

72 FLRA No. 91

UNITED STATES
MARINE CORPS
MARINE CORPS AIR
GROUND COMBAT CENTER
TWENTYNINE PALMS, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2018
(Union)

0-AR-5689

DECISION

September 15, 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 Authority¹**I. Statement of the Case**

This case involves interlocutory exceptions to an email addressing the procedural arbitrability of a grievance. As discussed below, we find that the email is an “award” under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute).² We also find that the Agency’s exception warrants interlocutory review, because if true, it would obviate the need for further arbitration proceedings.³ However, Arbitrator

¹ Member Abbott (He/Him) notes that the adoption of gender-neutral policies and the use of gender-neutral language in any form of communication not only “promotes acceptance and makes employees feel secure at work,” but also “attracts a wider variety of talent and skill sets, [and] brings in new perspectives on the current way of work.” Lisa Pradhan, *Gender Neutrality at the Workplace: How it Helps Companies be Better Employers*, Nagarro (June 23, 2021), <https://www.nagarro.com/en/blog/gender-neutrality-at-workplace>. According to Jody Herman, public policy scholar at the Williams Institute at UCLA School of Law, it is inevitable “that employers are going to be faced with an increasing percentage of employees over time who have nonbinary identities,” because there is greater prevalence of gender ambiguity among young people.” Yuki Noguchi, *He, She, They: Workplaces Adjust As Gender Identity Norms Change*, NPR (Oct. 16, 2019, 5:05 AM), <https://www.npr.org/2019/10/16/770298129/he-she-they-workplaces-adjust-as-gender-identity-norms-change>. In the Federal workforce, Executive Order 14020 established a White House Gender Policy Council to “promot[e] workplace diversity, fairness, and inclusion across the Federal workforce,” and “advance gender equity and equality . . .” Establishment of the White House Gender Policy Council, 86 Fed. Reg. 13,797, 13,797 (March 8, 2021). Because our statutory mandate tasks the Authority to “provide leadership in establishing policies and guidance” in the federal labor relations arena, 5 U.S.C. § 7105(a)(1), Member Abbott believes the Authority should issue its decisions in a gender-inclusive manner and establish policies that require parties to incorporate gender-neutral language in filings submitted to the Authority. This decision is drafted in a gender-neutral fashion. In an effort to recognize and dignify all persons who present matters to the Authority, over the coming months Member Abbott will focus on preparing decisions that move towards the full inclusion of gender-neutral language and encourages his colleagues and the Office of General Counsel to join in this effort.

² See 5 U.S.C. § 7122(a) (“Either party to arbitration under [the Statute] may file with the Authority an exception to any arbitrator’s award pursuant to the arbitration . . .” (emphasis added)); see also *U.S. Dep’t of VA, Gulf Coast Veterans Healthcare Sys.*, 71 FLRA 752, 752-53 (2020) (then-Member DuBester concurring) (dismissing interlocutory exceptions where the arbitrator’s email did not constitute an interim award because it did not “analyze the [a]gency’s arguments, or make a ruling on those arguments, concerning whether the grievance was arbitrable”).

³ See *U.S. DHS, U.S. CBP*, 71 FLRA 1244, 1245 (2020) (*CBP*) (then-Member DuBester concurring).

Byron Berry's conclusion is so unsupported by the record that we cannot determine whether the award is deficient on the grounds raised by the Agency's exception. Therefore, we remand the award for further action.

II. Background and Arbitrator's Award

As relevant here, the Agency issued guidance to all employees regarding COVID-19 on March 6, 2020.⁴ The Union filed a grievance on April 12, 2020, alleging that the Agency violated the parties' agreement by failing to provide all bargaining-unit employees (BUEs) with personal protective equipment and by failing to provide "hazardous duty pay" to BUEs exposed to COVID-19.⁵ The Agency denied the grievance on April 30, 2020.⁶ The Union requested mediation on May 13, 2020.⁷ The Agency declined mediation on June 2, 2020.⁸ The Union invoked arbitration on June 28, 2020.⁹

The Agency filed a motion to dismiss the grievance because "the grievance and the request for arbitration were both untimely filed" under the parties' agreement.¹⁰ The Arbitrator denied the Agency's motion in a one-sentence email, stating "[a]fter reviewing the [A]gency's motion . . . and the [U]nion's response thereto, it is determined that the matter is arbitrable, and will proceed to arbitration at the earliest date convenient to all sides."¹¹ The Agency filed exceptions on December 15, 2020, and the Union filed its opposition on January 13, 2021.

