72 FLRA No. 8

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS BENEFITS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL VA COUNCIL
(Union)

0-AR-5619

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DECISION

January 22, 2021

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

I. Statement of the Case

In this case, we conclude that the Arbitrator did not err by finding that the Union's grievance is procedurally arbitrable.

Prior to the merits hearing, the Agency claimed that the national grievance was not arbitrable under the parties' agreement because the Union had previously filed a separate local grievance over the same matter. Subsequently, Arbitrator Richard Trotter issued a prehearing award, finding that the national grievance is procedurally arbitrable because the parties' agreement permits the Union to file a national grievance by either elevating a local grievance to the national level *or* by independently filing a national grievance—even when the national grievance pertains to similar matters as the previously filed local grievance. Therefore, the Arbitrator ordered the parties to proceed to a hearing on the merits of the national grievance.

The Agency argues that the award does not draw its essence from the parties' agreement and that it is based on a nonfact. We deny the Agency's essence exception because it fails to raise any deficiencies in the Arbitrator's application of the parties' agreement. Also, the Agency's nonfact exception fails to challenge any central facts underlying the award. Therefore, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

To achieve a satisfactory evaluation, bargaining-unit employees (BUEs) must complete a certain number of telephone calls within a specified time. However, BUEs are also given "excluded time"—which is downtime that is not counted against a BUE's productivity—where a BUE may focus on other collateral matters, including technical issues and representational duties.[1]

On April 29, 2019, the Union filed a local grievance at the Agency's regional office in Nashville after the Agency implemented two new standard operating procedures that restricted BUEs from requesting excluded time on certain dates.[2] The local grievance alleged that the Agency violated the Federal Service Labor-Management Relations Statute (the Statute) and the parties' agreement by unilaterally implementing the standard operating procedures. Because the Union recognized that the new procedures had been implemented by the Agency's Office of Federal Operations, the Union filed a national grievance on May 1, 2019. While the national grievance and the local grievance include some overlapping allegations, the national grievance varies from the local grievance by alleging similar, but not identical, violations at the national level of recognition. The Agency then denied the national grievance and the matter proceeded to arbitration.

Prior to the merits hearing, the parties agreed to bifurcate the issue of arbitrability and submitted briefs to the Arbitrator on that issue. The Agency argued that the national grievance was not arbitrable under Article 44, Section 2(H) of the parties' agreement, which states:

> An arbitrator's award shall have only local application unless it was a national level grievance or the matter was elevated to the national level. Where it is mutually agreed between the NVAC President and the Department within 30 days after a local union has filed a notice for arbitration, an arbitration dispute will be elevated to the national level.[3]

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[1] Award at 2.

[2] Specifically, the Union claimed that the Agency "restricted Union representatives from requesting excluded time to engage in representational duties on Mondays, [h]olidays and [d]epartment [p]ay [d]ates." Award at 2-3.

[3] Exceptions, Ex. 10, Collective-Bargaining Agreement (CBA) at 235.

Specifically, because the parties had not mutually agreed to elevate the local grievance to the national level, the Agency argued that the national grievance was not arbitrable.[4]

The Arbitrator determined that the national grievance was procedurally arbitrable under the parties' agreement. Specifically, the Arbitrator noted that the parties' agreement permits the Union to either elevate a local grievance to the national level or to independently file a national grievance. Therefore, the Arbitrator found that the Union could separately file local and national grievances that encompass similar allegations and factual matters.[5] The Arbitrator also noted the variations between the two grievances and held that the national grievance was a separate grievance from the local grievance.[6] Consequently, he denied the Agency's claim that the Union had improperly elevated a local grievance to the national level. Moreover, while the Arbitrator noted that he was not bound by the prior decisions that were cited by the Union interpreting similar arbitrability issues between the parties, he found these prior decisions to be persuasive and held that they supported the Union's claim that the national grievance was arbitrable.

