1</sup> As a remedy, the Arbitrator directed the Agency to allow the Union representative onto the post to conduct Union business "as is provided for under the [Statute]."<sup>2</sup>

The main question before us is whether the Arbitrator exceeded his authority in finding that the Agency violated the Statute and awarding a remedy based on that statutory violation. Because the stipulated issues do not pertain to the Statute, we find that the Arbitrator resolved an issue that was not submitted to arbitration and, thereby, exceeded his authority.

<sup>1</sup> 5 U.S.C. §§ 7101-7135.

<sup>2</sup> Award at 26. The Arbitrator incorrectly referred to the Statute as the "Federal Labor Relations Act" or the "FLRA." *Id.* at 6, 13, 26.

**II. Background and Arbitrator's Award**

This dispute revolves around a Union vice president (the representative). At some point during his employment at the Agency, the Agency placed the representative on administrative leave pending the outcome of an investigation as to whether he misused government computers and violated the Privacy Act.<sup>3</sup> At the conclusion of that investigation, the Agency placed the representative on indefinite leave and suspended his security clearance. When the representative learned that the Agency had suspended his security clearance, he "presented himself to the security office," where he allegedly acted in an "aggressive, intimidating and threatening" manner.<sup>4</sup> In response, the Agency barred the representative from its premises (the bar) and, subsequently, terminated his employment. The representative unsuccessfully appealed his removal and the bar in several different forums.

A few years after the Agency removed the representative, the Union requested that the Agency rescind the bar. The Agency denied the request. As a result, the Union filed a grievance alleging that the bar was "arbitrary, unpredictable or discriminatory"<sup>5</sup> and that the Agency violated the Union's right to represent bargaining-unit employees. The Agency advised the Union that it would not process the grievance, and it returned the grievance to the Union.

The grievance was unresolved and moved to arbitration. Before the Arbitrator, the parties stipulated to the following issues:

1. Is the [g]rievance grievable?
2. Did the Agency violate the [g]rievance [p]rocedure of the [parties' a]greement with regard to the return of the grievance to the Union and the bar from the [Agency]?
3. Did the Agency violate [Department of Defense Instruction] 5200.08 [or Agency] Regulation 190.2?
4. If so, what is the appropriate remedy?<sup>6</sup>

On issue one, the Arbitrator determined that the institutional aspect of the Union's grievance related to

<sup>3</sup> 5 U.S.C. § 552a.

<sup>4</sup> Award at 10.

<sup>5</sup> *Id.* at 11.

<sup>6</sup> *Id.* at 9.

“Union representation” was arbitrable,<sup>7</sup> but the representative’s individual issues – concerning loss of security clearance, termination, and the bar – were not.<sup>8</sup> As to issue two, the Arbitrator found that the Agency – by refusing to process and returning the grievance – violated “Union[] membership[’s] . . . rights under the [Statute].”<sup>9</sup> Considering issue three, the Arbitrator stated that the Agency was “not free to determine what Union representative will be allowed to represent Union membership,” and the representative was “entitled to represent” the Union.<sup>10</sup> While the Arbitrator concluded that the Agency did not violate Department of Defense Instruction 5200.08 or Agency Regulation 190.2, he held that the Agency violated its “legal obligation not to interfere with”<sup>11</sup> “the right of the Union to use the representatives of [its] choosing” at the Agency’s facility.<sup>12</sup>

On issue four, the remedy, the Arbitrator directed that the Agency “must allow [the representative] on [Agency premises] for the exclusive purpose of conducting Union business as is provided for under the [Statute].”<sup>13</sup>

On October 10, 2018, the Agency filed exceptions to the award, and on November 13, 2018, the Union filed an opposition to the Agency’s exceptions.<sup>14</sup>

### III. Analysis and Conclusion: The Arbitrator exceeded his authority

The Agency argues that the “four specific issues jointly framed by the parties” did not

<sup>7</sup> *Id.* at 26.

<sup>8</sup> *Id.*; *see also id.* at 22-23 (the Arbitrator stated that he “[would] not issue a decision with regard to [the representative’s] challenge [to]” the Agency’s decision to rescind his security clearance, terminate his employment, or bar him from the Agency’s premises, because those issues had been “fully litigated” in other forums).

<sup>9</sup> *Id.* at 22. Here, the Arbitrator incorrectly referred to the Statute as the “FLRA.” *Id.*

<sup>10</sup> *Id.* at 24.

<sup>11</sup> *Id.* at 25.

<sup>12</sup> *Id.* at 26.

<sup>13</sup> *Id.*

<sup>14</sup> In its opposition, the Union raises various “objections” to the Arbitrator’s award. Opp’n Br. at 1. To the extent the Union’s arguments constitute exceptions, we dismiss them as untimely filed. *See* 5 C.F.R. § 2425.2(b) (time limit for filing exceptions to an arbitration award is thirty days after the date of service of the award); *see, e.g., AFGE, Local 2002*, 70 FLRA 812, 814 n.32 (2018) (Member DuBester dissenting) (dismissing opposition arguments that award was contrary to law and based on a nonfact because they were untimely filed exceptions); *U.S. Dep’t of the Army, U.S. Army Garrison, Fort Drum, N.Y.*, 66 FLRA 402, 402 n.1 (2011) (dismissing opposition arguments that sought to modify the award as untimely filed exceptions).