On February 25, 2021, the Authority's Office of Case Intake and Publication issued an Order to Show Cause (Order) directing the Agency to "show cause why it should not dismiss the . . . exceptions for failure to satisfy the conditions for review of arbitration awards."¹² Specifically, the Authority asked the Agency to address "whether the Arbitrator's email constitutes an 'award' under § 7122(a) [of the Statute]."¹³ The Agency timely responded to the Order on March 3, 2021, asserting that the email decision was an "award" because the parties' agreement requires an arbitrator "to issue an award or decision on arbitrability prior to proceeding to a hearing or prior to issuing any further action on the claim."¹⁴ The Agency also asserted that the instant case differs from

U.S. Department of VA, Gulf Coast Veterans Healthcare System (Gulf Coast),¹⁵ because the Arbitrator's ruling was not a routine communication, but provided an answer to a specific matter presented by the parties.¹⁶

III. Preliminary Matters

- a. The email is an "award" for purposes of § 7122(a) of the Statute.

This case involves an email from the Arbitrator denying the Agency's motion to dismiss.¹⁷ The one-sentence email provided "[a]fter reviewing the [A]gency's motion . . . and the [U]nion's response thereto, it is determined that the matter is arbitrable, and will proceed to arbitration at the earliest date convenient to all sides."¹⁸

In *Gulf Coast*, the Authority held that an email was not an award for purposes of § 7122(a)¹⁹ because "[t]he [a]rbitrator did not analyze the Agency's arguments, or make a ruling on those arguments"²⁰ As the Agency correctly asserts in its response,²¹ this case is distinguishable from *Gulf Coast*. Unlike the email in *Gulf Coast*,²² this email provided a ruling on the parties' procedural-arbitrability arguments.²³ Further, the parties' agreement requires an arbitrator to "issue a written decision" on the procedural arbitrability of a grievance prior to proceeding to a hearing.²⁴ The fact that the email is void of any analysis or reasoning as to how the

⁴ Exceptions, Ex. B at 1.

⁵ *Id.* at 19-21 (Grievance); *see also* Opp'n Br. at 3.

⁶ Exceptions, Ex. B at 22 (Response to Grievance).

⁷ *Id.* at 24 (Request for Mediation).

⁸ *Id.* at 25.

⁹ *Id.* at 26 (Invocation of Arbitration).

¹⁰ *Id.* at 1; *see also id.* at 7-14 (Articles 11 and 12 of the parties' agreement).

¹¹ Exceptions, Ex. A at 1 (Email).

¹² Order to Show Cause at 2.

¹³ *Id.*

¹⁴ Agency's Response to Order to Show Cause (Resp.) at 3.

¹⁵ 71 FLRA at 752-53.

¹⁶ Resp. at 3.

¹⁷ *See* Email at 1.

¹⁸ *Id.*

¹⁹ 5 U.S.C. § 7122(a) ("Either party to arbitration under [the Statute] may file with the Authority an exception to any arbitrator's *award* pursuant to the arbitration" (emphasis added)).

²⁰ 71 FLRA at 753.

²¹ *See* Resp. at 3.

²² 71 FLRA at 752 ("[T]he [a]rbitrator responded by email that [the arbitrator] would 'not issue an interim ruling prior to the scheduled hearing at the request of only one party to the dispute.'").

²³ *See* Email at 1 ("[I]t is determined that the matter is arbitrable"). Compare *U.S. Dep't of the Army, Fort Stewart & Hunter Army Airfield, Fort Stewart, Ga.*, 72 FLRA 45, 46 (2021) (*Fort Stewart*) (ruling that "merely clarified the parties' obligations and expressly postponed resolving any of the parties' issues" did not constitute an award for purposes of filing exceptions), with *SSA*, 71 FLRA 205, 205 (2019) (*SSA*) (Member Abbott concurring on unrelated grounds; then-Member DuBester dissenting on unrelated grounds) (treating one-sentence email as an "award" where it constituted the only written memorialization of the arbitrator's bench decision).

²⁴ Exceptions, Ex. B at 13 (requiring the arbitrator to "issue a written decision" on the "grievability or arbitrability of [the] grievance"); *see also* Resp. at 3.

Arbitrator arrived at this decision does not, by itself, demonstrate that the email is not an award.²⁵ As such, the email in this case is an “award” for purposes of § 7122(a).²⁶

- b. The Agency has demonstrated extraordinary circumstances warranting review of its interlocutory exceptions.