The Agency filed exceptions to the award on April 22, 2020. The Union filed an opposition to the Agency's exceptions on May 21, 2020.

III. Preliminary Matter: The Agency's exceptions are interlocutory, but we find extraordinary circumstances warranting review.

Typically, the Authority does not consider interlocutory appeals.[7] Consequently, because the Agency filed interlocutory exceptions, the Authority issued a show-cause order (Order) directing the Agency to show cause why its exceptions should not be dismissed for being interlocutory.[8] In its timely response to the Order, the Agency argued that the grievance is not arbitrable and that the resolution of its exceptions would determine whether further arbitration is required.[9]

The Authority has held that any exception which would advance the ultimate disposition of a case and obviate the need for further arbitral proceedings presents an "extraordinary circumstance" warranting review.[10] Therefore, because the resolution of the Agency's exceptions could obviate the need for further arbitration in the instant case, we grant interlocutory review and turn to the substance of the Agency's exceptions.[11]

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the Arbitrator erred when he found that the national grievance makes statutory allegations while the local grievance makes contractual allegations.[12] Therefore, the Agency argues that the Arbitrator's finding that the grievances are distinct is based on a nonfact.[13] To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[14]

While the Agency correctly asserts that each grievance makes contractual and statutory allegations, the Arbitrator found the national grievance to be arbitrable because it is an independent filing under the parties' agreement.[15] Consequently, the Agency has not demonstrated that this finding is a central fact, but for which the Arbitrator would have reached a different conclusion regarding whether the national grievance is

[4] Member Kiko notes that, at arbitration, the Union argued that the two grievances were separate and that the national grievance was not an elevation of the local grievance.

[5] In this regard, the Arbitrator noted that the Union had alleged – and the Agency had "not refuted" – that the parties had a past practice of permitting simultaneous local and national grievances concerning the same factual circumstances. Award at 17-18.

[6] Member Kiko notes that, in support of his conclusion, the Arbitrator also found that the Union's filing of the national grievance when it had not yet invoked arbitration of the local grievance gave "credence to the Union's claim that the [n]ational [g]rievance was . . . independent . . . from the [l]ocal [g]rievance." *Id.* at 17.

[7] 5 C.F.R. § 2429.11; *see also U.S. Dep't of Educ.*, 71 FLRA 516, 517-18 (2020) (*DOE*) (then-Member DuBester concurring); *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 807 (2018) (*IRS*) (then-Member DuBester dissenting).

[8] Order to Show Cause (Order) at 1-2.

[9] Response to Order at 5-6.

[10] *DOE*, 71 FLRA at 517-18; *NLRB*, 71 FLRA 196, 196 (2019) (then-Member DuBester dissenting); *see also IRS*, 70 FLRA at 808.

[11] *DOE*, 71 FLRA at 517-18.

[12] Exceptions Br. at 6.

[13] *Id.*

[14] *U.S. Dep't of HUD*, 71 FLRA 616, 618 (2020) (*HUD*) (then-Member DuBester concurring); *AFGE, Local 3254*, 70 FLRA 577, 580 (2018); *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 172 (2015) (Member Pizzella dissenting).

[15] Award at 17. Member Kiko notes that although the grievances contain overlapping allegations, there are alleged violations in each grievance that do not appear in the other. *See id.* at 16-17; *see also* Exceptions, Ex. 2, Local Grievance at 3-4 (alleging, among others, violation of Article 29 of the parties' agreement); Exceptions, Ex. 5, National Grievance at 2 (alleging, among others, violations of Articles 2, 3, 48, and 49 of the parties' agreement).

arbitrable under the parties' agreement.[16] The Agency has failed to demonstrate that the award is based on a nonfact and we deny this exception.

