

72 FLRA No. 41

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
(Union)

0-AR-5624

DECISION

April 23, 2021

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, we reaffirm that a grievance filed on behalf of all bargaining-unit employees (BUEs) alleging violations of the Fair Labor Standards Act (FLSA) is not a class action because there is only one “plaintiff” – the Union.

The Union filed a grievance alleging that the Agency is improperly designating all BUEs as FLSA Exempt and is failing to pay proper overtime and compensatory time. Arbitrator Joyce M. Klein issued an award finding the grievance arbitrable, and the Agency filed exceptions to the award prior to a hearing on the merits of the grievance. Although the Agency’s exceptions are interlocutory, we grant interlocutory review of those exceptions that we find could obviate the need for further arbitration proceedings. However, because the Agency has failed to establish how the Arbitrator’s procedural-arbitrability determination is contrary-to-law or fails to draw its essence from the parties’ agreement, we deny the exceptions.

II. Background

¹ Award at 1; *see also* Exceptions, Exhibit 2, Grievance at 2.

² Award at 2.

³ *Id.* at 12 (quoting 5 U.S.C. § 7121(b)(1), which states: “[a]ny negotiated grievance procedure referred to in subsection (a) of

On April 5, 2019, the Union filed a grievance on behalf of all of its BUEs at the Agency. The grievance alleged that the Agency “violated and continues to violate” the FLSA, Title 5 of the United States Code, several different agency regulations, and the parties’ collective-bargaining agreement (CBA) by, among other things, improperly designating employees as FLSA Exempt and failing to pay proper overtime and compensatory time.¹ The Agency denied the grievance on May 17, 2019 and the matter proceeded to arbitration.

The Agency notified the Arbitrator that it intended to challenge the grievance’s arbitrability, and the parties agreed to brief the arbitrability issue prior to a hearing on the merits. The Arbitrator issued an opinion and order on motion for non-arbitrability on March 25, 2020. In the award, the Arbitrator noted that the Agency raised six issues with regard to the arbitrability of the grievance:

- A. Is the [g]rievance not arbitrable because it fails to include any specific factual information about the grievance?
- B. Is the grievance procedurally not arbitrable because the Union fails to provide evidence that its grievance is timely?
- C. Is the grievance procedurally not arbitrable because the Union attempts to file a class action, which is not provided for in the Agreement?
- D. Is the grievance procedurally not arbitrable because the Union fails to provide written consent pursuant to 29 U.S.C. § 216(b) of the FLSA?
- E. Is the grievance procedurally not arbitrable because the Union failed to provide preponderant evidence that it has met the prerequisites required for FLSA class certification?
- F. Is the grievance not arbitrable with respect to employees appointed and paid pursuant to Title 38?²

With regard to the first issue, the Agency asserted that § 7121(b)(1)(A) and (B) of the Federal Service Labor-Management Relations Statute (Statute) “requires that a grievance procedure be ‘fair and simple’ and ‘provide for expeditious processing’ of grievances,”³ and that, here, over 16,000 BUEs are covered by the parties’ CBA and the Union had so far failed to specify affected employees or specific instances of alleged violations. The

this section shall . . . be fair and simple[and] provide for expeditious processing”).

Arbitrator rejected this argument because the Agency was only challenging the grievance instead of the parties' negotiated grievance procedure.⁴

As to the second issue, the Agency argued that the Union failed to comply with Article 40, Section 14(a)(1) of the CBA, which concerns national grievances and provides that "[w]ithin 45 calendar days of the acts or occurrence, or the Party's awareness thereof, or at any time, if the act or occurrence is continuing, the aggrieved Party may file a written grievance."⁵ The Agency asserted that the grievance was untimely because the Union failed to allege a specific incident that occurred within 45 days of the date of the grievance. The Arbitrator found, however, that the grievance alleged a continuing violation, which the plain language of the CBA permitted to be filed at "any time."⁶ Regarding the Agency's contention that the Union failed to identify any specific instance of a grievable act, the Arbitrator concluded that requiring the Union to establish that there are in fact continuing violations is an issue to be addressed on the merits, and that "[t]he lack of proof at this preliminary stage of the proceeding does not render the [g]rievance untimely given the contractual language expressly providing for grievances of a 'continuing nature.'"⁷

