

**72 FLRA No. 142**

UNITED STATES  
DEPARTMENT OF THE AIR FORCE  
DAVIS-MONTHAN AIR FORCE BASE  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2924  
(Union)

0-AR-5637

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DECISION

March 29, 2022

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

**I. Statement of the Case**

In this case, we uphold an award finding that the Agency impermissibly relied on an executive order to supersede the parties' collective-bargaining agreement.

Executive Order 13,837 (the EO) required that agencies ensure the efficient use of official time.<sup>1</sup> In 2018, a district court enjoined the EO,<sup>2</sup> and, during the injunction period, the parties executed their current collective-bargaining agreement, which included official-time provisions. After the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) lifted the injunction,<sup>3</sup> President Trump issued a Presidential Memorandum<sup>4</sup> amending the EO

<sup>1</sup> Ensuring Transparency, Accountability, & Efficiency in Taxpayer-Funded Union Time Use, Exec. Order No. 13,837 (May 25, 2018), 83 Fed. Reg. 25,335 (June 1, 2018). After the Arbitrator issued his award, President Biden revoked Executive Order 13,837. Protecting the Federal Workforce, Exec. Order No. 14,003, 86 Fed. Reg. 7,231, 7,231 (Jan. 22, 2021) (revoking Executive Order No. 13,837 in § 3(b)).

<sup>2</sup> *AFGE, AFL-CIO v. Trump*, 318 F. Supp. 3d 370, 381-82 (D.D.C. 2018).

<sup>3</sup> *AFGE, AFL-CIO v. Trump*, 929 F.3d 748, 761 (D.C. Cir. 2019).

<sup>4</sup> Presidential Memorandum on Exec. Orders 13836, 13837, & 13839, 84 Fed. Reg. 56,095 (Oct. 11, 2019) (Presidential Memorandum).

such that any collective-bargaining agreement executed during the injunction period would not be subject to conflicting terms of the EO.

After the Agency implemented the EO and refused to grant certain official-time requests, the Union grieved. Arbitrator Robert B. Hoffman issued an award finding that, under the terms of the Presidential Memorandum, the EO did not supersede the parties' agreement.

The Agency's exceptions include an exceeded-authority exception challenging the Arbitrator's consideration of the Presidential Memorandum. The Arbitrator necessarily interpreted and applied the EO *as amended by the Presidential Memorandum*. Accordingly, we deny this exception. And because the Presidential Memorandum provided a separate ground for the award, the Agency's remaining exceptions challenging independent portions of the award do not provide a basis for finding the award deficient.

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

On May 25, 2018, President Trump issued the EO, requiring agencies to ensure that approval of official time was, among other things, "reasonable, necessary, and in the public interest."<sup>5</sup> Shortly after the EO's promulgation, a district court enjoined three provisions of the EO, including the mandates regarding official time.

During the injunction period, the parties negotiated and executed their current collective-bargaining agreement. When the D.C. Circuit lifted the injunction, the Agency informed the Union that it was implementing the EO's mandates regarding official time that conflicted with provisions of the parties' agreement. Two weeks after the D.C. Circuit decision, President Trump "amend[ed]" the EO through the Presidential Memorandum and clarified that agencies must "adhere to the terms of collective-bargaining agreements executed while the injunction was in effect."<sup>6</sup>

When the Agency denied Union representatives' requests for official time pursuant to the terms of the EO, the Union grieved.<sup>7</sup> The grievance proceeded to arbitration.

Before the Arbitrator, the parties agreed that the issues, as relevant here, were whether the Agency violated the parties' agreement or the EO by implementing the EO's official-time mandates. Additionally, the Arbitrator stated that the award would

<sup>5</sup> Exec. Order No. 13,837, 83 Fed. Reg. at 25,335 (§ 1).

<sup>6</sup> Presidential Memorandum, 84 Fed. Reg. at 56,095-96.

<sup>7</sup> Award at 11-14.

include “another issue not found specifically in the grievance, but presented during testimony at the hearing without objection by the Agency[:] whether the Agency violated the [Presidential Memorandum and i]f s o, what is the appropriate remedy?”<sup>8</sup>

Addressing the Presidential Memorandum, the Arbitrator observed that it amended the EO to create a “specific[] exempt[ion]” for collective-bargaining agreements executed during the injunction period.<sup>9</sup> Given that the injunction was in effect when the parties executed their agreement, the Arbitrator concluded that Agency was prohibited from enforcing terms of the EO that conflicted with the agreement.

Additionally, the Arbitrator observed that the purpose of the EO was to ensure the efficient use of “taxpayer dollars.”<sup>10</sup> Because the Union presented “unrefuted” testimony that the “nonappropriated[-]fund” employees in this bargaining unit were not paid from congressionally appropriated funds,<sup>11</sup> the Arbitrator found that that any official time used was not “taxpayer[]funded.”<sup>12</sup> Thus, the Arbitrator concluded that the EO, “by its own terms,” did not apply.<sup>13</sup>

The Agency filed exceptions to the award on May 28, 2020, and, on June 23, 2020, the Union filed an opposition.

