

## 72 FLRA No. 145

UNITED STATES  
DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
(Agency)

and

NATIONAL TREASURY  
EMPLOYEES UNION  
(Union)

0-AR-5718

-----  
DECISION

April 7, 2022

-----

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

## I. Statement of the Case

In this case, we reiterate that the Authority will defer to an arbitrator's interpretation of a negotiated grievance procedure unless that interpretation is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.

The Union filed a grievance alleging that the Agency violated the Rehabilitation Act (the Act)<sup>1</sup> and the parties' collective-bargaining agreement by failing to accommodate employees with visual disabilities and by discriminating against those same employees. Arbitrator Andrew M. Strongin issued a prehearing award finding the grievance arbitrable, to which the Agency filed interlocutory exceptions.

We find that the Agency's contrary-to-law exception does not present an extraordinary circumstance warranting review. Therefore, we dismiss this exception. We grant interlocutory review of the Agency's essence exceptions because these exceptions, if granted, could obviate the need for further arbitral proceedings. However, for the reasons described below, we deny these exceptions on the merits.

---

<sup>1</sup> 29 U.S.C. §§ 701-796.

## II. Background and Arbitrator's Award

In 2018, the Union filed a grievance on behalf of all visually-impaired bargaining-unit employees alleging violations of Sections 501 and 508 of the Act,<sup>2</sup> and the anti-discrimination provisions of the parties' agreement. The Union filed its grievance under Article 42 of the parties' agreement (Article 42). The Agency denied the grievance and the parties proceeded to arbitration.

At arbitration, the Agency filed a motion to dismiss the grievance on substantive- and procedural-arbitrability grounds. According to the Agency, the Union's claims arising under Section 508 of the Act were inarbitrable because the Act provides the exclusive administrative process for resolving such claims. The Agency also argued that the grievance was deficient because it did not satisfy the pleading requirements, contained in Article 42, for a national institutional grievance.

In a prehearing award, the Arbitrator held that the Union could use the parties' negotiated grievance procedure to allege a violation of Section 508 of the Act. Thus, he determined that the grievance was substantively arbitrable, and proceeded to address whether the grievance met the procedural requirements in Article 42.

Under Article 42, Section 4(A)(2), a national institutional grievance is defined as "a grievance concerning an issue of rights afforded to employees . . . which otherwise would be recognized as separate grievances from two . . . or more Chapters over the same issue(s)."<sup>3</sup> The Arbitrator determined that the grievance covered two or more local union chapters because the Union filed it "on behalf of all [visually-impaired] bargaining[-]unit employees."<sup>4</sup> Next, the Arbitrator found that the grievance satisfied the "same issue(s)"<sup>5</sup> requirement by raising several systemic issues common to visually-impaired employees, including: (1) the Agency's failure to provide accommodations that "meet the requirements of [Sections] 508 or 501" of the Act or the parties' agreement;<sup>6</sup> and (2) "the Agency's failure . . . to ensure . . . that its [visually-impaired] bargaining[-]unit employees can access the information and data necessary to the performance of their work."<sup>7</sup>

Although the Agency argued that the grievance, by naming only one aggrieved employee, could not "be recognized as separate grievances from two . . . or

---

<sup>2</sup> *Id.* §§ 791, 794d.

<sup>3</sup> Exceptions, Attach. 3, Collective-Bargaining Agreement (CBA) at 138.

<sup>4</sup> Award at 20.

<sup>5</sup> CBA at 138.

<sup>6</sup> Award at 20.

<sup>7</sup> *Id.* at 21.

more Chapters,”<sup>8</sup> the Arbitrator rejected this interpretation as inconsistent with the plain wording of Article 42. On this point, the Arbitrator emphasized that “[n]othing in [Article 42] . . . requires . . . identification of all covered employees by name.”<sup>9</sup>

In addition, the Arbitrator disagreed with the Agency’s contention that the grievance did not adequately explain the allegations. Under Article 42, Section 2(C) of the parties’ agreement, a grievance must “provide information concerning the nature of the grievance . . . and present sufficient information to explain the allegations.”<sup>10</sup> Applying that section, the Arbitrator found that the grievance alleged “violations of §§ 501 and 508 of the . . . Act and Art[icle] 4 of the [parties’ agreement] . . . in significant detail.”<sup>11</sup> As a result, the Arbitrator ruled that the grievance complied with Article 42, Section 2(C).