With regard to the third, fourth, and fifth issues, the Arbitrator noted that the Agency was essentially arguing with respect to each that the grievance is not procedurally arbitrable because the grievance "is a class action proceeding filed without the express consent of each bargaining unit member."⁸ The Arbitrator disagreed, finding that based on the Authority's decision in *U.S. Department of the Army, White Sands Missile Range, White Sands Missile Range, New Mexico (White Sands)*,⁹ "[a]s the exclusive representative, the Union filed a single grievance as a 'plaintiff' rather than a class action lawsuit on behalf of individual employees of the Agency."¹⁰ The Arbitrator also addressed the Agency's argument that the FLSA states that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."¹¹ The Agency argued that this provision, in conjunction with Article 16 of the parties' CBA, which provides "that overtime is subject to

and consistent with all federal laws including the FLSA," means that all grievances asserting FLSA claims require the written consent of affected BUEs.¹² The Arbitrator rejected this argument, concluding that the Agency had failed to consider that under *White Sands*, the Union is the "plaintiff," so "only the Union need consent to file the [g]rievance alleging violations of the FLSA."¹³ The Arbitrator stressed that because the Union is the only "plaintiff," the grievance cannot be a class action and consent by all BUEs is not required.¹⁴

As to the last issue, the Arbitrator dismissed the grievance to the extent that it covered any Title 38 employees. However, the Arbitrator concluded that the Union's grievance was arbitrable in all other respects and denied the Agency's Motion to Dismiss.

The Agency filed exceptions to the award on April 24, 2020. The Union filed an opposition to the Agency's exceptions on May 25, 2020.

III. Preliminary Matter: The Agency's exceptions are interlocutory, but extraordinary circumstances warrant considering the exceptions.

The Authority does not ordinarily consider interlocutory appeals.¹⁵ However, 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.¹⁶

The Authority issued an order in this case directing the Agency to show cause why its exceptions should not be dismissed for being interlocutory.¹⁷ The Agency timely responded, arguing that the grievance is not arbitrable and that resolution of its exceptions would avoid the need for further arbitration.¹⁸ Because resolution of the Agency's exceptions challenging the arbitrability of the entire grievance could conclusively determine whether

⁴ The Arbitrator also found that the grievance's allegations were sufficiently specific to comply with the procedural requirements of the CBA. *Id.* at 13-14.

⁵ *Id.* at 6-7.

⁶ *Id.* at 16 (quoting Art. 40, § 14(a)(1) of the CBA).

⁷ *Id.*

⁸ *Id.* at 17.

⁹ 67 FLRA 619 (2014).

¹⁰ Award at 22.

¹¹ 29 U.S.C. § 216(b); *see also* Award at 22.

¹² Award at 22.

¹³ *Id.* at 23.

¹⁴ *Id.*

¹⁵ 5 C.F.R. § 2429.11; *see also U.S. Dep't of VA, Veterans Benefit Admin.*, 72 FLRA 57, 58 (2021) (*VA*) (Member Abbott concurring; Chairman DuBester dissenting); *U.S. Dep't of the Army, Nat'l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 523 (2020) (*Fort Irwin*) (then-Member DuBester dissenting).

¹⁶ *VA*, 72 FLRA at 58 (citing *U.S. Dep't of Educ.*, 71 FLRA 516, 517-18 (2020) (then-Member DuBester concurring); *NLRB*, 71 FLRA 196, 196 (2019) (then-Member DuBester dissenting)).

¹⁷ Order to Show Cause (Order) at 1-2.

