

72 FLRA No. 131

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY DENTAL ACTIVITY
FORT JACKSON, SOUTH CAROLINA
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL NO. 1214
(Union)

0-AR-5659

DECISION

February 25, 2022

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

I. Statement of the Case

In this case, we reaffirm that the Authority will enforce grievance-procedure exclusions contained in parties' collective-bargaining agreements.

The Union filed a grievance seeking to remediate the Agency's alleged failure to adhere to various wage and overtime laws, and related articles of the parties' agreement. In an arbitrability award, Arbitrator Vicki Peterson Cohen found the grievance arbitrable as an institutional grievance under Article 31 of the agreement. The Agency filed exceptions arguing that the parties' agreement prohibits institutional grievances that seek personal relief for individual employees. For the reasons provided below, we grant the Agency's essence exception and set aside the award.

II. Background and Arbitrator's Award

The Union's grievance, filed on behalf of all bargaining-unit employees, alleges violations of the Fair Labor Standards Act (FLSA); Title 5 of the United States Code; the Federal Employees Pay Act; and Articles 13 and 14 of the parties' agreement. As remedies for these alleged violations, the grievance requests, among other things, that the Agency: redesignate certain employees, retirees, and past

employees as FLSA non-exempt; pay backpay to wrongfully designated employees for overtime worked; pay "suffer or permit overtime" to employees;¹ pay backpay to certain "groups of current and past employees";² and pay the affected employees liquidated damages.

The Union presented the grievance as an "[e]mployee [g]rievance" under Article 30 of the parties' agreement or, "alternative[ly,]" as a "Union [g]rievance" under Article 31.³ Article 30 is titled "Employee Grievance Procedure" and permits a bargaining-unit employee or a group of employees to initiate a grievance that seeks "personal relief in a matter of concern or dissatisfaction to the employee or group."⁴ Separately, the parties' agreement contains a "Union/Employer Grievance Procedure" in Article 31.⁵ That article allows "the Union or [m]anagement" to file a grievance but specifies that its "procedure cannot be used for grievances involving personal relief of individual employees."⁶

To explore settlement options, the parties agreed to stay the Union's grievance. After approximately five years of unsuccessful settlement discussions, the Agency revoked the stay and denied the grievance. In its denial, the Agency asserted that the grievance was inarbitrable because it did not comply with the procedural requirements of either Article 30 or Article 31. The parties then proceeded to arbitration, where they agreed to bifurcate the arbitrability and merits of the grievance.

In an arbitrability award, the Arbitrator faulted the Agency for objecting to the procedural arbitrability of the grievance, for the first time, more than five years after the Union filed it. The Arbitrator noted that Article 30, Section 4 requires questions of arbitrability "to be raised early in the grievance process,"⁷ and, in the Arbitrator's view, the Agency raised the issue of arbitrability outside "th[at] contractual time frame[]." ⁸

Even so, the Arbitrator addressed whether the grievance was "arbitrable under Article 30 or Article 31."⁹ Although the Arbitrator framed the issue as including Article 30, she focused exclusively on Article 31 and its preclusion of grievances that seek personal relief. The Arbitrator determined that the

¹ Exceptions, Ex. 5, Grievance at 2.

² *Id.* at 4.

³ *Id.* at 1.

⁴ Exceptions, Ex. 4, Collective-Bargaining Agreement (CBA) at 51-52.

⁵ *Id.* at 55.

⁶ *Id.*

⁷ Award at 16 (quoting Art. 30, § 4).

⁸ *Id.* at 15.

⁹ *Id.* at 2.

grievance's requested remedies concerning FLSA "exemption status" sought "position relief, not personal relief," because resolution of the exemption-status issue was a prerequisite to attaining personal remedies.¹⁰ In addition, the Arbitrator held that *U.S. Department of the Army, White Sands Missile Range, White Sands Missile Range, N.M. (White Sands)*¹¹ authorized the Union to file the grievance. Based on these findings, the Arbitrator concluded that the Union's grievance was arbitrable under Article 31.

On July 24, 2020, the Agency filed exceptions to the award,¹² and, on August 28, 2020, the Union filed an opposition.

