

72 FLRA No. 112

UNITED STATES
DEPARTMENT OF THE ARMY
LETTERKENNY ARMY DEPOT
CHAMBERSBURG, PENNSYLVANIA
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1442
(Union)

0-AR-5557
0-AR-5562
0-AR-5578

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DECISION

December 13, 2021

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

I. Statement of the Case

In this case, we hold that the Union may proceed with its default grievance seeking remedies under the Fair Labor Standards Act (FLSA),¹ the Federal Employees Pay Act (FEPA), and other federal laws and regulations.

Arbitrator Ira F. Jaffe issued an interim award finding that the Union's default grievance and underlying FLSA grievance were procedurally and substantively arbitrable. The Arbitrator also made findings concerning the FLSA classification of sixteen bargaining-unit employees.

The Agency filed interlocutory exceptions to the interim award. Subsequently, the Union requested that the Arbitrator stay further arbitral proceedings until the Authority resolved the Agency's exceptions to the interim award. The Arbitrator denied the request twice, and the Union filed interlocutory exceptions to both of those denials.

We find that the Union's interlocutory exceptions and several of the Agency's interlocutory

exceptions do not present an "extraordinary circumstance" warranting review, and we dismiss them without prejudice. We grant interlocutory review of the Agency's remaining exceptions that, if resolved, could obviate the need for further arbitral proceedings. However, we deny the remaining exceptions because they do not demonstrate that the interim award is deficient.²

II. Background and Arbitrator's Awards**A. The 2014 Arbitrability Award**

In 2012, the Union filed a grievance on behalf of all bargaining-unit employees alleging violations of several laws and regulations, including the FLSA, the FEPA, the Back Pay Act,³ Office of Personnel Management (OPM) and Department of Labor (DOL) regulations, and the parties' collective-bargaining agreement (the FLSA grievance). The Union filed this grievance as a Union grievance at step three of the parties' negotiated grievance procedure.⁴ However, the Agency did not respond to the grievance or the Union's subsequent invocation of arbitration. Consequently, the Union filed a second grievance (the default grievance), alleging that the Agency violated Article 42 of the parties' agreement by neglecting to process the FLSA grievance.⁵

As part of the default grievance, the Union asserted that Article 42, Section 14 (Section 14) of the parties' agreement obligated the Agency to grant all of

² Because Case Nos. AR-5557, AR-5562, and AR-5578 involve the same parties and arise from the same arbitration proceeding, we have consolidated them for decision. *See U.S. DOJ, U.S. Marshals Serv., Just. Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 19 n.1 (2012) (consolidating cases that involved the same parties and arose from the same arbitration proceeding).

³ 5 U.S.C. § 5596.

⁴ Under Article 42, Section 7(a), "[a] Union grievance (defined as nonpersonal, nonindividual, concerning an issue [that] has wide impact over the interpretation and/or application of this agreement) will be submitted by the Union directly at step [three]." AR-5557, Exceptions, Ex. 4, Labor-Management Agreement (LMA) at 77.

⁵ When the Union filed the FLSA grievance on August 13, 2012, it initially waived the Agency's contractual obligation to answer within a specific timeframe. AR-5557, Exceptions, Ex. 2, Nov. 17, 2014 Arbitrability Award (Arbitrability Award) at 7. However, when the Agency did not respond after thirty days and again after sixty days, the Union notified the Agency that it was revoking the waiver. *Id.* at 15-16. After the Agency continued to be unresponsive, the Union invoked arbitration, but the Agency did not participate in the arbitration process. *Id.* at 16; *see id.* at 28 (noting that the Agency did not respond to the invocation of arbitration). The Agency addressed the allegations in the FLSA grievance, for the first time, in its written response to the default grievance, submitted on January 3, 2013. *Id.* at 17-19.

¹ 29 U.S.C. §§ 201-219.

the relief requested in the FLSA grievance.⁶ Section 14 provides, in relevant part, that a “[f]ailure of the [Agency] to observe the time limits at step [three] of the grievance procedure will entitle the employee(s) to the remedy sought, provided the remedy is not contrary to any law, rule, or regulation.”⁷ The Agency denied the default grievance and the parties proceeded to arbitration.