B. The Agency fails to demonstrate that the award does not draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator did not adequately explain how the national grievance is an independent filing under the parties' agreement.[17] However, a review of the award demonstrates that the opposite is true. The Arbitrator examined the plain wording of Article 44, Section 2(H) of the parties' agreement and noted that a grievance has national application if it "was a national level grievance or the matter was elevated to the national level."[18] Thus, elevating a local grievance is not the only method for filing a national grievance. Here, the Union filed the national grievance on May 1, 2019 and it did not invoke arbitration for the local grievance until June 7, 2019.[19] Consequently, he found that "[b]ecause the [n]ational [g]rievance was filed before the elevation timeframe began, it further demonstrates that the [n]ational [g]rievance was an independent filing from the [l]ocal [g]rievance."[20] Lastly, he examined the past practices of the parties and held that the parties have previously permitted the simultaneous filing of similar national and local grievances.[21] While the Agency may disagree with the Arbitrator's interpretation of Article 44, Section 2(H),[22] it fails to highlight any language in Article 44 that demonstrates the Arbitrator ignored, irrationally interpreted, or implausibly read the parties' agreement when he concluded that the national grievance was not an improper elevation of the local grievance.[23] Therefore, we deny this exception.[24]

[16] *HUD*, 71 FLRA at 618-19 ("Most importantly, the [a]gency has not demonstrated that these findings are central facts, but for which the [a]rbitrator would have reached a different conclusion regarding whether the [u]nion established a particularized need for the requested items.").

[17] Exceptions Br. at 7. The Authority will find an arbitration award is deficient as failing to draw its essence from a collective bargaining agreement when the excepting party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *Library of Cong.*, 60 FLRA 715, 717 (2005) (Member Pope dissenting) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

[18] Award at 7-8.

[19] *Id.* at 9, 17.

[20] *See id.* at 9; CBA at 235 ("An arbitrator's award shall have only local application unless it was a national level grievance or the matter was elevated to the national level.").

[21] Award at 17. The Agency argues that the Arbitrator erred by relying on a past practice to find that the parties' agreement permits the Union to simultaneously file local and national grievances. Exceptions Br. at 5-6. However, the Agency fails to support its terse argument with any examples that demonstrate the Arbitrator used a past practice to modify the plain terms of the parties' agreement. *Id.* ("In the case at hand, the Arbitrator failed to apply 5 U.S.C. § 7114(c) correctly when he analyzed the Union's past practice allegation. Article 44, Section 2(H) of the CBA states that local grievances may only be elevated to national grievances within 30 days with mutual agreement; however, the Arbitrator wholly failed to analyze the language of the CBA and limited his review solely to examples provided by the Union where the Agency and the Union permitted simultaneous filings of local and national grievances."); *see also U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755 (2018) (then-Member DuBester dissenting) ("Further, arbitrators may consider parties' past practices when interpreting an ambiguous contract provision, but they may not rely on past practices to *modify* the terms of a contract."). Because this exception is unsupported, we deny it. 5 C.F.R. § 2425.6(e)(1); *see U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1168 n.21 (2020) (then-Member DuBester concurring) (denying unsupported exception).

[22] *U.S. Dep't of HHS, Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 571-72 (2011) (finding that a different interpretation of a particular article does not automatically render the arbitrator's interpretation implausible).

[23] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Tallahassee, Fla.*, 71 FLRA 622, 624 (2020) (then-Member DuBester concurring) (denying the agency's essence exception because it did not "establish that the award fails to draw its essence from the agreement").

[24] The Agency also argues that "the Arbitrator's [a]ward displays a mix of legal error, nonfact and a failure to draw its essence from the CBA when he concludes that a prior [a]ward has a res judicata effect on the present grievance." Exceptions Br. at 7-8. However, the Arbitrator held that the concepts of res judicata and stare decisis

> alone, in the absence of the other compelling arguments the Union has presented, would not be sufficient on their own to rebut the Agency's claim of arbitrability because arbitrator[s,] unlike judges in courts of law[,] are not strictly bound by stare decisis or res judicata. However, this being said and in conjunction with the Union's other arguments, these arguments do strengthen the Union's case.