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

As the Arbitrator has not yet ruled on the grievance's merits, the Agency acknowledges that its exceptions are interlocutory.¹³ Under § 2429.11 of the Authority's Regulations, the Authority ordinarily does not consider interlocutory appeals.¹⁴ But the Authority has determined that any exception that advances the ultimate disposition of a case by obviating the need for further arbitral proceedings presents an extraordinary circumstance warranting review.¹⁵

The Agency contends, in its exceptions, that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement. Because resolution of that exception could conclusively determine

whether further arbitral proceedings are required, we grant interlocutory review.¹⁶

IV. Analysis and Conclusion: The award fails to draw its essence from the parties' agreement.

The Agency makes two pertinent essence arguments.¹⁷ First, it challenges the Arbitrator's finding that the Agency objected to the arbitrability of the grievance outside the "contractual time frame[]" in Article 30, Section 4.¹⁸ As relevant here, Article 30, Section 4 states, "Questions as to whether issues are . . . arbitrable will be raised early in the grievance process."¹⁹

Putting aside that the parties' mutual decision to stay the grievance reasonably accounts for the timing of the Agency's arbitrability objection, the Arbitrator's application of Article 30, Section 4 cannot, in any rational way, be derived from the agreement. As noted above, the parties' agreement contains two separate grievance procedures: an employee grievance procedure in Article 30,²⁰ and a "[u]nion/[e]mployer" grievance procedure in Article 31.²¹ The Arbitrator found the Union's grievance arbitrable under Article 31, not Article 30.²² Unlike Article 30, Article 31 does not require that arbitrability questions be raised early in the grievance process. And the Arbitrator cited no authority, contractual or otherwise, that permitted applying the provisions of one procedure to a grievance brought under

¹⁰ *Id.* at 18.

¹¹ 67 FLRA 619 (2014).

¹² The Agency later requested leave to file, and filed, a supplemental submission concerning the Authority's recent decision in *U.S. Dep't of the Army, Moncrief Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 207 (2021) (*Moncrief*) (Member Abbott concurring; Chairman DuBester dissenting). Because the record is sufficient for us to resolve the case, we do not consider the Agency's submission. See 5 C.F.R. § 2429.26 (stating that the Authority may, in its discretion, grant leave to file "other documents" as it deems appropriate); *NTEU*, 41 FLRA 1241, 1241 n.2 (1991) (denying consideration of supplemental submission because the "Regulations do not provide for such submissions, and . . . the record [wa]s sufficient . . . to resolve the issues").

¹³ Exceptions Br. at 14.

¹⁴ 5 C.F.R. § 2429.11.

¹⁵ *U.S. Dep't of the Army, Nat'l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 523 (2020) (*Army*) (then-Member DuBester dissenting).

¹⁶ See *Army*, 71 FLRA at 523 (finding that resolution of exception challenging arbitrability of grievance could obviate need for further arbitral proceedings).

¹⁷ The Authority will find that an arbitration 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 Treasury, IRS, Kan. City Campus*, 71 FLRA 1161, 1162 n.16 (2020) (then-Member DuBester dissenting) (citing *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (*SBA*) (then-Member DuBester concurring, in part, and dissenting, in part)). The Authority has found that an award fails to draw its essence from a collective-bargaining agreement where the award conflicts with the agreement's plain wording. *SBA*, 70 FLRA at 527.

¹⁸ Exceptions Br. at 12-13.

¹⁹ CBA at 52.

²⁰ *Id.* at 51.

²¹ *Id.* at 55.

²² Award at 18 ("The grievance is found to be arbitrable under Article 31 . . .").

the other.²³ Accordingly, the Arbitrator's conclusion that the Agency's arbitrability objection violated Article 30, Section 4 fails to draw its essence from the agreement.²⁴

The Agency's second essence argument contests the Arbitrator's finding that the grievance was arbitrable under Article 31.²⁵ Article 31 unambiguously states that its procedure "cannot be used for grievances involving personal relief of individual employees."²⁶ The Arbitrator analyzed the grievance's requested relief only as it pertained to FLSA redesignations.²⁷ But an examination of the grievance reveals that the Union identified "groups of current and past employees" and requested individualized relief for each group.²⁸ The requested remedies for these employees included backpay and liquidated damages²⁹—forms of relief that are statutorily designed to compensate individual employees.³⁰ Given the personalized nature of these requested remedies,³¹ we find that the Arbitrator evidenced a manifest disregard of Article 31 by finding the grievance arbitrable.³²

Like the Arbitrator,³³ the Union relies upon *White Sands* to assert that the grievance is arbitrable under Article 31.³⁴ But *White Sands* does not govern where parties have exercised their right under § 7121(a)(2) of the Federal Service Labor-Management Relations Statute to exclude a matter from the application of their grievance procedures.³⁵ Within Article 31, the parties here agreed to exclude Union- and Agency-filed grievances that "involv[e] personal relief."³⁶ We are merely enforcing that exclusion.