Based on these findings, the Arbitrator concluded that the grievance was arbitrable and denied the Agency’s motion to dismiss.

On March 24, 2021, the Agency filed exceptions to the prehearing award, and on April 22, 2021, the Union filed an opposition to the Agency’s exceptions.

### III. Preliminary Matters

- A. The Agency’s motion to stay is properly before us, but we deny it as moot.

On May 10, 2021, the Agency requested leave to file, and did file, a motion to stay further arbitration proceeding pending the outcome of its exceptions. Although the Authority’s Regulations do not provide for the filing of supplemental submissions, § 2429.26 of the Authority’s Regulations provides that the Authority may, in its discretion, grant leave to file “other documents” as it deems appropriate.<sup>12</sup> Because the Agency requested leave to file its motion in the instant case, we find that it is properly before us.<sup>13</sup> However, for the reasons discussed below, we dismiss or deny the Agency’s

exceptions to the award. Consequently, the Agency’s motion to stay is moot, and we deny the motion.<sup>14</sup>

- B. The Agency’s exceptions are interlocutory, but we find extraordinary circumstances warrant review of some of the exceptions.

The Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all issues submitted to arbitration.<sup>15</sup> However, the Authority has held that interlocutory exceptions present “extraordinary circumstances” warranting review when their resolution will advance the ultimate disposition of the case by obviating the need for further arbitration.<sup>16</sup>

The Agency concedes that its exceptions to the prehearing award are interlocutory but contends that the exceptions, if granted, could “resolve all the issues in the underlying case.”<sup>17</sup> In its exceptions, the Agency argues that: (1) the grievance is not substantively arbitrable under Section 508 of the Act;<sup>18</sup> (2) the award fails to draw its essence from Article 42, Section 4(A)(2);<sup>19</sup> and (3) the award fails to draw its essence from Article 42, Section 2(C).<sup>20</sup>

We find that the Agency’s contrary-to-law exception challenging the grievance’s arbitrability under Section 508 of the Act does not demonstrate extraordinary circumstances warranting interlocutory review. Even assuming that granting this exception would resolve the grievance’s allegation that the Agency violated Section 508 of the Act, further arbitral proceedings would be required to address the additional alleged violations of Section 501 of the Act and the

<sup>8</sup> CBA at 138.

<sup>9</sup> Award at 21; *see also id.* (noting that the parties included wording in Article 41, but not Article 42, requiring certain grievances to identify all known grievants by name).

<sup>10</sup> CBA at 138.

<sup>11</sup> Award at 19-20.

<sup>12</sup> 5 C.F.R. § 2429.26; *see AFGE, Loc. 2516*, 72 FLRA 567, 568 (2021) (citing 5 C.F.R. § 2429.26; *IFPTE, Loc. 4*, 70 FLRA 20, 21 (2016)).

<sup>13</sup> *See U.S. DHS, U.S. CBP*, 69 FLRA 22, 24 (2015) (finding a motion to stay appropriate for consideration where the requesting party requested leave to file its motion).

<sup>14</sup> *See NLRB*, 71 FLRA 196, 197 n.10 (2019) (then-Member DuBester dissenting) (denying motion to stay arbitration proceedings pending outcome of exceptions as moot where Authority decision resolved the exceptions).

<sup>15</sup> *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 494, 494 (2021) (Chairman DuBester concurring) (citations omitted).

<sup>16</sup> *U.S. DHS, U.S. CBP, L.A., Cal.*, 72 FLRA 411, 412 (2021) (citations omitted).

<sup>17</sup> Exceptions Br. at 8-9.

<sup>18</sup> *Id.* at 10-20.

<sup>19</sup> *Id.* at 21-29.