At arbitration over the default grievance, the parties agreed to address any questions of arbitrability first. The Agency filed a motion to dismiss on the ground that the default grievance and underlying FLSA grievance were inarbitrable. According to the Agency, the FLSA grievance was not procedurally arbitrable because the Union improperly filed it as a Union grievance and submitted it to the wrong Agency official. With respect to the default grievance, the Agency claimed that the Union was ineligible for relief because Section 14 did not apply to Union grievances. On substantive arbitrability, the Agency argued that the parties’ agreement did not permit class-action FLSA grievances.

In a 2014 arbitrability award, the Arbitrator found that: the Union properly filed its grievance as a Union grievance;⁸ the Union submitted the FLSA grievance to the correct Agency official;⁹ and Section 14 applies to Union grievances. Further, the Arbitrator determined that the Agency had waived its procedural-arbitrability objections by defaulting on the FLSA grievance.¹⁰ Considering substantive arbitrability, the Arbitrator concluded that the Union had standing to file a FLSA grievance on behalf of the bargaining unit, citing the Authority’s decision in *U.S. Department of the Navy, Naval Explosive Ordinance Disposal Tech Division, Indian Head, Maryland (Indian Head)*.¹¹

Turning to the default grievance, the Arbitrator agreed with the Union that the Agency’s failure to respond to the FLSA grievance triggered a default under Section 14. Thus, the Arbitrator sustained the default grievance. The Arbitrator determined that the appropriate remedy for the default would be to grant the remedy requested in the FLSA grievance. But, as relevant here, the Arbitrator also held that further arbitration was necessary to ensure that any relief awarded to employees

“is not contrary to any law, rule, or regulation.”¹² Accordingly, the Arbitrator concluded that the Agency’s default provided a basis for permitting the Union to present its FLSA claims but only “as a question of the appropriate remedy for the [default] grievance.”¹³

In 2014, the Agency filed interlocutory exceptions to the arbitrability award, arguing that the Arbitrator’s alleged impartiality created a plausible jurisdictional defect warranting review. In *U.S. Department of the Army, Letterkenny Army Depot, Chambersburg, Pennsylvania (LEAD I)*,¹⁴ the Authority declined to grant interlocutory review and dismissed the Agency’s exceptions without prejudice.¹⁵

B. The September 22, 2019 Interim Award

Following the Authority’s decision in *LEAD I*, the parties participated in evidentiary proceedings to determine whether any employees were wrongly classified as FLSA exempt. First, in a 2018 interim award, the Arbitrator held that the Agency improperly exempted eight employees from coverage under the FLSA.¹⁶ In 2019, the Arbitrator held hearings for sixteen employees and asked the parties to address only whether the Agency had correctly classified the employees as FLSA exempt. However, in its post-hearing brief, the Agency raised new arbitrability challenges to: the Arbitrator’s authority to consider the merits of the FLSA grievance; the Union’s failure to submit the FLSA grievance to arbitration; the Union’s alleged untimely filing of the default grievance; and the Union’s failure to acquire written consent from employees before filing the FLSA grievance, citing § 216(b) of the FLSA.¹⁷ The Agency also requested that the Arbitrator reconsider the procedural- and substantive-arbitrability arguments that it had raised previously in its 2014 motion to dismiss.

In a 2019 interim award (the interim award), the Arbitrator addressed the Agency’s arbitrability objections before assessing whether the sixteen employees were wrongly classified as FLSA exempt. As an initial matter, the Arbitrator declined to reconsider any arbitrability objections that the Agency raised previously in its motion to dismiss. Further, the Arbitrator determined that the

⁶ AR-5557, Exceptions, Ex. 3, Dec. 14, 2012 Default Grievance (Default Grievance) at 1-2.

⁷ LMA at 79.

⁸ Arbitrability Award at 27.

⁹ See *id.* at 27-28 (also finding, in the alternative, that the Union filed the grievance in good faith with the person it believed was the correct Agency official).

¹⁰ *Id.* at 28 (finding that the Agency waived its procedural-arbitrability arguments by “fail[ing] to respond to the [FLSA] grievance or the invocation of arbitration”).

¹¹ 57 FLRA 280, 286 (2001) (Chairman Cabaniss dissenting).

¹² Arbitrability Award at 48.