¹⁸ Resp. to Order at 7-8.

any further arbitral proceedings are required,¹⁹ we grant interlocutory review of those exceptions.²⁰

IV. Analysis and Conclusions

A. The award is not contrary to § 7121(b)(1)(A) and (B) of the Statute.

The Agency argues that the award is contrary to § 7121(b)(1)(A) and (B) of the Statute,²¹ which “requires that grievances are fair and simple.”²² Specifically, the Agency contends that this section of the Statute requires grievances to include “actual facts about the employees involved and not mere generic allegations.”²³ Contrary to the Agency’s assertions, however, the Statute requires no such thing. Section 7121(b)(1) states only that “[a]ny negotiated grievance procedure referred to in subsection (a) of this section shall (A) be fair and simple, [and] (B) provide for expeditious processing.”²⁴ It says nothing about the content of individual grievances. And here, as the Arbitrator correctly noted in her award, the Agency is only alleging that the *content* of the grievance is not “fair and simple,” not that the parties’ negotiated grievance procedure is deficient.²⁵ As a result, the award is not

contrary to § 7121(b)(1)(A) and (B) of the Statute and we deny the Agency’s exception.²⁶

B. The award does not fail to draw its essence from the CBA.

The Agency argues that the award fails to draw its essence²⁷ from the parties’ CBA for a number of reasons.

First, the Agency argues that the award fails to draw its essence from the CBA because the Arbitrator concluded “that the Union is able to meet the procedural requirement of timeliness by merely pleading it and is allowed to submit actual evidence of timeliness at the hearing.”²⁸ The Agency points out that Article 40, Section 14(A)(1) of the CBA states that “[w]ithin 45 calendar days of the acts or occurrence, or the [p]arty’s awareness thereof, or at any time, if the act or occurrence is continuing, the aggrieved [p]arty may file a written grievance” and that Article 41, Section 10 states that “[g]rievability/arbitrability issues will be resolved as threshold issues of arbitration.”²⁹ The Agency contends that “[i]nstead of analyzing the Union’s grievance to confirm whether it was filed within 45 days of the act or

¹⁹ The Agency argues that “[p]ursuant to Article 16, the Union agreed to abide by the FLSA and waived its right to file FLSA claims on its own on behalf of BUEs,” and that because of this, “pursuant to the FLSA, the Union must obtain consent from all the BUEs in order to pursue a FLSA grievance” and must also comply with the additional requirements of an FLSA claim, including limiting claims to actual employees. Exceptions Br. at 9. However, this exception challenges only the arbitrability of the grievance’s FLSA claims, not the entirety of the grievance. See Award at 1 (listing grievance’s claims as including alleged violations of the FLSA, Title 5, the Fair Employment Protection Act (FEPA), Office of Personnel Management (OPM) and Department of Labor Regulations (DOL), and Articles 15 and 16 of the CBA). Thus, even if we granted this FLSA-specific exception, the Arbitrator would still have arbitrable claims before her for resolution. Because resolution of this exception would not obviate the need for further arbitral proceedings, extraordinary circumstances do not exist to warrant Authority review, and we dismiss the exception as interlocutory. *U.S. Dep’t of the Army, Army Corps of Eng’rs, Norfolk Dist.*, 71 FLRA 713, 714 (2020) (then-Member DuBester concurring) (dismissing interlocutory exceptions that “exclusively concern[ed] the grievance’s FLSA allegations” because, even if granted, the arbitrator would still have to resolve claims “based on FEPA, Title 5, associated DOL and OPM regulations, and the parties’ agreement”). For the same reason, we also dismiss the Agency’s exception arguing that the award is contrary to law insofar as the Arbitrator misinterpreted 29 U.S.C. § 216(b), because it also concerns only the grievance’s FLSA allegations. See Exceptions Br. at 9.

²⁰ *VA*, 72 FLRA at 58; *Fort Irwin*, 71 FLRA at 523.

²¹ The Authority reviews questions of law de novo. *U.S. Dep’t of VA, Boise Veterans Admin. Med. Ctr.*, 72 FLRA 124, 126 n.24 (2021) (*VA Boise*) (Member Abbott concurring; Chairman DuBester dissenting in part) (citing *NTEU*,

Chapter 24, 50 FLRA 330, 332 (1995)). In conducting a de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *Id.* (citing *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998)). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party established that they are nonfacts. *Id.* (citing *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring)).

²² Exceptions Br. at 10.

²³ *Id.* at 11.