<sup>20</sup> *Id.* at 29-34.

parties' agreement.<sup>21</sup> Accordingly, we dismiss, without prejudice, the Agency's contrary-to-law exception.<sup>22</sup>

Nonetheless, the Agency's essence exceptions, if granted, would obviate the need for further arbitral proceedings by rendering the grievance inarbitrable as to *all* claims. Therefore, we grant interlocutory review of the Agency's essence exceptions contesting the Arbitrator's interpretation of Article 42.<sup>23</sup>

#### IV. Analysis and Conclusion: The award does not fail to draw its essence from Article 42.

The Agency asserts that the award fails to draw its essence from two sections of Article 42.<sup>24</sup> First, the Agency contends that the Arbitrator's finding that the grievance complied with the procedural requirements of Article 42, Section 4(A)(2) evidences a manifest disregard for the agreement.<sup>25</sup> As noted above, Section 4(A)(2) defines a national institutional grievance as a grievance "which otherwise would be recognized as

separate grievances from two . . . or more Chapters over the same issue(s)."<sup>26</sup>

In the award, the Arbitrator ruled that the grievance satisfied Section 4(A)(2) because the grievance covered "all [visually-impaired] bargaining[-]unit employees" and raised issues common to those employees.<sup>27</sup> In this regard, the Arbitrator found that "[n]othing in [Article 42] . . . requires . . . identification of all covered employees by name."<sup>28</sup> The Agency contends that the Arbitrator erred in finding that the grievance concerned two or more Chapters because the Union "presented only one individual employee in connection with an alleged claim."<sup>29</sup> But, the Agency does not identify any specific contractual language that conflicts with the Arbitrator's interpretation of what constitutes "two . . . or more Chapters."<sup>30</sup> Similarly, the Agency fails to identify any contract provision that either defines the term "same issue(s)"<sup>31</sup> or required the Arbitrator to find – as a matter of contract interpretation – that the grievance advanced different issues across Chapters. Therefore, the Agency's exception does not demonstrate that the Arbitrator's interpretation of Article 42, Section 4(A)(2) is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.<sup>32</sup>

Second, the Agency asserts that the Arbitrator should have found the grievance inarbitrable under Article 42, Section 2(C) because the grievance provided "insufficient information to 'explain the allegations.'"<sup>33</sup> As noted above, under Article 42, Section 2(C), a grievance must "provide information concerning the nature of the grievance . . . and present sufficient information to explain the allegations."<sup>34</sup> The Agency accuses the Arbitrator of "gloss[ing] over the specificity requirement" in this provision.<sup>35</sup> However, the Arbitrator found that the grievance met the pleading requirements of Article 42, Section 2(C) because the grievance alleged "violations of [Sections] 501 and 508 of the . . . Act and

<sup>21</sup> Award at 2 (stating that the grievance alleges "violation[s] of §§ 501 and 508 of the . . . Act and Art[icle] 4, [Section] 2.A.4" of the parties' agreement); *see also id.* at 12 (noting that the Union could "demonstrate a § 501 [of the Act] . . . or Art[icle] 4 violation" even if "standalone § 508 [of the Act] claims are not arbitrable").

<sup>22</sup> *See U.S. Dep't of the Army*, 72 FLRA 363, 365 (2021) (Member Abbott concurring; Chairman DuBester dissenting) (holding that interlocutory exceptions failed to present "extraordinary circumstances" where granting exceptions would not obviate the need for further arbitration as to all claims raised in the grievance); *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 71 FLRA 713, 714 (2020) (then-Member DuBester concurring) (dismissing contrary-to-law exception as interlocutory, without prejudice, because further arbitration would be required even if the Authority granted the exception).

Member Abbott agrees that under the current standard for interlocutory review the Agency's contrary-to-law exception should be dismissed. However, he feels that the standard needs to be further revised to promote an effective and efficient government. *See* 5 U.S.C. § 7101(b).

<sup>23</sup> *See U.S. Dep't of the Army, Nat'l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 523 (2020) (then-Member DuBester dissenting) (granting interlocutory review of exceptions that, if granted, could obviate the need for further arbitral proceedings by rendering the grievance inarbitrable as to all claims).

<sup>24</sup> 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. *SSA, Off. of the Gen. Counsel*, 72 FLRA 554, 555 (2021) (citation omitted).

<sup>25</sup> Exceptions Br. at 21-29.

<sup>26</sup> CBA at 138.

