72 FLRA No. 70

UNITED STATES
DEPARTMENT OF THE ARMY
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 2189
(Union)

0-AR-5474

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DECISION

June 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

For the second time, the Agency has filed interlocutory exceptions seeking to terminate arbitral proceedings about an ongoing overtime dispute. However, we conclude that none of the Agency's exceptions support terminating the proceedings.

The Union filed a grievance contesting the Fair Labor Standards Act (FLSA) classification of all bargaining-unit employees[1] whom the Agency treated as FLSA exempt. The grievance also alleged that the Agency owed some employees backpay or compensatory time off under the FLSA, the Federal Employees Pay Act (FEPA), the parties' collective-bargaining agreement, and several federal regulations. After the grievance was filed, the parties entered into three partial settlement agreements, but the Agency ultimately denied the grievance. The outstanding claims moved to arbitration before Arbitrator William A. Dealy.

Arbitrator Dealy first issued an award concerning the grievance's arbitrability (arbitrability award), and he found the grievance arbitrable. The Agency filed interlocutory exceptions to the arbitrability award, and the Authority dismissed those exceptions. Later, the Arbitrator issued a preliminary award concerning the FLSA classification of roughly sixty position titles (preliminary award). The Agency has now filed interlocutory exceptions to the preliminary award.

We grant interlocutory review for two of the Agency's arguments that, if resolved, could obviate the need for further proceedings. But, for the reasons explained below, we find that those arguments lack merit, so we deny them. We dismiss the remainder of the Agency's arguments either because they were not raised below, or because, even if resolved, they would not obviate the need for further proceedings.

II. Background and Arbitrator's Awards

The Union filed a grievance alleging that the Agency failed to properly compensate some employees for overtime, and incorrectly classified certain employees as FLSA exempt. The grievance also included an information request under § 7114(b)(4) of the Federal Service Labor-Management Relations Statute (the Statute).[2] The parties entered into settlement negotiations, which led to three partial settlement agreements in which the Agency agreed to reclassify three groups of employees from FLSA exempt to FLSA non-exempt. The settlement agreements did not resolve any damages owed to employees in the three affected groups, and the Agency later denied the remainder of the grievance.

Thereafter, the parties advanced the remaining disputed issues to arbitration. The parties requested that the Arbitrator first resolve the Agency's challenges to the grievance's arbitrability, and the parties filed briefs addressing those challenges.

As relevant here, the Agency argued that the grievance was not arbitrable because it did not satisfy the procedural requirements in the agreement. According to the Agency, the agreement recognized that there were only two types of grievances that could be filed against the Agency – an individual-employee grievance or a group grievance. And the Agency argued that the Union's grievance did not satisfy the contractual requirements for either of those two grievance types.

By contrast, the Union argued that the agreement recognized a third type of grievance: one that the Union could file on its own behalf against the Agency (Union grievance). The Union contended that the overtime grievance was this third type, so the contractual requirements for individual or group grievances were inapplicable. In rebuttal, the Agency asserted that a

[1] All further references to "employees" mean "bargaining-unit employees" only.

[2] 5 U.S.C. § 7114(b)(4).

Union grievance may concern only the Union's institutional rights, so the overtime grievance was not a Union grievance.

In the arbitrability award, the Arbitrator determined that the grievance before him was a Union grievance. Consequently, the Arbitrator held that the grievance did not need to comply with the procedural requirements for individual or group grievances. Instead, the Arbitrator found that Article XXX, Section 8 of the agreement contained the only relevant procedural requirements for Union grievances. That section required that "[g]rievances between the [Agency] and the Union over the interpretation or application of this [a]greement will be presented to the Commander and the Union President."[3] Because the Union filed its grievance with the Commander, the Arbitrator found that the grievance satisfied the pertinent procedural requirements. Therefore, the Arbitrator denied the Agency's arbitrability challenges.

The Agency filed exceptions to the arbitrability award,[4] and the Authority issued a show-cause order directing the Agency to explain why its exceptions should not be dismissed as interlocutory. When the Agency failed to respond to the show-cause order, the Authority dismissed the exceptions to the arbitrability award without prejudice.[5]

Following the arbitrability award, the parties decided to further divide the outstanding grievance issues, and they asked the Arbitrator to "address[] the matter of [FLSA]-exemption determination[s] first, followed by hearings on the remaining issues and damages."[6] However, the parties disagreed about whether the Arbitrator should consider their three partial settlements in resolving the grievance.