²⁴ 5 U.S.C. § 7121(b)(1)(A), (B) (emphasis added).

²⁵ Award at 13 (“The Agency however, is challenging the [g]rievance rather than the parties’ negotiated grievance procedure.”).

²⁶ See *AFGE, Loc. 2041*, 67 FLRA 651, 653 (2014) (rejecting argument that procedural-arbitrability determination was contrary to § 7121’s “fair and simple” and “expeditious processing” principles and noting that “this section of the Statute merely sets forth ‘broad general criteria’ concerning the character of negotiated grievance procedures”) (quoting *AFGE, Loc. 1235*, 66 FLRA 624, 625 (2012)).

²⁷ The Authority will find an arbitration award is deficient as failing to draw its essence from a CBA 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. *VA Boise*, 72 FLRA at 129 n.52 (citing *Libr. of Cong.*, 60 FLRA 715, 717 (2005) (Member Pope dissenting)).

²⁸ Exceptions Br. at 6.

²⁹ *Id.*

occurrence, the Arbitrator accept[ed] the Union's bare assertion that it ha[d] filed a timely grievance," which ignored Article 41, Section 10 making arbitrability a "threshold issue" and "ignores the agreement by both parties to brief arbitrability before holding a hearing on the merits."³⁰

Here, the Arbitrator did not simply accept the Union's "bare assertion" that the grievance was timely. She found that the grievance alleged a continuing violation and that Article 40, Section 14(A)(1) of the CBA, by its plain language, allows grievances to be filed "any time if the act or occurrence is of a continuing nature."³¹ Although the Agency takes issue with the fact that the Union did not have to "submit actual evidence of timeliness,"³² and asserts that "[t]here is no article in the CBA[] which allows either party to sustain timeliness by merely pleading it,"³³ the Agency fails to point to any part of the contract that requires the grievance to include proof that the alleged violations are ongoing in order to be considered procedurally arbitrable. Furthermore, the Agency's assertion that the Arbitrator ignored Article 41, Section 10, which makes arbitrability a "threshold issue," and "ignore[d] the agreement by both parties to brief arbitrability before holding a hearing on the merits" is wholly without merit.³⁴ Not only is the Arbitrator's entire twenty-four page award devoted to determining the threshold issue of whether the Union's grievance is arbitrable, but the Agency actually submitted as evidence in this case the two briefs that it submitted to the Arbitrator on the question of arbitrability.³⁵ Moreover, the Agency has not demonstrated how the award is irrational, unfounded, implausible, or in manifest disregard of the CBA.³⁶ As a result, we find that the Agency has failed to establish that the award fails to draw its essence from the CBA on this basis and we deny this exception.³⁷

The Agency also argues that the award fails to draw its essence from the CBA because "the grievance is in the nature of a class action,"³⁸ and the CBA is "silent" as to class action grievances.³⁹ In this regard, the Agency argues that the *White Sands* decision that the Arbitrator

relied on is "distinguishable" because, in that case, the CBA allowed the union to bring a FLSA claim as a class action.⁴⁰ In addition, the Agency argues that the U.S. Supreme Court has held that "courts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party agreed to do so.'"⁴¹

In *White Sands*, the arbitrator had determined that the parties' agreement allowed the union to bring FLSA claims as a class/collective action.⁴² The agency argued before the Authority that the arbitrator's determination was contrary to three U.S. Supreme Court cases concerning class arbitration under the Federal Arbitration Act, and further that parties had to consent to class arbitration and that "an arbitration agreement that is silent with respect to class arbitration cannot be construed to allow arbitration by a class of plaintiffs."⁴³ The Authority found the three U.S. Supreme Court cases that the agency cited to be unpersuasive, as the case before it concerned federal labor arbitration under the Statute. In addition, the Authority concluded:

Moreover, the [a]gency ignores the fact that the Statute provides "an exclusive representative the right, in its own behalf or *on behalf of any employee in the unit represented by the exclusive representative*, to present and process grievances." Thus, the grievance in this case is neither a class action nor a collective action because there is only one "plaintiff": the [u]nion, which represents all [BUEs] as a matter of law.⁴⁴

We find that the Agency here is ignoring the Authority's reasoning and holding in *White Sands*, which the Authority recently reiterated in *U.S. Department of the Army, National Training Center and Fort Irwin*,

³⁰ *Id.*

³¹ Award at 16 (internal quotes omitted).