<sup>27</sup> Award at 20-21.

<sup>28</sup> *Id.* at 21.

<sup>29</sup> Exceptions Br. at 22.

<sup>30</sup> CBA at 138.

<sup>31</sup> *Id.*

<sup>32</sup> *See U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 293, 295 (2021) (Member Kiko concurring; Member Abbott concurring) (denying essence exception where excepting party did not identify any "specific language" in the parties' agreement that conflicted with arbitrator's interpretation); *AFGE*, 63 FLRA 627, 629 (2009) (arbitrator's interpretation of agreement not deficient where excepting party failed to provide contractual wording defining the relevant contract term or otherwise establish that arbitrator's interpretation was implausible).

<sup>33</sup> Exceptions Br. at 31 (quoting Art. 42, § 2(C)).

<sup>34</sup> CBA at 138.

<sup>35</sup> Exceptions Br. at 32.

Art[icle] 4 of the [parties' agreement] . . . *in significant detail*.”<sup>36</sup> The Agency has not demonstrated that the Arbitrator's application of Article 42, Section 2(C) is irrational, unfounded, implausible, or evidences a manifest disregard of the agreement. Thus, the Agency has not shown that the award fails to draw its essence from Article 42, Section 2(C).<sup>37</sup>

Accordingly, we deny the Agency's essence exceptions.

## V. Decision

We dismiss the Agency's contrary-to-law exception, without prejudice, for failure to demonstrate extraordinary circumstances warranting interlocutory review. We grant interlocutory review of the Agency's essence exceptions but deny them.

---

<sup>36</sup> Award at 19-20 (emphasis added); *see also id.* at 20 (finding that the grievance described “the many and varied ways in which the Agency allegedly failed to provide its [visually-impaired] bargaining[-]unit employees with adequate access to information and data made available to its [non-visually-impaired] employees, necessary to the performance of their work” and alleged that such failure violated law and the parties' agreement); Opp'n, Attach. 15, Ex. A, Grievance at 2 (alleging that the Agency violated the Act by providing visually-disabled employees with “JAWS and ZoomText tools [that] are not fully compatible with many of the programs routinely used by [bargaining-unit] employees, such as . . . the Correspondence Imaging system”).

<sup>37</sup> *See U.S. Dep't of VA, Member Servs. Health Res. Ctr.*, 71 FLRA 311, 312 (2019) (then-Member DuBester concurring) (denying essence exception where award was “plausible and consistent with the plain wording” of the parties' agreement).

**Chairman DuBester, concurring in part and dissenting in part:**

As I have expressed previously, I continue to disagree with the majority's expansion of the grounds upon which the Authority will review interlocutory exceptions.<sup>1</sup> In my view, 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.<sup>2</sup> 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."<sup>3</sup>

Applying this standard, I would dismiss, without prejudice, the Agency's interlocutory exceptions. I agree that the Agency's contrary-to-law exception challenging the grievance's arbitrability under Section 508 of the Rehabilitation Act does not demonstrate extraordinary circumstances because granting interlocutory review would not advance the resolution of the case. However, because the Agency's essence exception does not raise a plausible jurisdictional defect, I dissent from the majority's decision to grant review of that exception.<sup>4</sup>

---

<sup>1</sup> *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 72 FLRA 575, 581 (2021) (Separate Opinion of Chairman DuBester) (citing *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 810-11 (2018) (Dissenting Opinion of then-Member DuBester); see also *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).

<sup>2</sup> *IRS II*, 71 FLRA at 195 (citing *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012)); see also *U.S. Dep't of VA, Veterans Benefit Admin.*, 72 FLRA 57, 62 (2021) (Dissenting Opinion of Chairman DuBester) (citations omitted).

<sup>3</sup> *IRS II*, 71 FLRA at 195 (citing *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 68 FLRA 640, 641 (2015); *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 1, 3 (2012)).

<sup>4</sup> Had I agreed with the majority to grant interlocutory review of the Agency's essence exception, I would have also found that the exception is without merit. *E.g.*, *U.S. Dep't of VA*, 72 FLRA 194, 199 (2021) (Dissenting Opinion of Chairman DuBester).