In keeping with the parties' plan to divide the remaining issues, the Arbitrator conducted additional proceedings that were limited to scrutinizing the Agency's FLSA-exemption determinations for roughly sixty position titles.[7] The Arbitrator framed the issues for decision at that stage of the proceedings as: (1) whether the Agency violated the FLSA, its implementing regulations, the parties' agreement, or any other relevant and applicable rule or regulation when the Agency determined that the work of certain employees rendered them exempt from the FLSA; and (2) if the Agency committed violations, what corrective action was required.

The Union asked the Arbitrator to find that the roughly sixty disputed position titles – which the Agency had designated as FLSA exempt – should have been designated as FLSA non-exempt. The Agency defended the accuracy of its exemption determinations for those position titles. The parties set forth their myriad disagreements at hearings and in briefs,[8] all of which the Arbitrator considered.

At the outset of his analysis in the preliminary award, the Arbitrator decided that he would consider the partial settlement agreements because they had not totally excluded the affected employees from the grievance's scope. Turning to the main issue of the Agency's FLSA-exemption determinations, the Arbitrator found that the Agency's "review processes and actions" for FLSA exemptions "leave one mystified."[9] In particular, the Arbitrator found that the Agency personnel who made such determinations often failed to follow pertinent regulations and guidance, and also routinely failed to document the review activities and considerations that supported their exemption determinations. Moreover, the Arbitrator found that the Agency did not regularly review exemption determinations for continued accuracy.

Because of the deficiencies that he identified in the Agency's exemption-determination processes and outcomes,[10] the Arbitrator found that the Agency violated the FLSA, its implementing regulations, the parties' agreement, and Agency regulations and guidance. He directed the Agency to adjust certain of its FLSA-classification records, and he directed the Agency to improve its processes for making and documenting FLSA-exemption determinations.

At the end of the preliminary award, the Arbitrator noted that the "remaining unresolved issues" included determining appropriate damages and deciding whether the Agency properly responded to all parts of the

[3] Arbitrability Award at 31 n.34 (quoting Collective-Bargaining Agreement (CBA) Art. XXX, § 8).
[4] Preliminary Award at 296 n.11.
[5] *Id.* at 296 n.13.
[6] *Id.* at 5.
[7] Because multiple employees could share the same position title, the number of affected employees was greater than the number of disputed position titles.
[8] These disagreements included the appropriate burdens of proof; the use of affirmative defenses; the meaning of the FLSA-implementing regulations; the Agency's obligation to regularly review position descriptions and their FLSA classifications; whether the Arbitrator could hold the Agency to account for failing to follow its internal regulations or guidance; and whether the Arbitrator could find violations based on shortcomings in the Agency's processes for making and documenting FLSA exemptions, even if the eventual determinations were correct.
[9] *Id.* at 30.
[10] The Arbitrator found that the Agency's exemptions were largely accurate, but he faulted the Agency for not supporting those exemption determinations with "clear evidence." *Id.* at 33.

Union's information request.[11] And he assessed arbitration costs and fees against the Agency as the losing party.

The Agency filed exceptions to the preliminary award on February 25, 2019, and the Union filed an opposition on March 27, 2019.

III. Preliminary Matters

A. The Agency's exceptions are interlocutory, but extraordinary circumstances warrant granting review of some of the Agency's arguments.