The Agency concedes that its exceptions are interlocutory.²⁷ 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.²⁸ 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.²⁹

Here, the Agency asserts that the Arbitrator should have dismissed the grievance because the Union failed to adhere to the procedural deadlines provided by the parties’ agreement.³⁰ Because the Agency’s exceptions allege a procedural-arbitrability dispute that, if resolved, will advance the ultimate disposition of the case, the exceptions warrant interlocutory review.³¹

IV. Analysis and Conclusion: We remand the award for further action.

In its exceptions, the Agency argues that the award fails to draw its essence from the parties’ agreement because the Arbitrator ignored the procedural

deadlines established by the parties’ agreement.³² In particular, the Agency asserts that the Arbitrator provided “no authority or contractual [language] which allow[ed] the Union to forgo the [procedural deadlines] set forth in [the parties’ agreement].”³³

The Authority has held that where an award is unclear and the arbitrator has not made sufficient findings for the Authority to determine whether the award is deficient, the Authority will remand the award.³⁴ Here, the Arbitrator provided a one-sentence conclusion void of any analysis, rationale, support, or explanation.³⁵ As such, we are unable to determine whether the award is deficient on the grounds raised by the Agency’s exceptions. Accordingly, we remand the award to the parties for resubmission to the Arbitrator.³⁶ On remand, the Arbitrator should, consistent with this decision, explain the contractual bases for the conclusion; explain any interpretations of the parties’ agreement; and support the conclusion with factual findings.³⁷

V. Order

We remand the award for further action consistent with this decision.³⁸

²⁵ See SSA, 71 FLRA at 205 (where parties agreed to streamlined arbitration process that allowed for a bench decision, one-sentence email constituted an “award”).

²⁶ While not required by law or the parties’ agreement, Member Abbott views the Arbitrator’s failure to provide any rationale whatsoever as a breach of the Arbitrator’s basic duty to settle disputes between the parties. The one-sentence award in this case, does not settle the dispute between the parties. Rather, it leads to more disputes, such as the instant proceeding.

²⁷ See Exceptions Br. at 4-6 (providing Authority case law for review of interlocutory exceptions as grounds for why the Authority should consider its exceptions). The Union also asserts that the Agency’s exceptions are interlocutory. Opp’n Br. at 1.

²⁸ 5 C.F.R. § 2429.11; *Fort Stewart*, 72 FLRA at 46 (citing *NTEU*, 66 FLRA 696, 698 (2012)).

²⁹ *CBP*, 71 FLRA at 1245 (citing *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (*IRS*) (then-Member DuBester dissenting)).

³⁰ See Exceptions Br. at 8-10.

³¹ See *U.S. Dep’t of VA, Veterans Benefits Admin.*, 72 FLRA 57, 58 (2021) (Member Abbott concurring; Chairman DuBester dissenting) (finding that an allegation that the grievance is not procedurally arbitrable presented extraordinary circumstances warranting interlocutory review).

³² See Exceptions Br. at 7-9.

³³ *Id.* at 8.

³⁴ See *AFGE, Loc. 3408*, 70 FLRA 638, 639 (2018) (*Loc. 3408*) (then-Member DuBester concurring) (citing *AFGE, Loc. 3506*, 64 FLRA 583, 584 (2010); *AFGE, Loc. 2054*, 63 FLRA 169, 172 (2009)).

³⁵ See Email at 1.

³⁶ Member Kiko reiterates that it is not the Authority’s role “to referee email communications between parties and an arbitrator.” *U.S. Dep’t of Educ., Fed. Student Aid*, 72 FLRA 316, 317 n.16 (2021) (Chairman DuBester concurring) (quoting *Gulf Coast*, 71 FLRA at 753). When the parties here negotiated a provision requiring an arbitrator to “issue a written decision” on procedural-arbitrability issues prior to conducting a hearing, they surely hoped for more than a one-sentence email. Exceptions, Ex. B at 35. Resolving potentially dispositive arbitrability issues requires more than a conclusory email. It is the cursory nature with which the Arbitrator fulfilled his contractual obligations – rather than the Authority’s interlocutory-review standard – which hinders “effective and efficient government” in this case. Dissent at 8 (quoting *IRS*, 70 FLRA at 809).

³⁷ See *Loc. 3408*, 70 FLRA at 639 (remanding an award where the arbitrator’s conclusions were so unsupported that the Authority could not assess whether the award was deficient).

³⁸ We note that nothing in this decision precludes the parties from mutually agreeing to select a different arbitrator upon remand.

