

**72 FLRA No. 77**

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
U.S. CUSTOMS AND BORDER PROTECTION  
LOS ANGELES, CALIFORNIA  
(Agency)

and

NATIONAL TREASURY  
EMPLOYEES UNION  
CHAPTER 103  
(Union)

0-AR-5618

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DECISION

June 30, 2021

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

**I. Statement of the Case**

Arbitrator Carol A. Vendrillo found that the Union's grievance filed on behalf of two grievants is not moot despite their voluntary retirements from the Agency. The Agency filed exceptions to the award on exceeded-authority grounds. Because the Arbitrator considered issues not specific to the two named grievants in determining that the grievance was not moot, we find that she exceeded her authority. Accordingly, we grant the Agency's exception and set aside the award.

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

After determining that the night shift in a particular work unit was not appropriate for unarmed officers on light-duty assignment, the Agency reassigned two officers (the grievants) to different units. On March 13, 2019, the Union filed a grievance on behalf of the grievants, alleging that the Agency violated Articles 33 and 43 of the parties' collective-bargaining agreement by failing to assess the availability of light-duty assignments in the grievants' original work unit "on a case-by-case basis" in light of each grievant's specific medical condition.<sup>1</sup> As remedies, the Union

requested that the Agency "[r]eturn both employees to their previous shift immediately,"<sup>2</sup> and asked the Arbitrator to provide "any and all remedies deemed appropriate."<sup>3</sup> While the grievance was pending, both grievants retired. The Agency then filed a motion to dismiss the grievance, contending that the grievants' retirements had rendered the dispute moot.

The Arbitrator stated that the issue was "whether the dispute involving the light-duty assignments of [the grievants] is moot because they have retired from the Agency and whether the invocation of arbitration should be dismissed."<sup>4</sup> On this point, the Arbitrator found "no reasonable expectation that [the grievants] will be reassigned to a light-duty night shift in [the work unit at issue] because both have retired from the Agency."<sup>5</sup> She also noted that the Union "did not file this grievance on its own behalf," but rather on behalf of only the two grievants.<sup>6</sup>

Nevertheless, the Arbitrator found that "the dispute concerns more than the removal of the two [g]rievants from their light-duty assignments," because "[t]he thrust of the grievance concerns the Agency's broad proclamation that there can be no light-duty assignments in [the work unit at issue]."<sup>7</sup> She therefore found that the grievants' retirements have not "completely or irrevocably eradicated the effects" of the alleged violations.<sup>8</sup> And on this basis, she concluded that the grievance was not rendered moot by the grievants' retirements.<sup>9</sup>

On April 17, 2020, the Agency filed exceptions to the award and on May 22, 2020, the Union filed an opposition to the Agency's exceptions.

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

The Agency concedes that its exceptions are interlocutory because the Arbitrator has not yet ruled on

<sup>1</sup> Exceptions, Attach. at 2-8, Agency's Ex. 1, Grievance (Grievance) at 4 (quoting Art. 33, § 11A); *see also* Award at 2-3.

<sup>2</sup> Grievance at 1.

<sup>3</sup> Award at 2.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.* at 6.

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

<sup>7</sup> *Id.* at 7 (referencing the "Agency's response to the step 3 grievance, wherein it unequivocally asserted that [the work unit] can no longer support officers in a light-duty capacity on any tour of duty").

<sup>8</sup> *Id.* at 6; *see also id.* at 7 (finding that the grievance "leaves open the question whether the Agency will continue to violate the light-duty provisions of the contract").

<sup>9</sup> *Id.* at 8.

the grievance's merits.<sup>10</sup> The Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration.<sup>11</sup> However, the Authority has determined that interlocutory exceptions present "extraordinary circumstances" that warrant review when their resolution will advance the ultimate disposition of the case by obviating the need for further arbitration.<sup>12</sup> For example, exceptions raising plausible jurisdictional defects warrant interlocutory review when their resolution "would end the litigation."<sup>13</sup>

Here, the Agency argues that the grievance is not arbitrable because it is moot and the Arbitrator erred by finding otherwise.<sup>14</sup> The Authority has found that when a controversy ceases to exist, the issues arising out of that controversy will be dismissed for want of jurisdiction.<sup>15</sup> Because the Agency's exceptions allege a plausible jurisdictional defect that, if resolved, will advance the ultimate disposition of the case, the exceptions warrant interlocutory review.<sup>16</sup>

#### **IV. Analysis and Conclusions: The Arbitrator exceeded her authority in determining that the grievance was not moot.**

The Agency argues that the Arbitrator exceeded her authority by finding that the Union had a cognizable

interest in the grievance despite the grievants' retirements.<sup>17</sup> Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed by the grievance.<sup>18</sup>

As noted by the Agency, the parties' agreement limits the Arbitrator's authority to resolve only issues raised and remedies requested in the initial filing of the Step 2 grievance form.<sup>19</sup> And, in the Step 2 grievance, the Union specifically limited the issue to the two grievants and did not request any broader relief.<sup>20</sup> Moreover, the Arbitrator framed the issue as limited to the two grievants, and she found that the Union had not filed the grievance "on its own behalf."<sup>21</sup> Therefore, the Arbitrator's authority was limited to considering the Agency's alleged contractual violations and remedies as to the two grievants.