As the Agency has demonstrated that the award fails to draw its essence from the parties' agreement, we set aside the award.³⁷

V. Decision

We grant the Agency's essence exception and set aside the award.

²³ The record shows that the parties agreed to "stay all timeframes" related to grievance processing "indefinitely." Exceptions, Ex. 6, Email Between the Parties at 3. And the parties arrived at that agreement just two weeks after the Union filed its November 7th grievance. *Id.* So, the dissent's claim that the Agency violated Article 31 by failing to respond to the grievance within thirty days is groundless. Dissent at 7.

²⁴ See *U.S. Dep't of the Treasury, Off. of the Comptroller of the Currency*, 71 FLRA 387, 393 (2019) (then-Member DuBester dissenting in part) (arbitrator's finding that agency waived right to challenge arbitrability—by waiting seven months to raise that issue—did not represent plausible interpretation of agreement, because agreement did not impose any such deadline).

²⁵ Exceptions Br. at 15-16, 20-23.

²⁶ CBA at 55.

²⁷ See Award at 17 ("[The grievance] was the Union requesting that the exemption status of positions within the bargaining unit be properly classified under the FLSA.").

²⁸ Grievance at 4.

²⁹ *Id.* at 2-3.

³⁰ See 5 U.S.C. § 5596(b)(1) (stating that backpay is available for "[a]n employee" affected by an unjustified or unwarranted personnel action that resulted in a withdrawal or reduction in that employee's pay); 29 U.S.C. § 216(b) ("Any employer who violates the provisions of [§] 206 or [§] 207 of [the FLSA] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." (emphasis added)); see also *Chao v. Barbeque Ventures*, 547 F.3d 938, 941 (8th Cir. 2008) ("Liquidated damages . . . are 'intended in part to compensate employees for the delay in payment of wages owed under the FLSA.'" (citation omitted)).

³¹ The dissent does not even attempt to reconcile its position with the grievance's numerous individualized remedial requests.

³² See *Moncrief*, 72 FLRA at 208 (holding that award failed to draw its essence from Article 31 where grievance sought "damages on behalf of misclassified employees").

³³ Award at 17-18.

³⁴ Opp'n at 7 (citing 67 FLRA at 620).

³⁵ See 5 U.S.C. § 7121(a)(2) ("Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.").

³⁶ CBA at 55; see also *U.S. Dep't of the Army, Moncrief Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 506, 508 (2021) (Chairman DuBester dissenting) (affirming that these same parties agreed to exclude Union grievances seeking personal relief from their negotiated grievance procedure through Article 31).

³⁷ Because we set aside the award on essence grounds, we find it unnecessary to address the Agency's remaining exceptions. See *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 756 n.19 (2018) (then-Member DuBester dissenting) (finding it unnecessary to address remaining exceptions where Authority set aside award as failing to draw its essence from the agreement).

Chairman DuBester, dissenting:

At the outset, I believe that the Agency's exceptions should be dismissed as interlocutory.¹ As I explained in *U.S. Department of the Army, Moncrief Army Health Clinic, Fort Jackson, South Carolina (Moncrief)*, a case similar in many respects to the case before us today, granting interlocutory review is inappropriate where, as here, it is done so "to vacate an award based upon an action that has yet to be taken – namely, the awarding of individual relief to the employees affected by the violations alleged in the grievance."²

I also disagree with the majority's decision to grant the Agency's essence arguments. In reaching this decision, the majority concludes that the Arbitrator could not have rationally found that the Agency failed to object to the grievance's arbitrability within the time frames set forth in the parties' agreement. More specifically, it concludes that because the Arbitrator found the Union's grievance to be arbitrable under Article 31, "the Arbitrator's conclusion that the Agency's arbitrability objection violated Article 30, Section 4" – which, unlike Article 31, explicitly requires arbitrability to be raised early in the grievance process – "fails to draw its essence from the agreement."³