### III. Preliminary Matter: We will not consider the untimely filed page of the Agency’s exceptions.

Because the exceptions brief that the Agency filed with the Authority was missing a page, the Authority’s Office of Case Intake and Publication issued an order on August 25, 2020, directing the Agency to correct the deficiency by September 8, 2021.<sup>14</sup> As the Agency did not submit the missing page until September 24, 2021—sixteen days after the deadline<sup>15</sup>—

we do not consider the untimely page.<sup>16</sup> However, the Agency’s failure to timely file the missing page is a minor deficiency that did not impede the Union’s ability to respond to the other exceptions. Therefore, the deficiency does not warrant dismissal of the Agency’s other exceptions, and we consider the remaining pages of the Agency’s brief.<sup>17</sup>

### IV. Analysis and Conclusions

#### A. The Arbitrator did not err by considering the Presidential Memorandum.

In support of its exceeded-authority exception, the Agency contends that the Arbitrator erred by considering the Presidential Memorandum.<sup>18</sup> According to the Agency, the Arbitrator “adopted a distinct issue . . . without discussion . . . or concurrence of the parties.”<sup>19</sup> As relevant here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration.<sup>20</sup> The Authority has held that arbitrators do not exceed their authority by addressing an issue that is necessary to decide issues submitted to arbitration or by addressing an

<sup>8</sup> *Id.* at 2-3.

<sup>9</sup> *Id.* at 27 (“[I]t is found and so concluded that th[e] Presidential Memorandum specifically exempts [the parties’ agreement] from those ‘specific terms prohibited by [the EO]’ as it was so ‘executed . . . between the date of the [EO] and the date of the Court of Appeals’ mandate.” (quoting Presidential Memorandum, 84 Fed. Reg. at 56,095)).

<sup>10</sup> *Id.* at 26; see also Exec. Order No. 13,837, 83 Fed. Reg. at 25,335 (“[A]gencies should ensure that taxpayer-funded union time is used efficiently and authorized in amounts that are reasonable, necessary, and in the public interest.”).

<sup>11</sup> Award at 4, 25.

<sup>12</sup> *Id.* at 26 (quoting Exec. Order No. 13,837, 83 Fed. Reg. at 25,335-38 (§§ 1, 4)).

<sup>13</sup> *Id.*

<sup>14</sup> Procedural-Deficiency Order at 1.

<sup>15</sup> Agency’s Response to Procedural-Deficiency Order at 1.

<sup>16</sup> See *U.S. Dep’t of VA, Wash., D.C.*, 67 FLRA 152, 153 (2013) (declining to consider filing where excepting party failed to cure filing deficiency); *U.S. Dep’t of VA*, 60 FLRA 479, 479 n.1 (2004) (same).

<sup>17</sup> See *AFGE, Loc. 12*, 70 FLRA 348, 349 (2017) (then-Member DuBester concurring on other grounds) (declining to dismiss filings on the basis of minor deficiencies where the deficiencies did not harm or impede the opposing party’s ability to respond); *U.S. Dep’t of the Air Force, Joint Base Elmendorf-Richardson*, 69 FLRA 541, 543 (2016) (Member Pizzella dissenting on other grounds) (declining to dismiss improperly served exceptions where the deficiency did not impede the opposing party’s ability to respond). Under § 2425.6(e)(1) of the Authority’s Regulations, an excepting party must raise and support a recognized basis for finding an award deficient. 5 C.F.R. § 2425.6(e)(1) (“An exception may be subject to . . . denial if . . . [t]he excepting party fails to raise and support a ground” for finding the award deficient). Without the untimely filed page of the Agency’s exceptions, the Agency fails to explain how the award fails to draw its essence from the parties’ agreement or identify an article of the parties’ agreement that conflicts with the award. Exceptions Br. at 15-16. Consequently, the Agency does not support its essence argument, and we deny this exception. See *AFGE, Loc. 1938*, 66 FLRA 741, 744 (2012) (denying essence exception where excepting party failed to explain any basis for finding the award deficient).

<sup>18</sup> Exceptions Br. at 11.

<sup>19</sup> *Id.* at 15.

<sup>20</sup> *U.S. Dep’t of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 72 FLRA 541, 544 (2021) (Member Abbott concurring; Chairman DuBester concurring in part and dissenting in part) (citing *U.S. Dep’t of the Interior, Nat’l Park Serv., Golden Gate Nat’l Recreation Area, S.F., Cal.*, 55 FLRA 193, 194 (1999)).

issue that necessarily arises from an issue submitted to arbitration.<sup>21</sup>

Here, the parties stipulated to the issue of whether the Agency violated the EO by enforcing its mandates notwithstanding conflicting terms in the parties' agreement.<sup>22</sup> The Presidential Memorandum specifically stated that it should be "*construed to amend*" the EO by directing "[a]gencies [to] adhere to the terms of collective[-]bargaining agreements executed while the injunction was in effect."<sup>23</sup> Noting that the parties executed their agreement during the injunction period, the Arbitrator concluded that the amended EO could not supersede conflicting provisions of the parties' agreement.<sup>24</sup> Thus, although the stipulated issue did not explicitly mention the Presidential Memorandum, it was necessary for the Arbitrator to consider it in order to interpret and apply the EO. Consequently, we deny the Agency's exceeded-authority exception.<sup>25</sup>

- B. The remaining exceptions do not establish grounds for finding the award deficient.

