

71 FLRA No. 144

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
GULF COAST
VETERANS HEALTHCARE SYSTEM
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1045
(Union)

0-AR-5558

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DECISION

May 19, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

Today we hold that a routine email communication from an arbitrator is not accorded the legal and procedural status of an arbitral award.

In this case, the Agency filed interlocutory exceptions to a brief email wherein Arbitrator David K. Monsour informed the parties that he would *not* issue an interim ruling on arbitrability prior to the hearing. For the reasons discussed below, we dismiss the Agency's interlocutory exceptions for failure to file an exception to an arbitrator's *award* pursuant to § 2425.2(a) of the Authority's Regulations.¹

II. Background and Order to Show Cause

The Union alleged that the Agency violated the parties' collective-bargaining agreement when it denied the Union's request for official time for two employees. The Union grieved the matter and the parties selected the Arbitrator to hear the case. Prior to the hearing, the Agency submitted a Brief on Arbitrability requesting that the Arbitrator dismiss the case as barred under § 7116(d) of the Federal Service Labor-Management Relations

Statute (Statute)² because the Agency contends that the Union had raised the same matter in a previously-filed unfair-labor-practice (ULP) charge. In a series of emails between the parties and the Arbitrator, the parties disputed the Agency's request for a ruling on arbitrability prior to the hearing on the merits of the grievance. After this exchange between the representatives, the Arbitrator responded by email that he would "not issue an interim ruling prior to the scheduled hearing at the request of only one party to the dispute."³

The Agency filed exceptions to the Arbitrator's email on October 23, 2019. The Union filed an opposition to the exceptions on November 20, 2019.

On November 26, 2019, the Authority's Office of Case Intake and Publication issued an order directing the Agency to address whether the Arbitrator's email constituted an "award" under § 7122(a) of the Statute and to show cause why its exceptions should not be dismissed for failure to satisfy the conditions for review of arbitration awards.⁴

In its response, the Agency argues that the Arbitrator's email should be considered an interim award because of the Authority's decision in *U.S. Department of VA, Waco Regional Office, Waco, Texas*, where the Authority referred to an arbitrator's email as an interim award.⁵ The Agency maintains that the Arbitrator's decision to go to hearing on the merits is the interim award.⁶ Furthermore, the Agency emphasizes that "[i]f [it] cannot yet file an interlocutory appeal on having to participate in a hearing for a claim that was already investigated as part of a ULP, there is no opportunity to use [§] 7116(d) to avoid duplicate litigation."⁷

III. Analysis and Conclusion: We dismiss the Agency's interlocutory exceptions for failure to file an exception to an arbitrator's award pursuant to § 2425.2(a) of the Authority's Regulations.

Under § 2425.2(a) of the Authority's Regulations, "[e]ither party to arbitration . . . may file an exception to an arbitrator's award rendered pursuant to the arbitration."⁸ While the Authority ordinarily will not

² 5 U.S.C. § 7116(d).

³ Exceptions, Ex. H, Arbitrator's October 14, 2019 email (Arbitrator's October 14, 2019 email) at 1.

⁴ Order to Show Cause (Order) at 2; 5 U.S.C. § 7122(a).

⁵ Resp. to Order at 1-2 (citing *U.S. Dep't of VA, Waco Reg'l Office, Waco, Tex.*, 70 FLRA 92 (2016) (Member Pizzella concurring)).

⁶ *Id.* at 3.

⁷ *Id.*

⁸ 5 C.F.R. § 2425.2(a).

¹ 5 C.F.R. § 2425.2(a).

resolve exceptions to an arbitration award unless the award is final and constitutes a complete resolution of all the issues submitted to arbitration, it will consider interlocutory exceptions to an arbitration award when their resolution will advance the ultimate disposition of the case.⁹

Here, the Arbitrator's email was not an interim award. The Arbitrator did not analyze the Agency's arguments, or make a ruling on those arguments, concerning whether the grievance was arbitrable. He simply communicated to the parties that he would "not issue an interim ruling prior to the scheduled hearing."¹⁰

Furthermore, as a general matter, we are not persuaded that an email under the circumstances here can be accorded the legal and procedural status of an award.¹¹ The Statute authorizes the Authority to resolve exceptions to an "arbitrator's award," it does not authorize the Authority to referee email communications between parties and an arbitrator.¹² If we were to elevate the status of such an email that contains almost no substance, the Authority will routinely be called on to resolve exceptions to all manner of messages whether exchanged by email, text, voicemail, or even Twitter.¹³ Such a result certainly will not "facilitate[] and encourage[] the amicable settlement of disputes"¹⁴ or promote "an effective and efficient Government."¹⁵

Consequently, because the Arbitrator's email does not constitute an arbitral award as required by § 2425.2(a) of the Authority's Regulations,¹⁶ we dismiss the Agency's exceptions.

IV. Decision

We dismiss the Agency's exceptions.

⁹ *U.S. DHS, CBP*, 70 FLRA 992, 992 (2018) (Member DuBester concurring); *see also* 5 C.F.R. § 2429.11; *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (Member DuBester dissenting).

¹⁰ Arbitrator's October 14, 2019 email at 1.

¹¹ *See AFGE, Local 3749*, 69 FLRA 519, 524 (2016) (*Local 3749*) (Dissenting Opinion of Member Pizzella) ("I do not believe that the [a]rbitrator's one-sentence email should be accorded the legal and procedural status of an award."); *see also AFGE, Local 3690*, 69 FLRA 154, 156 (2015) (*Local 3690*) (Separate Opinion of Member Pizzella).

¹² 5 U.S.C. § 7105(a)(2)(H); *see also Local 3749*, 69 FLRA at 524 ("By according award status to a routine email communication between the [a]rbitrator and the [u]nion, the majority assumes a responsibility which Congress did not give to the Authority. The Statute authorizes the Authority to resolve . . . exceptions to arbitrator's awards but not to referee emails, voice mail messages, texts, and tweets between parties and arbitrators.") (internal quotation marks omitted).

¹³ *See Local 3749*, 69 FLRA at 524; *Local 3690*, 69 FLRA at 156.

¹⁴ 5 U.S.C. § 7101(a)(1)(C).

¹⁵ 5 U.S.C. § 7101(b).

¹⁶ 5 C.F.R. § 2425.2(a).

Member DuBester, concurring:

Under the circumstances of this case, I agree that the Arbitrator's email should not be afforded the legal status of an award. As the majority notes, the Arbitrator did not analyze the Agency's arbitrability arguments or make any ruling on those arguments in his email.¹ Moreover, in rejecting the Agency's request, the Arbitrator explained that the parties had mutually agreed upon "all decisions and procedures leading to the scheduled hearing" before his receipt of the Agency's request for an interim ruling.² The Arbitrator's email simply communicated to the parties that, consistent with these procedures, he would "not issue an interim ruling prior to the scheduled hearing at the request of only one party to the dispute."³ Therefore, I agree with the majority's decision to dismiss the Agency's exceptions.

¹ Majority at 3.

² Exceptions, Ex. H at 1.

³ *Id.*