“involve[] statutory violations,” and, therefore, the Arbitrator exceeded his authority in finding that the Agency violated the Statute.<sup>15</sup>

As relevant here, the Authority will find that arbitrators exceed their authority when they resolve an issue that was not submitted to arbitration.<sup>16</sup> The Authority has consistently held that “arbitrators must confine their decisions and remedies to the issues submitted to arbitration” by the parties and that they “must not dispense their own brand of industrial justice.”<sup>17</sup> Likewise, though arbitrators may legitimately bring their judgment to bear in reaching a fair resolution of a dispute submitted to them, they may not decide matters that are not before them.<sup>18</sup>

Here, the parties framed the issues in terms of the Agency’s compliance with the provisions of the parties’ agreement related to the “[g]rievance [p]rocedure,” a specific Department of Defense instruction, and a specific Agency regulation.<sup>19</sup> Nevertheless, in sustaining the grievance with regard to “the right of the Union to use the representatives of [its] choosing” at the Agency’s facility,<sup>20</sup> and in ordering the Agency to allow the representative on the premises “as is provided for under the [Statute],”<sup>21</sup> the Arbitrator relied solely on the Statute.<sup>22</sup> In doing so, the Arbitrator decided a statutory issue that was not submitted to arbitration, and did not arise from stipulated issues.<sup>23</sup> Thus, we find that the Arbitrator exceeded his authority.<sup>24</sup>

<sup>15</sup> Exceptions at 4, 8.

<sup>16</sup> *U.S. Dep’t of Transp., FAA*, 64 FLRA 612, 613 (2010) (*FAA*) (citing *U.S. Dep’t of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 779 (2005) (Member Pope dissenting) (*U.S. Mint*)).

<sup>17</sup> *Id.* at 613-14 (quoting *Veterans Admin.*, 24 FLRA 447, 450 (1986)); *U.S. Mint*, 60 FLRA at 779 (same).

<sup>18</sup> *FAA*, 64 FLRA at 614 (citing *U.S. Mint*, 60 FLRA at 780).

<sup>19</sup> Award at 9.

<sup>20</sup> *Id.* at 26.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 25 (finding that Agency violated a “legal obligation”), 26 (directing the Agency to allow the representative on Agency premises “as is provided for under the [Statute]”).

<sup>23</sup> We note that Article 4, Section 2 of the parties’ agreement provides that employees have the right “to engage in collective bargaining with respect to conditions of employment through representatives chosen by the [e]mployees.” Award at 4. However, the stipulated issues refer only to the “[g]rievance [p]rocedure” of the parties’ agreement, which is set forth in Article 28. Award at 5-6, 9. Thus, to the extent the Arbitrator found that the Agency’s conduct violated Article 4 of the parties’ agreement, he exceeded his authority in deciding that issue as it was not before him.

<sup>24</sup> *See, e.g., U.S. Mint*, 60 FLRA at 779-80 (finding that the arbitrator exceeded his authority by deciding and awarding a remedy concerning an issue that was not submitted to arbitration).

Accordingly, we modify the award to exclude the Arbitrator's findings related to the statutory violations, and we strike the statutory remedy which required the representative to have access onto the post.<sup>25</sup>

#### IV. Decision

We grant the Agency's exceeds-authority exception and modify the award accordingly.

#### Member DuBester, dissenting:

Given the unique circumstances of this case, I would not find that the Arbitrator exceeded his authority.<sup>1</sup> Therefore, I disagree with the decision to set aside the award on that basis and would address the Agency's remaining exceptions.

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<sup>25</sup> See *U.S. Dep't of VA, VA Reg'l Office, St. Petersburg, Fla.*, 70 FLRA 799, 801 (2018) (Member DuBester concurring in part and dissenting in part) (striking portion of award in which the arbitrator exceeded her authority by deciding an issue not submitted for arbitration). Given the disposition of this case, it is unnecessary to reach the Agency's remaining arguments. See *U.S. Mint*, 60 FLRA at 780 n.5; see also *SSA Office of Hearings Operations*, 71 FLRA 642, 643 n.15 (2020) (Member DuBester dissenting) (declining to reach the excepting party's remaining arguments where the award was set aside on contrary-to-law grounds). Member Abbott notes that the Authority has previously held that Union officials may not unilaterally demand entry into controlled access agency facilities. The questions of who may access and when access may occur are clearly determinations that are reserved solely for federal agencies. See *U.S. Dep't of VA, St. Petersburg Reg'l Benefit Office*, 70 FLRA 586, 589 n.30 (2018) (Member DuBester dissenting).

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<sup>1</sup> *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div.*, 60 FLRA 530, 532 (2004) ("Arbitrators do not exceed their authority by addressing any issue that is necessary to decide an issue before the arbitrator . . . or by addressing any issue that necessarily arises from issues specifically included in an issue before the arbitrator.") (citing *NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996); *Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 519 (1986)).