Contrary to the majority's assertions, however, the Arbitrator did not rely solely on the wording of Article 30 to reach this determination. Rather, she found that *Article 31* requires the Agency to respond to a grievance within thirty days of the filing, and that the Agency chose not to respond or "object to the arbitrability of the grievance under *either* Article 30 or 31 within the contractual time frames"⁴ or at any time during "the next approximate five years."⁵ Considering the award properly in context,⁶ the Arbitrator's finding that

the Agency did not object to the grievance's arbitrability "within the contractual time frames" is an entirely plausible interpretation of the parties' agreement.

I also disagree with the majority's conclusion that the Arbitrator "evidenced a manifest disregard of Article 31" by finding the Union's grievance arbitrable.⁷ The majority bases this conclusion upon its finding that the Arbitrator "disregard[ed]"⁸ Article 31's language that it "cannot be used for grievances involving personal relief of individual employees" because the Union's grievance requested remedies for groups of employees that the majority asserts are "designed to compensate individual employees."⁹

But, similar to the arbitrator in *Moncrief*, the Arbitrator did not "disregard" this contractual language. To the contrary, she specifically addressed why the grievance was arbitrable under Article 31.¹⁰ On this point, the Arbitrator noted that the grievance claimed "that the Agency ha[d] repeatedly and continually violated the FLSA when classifying position exemption status, thereby incorrectly compensating employees for overtime and hours of work provisions under the parties' [a]greement."¹¹ And, similar to the arbitrator in *Moncrief*, the Arbitrator determined that the Union "was seeking position relief, not personal relief, for positions within the bargaining unit which exemption status violated the FLSA."¹² Moreover, the Arbitrator explained that individual relief could not be obtained until the exemption status was resolved by virtue of the Union's grievance.¹³

As I noted in *Moncrief*, the Authority was recently reminded by the U.S. Court of Appeals for the D.C. Circuit that the "sole inquiry" in resolving an essence exception to an arbitral award should be "whether the Arbitrator was 'even arguably construing or

¹ *U.S. Dep't of the Army, Moncrief Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 207, 210 (2021) (*Moncrief*) (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)) (stating that the only basis for granting interlocutory review should be extraordinary circumstances that raise a plausible jurisdictional defect, the resolution of which would advance the resolution of the case).

² *Id.*

³ Majority at 4.

⁴ See Award at 15 (emphasis added).

⁵ *Id.*

⁶ See *U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 72 FLRA 47, 52 (2021) (Dissenting Opinion of then-Member DuBester) ("[T]he Authority has consistently held that awards must be read in context." (citing *U.S. Dep't of HHS, Ctrs. For Medicare & Medicaid Servs.*, 67 FLRA 665, 667 (2014) (Member Pizzella concurring))).

⁷ Majority at 5.

⁸ *Id.*

⁹ *Id.* (quoting *Exceptions, Ex. 4, Collective-Bargaining Agreement* at 55).

¹⁰ See Award at 2, 16-17.

¹¹ *Id.* at 16.

¹² *Id.* at 17-18; see also *id.* at 17 (finding that the grievance was arbitrable under Article 31 because the "Union sought compliance with the FLSA for all eligible bargaining unit positions . . ." as opposed to personal or individualized relief).

¹³ *Id.* at 18 ("personal relief could not be determined until the exemption status of the position, possibly held by one or more bargaining unit members, was changed to be in compliance with the FLSA").

applying the [CBA].”¹⁴ Applying the proper standard of review, I would find that the Arbitrator’s conclusion that the Union’s grievance was arbitrable under Article 31 of the parties’ agreement readily survives the Agency’s essence challenge.

Accordingly, I dissent.

¹⁴ *Nat’l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 881 (D.C. Cir. 2020) (quoting *United Paperworkers Int’l Union v. Misco*, 484 U.S. 29, 38 (1987)); see also *Moncrief*, 72 FLRA at 210 (“As I have consistently noted, this deferential approach is appropriate ‘because it is the arbitrator’s construction of the agreement for which the parties have bargained.’” (quoting *U.S. DOD, Domestic Elementary & Secondary Schs.*, 71 FLRA 236, 238 (2019) (Dissenting Opinion of then-Member DuBester))).