The Arbitrator, however, did not confine her analysis to the two grievants. Rather, she concluded that the grievance was not moot because there was an "open . . . question whether the Agency will continue to violate the light-duty provisions of the contract" after the grievants' retirements.<sup>22</sup> Because this conclusion disregards her own framing of the issue as limited to the two grievants, which was consistent with the contractual limitations on her authority as applied to the specific grievance before her, we find that the Arbitrator exceeded her authority in deciding that the grievance was not rendered moot by the grievants' retirement.

<sup>10</sup> Exceptions at 5; *see also* Opp'n at 7.

<sup>11</sup> 5 C.F.R. § 2429.11; *U.S. DHS, U.S. CBP*, 65 FLRA 603, 605 (2011); *see also U.S. Dep't of Educ.*, 71 FLRA 516, 517-18 (2020) (then-Member DuBester concurring).

<sup>12</sup> *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (*IRS*) (then-Member DuBester dissenting); *see also U.S. Dep't of the Army, Nat'l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 523 (2020) (then-Member DuBester dissenting) (finding extraordinary circumstances when "exceptions could conclusively determine whether any further arbitral proceedings are required").

<sup>13</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 66 FLRA 414, 415 (2011) (interlocutory review "advance[s] the ultimate disposition of the case" when "resolving the exceptions would end the litigation").

<sup>14</sup> Exceptions at 5-6.

<sup>15</sup> *See NTEU*, 70 FLRA 57, 59-60 (2016) (citing *NTEU*, 63 FLRA 26, 27 (2008)) (explaining that the Authority will not resolve issues that are moot).

<sup>16</sup> Chairman DuBester notes that he continues to disagree with the expanded interlocutory standard introduced by the Authority in *IRS*. *See, e.g., U.S. Dep't of VA, Veterans Benefit Admin.*, 72 FLRA 57, 62 (2021) (Dissenting Opinion of Chairman DuBester) (citing *U.S. Dep't of the Treasury, IRS*, 71 FLRA 192, 195 (2019) (Dissenting Opinion of then-Member DuBester); *U.S. Small Bus. Admin.*, 70 FLRA 885, 888-89 (2018) (Dissenting Opinion of then-Member DuBester)). However, because the Agency's exception raises a plausible jurisdictional defect which, if resolved, would advance the ultimate disposition of the case, he agrees that interlocutory review is appropriate.

<sup>17</sup> Exceptions at 7-8.

<sup>18</sup> *AFGE, Nat'l VA Council No. 53*, 67 FLRA 415, 415-16 (2014) (citing *U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996)).

<sup>19</sup> *See* Exceptions at 7 (citing Art. 28, § 8 of the parties' agreement); *see also* Exceptions, Attach. at 260, Agency's Ex. 6 at 125 (Art. 28, § 8.B.).

<sup>20</sup> Exceptions at 7-8; *see also* Grievance at 1, 6. Although the Arbitrator noted the Union's argument that one of the grievants was entitled to backpay, Award at 4, she did not base her mootness decision on that issue. Award at 6. More importantly, the Union did not allege in its Step 2 grievance that either grievant was denied overtime as a result of their reassignments, *see* Grievance at 2-8, nor did it raise the grievants' potential entitlement to overtime as a basis for affirming the award in its exceptions. Additionally, the Agency asserted that the Union had separately grieved the issue of one grievant's alleged loss of overtime, and provided evidence that this issue was pending before a *different* arbitrator. *See* Exceptions, Attach. at 242, Agency's Ex. 5, Agency's Reply to NTEU's Opposition to Motion to Dismiss Invocation of Arbitration (Reply) at 10; Exceptions, Attach. at 251-52, Reply Ex. 1 at 1-2 (emails confirming Union's invocation of arbitration for overtime grievance and stating that grievance is before Arbitrator Robert Hirsch).

<sup>21</sup> Award at 2, 6.

<sup>22</sup> *Id.* at 7.

Accordingly, we grant the Agency's exceeded-authority exception and set aside the award.<sup>23</sup>

**V. Decision**

We set aside the Arbitrator's award.

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<sup>23</sup> The Agency also challenges the award on the grounds that it fails to draw its essence from the parties' agreement, Exceptions at 12-17, and is incomplete, ambiguous, and contradictory, *id.* at 17. Because we set aside the award, we do not address these exceptions. See *U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017) (setting aside award on exceeded-authority ground made it unnecessary to review remaining exceptions).