¹³ *Id.* at 51.

¹⁴ 68 FLRA 640 (2015).

¹⁵ *Id.* at 641.

¹⁶ AR-5557, Exceptions, Ex. 11, Mar. 18, 2018 Interim Award at 60. The Agency did not appeal the March 18, 2018 award. AR-5578, Award at 2.

¹⁷ Section 216(b) provides, in relevant part, 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.” 29 U.S.C. § 216(b).

Agency had waived any new procedural-arbitrability challenges by failing to raise them during the 2014 arbitrability phase¹⁸ and then raising them sua sponte in its 2019 post-hearing brief – thus denying the Union an opportunity for rebuttal.¹⁹ The Arbitrator also concluded, relying on the Authority’s decision in *Indian Head*, that § 216(b)’s opt-in requirement was not applicable to grievances filed under the parties’ negotiated grievance process.

On the merits, the Arbitrator found that the Agency failed to support its classification of five employees as FLSA exempt. As a result, the Arbitrator directed the Agency to reclassify these employees as FLSA non-exempt.

The Agency filed exceptions to the interim award on October 22, 2019, to which the Union filed an opposition.²⁰

C. The Arbitrator’s Stay Denials

After issuing the interim award, the Arbitrator instructed the Union to present its claims for monetary damages owed to improperly exempted employees. Before a damages hearing on October 23, 2019, the Agency informed the Arbitrator and the Union that it had filed exceptions to the interim award with the Authority. Subsequently, the Union requested that the Arbitrator implement a stay of arbitration until the Authority resolved the Agency’s exceptions. In a bench ruling (the bench ruling), the Arbitrator declined to grant a stay and ordered the parties to continue with the hearing. The Union filed exceptions to the Arbitrator’s stay denial on October 23, 2019, and the Agency filed an opposition to the Union’s exceptions.²¹

The Arbitrator later issued a written award (the third award) affirming the bench ruling. The Union filed exceptions to this award on December 26, 2019, to which the Agency filed an opposition.²²

¹⁸ AR-5557, Sept. 22, 2019 Interim Award (Interim Award) at 22 (“The failure to have raised these objections at the initial stage – which was designated by the [p]arties and the Arbitrator as the appropriate point in time to raise objections to [procedural] arbitrability – waived any such objections.”).

¹⁹ See *id.* at 21-22. The Arbitrator also noted that the Agency “did not establish its claims of non-arbitrability even assuming *arguendo* that it could properly raise them.” *Id.* at 22.

²⁰ The Authority docketed the Agency’s exceptions under Case No. AR-5557.

²¹ The Authority docketed the Union’s exceptions under Case No. AR-5562.

²² The Authority docketed the Union’s exceptions under Case No. AR-5578.

III. Preliminary Matters

A. The Union’s exceptions are interlocutory and do not present extraordinary circumstances warranting review.

The Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all issues submitted to arbitration.²³ However, the Authority has held that an exception which would advance the ultimate disposition of the case by obviating the need for further arbitral proceedings presents an “extraordinary circumstance” warranting review.²⁴

The Union’s exceptions to the bench ruling and the third award challenge the Arbitrator’s denial of the Union’s stay request.²⁵ However, even if granted, an arbitral stay would not conclusively obviate the need for further arbitration. Accordingly, we dismiss the Union’s exceptions, without prejudice, as interlocutory.²⁶

²³ *U.S. DHS, U.S. CBP*, 71 FLRA 1244, 1245 (2020) (then-Member DuBester concurring) (citing 5 C.F.R. § 2429.11; *U.S. Dep’t of the Army, Army Corps of Eng’rs, Norfolk Dist.*, 71 FLRA 713, 713 (2020) (*Norfolk Dist.*) (then-Member DuBester concurring)).

²⁴ *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) (citations omitted).

²⁵ Relying on the Authority’s decision in *U.S. Department of the Navy, Naval Surface Warfare Center, Indian Head Division, Indian Head, Maryland*, 56 FLRA 848 (2000), the Union argues that the Arbitrator had to grant its request for an arbitral stay, as a matter of law, once the Agency filed interlocutory exceptions to the interim award. AR-5562, Exceptions Br. at 3-4 (arguing that arbitration cannot continue because the interim award is not “final and binding” until the Authority resolves the Agency’s interlocutory exceptions); AR-5578, Exceptions Br. at 4-5 (same).