Chairman DuBester, dissenting:

For reasons expressed in my dissenting opinion in *U.S. Department of the Treasury, IRS (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 previously stated, 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.² And exceptions to arbitration awards raise a plausible jurisdictional defect "when they present a credible claim that the arbitrator lacked jurisdiction as a matter of law."³

That standard is not met in this case because there is no basis for finding that the Arbitrator lacked jurisdiction as a matter of law. And, although I need not repeat all of the policies that underlie that standard here, I find it appropriate to reemphasize one: that "interlocutory appeals can 'cause considerable disruption to the conduct of the trial proceedings, and flood appellate courts with additional work.'"⁴

The Authority's experience under *IRS* has borne this out. In the three years before the majority adopted the *IRS* standard, the Authority issued only eight decisions involving interlocutory exceptions;⁵ in the three years since *IRS*, however, it has issued nearly *three times as many* such decisions, the vast majority of

which did not implicate any jurisdictional concerns.⁶ And there are still more pending.

The time that three Authority Members and their staffs have needed to spend reviewing this explosion in cases has not fostered "effective and efficient government" – the majority's purported rationale for adopting the *IRS* standard.⁷ This is particularly true where, as here, the majority is simply sending the case back to the Arbitrator for further findings.

Accordingly, I dissent.

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

² *U.S. Dep't of the Army*, 72 FLRA 363, 369 (2021) (*Army*) (Dissenting Opinion of Chairman DuBester) (citations omitted).

³ *Id.* (citations omitted).

⁴ *IRS*, 70 FLRA at 810.

⁵ *U.S. Small Bus. Admin.*, 70 FLRA 729 (2018) (then-Member DuBester dissenting); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Bryan, Tex.*, 70 FLRA 707 (2018) (then-Member DuBester dissenting); *U.S. DOL*, 70 FLRA 497 (2018) (then-Member DuBester dissenting); *U.S. Dep't of the Army, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 70 FLRA 172 (2017); *U.S. Dep't of VA, Waco Reg'l Office, Waco, Tex.*, 70 FLRA 92 (2016) (Member Pizzella concurring); *AFGE, Loc. 2145*, 69 FLRA 563 (2016) (Member Pizzella dissenting); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div. Keyport, Keyport, Wash.*, 69 FLRA 292 (2016); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 69 FLRA 176 (2016).

⁶ *U.S. Dep't of the Army, White Sands Missile Range*, 72 FLRA 435 (2021) (Chairman DuBester concurring); *U.S. DHS, U.S. CBP, L.A., Cal.*, 72 FLRA 411 (2021); *Army*, 72 FLRA 363; *U.S. DHS, U.S. CBP*, 72 FLRA 340 (2021) (Chairman DuBester concurring; Member Kiko concurring); *U.S. Dep't of Educ., Fed. Student Aid*, 72 FLRA 316 (2021) (Chairman DuBester concurring); *U.S. Dep't of the Army, Moncreif Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 207 (2021) (Member Abbott concurring; Chairman DuBester dissenting); *U.S. Dep't of Educ.*, 72 FLRA 203 (2021) (Chairman DuBester concurring); *U.S. Dep't of VA*, 72 FLRA 194 (2021) (Chairman DuBester dissenting); *U.S. DHS, CBP*, 72 FLRA 166 (2021) (Chairman DuBester concurring); *NLRB*, 72 FLRA 80 (2021) (Member Abbott dissenting in part); *U.S. Dep't of VA, Veterans Benefits Admin.*, 72 FLRA 57 (2021) (Member Abbott concurring; Chairman DuBester dissenting); *U.S. Dep't of the Army, Fort Stewart & Hunter Army Airfield, Fort Stewart, Ga.*, 72 FLRA 45 (2021); *U.S. DHS, U.S. CBP*, 71 FLRA 1244 (2020) (then-Member DuBester concurring); *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 71 FLRA 713 (2020) (then-Member DuBester concurring); *U.S. Dep't of the Army, Nat'l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522 (2020) (then-Member DuBester dissenting); *U.S. Dep't of Educ.*, 71 FLRA 516 (2020) (then-Member DuBester concurring); *NLRB*, 71 FLRA 196 (2019) (then-Member DuBester dissenting); *U.S. Dep't of the Treasury, IRS*, 71 FLRA 192 (2019) (then-Member DuBester dissenting); *U.S. DOD, U.S. Marine Corps, Air Ground Combat Ctr., Twentynine Palms, Cal.*, 71 FLRA 173 (2019) (then-Member DuBester dissenting); *U.S. DHS, CBP*, 70 FLRA 992 (2018) (then-Member DuBester concurring); *U.S. Agency for Glob. Media*, 70 FLRA 946 (2018) (then-Member DuBester dissenting); *U.S. Small Bus. Admin.*, 70 FLRA 895 (2018) (then-Member DuBester dissenting).

⁷ *IRS*, 70 FLRA at 809.