Because the Agency's exceptions concern the arbitrability award and the preliminary award, which did not resolve all of the issues that the parties advanced to arbitration, the exceptions are interlocutory. Ordinarily, under § 2429.11 of the Authority's Regulations, the Authority does not consider interlocutory appeals.[12] However, the Authority has held that an exception presents "extraordinary circumstances" that warrant interlocutory review when resolving the exception could advance the ultimate disposition of the case by obviating the need for further arbitral proceedings.[13]

Most of the arguments in the Agency's exceptions do not establish extraordinary circumstances warranting interlocutory review because, even if the Authority found that the arguments had merit, they would not end the arbitral proceedings over the grievance.[14] For example, the Agency challenges many aspects of the preliminary award as allegedly contrary to the FLSA. But granting the Agency relief based on those FLSA-specific challenges would not obviate the need for further proceedings on the grievance's information request under § 7114(b)(4) of the Statute,[15] or the grievance's claims under the FEPA and the parties' agreement.[16] Therefore, we deny interlocutory review for the arguments in the exceptions that fail to establish extraordinary circumstances.

Nevertheless, there are four arguments in the exceptions that have the potential to end further proceedings on the grievance. First, the Agency asserts that the arbitrability award failed to draw its essence from the agreement because the Arbitrator did not require the Union to follow the procedural requirements for individual or group grievances.[17] Second, the Agency contends that it is unlawful for the Union to bring claims under the FLSA, the FEPA, the agreement, and applicable federal regulations "in this manner" – which presumably refers to the filing of a Union grievance.[18] Third, the Agency argues that the arbitrability award and preliminary award violate § 7121(b)(1)(B) of the Statute, according to which "[a]ny negotiated grievance

[11] *Id.* at 37.
[12] 5 C.F.R. § 2429.11; *U.S. DHS, U.S. CBP*, 65 FLRA 603, 605 (2011).
[13] *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (then-Member DuBester dissenting).

[14] These arguments include the Agency's contentions that the Arbitrator: (1) legally erred in finding violations of the FLSA and its implementing regulations, Exceptions Br. at 22-25; (2) applied the wrong burdens of proof, *id.* at 26, 33-39; (3) improperly faulted the Agency's processes even when the resulting exemption determinations were correct, *id.* at 26-29, 54-55; (4) failed to identify any binding internal regulations or guidance that the Agency violated, *id.* at 29-32; (5) "allowed the Union to assert the Agency's affirmative defense [under the FLSA] as a cause of action," *id.* at 39; (6) ignored Office of Personnel Management (OPM) regulations about appealing FLSA-exemption status, *id.* at 40-43; (7) awarded backpay for more than three years before the grievance, *id.* at 42-43; (8) unlawfully assessed costs and fees against the Agency, *id.* at 44; (9) resolved classification matters that § 7121(c)(5) of the Statute excluded from the grievance procedure, *id.* at 44-51; (10) exceeded his authority by entertaining claims from individuals outside the bargaining unit, and by considering the partial settlements, *id.* at 52-57; (11) relied on the nonfact that the Agency failed to support its exemptions with clear proof, *id.* at 57-60; and (12) unlawfully permitted the Union to pursue a representative action under the FLSA, *id.* at 64-73.
[15] 5 U.S.C. § 7114(b)(4).
[16] *See, e.g.*, *U.S. Dep't of VA*, 72 FLRA 194, 195-96 & n.19 (2021) (Chairman DuBester dissenting) (refusing to grant interlocutory review of FLSA-specific arguments because grievance also included claims under the FEPA, the parties' agreement, and federal regulations); *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 71 FLRA 713, 714 (2020) (*Army*) (then-Member DuBester concurring) (same).
[17] Exceptions Br. at 77-86.
[18] *Id.* at 61, 63.

procedure . . . shall . . . provide for expeditious processing."[19] Fourth, the Agency argues that the awards are contrary to public policy because they do not support a negotiated grievance procedure that operates "in a manner consistent with the requirement of an effective and efficient [g]overnment," under § 7101(b) of the Statute.[20]

However, before turning to the substance of those four arguments, we must determine whether the Authority's Regulations permit considering them.

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar considering two of the Agency's arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments that a party could have, but did not, raise before an arbitrator.[21] The Union contends that the Agency never presented to the Arbitrator the expeditious-processing argument under § 7121(b)(1)(B)[22] or the public-policy argument concerning § 7101(b).[23] The record supports the Union's contentions that the Agency failed to present those arguments below. Therefore, §§ 2425.4(c) and 2429.5 bar considering those two arguments.

Accordingly, we grant interlocutory review to consider the two remaining Agency arguments that (1) are not barred by the Authority's Regulations and (2) could obviate the need for further proceedings.