²⁶ In its exceptions to the third award, the Union requested an expedited decision under § 2425.7 of the Authority’s Regulations. AR-5578, Exceptions Br. at 9-10; see 5 C.F.R. § 2425.7 (the Authority may, in appropriate cases, “resolve[] the parties’ arguments without a full explanation of the background, arbitration award, parties’ arguments, and analysis of those arguments”). Because we dismiss the Union’s exceptions as interlocutory, the Union’s request for an expedited decision is denied.

- B. The Agency's exceptions are interlocutory, but we find extraordinary circumstances warranting review of some of its exceptions.

The Agency concedes that its exceptions are interlocutory but argues that extraordinary circumstances warrant review because granting its exceptions would render the FLSA grievance inarbitrable, thus avoiding the need for further arbitral proceedings.²⁷ In its exceptions to the interim award, the Agency argues: (1) the Arbitrator exceeded his authority by asserting jurisdiction over the FLSA grievance;²⁸ (2) the interim award fails to draw its essence from Article 42 of the parties' agreement;²⁹ (3) the FLSA grievance is not substantively arbitrable under the FLSA or the Federal Service Labor-Management Relations Statute (the Statute)^{30,31} (4) the Arbitrator exceeded his authority by finding that the grievance included claims that arose after the Union filed the grievances;³² (5) the Arbitrator ignored OPM regulations concerning FLSA-exempt-status appeals;³³ (6) the FLSA grievance violates the doctrines of sovereign immunity³⁴ and associational standing;³⁵ and (7) the Arbitrator's FLSA exempt-status determinations are contrary to law and based on nonfacts.³⁶

We find that the Agency's exceptions challenging the scope of the grievance, the grievance's arbitrability under the FLSA, the Arbitrator's alleged failure to apply OPM regulations, and the Arbitrator's exempt-status determinations do not demonstrate "extraordinary circumstances" warranting interlocutory review. Even if granted, these exceptions would not obviate the need for further proceedings to address alleged violations of "a number of other pay statutes" besides the FLSA,³⁷ and monetary remedies owed to employees covered by the March 18, 2018 interim award

would still be at issue.³⁸ Accordingly, we dismiss, without prejudice, the Agency's interlocutory exceptions that fail to establish extraordinary circumstances.³⁹

Nonetheless, the Agency's remaining exceptions present extraordinary circumstances warranting interlocutory review because resolving these exceptions could conclusively determine whether further arbitral proceedings are required. If meritorious, these exceptions would obviate the need for further arbitration by nullifying the Arbitrator's March 18, 2018 interim award and rendering all of the Union's claims inarbitrable – including those arising under the FEPA, the Back Pay Act, federal regulations, and the parties' agreement. Therefore, we grant interlocutory review and address the substance of the Agency's exceptions contesting the Arbitrator's jurisdiction over the FLSA grievance, the Arbitrator's interpretation of Article 42, the FLSA grievance's arbitrability under the doctrines of sovereign immunity and associational standing, and the Union's ability to pursue the FLSA grievance under the Statute.⁴⁰

IV. Analysis and Conclusions

- A. The Arbitrator did not exceed his authority in the interim award.

The Agency asserts that the Arbitrator exceeded his authority by making findings regarding the FLSA grievance when that grievance was not submitted to him for arbitration.⁴¹ Arbitrators exceed their authority when they 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.⁴²

²⁷ AR-5557, Exceptions Br. at 21.

²⁸ *Id.* at 22-25.

²⁹ *Id.* at 30-49.

³⁰ 5 U.S.C. §§ 7101-7135.

³¹ AR-5557, Exceptions Br. at 53-68, 70-73, 76-77.

³² *Id.* at 25-30.

³³ *Id.* at 73-76.

³⁴ *Id.* at 68-70.

³⁵ *Id.* at 51-53.

³⁶ *Id.* at 78-109.