The Agency also argues that the award is contrary to the EO<sup>26</sup> and is based on a nonfact.<sup>27</sup> The Authority has repeatedly held that when an arbitrator has based an award on separate grounds, an appealing party

must establish that all of the grounds are deficient before the Authority will set the award aside.<sup>28</sup>

Here, as noted above, the Arbitrator based his finding that the EO did not supersede conflicting terms of the parties' agreement on two grounds: (1) the Presidential Memorandum exempted the parties' agreement from the EO's official-time mandates;<sup>29</sup> and (2) even without the Presidential Memorandum, the EO—"by its own terms"—did not apply because the relevant employees are not paid from appropriated funds.<sup>30</sup> Both of the Agency's remaining exceptions challenge only the second ground.<sup>31</sup> As the Agency has failed to establish that the first ground is deficient, neither of its remaining exceptions provide a basis for vacating the award. Consequently, we do not consider these exceptions.<sup>32</sup>

## V. Decision

We deny the Agency's exceptions.

<sup>21</sup> *U.S. Small Bus. Admin.*, 71 FLRA 655, 656 n.14 (2020) (then-Member DuBester dissenting) (citing *U.S. Dep't of the Treasury, IRS, Off. of Chief Counsel*, 70 FLRA 783, 784 n.15 (2018) (then-Member DuBester dissenting)).

<sup>22</sup> Award at 2 ("At issue, as the parties agreed, is whether the Agency violated . . . [the EO] . . .").

<sup>23</sup> Presidential Memorandum, 84 Fed. Reg. at 56,095-96 (emphasis added).

<sup>24</sup> Award at 27 ("[I]t is found and so concluded that th[e] Presidential Memorandum specifically exempts [the parties' agreement] from those 'specific terms prohibited by [the EO]' as it was so 'executed . . . between the date of the [EO] and the date of the Court of Appeals' mandate.'" (quoting Presidential Memorandum, 84 Fed. Reg. at 56,095)).

<sup>25</sup> See *AFGE, Loc. 3254*, 70 FLRA 577, 579 (2018) (denying exceeds-authority exception where arbitrator addressed an issue necessary to resolve the framed issue); see also *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div.*, 60 FLRA 530, 532 (2004) (arbitrator did not exceed authority by considering whether agency's overtime system violated parties' agreement because it was necessary to resolve whether grievant was improperly denied overtime).

<sup>26</sup> Exceptions Br. at 9-10 (arguing that the Arbitrator disregarded the EO's definition of "employees" by finding that the EO did not apply to non-appropriated-fund employees).

<sup>27</sup> *Id.* at 8 (arguing that the employees in the bargaining unit did, in fact, receive congressionally appropriated funds).

<sup>28</sup> *U.S. DHS, U.S. CBP*, 71 FLRA 1155, 1157 (2020) (Member Abbott dissenting); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Englewood, Colo.*, 69 FLRA 474, 478 (2016).

<sup>29</sup> Award at 27; see also *id.* at 26 (referring to the Presidential Memorandum as providing a "second[ary] threshold basis for sustaining the grievance" aside from EO not applying to nonappropriated-fund employees).

<sup>30</sup> *Id.* at 26 (finding that the "EO, by its own terms, is not meant to apply to [non-appropriated-fund] employees in this unit, as no taxpayer dollars [are] involve[d] in the makeup of their pay for [u]nion or official time").

<sup>31</sup> Exceptions Br. at 8, 10.

<sup>32</sup> "Where an arbitrator has based an award on separate and independent grounds, the Authority has consistently required the excepting party to establish that *all* of the grounds are deficient in order to have the award found deficient. If the excepting party does not do so, then it is unnecessary to address exceptions to the other grounds." *U.S. EPA*, 70 FLRA 715, 715-16 (2018) (then-Member DuBester concurring in part; Member Abbott concurring) (citing *SSA*, 69 FLRA 208, 210-11 (2016); *U.S. Dep't of the Army, Blue Grass Army Depot, Richmond, Ky.*, 58 FLRA 314, 314-15 (2003)); see *U.S. Dep't of the Air Force, 442nd Fighter Wing, Whiteman Air Force Base, Mo.*, 66 FLRA 357, 364-65 (2011) (holding that, where excepting party does not demonstrate that the award is deficient on one of the grounds relied on by the arbitrator, it is unnecessary to address exceptions to the other grounds); *U.S. DOJ, Exec. Off. for Immigr. Rev., Bd. of Immigr. Appeals*, 65 FLRA 657, 660 (2011) (Member Beck concurring) (declining to consider exceptions where the excepting party did not demonstrate that a separate ground relied on by the arbitrator was deficient).

**Chairman DuBester, concurring:**

I agree with the Decision to deny the Agency's exceptions.