IV. Analysis and Conclusions

A. The arbitrability award draws its essence from the agreement's procedural requirements for Union grievances.

The Agency argues that the arbitrability award fails to draw its essence from the parties' agreement because the Arbitrator held that a Union grievance did not need to comply with the procedural requirements for individual or group grievances.[24] The Agency contends that the provisions of the agreement that apply to individual and group grievances also apply to Union grievances.[25] But it was not irrational, unfounded, implausible, or in manifest disregard of the agreement for the Arbitrator to find otherwise because the sections of the agreement on which the Agency relies refer specifically to "[e]mployee grievances"[26] and "group grievances,"[27] but not Union grievances. Thus, the Agency's arguments – including a timeliness challenge[28] – that are based on the agreement sections concerning individual and group grievances fail to establish that the arbitrability award did not draw its essence from the agreement.

Further, the Agency argues that the arbitrability award fails to draw its essence from Article XXX, Section 8 of the agreement – which the Arbitrator held did apply to Union grievances.[29] That section addresses "[g]rievances between the [Agency] and the Union over the interpretation or application of th[e] [a]greement,"[30] but, according to the Agency, the current grievance does not concern the "interpretation or application of the agreement."[31] Contrary to the Agency's argument, the grievance alleges violations of the agreement,[32] so the Arbitrator's conclusion that the grievance complied with Article XXX, Section 8 was not irrational, unfounded, implausible, or in manifest disregard of that section.

The Agency also asserts that the grievance cannot be a Union grievance because: (1) the Union lacked standing to bring such a grievance; and (2) Union grievances cannot seek damages on behalf of individual

[19] 5 U.S.C. § 7121(b)(1)(B).
[20] *Id.* § 7101(b).
[21] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also U.S. DOL*, 70 FLRA 497, 498 (2018) (applying §§ 2425.4(c) and 2429.5 to bar arguments related to extraordinary circumstances that warranted granting interlocutory review).
[22] Opp'n Br. at 54.
[23] *Id.* at 69-70.
[24] An award fails 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. *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755 (2018).
[25] Exceptions Br. at 81-86.
[26] Exceptions, Ex. 3, CBA Art. XXX, §§ 6, 6.a.
[27] *Id.* § 6.e.
[28] Exceptions Br. at 84.
[29] Arbitrability Award at 22.
[30] *Id.* at 31 n.34 (quoting CBA Art. XXX, § 8 ("Grievances between the [Agency] and the Union over the interpretation or application of this [a]greement will be presented to the Commander and the Union President.")).
[31] Exceptions Br. at 83.
[32] Exceptions, Ex. 1, Grievance at 1 ("The Union alleges that the Agency violated the [FLSA], [the FEPA], OPM and [Department of Labor] Regulations, *the collective*[-]*bargaining agreement*[,] and all other relevant and applicable law, rule[,] and regulation . . . ." (emphasis added)).

employees.[33] Because neither of those conditions appears in Article XXX, Section 8, and as the Agency fails to cite any agreement wording to support them, we reject those assertions.

For the foregoing reasons, we deny the Agency's essence exception to the arbitrability award.

B. The Agency's argument that it is unlawful for the Union to bring claims "in this manner" lacks supporting detail.

The Agency claims that the law prohibits the Union from filing a Union grievance "in this manner" for violations of the FLSA, the FEPA, the agreement, and applicable federal regulations.[34] However, the section of the Agency's brief that advances this claim never identifies a law, rule, or regulation that prohibits the grievance,[35] so we deny the claim on the basis of the Agency's failure to provide supporting arguments.[36]

V. Decision

To the extent that the exceptions fail to establish extraordinary circumstances warranting interlocutory review, we dismiss the exceptions without prejudice. We also dismiss the exceptions, in part, because the Authority's Regulations bar two arguments from consideration. Finally, we grant interlocutory review of two arguments, but we deny those arguments on their merits.

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[33] Exceptions Br. at 85.

[34] *Id.* at 61, 63.

[35] *E.g.*, *id.* at 63 (arguing that "[a]ward is contrary to law, rule, and regulation," without citing any law, rule, or regulation).