³⁷ Interim Award at 1-2; *see* AR-5557, Exceptions, Ex. 1, August 13, 2012 FLSA Grievance at 1 (alleging violations of the FEPA, Title 5, federal regulations, and the parties' agreement); *see also* Arbitrability Award at 1-2 (noting that the issue concerns the Agency's failure to process and participate in the grievance procedure "with respect to an August 13, 2012 grievance . . . alleging that [the Agency] had violated the LMA and, inter alia, . . . Title 5 . . . the [FEPA], and [OPM] and [DOL] regulations"); AR-5557, Opp'n Br. at 5 (stating that the grievance involves "the FLSA, Title V[,] and the provisions of the contract relating to overtime pay").

³⁸ AR-5557, Exceptions, Ex. 11, Mar. 18, 2018 Interim Award at 60.

³⁹ *See Norfolk Dist.*, 71 FLRA at 714 (dismissing exceptions based on the FLSA as interlocutory where arbitration would still be necessary to resolve claims under the FEPA, federal regulations, and the parties' agreement); *U.S. Dep't of the Interior, Bureau of Reclamation*, 59 FLRA 686, 687 (2004) (dismissing interlocutory exceptions that would not end arbitration as to all grievants).

⁴⁰ *See U.S. Dep't of the Army*, 72 FLRA 363, 365 (2021) (Member Abbott concurring; Chairman DuBester dissenting) (granting interlocutory review of exceptions that could end further arbitral proceedings as to each of the claims raised in the grievance); *Fort Irwin*, 71 FLRA at 523 (granting interlocutory review where resolving the exceptions could render the grievance inarbitrable and thus avoid the need for further arbitration).

⁴¹ AR-5557, Exceptions Br. at 22-29.

⁴² *AFGE, Loc. 3342*, 72 FLRA 91, 92 n.13 (2021) (*Loc. 3342*) (citing *AFGE, Nat'l VA Council No. 53*, 67 FLRA 415, 415-16 (2014)).

Citing the Authority's decision in *U.S. Small Business Administration (SBA)*,⁴³ the Agency contends that the Arbitrator could not resolve any issues presented in the FLSA grievance.⁴⁴ In *SBA*, the Authority found that an arbitrator who was hired to determine whether a grievance was arbitrable exceeded her authority by assuming jurisdiction over a different grievance.⁴⁵ Here, unlike *SBA*, the parties' agreement contains a provision – Section 14 – that *required* the Arbitrator to evaluate the remedies requested in the FLSA grievance.⁴⁶ Once the Arbitrator found that the Agency's failure to process the FLSA grievance resulted in a default, the sole issue remaining before the Arbitrator was whether the remedies requested in the FLSA grievance were "contrary to law, rule, or regulation."⁴⁷ Thus, the Arbitrator necessarily looked to the FLSA grievance to assess the remedies requested therein.⁴⁸ He was not assuming jurisdiction over the FLSA grievance but, rather, was applying Section 14 to resolve the default grievance. Accordingly, we deny the Agency's exceeded-authority exception.⁴⁹

B. The award does not fail to draw its essence from the parties' agreement.

The Agency alleges that the award fails to draw its essence from the parties' agreement.⁵⁰ Specifically, the Agency contends that the Arbitrator: (1) misinterpreted Article 42, Section 7(a) by allowing the FLSA grievance to proceed as a Union grievance; (2) erroneously found that Article 42, Section 14 permitted the Union to obtain default relief; (3) improperly allowed the Union to avoid the requirements for filing a group grievance under Article 42, Section 11; and (4) failed to find that the default grievance was untimely.⁵¹

In the interim award, the Arbitrator held that the Agency's procedural-arbitrability objections to both the FLSA grievance and the default grievance were unpersuasive on the merits and also that the Agency had waived those arguments.⁵² Although the Agency contends that the Arbitrator's procedural-arbitrability determinations are based on misinterpretations of Article 42, the Agency does not challenge the Arbitrator's conclusion that the Agency waived its procedural-arbitrability objections. As the Agency does not demonstrate that any of the Arbitrator's waiver findings are erroneous, the Agency's exceptions do not establish that the Arbitrator's procedural-arbitrability determinations are irrational, unfounded, implausible, or manifest a disregard for the parties' agreement.⁵³ Accordingly, we deny the Agency's essence exceptions.

⁴³ 70 FLRA 885 (2018) (then-Member DuBester dissenting).

