

**72 FLRA No. 134**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
JOHN J. PERSHING VA MEDICAL CENTER  
POPLAR BLUFF, MISSOURI  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2338  
(Union)

0-AR-5646

DECISION

March 9, 2022

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

Decision by Member Abbott for the Authority

**I Statement of the Case**

The decision in this case hinges on the Arbitrator's failure to address an issue which, when answered, could have resolved the parties' dispute. After the Agency filed a motion with Arbitrator Ann Breen-Greco to dismiss the grievance because of an alleged jurisdictional defect, the Arbitrator wrote a letter declining to rule on the motion and reserving the issue for the arbitration hearing. Subsequently, the Agency filed an exception to this letter. For the reasons discussed below, we dismiss the Agency's interlocutory exception for failure to file an exception to an arbitrator's *award* pursuant to § 2425.2(a) of the Authority's Regulations.<sup>1</sup>

**II Background**

The facts and circumstances which led to this grievance are not dispositive to our decision and will only be briefly described.

On May 28, 2019, the Union filed a grievance contesting certain working conditions at the Agency. On January 9, 2020, the Union filed an unfair-labor-practice (ULP) charge alleging that the Agency did not provide a safe accommodation after mold was discovered in the grievant's workspace and then retaliated against the grievant for disclosures made to the Occupational Safety and Health Administration. On March 11, 2020, the Union filed another grievance concerning working conditions (the second grievance). The Union withdrew the ULP charge on April 2, 2020.

The second grievance proceeded to arbitration. After hearing dates were set, the Agency asked the Arbitrator to dismiss the second grievance, arguing that it was barred by §§ 7121(d) and 7116(d) of the Federal Service Labor-Management Relations Statute.<sup>2</sup>

By letter to the parties,<sup>3</sup> the Arbitrator acknowledged the dismissal request but declined to rule.<sup>4</sup> The Agency filed this exception to the Arbitrator's letter and the Union filed an opposition.

**III Analysis and Conclusion: We dismiss the Agency's interlocutory exception for failure to file an exception to an arbitrator's award pursuant to § 2425.2(a) of the Authority's Regulations.**

Section 2425.2(a) of the Authority's Regulations provides, as relevant here, that "[e]ither party to arbitration . . . may file an exception to an arbitrator's award rendered pursuant to the arbitration."<sup>5</sup> Ordinarily, the Authority will not resolve exceptions to an arbitration award unless the award constitutes a final and complete resolution of all the issues submitted to arbitration.<sup>6</sup> An arbitration award that postpones the determination of an issue does not constitute a final award subject to review.<sup>7</sup>

<sup>1</sup> 5 C.F.R. § 2425.2(a).

<sup>2</sup> 5 U.S.C. § 7121(d) (a grievant "may raise the matter under a statutory procedure or the negotiated procedure, but not both"); *id.* § 7116(d) ("issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures").

<sup>3</sup> Arbitrator's Non-Dismissal Letter.

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

<sup>5</sup> 5 C.F.R. § 2425.2(a); *see also* 5 U.S.C. § 7122(a) ("Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's *award* . . ." (emphasis added)).

<sup>6</sup> 5 C.F.R. § 2429.11; *U.S. DHS, U.S. CBP*, 71 FLRA 1244, 1245 (2020) (then-Member DuBester concurring).

<sup>7</sup> *U.S. Dep't of the Army, Fort Stewart & Hunter Army Airfield, Fort Stewart, Ga.*, 72 FLRA 45, 46 (2021) (*Fort Stewart*) (citing *NTEU*, 66 FLRA 696, 698 (2012)).

We have held that an email is not an arbitral award where the arbitrator “did not analyze the [a]gency’s arguments, or make a ruling on those arguments, concerning whether the grievance was arbitrable. . . . [The arbitrator] simply communicated to the parties that he would not issue an interim ruling prior to the scheduled hearing.”<sup>8</sup>

Similarly, here, the Arbitrator’s letter acknowledges receipt of the Agency’s request to dismiss the grievance, but the Arbitrator made no determination on that issue and instead deferred ruling on it until the entire case was presented at arbitration.

The Arbitrator’s letter is neither an interim award nor a ruling on the potential jurisdictional issue raised by the Agency. Thus, because the letter does not constitute an arbitral award, we dismiss the Agency’s exception.<sup>9</sup>

#### **IV. Decision**

We dismiss the Agency’s exception.

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<sup>8</sup> *U.S. Dep’t of VA, Gulf Coast Veterans Healthcare Sys.*, 71 FLRA 752, 753 (2020) (VA) (then-Member DuBester concurring) (internal quotation marks omitted); *see Fort Stewart*, 72 FLRA at 46 (finding that the arbitrator’s written ruling did not constitute an arbitral award because “[a]lthough the instant ruling has more indicia of formality than the email in VA, the ruling merely clarified the parties’ obligations and expressly postponed resolving any of the parties’ issues”).

<sup>9</sup> *See Fort Stewart*, 72 FLRA at 46; VA, 71 FLRA at 753.

**Chairman DuBester, concurring:**

I agree with the Decision to dismiss the Agency's exception.