[36] 5 C.F.R. § 2425.6(e)(1) ("An exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground [for review] . . . ."); *see U.S. Dep't of the Army, Nat'l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 524 (2020) (then-Member DuBester dissenting) (rejecting argument that arbitrability determination was contrary to law where agency "fail[ed] to cite any law with which the . . . arbitrability determination conflict[ed]"). To the extent that this claim rests on purported legal requirements that would apply only to the parts of the grievance concerning the FLSA, *see* Exceptions Br. at 65-73 (repeatedly citing the FLSA and related decisional precedent), addressing such alleged requirements would not end the grievance proceedings, so these portions of the claim do not establish extraordinary circumstances warranting interlocutory review. *See Army*, 71 FLRA at 714 (arguments that exclusively concerned FLSA did not warrant interlocutory review, where grievance included other non-FLSA claims).

Member Abbott, concurring:

As I have written before, the Authority has internal goals by which it assesses its performance in terms of case processing, i.e. issuing timely decisions. The first goal is for a decision to be issued no later than 210-days from the filing of an application for review.[1] If 210-days cannot be met, the backstop goal is 365-days.[2] This case went overage on February 25, 2020 and it has taken the Authority more than double its 365-day backstop goal to issue this decision. When the Authority fails to meet its own internal case processing goals, the Authority does not promote an effective and efficient government.[3]

Further, regarding interlocutory appeals, the Authority "do[es] not agree that only exceptions which raise a 'plausible jurisdictional defect' present extraordinary circumstances which warrant review."[4] Contrary to the Chairman's position, I do not believe the Authority should limit consideration of interlocutory reviews to "extraordinary circumstances." Instead, I support the concept that, in furtherance of an effective and efficient government, the Authority will decide exceptions which would "obviate the need for further arbitration."[5]

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[1] FLRA, *2021 Congressional Budget Justification*, https://www.flra.gov/CJ (last visited June 2, 2021).

[2] *Id.*

[3] *U.S. EPA, Off. of Rsch. & Dev., Ctr. for Env't. Measuring & Modeling, Gulf Ecosystems Measurement & Modeling Div., Gulf Breeze, Fla.*, 71 FLRA 1199, 1202-03 (2020) (Concurring Opinion of Member Abbott) (explaining the Authority's internal case processing goals of 210 and 365 days, respectively).

[4] *U.S. Dep't of the Army, Moncreif Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 207, 209 (2021) (Concurring Opinion of Member Abbott) (addressing Chairman DuBester's repeated argument regarding interlocutory appeals).

[5] *Id.*

Chairman DuBester, dissenting:

For reasons expressed in my dissenting opinion in *U.S. Department of the Treasury, IRS*,[1] I continue to disagree with the majority's expansion of the grounds upon which the Authority will review interlocutory exceptions. As I have expressed previously,[2] the only basis for granting interlocutory review should be "extraordinary circumstances" that raise a plausible jurisdictional defect, the resolution of which would advance resolution of the case.[3] 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."[4]

In my view, only one of the Agency's exceptions actually raises a jurisdictional basis for vacating the award.[5] But even if this exception raised a plausible jurisdictional defect, I would not grant interlocutory review of the exception.[6] Accordingly, I would dismiss, without prejudice, the Agency's exceptions in their entirety on grounds that they fail to raise extraordinary circumstances warranting interlocutory review.

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

[2] *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).

[3] *U.S. Dep't of VA, Veterans Benefits Admin.*, 72 FLRA 57, 62 (2021) (Dissenting Opinion of Chairman DuBester) (citing *IRS*, 71 FLRA at 195).

[4] *IRS*, 71 FLRA at 195 (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)).

[5] *See* Exceptions Br. at 44-52 (arguing that the Arbitrator resolved a classification matter that is excluded from the parties' negotiated grievance procedure by 5 U.S.C. § 7121(c)(5)).

[6] *U.S. Dep't of the Army, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 70 FLRA 172, 173 (2017) (under the pre-*IRS* standard, the Authority will only review interlocutory exceptions that allege a plausible jurisdictional defect "if addressing that defect will advance the ultimate disposition of the case by ending the litigation").