⁴⁴ AR-5557, Exceptions Br. at 22-24.

⁴⁵ 70 FLRA at 887.

⁴⁶ See LMA at 79 ("Failure of the Employer to observe the time limits at step [three] of the grievance will entitle the employee(s) to the remedy sought, provided the remedy is not contrary to any law, rule, or regulation.")

⁴⁷ Arbitrability Award at 50; see also *id.* at 51 (ordering the FLSA grievance to proceed solely "as a question of the appropriate remedy for the [default] grievance").

⁴⁸ We note that the Arbitrator's finding of a default did not entitle any employees to a remedy. Rather, based on this finding, the Arbitrator required the Agency to establish that it correctly classified each aggrieved employee as FLSA exempt. Interim Award at 43-129 (determining that the Agency properly applied an FLSA exemption to eleven out of sixteen employees).

⁴⁹ See *NAIL, Loc. 10*, 71 FLRA 513, 515 (2020) (denying exceeded-authority exception where the award was directly responsive to the framed issue). To the extent the Agency relies on the Authority's decision in *LEAD I* to argue otherwise, the Agency mischaracterizes that holding. Compare AR-5557, Exceptions Br. at 24 (asserting that the Authority held that the issue of the remedy for the default grievance was "never submitted to arbitration in the first place"), with *LEAD I*, 68 FLRA at 641 (finding that the Agency "does not argue that the 'unresolved issues' still pending before the Arbitrator were never submitted to arbitration in the first place" (emphasis added)).

⁵⁰ When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority will find that an arbitration award is deficient as failing to draw its essence from the agreement when the appealing 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. *Loc. 3342*, 72 FLRA at 92 (citations omitted).

⁵¹ AR-5557, Exceptions Br. at 34-47.

⁵² Interim Award at 21-29.

⁵³ See *U.S. Dep't of VA, Denver Reg'l Off.*, 70 FLRA 870, 871 (2018) (then-Member DuBester concurring) (denying essence exception where the excepting party challenged some, but not all, of the findings supporting the arbitrator's interpretation of the parties' agreement).

C. The award is not contrary to law.

The Agency asserts that the Arbitrator's substantive-arbitrability determinations are contrary to law.⁵⁴

The Agency first argues that the FLSA grievance is barred by the doctrines of associational standing and sovereign immunity.⁵⁵ However, the Agency's arguments fail to recognize 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."⁵⁶ As the Authority stated in *U.S. Department of the Army, White Sands Missile Range, White Sands Missile Range, New Mexico*, when a federal union files a grievance on behalf of employees, it acts as "one 'plaintiff' . . . which represents all bargaining-unit employees as a matter of law."⁵⁷ Consistent with these principles, the Authority has previously held that the law of associational standing does not apply to federal-union grievances filed on behalf of bargaining-unit employees.⁵⁸ The Authority has also held that "[b]y authorizing suits against the United States, the [FLSA's amendment] waives the government's sovereign immunity."⁵⁹ Because the Agency does not distinguish these holdings or otherwise demonstrate that the doctrines of associational standing and sovereign immunity apply to this case, we deny these exceptions.

Next, the Agency asserts that § 7121(b) of the Statute "does not authorize Union representational actions for damages,"⁶⁰ because arbitration of these claims violates the requirement that negotiated grievance procedures "provide for expeditious processing."⁶¹

⁵⁴ AR-5557, Exceptions Br. at 51-53, 66-70. The Authority reviews questions of law de novo. *U.S. Dep't of the Air Force, Peterson Air Force Base, Colo.*, 72 FLRA 143, 144 (2021) (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.* at 144 n.17 (citing *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998)).

⁵⁵ AR-5557, Exceptions Br. at 51-53, 68-70.

⁵⁶ *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 621 (2014) (citing 5 U.S.C. § 7121 (b)(1)(C)(i)).

⁵⁷ *Id.* (citing *Indian Head*, 57 FLRA at 284-87).

⁵⁸ *Fort Irwin*, 71 FLRA at 524 (holding that the doctrine of associational standing "does not apply" to "federal labor arbitration under the Statute").