V. Decision

We deny the Agency's exceptions.

Award at 18. Furthermore, because the Agency fails to demonstrate that the Arbitrator erroneously concluded that the national grievance is an independent filing under the parties' agreement, and this finding provides a separate basis for the award, it is unnecessary to address this exception. *U.S. DOL, Bureau of Labor Statistics*, 67 FLRA 77, 81 (2012) ("[I]f the excepting party does not demonstrate that the award is deficient on one of the grounds relied on by the arbitrator, then it is unnecessary to address exceptions to the other grounds."). Therefore, we do not address this claim.

Member Abbott concurring:

I agree that the national grievance is arbitrable because the Agency fails to demonstrate that the award does not draw its essence from the parties' agreement.[1] However, I write separately to highlight my concerns with permitting a union to file multiple grievances that concern the same factual matters and similar legal allegations.

Under § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute), issues may be raised under a negotiated grievance procedure or under the statutory unfair labor practice procedure, but not under both.[2] Consequently, § 7116(d) acts as a choice-of-forum provision that precludes parties from relitigating the same issues in separate proceedings.[3] While § 7116(d) admittedly does not apply here—because the Union filed two grievances pertaining to the same facts—I believe that the reasoning behind Congress's enactment of § 7116(d) still applies when a union files multiple grievances that arose from the same set of factual circumstances or advance substantially similar legal theories.[4] By permitting a union to file multiple grievances that concern the same factual circumstances or legal theories, they are encouraged to engage in forum shopping and to get "two bites at the apple."[5] Agencies are also forced to relitigate the same grievance in separate arbitrations and, consequently, there is a possibility that the same grievance could lead to different results.

Therefore, I implore Congress to consider a revision to the Statute that would bar unions from filing multiple grievances—that concern the same set of factual circumstances or advance substantially similar legal theories—in separate proceedings.[6]

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[1] Majority at 4-5.
[2] 5 U.S.C. § 7116(d); *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 514 (2018) (*Navy Mid-Atl.*) (then-Member DuBester dissenting).
[3] *Navy Mid-Atl.*, 70 FLRA at 514.
[4] *U.S. Dep't of Educ.*, 71 FLRA 516, 518 (2020) (then-Member DuBester concurring) ("To determine whether the issues involved in [an unfair-labor-practice (ULP)] charge and a grievance are the same, the Authority examines whether: (1) the ULP charge and the grievance arose from the same set of factual circumstances, and (2) the theories advanced in support of the ULP charge and the grievance were substantially similar.").
[5] *Navy Mid-Atl.*, 70 FLRA at 515.
[6] *See id.* at 515-17.

Chairman DuBester, dissenting:

In my view, the Agency's exceptions should be dismissed as interlocutory. As I have expressed previously,[1] the only basis for granting interlocutory review should be "extraordinary circumstances" that raise a plausible jurisdictional defect, the resolution of which would advance the resolution of the case.[2] And "[e]xceptions raise a plausible jurisdictional defect when they present a credible claim that the arbitrator lacked jurisdiction over the subject matter as a matter of law."[3] Applying this standard, I would dismiss, without prejudice, the Agency's interlocutory exceptions.

Accordingly, I dissent from the majority's decision to grant interlocutory review.[4]

[1] *U.S. Dep't of the Treasury, IRS*, 71 FLRA 192, 195 (2019) (*IRS*) (Dissenting Opinion of then-Member DuBester); *U.S. Small Bus. Admin.*, 70 FLRA 885, 888-89 (2018) (Dissenting Opinion of then-Member DuBester).
[2] *IRS*, 71 FLRA at 195 (citing *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012)).
[3] *Id.* (citing *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 1, 3 (2012); *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 68 FLRA 640, 641 (2015)).
[4] Had I agreed with the majority to grant interlocutory review of the Agency's exceptions, I would have also found that the exceptions are without merit.