³² Exceptions Br. at 6.

³³ *Id.* at 7.

³⁴ *Id.* at 6.

³⁵ See Exceptions, Ex. 6, Agency Br. on Arbitrability; Exceptions, Ex 8, Agency Reply to Union Resp. to Agency Br. Challenging Arbitrability of Grievance.

³⁶ To the extent the Agency is challenging the Arbitrator's interpretation and application of the CBA, the Authority has held that mere disagreement with an arbitrator's interpretation of a CBA as to the procedural arbitrability of the grievance is not grounds for finding an award deficient. *SSA*, 71 FLRA 580, 580 (2020) (then-Member DuBester concurring).

³⁷ See *AFGE, Loc. 3342*, 72 FLRA 91, 93 (2021) (denying exception because the union failed to provide any basis for finding that the award was irrational, unfounded, implausible, or in manifest disregard of the parties' agreement); *AFGE, Nat'l Council of Field Lab. Locs.*, 71 FLRA 1180, 1181 (2020) (denying essence exception because the union failed to explain how the arbitrator's interpretation was irrational, unfounded, implausible, or in manifest disregard of the agreement).

³⁸ Exceptions Br. at 11.

³⁹ *Id.* at 12.

⁴⁰ *Id.* at 13.

⁴¹ *Id.* at 11-12 (quoting *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019)) (emphasis omitted).

⁴² *White Sands*, 67 FLRA at 619.

⁴³ *Id.* at 621.

⁴⁴ *Id.* (quoting 5 U.S.C. § 7121(b)(1)(C)(i)).

California.⁴⁵ It is of no matter whether the parties' CBA allows or is silent as to class action grievances, because the Authority has continually held that, in these circumstances, "there is only one plaintiff," the Union representing all BUEs.⁴⁶ In addition, we also find the U.S. Supreme Court case that the Agency relies on here to be of no consequence, since – just as the Arbitrator found – that case concerns the Federal Arbitration Act and this case concerns a grievance filed under our Statute.⁴⁷ Consequently, because the Agency has failed to establish that the award is irrational, unfounded, implausible, or in manifest disregard of the CBA, we deny the exception.⁴⁸

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

⁴⁵ 71 FLRA at 522.

⁴⁶ *White Sands*, 67 FLRA at 621; *see also Fort Irwin*, 71 FLRA at 524 (finding this *White Sands* holding to be "well settled"). We find the Agency's reliance on the Authority's discussion in *U.S. Small Bus. Admin.*, 70 FLRA 525 (2018) (*SBA*) (then-Member DuBester concurring, in part, and dissenting, in part), regarding clearly defined contract provisions and in support of its "silence" argument, to be misplaced given that the Authority's comments in *SBA* were regarding a past practice analysis and the contract's silence is not the issue here. *See Exceptions Br.* at 12.

⁴⁷ *See Fort Irwin*, 71 FLRA at 524 (rejecting the agency's reliance on U.S. Supreme Court cases that did not concern federal

labor arbitration under the Statute); *White Sands*, 67 FLRA at 621 (same).

⁴⁸ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 71 FLRA 997, 998 (2020) (denying the agency's essence exception because it failed to establish that the arbitrator's procedural-arbitrability determination was irrational, unfounded, implausible, or in manifest disregard of the agreement); *NAGE*, 71 FLRA 775, 777 (2020) (noting that the Authority and federal courts have recognized that an arbitrator's procedural-arbitrability determination is entitled to deference and denying a union's essence exception).

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)); see also *U.S. Dep't of VA, Veterans Benefit Admin.*, 72 FLRA 57, 62 (2021) (Dissenting Opinion of Chairman DuBester) (citations omitted).

³ *IRS*, 71 FLRA at 195 (citing *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 68 FLRA 640, 641 (2015); *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 1, 3 (2012)).

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.