⁵⁹ *U.S. DOJ, Fed. BOP, USP Admin. Maximum (ADX), Florence, Colo.*, 65 FLRA 76, 77 (2010) (quoting *Dep't of the Treasury, IRS*, 521 F.3d 1148, 1154 (9th Cir. 2008)).

⁶⁰ AR-5557, Exceptions Br. at 66.

⁶¹ *Id.* at 67 (citing 5 U.S.C. § 7121(b)(1)(B)); *see also id.* at 111 (arguing that the FLSA grievance violates a statutory requirement that grievances be "fair and simple" (citing 5 U.S.C. § 7121(b)(1)(A))).

Based on this interpretation, the Agency contends that the remedies requested in the FLSA grievance violate § 7121(b)(1) because they are "so broad and vague" that they make "expeditious resolution . . . impossible."⁶² However, the Agency provides no legal authority to support its interpretation of § 7121(b)(1), nor does it demonstrate how that provision is applicable to the FLSA grievance. By its plain wording, § 7121(b)(1) applies to "negotiated grievance *procedure[s]*," rather than discrete grievances.⁶³ Thus, the Agency's argument provides no basis for finding that the award is contrary to § 7121(b)(1) of the Statute, and we deny the Agency's exception.⁶⁴

V. Decision

We dismiss the Union's interlocutory exceptions and some of the Agency's interlocutory exceptions, without prejudice, for failure to demonstrate extraordinary circumstances warranting interlocutory review. We grant interlocutory review of the Agency's remaining exceptions but deny them.

⁶² *Id.* at 67.

⁶³ 5 U.S.C. § 7121(b)(1) (emphasis added); *see U.S. Dep't of VA, 72 FLRA 194, 196* (2021) (Chairman DuBester dissenting) (holding that § 7121(b)(1) of the Statute concerns only negotiated grievance procedures and "says nothing about the content of individual grievances"); *AFGE, Loc. 2041*, 67 FLRA 651, 653 (2014).

⁶⁴ The Agency also raises generic public-policy arguments about the broadness, lack of specificity, and representative nature of the Union's grievance, referencing alleged public policies found in § 7121(b) and § 7101 of the Statute. AR-5557, Exceptions Br. at 110-14. However, we deny the Agency's public-policy arguments because the Agency, by merely restating its contrary-to-law exceptions and citing statutory language, has not identified an "explicit" "well defined" and "dominant" policy or "clearly shown" that the award violates the alleged policy. *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 179 (2017) (citing *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 174 (2015)); *see also Fort Irwin*, 71 FLRA at 524 (denying the agency's "generalized . . . arguments" that the union's FLSA grievance was overly broad and constituted "misuse" of the negotiated grievance process).

Chairman DuBester, concurring in part and dissenting in part:

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 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

At the outset, it is not clear how the majority's determination in Part III.B. of its decision to grant interlocutory review of some of the Agency's exceptions – which challenge the Arbitrator's jurisdiction over the Fair Labor Standards Act (FLSA) grievance, the Arbitrator's application of Article 42 to the FLSA grievance, the FLSA grievance's arbitrability, and the Union's ability to pursue the FLSA grievance under the Statute – is consistent with even its misguided *IRS* standard. The majority concludes that interlocutory review of these exceptions is appropriate because their resolution "could conclusively determine whether further arbitral proceedings are required."⁵ Yet, in the very same section of its decision, the majority – noting that the Union's grievance also alleges "violations of 'a number of other pay statutes' besides the FLSA" – *denies* interlocutory review of other exceptions filed by the Agency challenging the Arbitrator's ruling on the Union's FLSA allegations because resolution of these

exceptions "would not obviate the need for further proceedings."⁶

Nevertheless, because the Union's exceptions, and the Agency's exceptions that the majority dismisses, do not raise plausible jurisdictional defects for vacating the award, I would deny interlocutory review of these exceptions.⁷ And on this basis, I agree with the conclusions in Parts III.A. and III.B. of the decision to the extent that the majority finds that the Union's and the Agency's interlocutory exceptions should be dismissed, without prejudice.

Unlike the majority, however, I would deny interlocutory review of the Agency's remaining exceptions because they do not raise plausible jurisdictional defects, or because granting the exception would otherwise not advance the ultimate disposition of the case by ending the litigation.⁸ Therefore, I would also deny review of these exceptions and dismiss them without prejudice.

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 II*) (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 II*, 71 FLRA at 195).

⁴ *IRS II*, 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 Majority at 7. The majority's purported basis for this conclusion is that granting these exceptions would obviate the need for further arbitration "by nullifying the Arbitrator's March 18, 2018 interim award." *Id.* But it is altogether unclear how nullifying this award, in which the Arbitrator ruled on the FLSA exempt status of eight employees, would obviate the need for any further arbitration regarding the remainder of the Union's claims. Moreover, as the majority itself notes, the Agency "did not appeal the March 18, 2018 award." *Id.* at 4 n.16.

⁶ *Id.* at 6.

⁷ *U.S. Dep't of the Army, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 70 FLRA 172, 173 (2017) (*Fort Bragg*) (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"); see *U.S. Dep't of the Army*, 72 FLRA 363, 369 (2021) (*Army*) (Dissenting Opinion of Chairman DuBester).

⁸ *Fort Bragg*, 70 FLRA at 173; *Army*, 72 FLRA at 369; see also *NTEU*, 66 FLRA 696, 699 (2012) ("Even assuming that the sovereign-immunity exception establishes a plausible jurisdictional defect, the [a]gency does not demonstrate that interlocutory resolution of the exception will advance the ultimate disposition of this case."); *U.S. DOJ, Fed. BOP, USP Admin. Maximum (ADX), Florence, Colo.*, 65 FLRA 76, 77 (2010) ("[b]y authorizing suits against the United States, the [FLSA's amendment] waives the government's sovereign immunity[]").

Member Abbott, dissenting in part:

While I concur with most aspects of our decision, I disagree on one point.

In order to determine whether an employee is exempt or non-exempt under the Fair Labor Standards Act's various exemptions,¹ specific findings must be made. In this case, the Arbitrator analyzed both the "administrative" exemption² and the "computer employees" exemption.³ The findings that are necessary for an employee to be classified as non-exempt under the administrative exemption have been enumerated time and again by federal and state courts.⁴ As would be expected, the Authority has followed and applied the same requirements.⁵

Classifying an employee as non-exempt bestows upon an employee an ongoing entitlement to various forms of pay—overtime pay and compensation for travel time outside of normal work hours are but two examples⁶—requiring agencies to pay non-exempt employees; however, the same entitlements are not available to exempt employees.

In *U.S. DOL*, the Authority found that career status could not be bestowed upon a probationary employee simply by arbitral fiat or accident.⁷ Because classifying an employee as non-exempt bestows a status which significantly affects how an employee is scheduled for work and entitlement to pay, overtime, and certain benefits, it is a status that may not be assumed by "default."⁸

Therefore, I would find that the Arbitrator's award is deficient because the requisite findings were not

made that would entitle the employees to be classified as non-exempt and therefore entitled to a remedy.

¹ 29 U.S.C. §§ 201-209.

² 5 C.F.R. § 551.206.

³ *Id.* § 551.210.

⁴ *Shea v. United States*, 976 F.3d 1292, 1299 (Fed. Cir. 2020) ("We also agree with the trial court, that, on its face, the position description contains duties that could reasonably be interpreted as qualifying for the administrative exemption—namely duties involving 'office or non-manual work' related to 'management or general business operations' and that require 'the exercise of discretion and independent judgment with respect to matters of significance.'"); *Perry v. Randstad Gen. Partner (US) LLC*, 876 F.3d 191, 208 (6th Cir. 2017); *Williams v. Mann*, 388 P.3d 295, 305-06 (N.M. Ct. App. 2016).

⁵ *U.S. Dep't of the Navy, Military Sealift Command Atl. Region, Hampton, Va.*, 65 FLRA 583, 586 (2011); *U.S. DHS, U.S. CBP*, 65 FLRA 356, 360-61 (2010).

⁶ *Shea v. United States*, 143 Fed. Cl. 320, 329-30 (2019); *AFGE, AFL-CIO, Loc. 3614*, 60 FLRA 601, 604-05 (2005).

⁷ 70 FLRA 903, 905 (2018) (then-Member DuBester dissenting) ("Congress did not give arbitrators the power to grant permanent-employee status to term appointees like the grievant here.").

⁸ Majority at 8.