

70 FLRA No. 161

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5294

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DECISION

August 31, 2018

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

I. Statement of the Case

In this case, we revisit those circumstances which will be considered “extraordinary” under which the Authority will address interlocutory appeals. We determine that we will consider an interlocutory exception that raises a defect which, if resolved, will advance the ultimate disposition of the case.

Arbitrator M. David Vaughn issued an award finding the Union’s grievance arbitrable and finding that the Agency violated the parties’ agreement when it delayed approving quality step increases (QSIs). As a remedy, the Arbitrator ordered the parties to negotiate a settlement reconsidering the policy of delaying the approval of QSIs. The Agency filed exceptions to the award.

As pertinent, the Agency argues that the award failed to draw its essence from the parties’ agreement because, despite finding that the grievance was one day late, the Arbitrator found that the grievance was arbitrable. Because the Arbitrator’s interpretation of the parties’ agreement evidences a manifest disregard of that agreement, we grant this exception and vacate the award.

II. Background and Arbitrator’s Award

Under the parties’ agreement, employees receive performance appraisals on a rolling basis based on their

respective Social Security numbers. Employees who receive a rating of five in their appraisal are eligible for a QSI. Prior to the current grievance, the Agency issued a policy regarding QSIs. Facing budget constraints, the Agency announced that, rather than approve QSIs on a rolling basis, it would approve and process all QSIs only once a year. On October 9, 2015, the Union filed a grievance alleging that the Agency’s new policy violated the parties’ agreement and 5 C.F.R. § 531.506. The parties were unable to resolve the grievance, and the Union sent a letter on March 24, 2016, informing the Agency that it was invoking arbitration. However, the Union admitted that, under the parties’ agreement, it was late in invoking arbitration. The Agency denied the Union’s request to waive any timeliness issues.

The parties met for an arbitration hearing on January 11, 2017. The Arbitrator framed the issues as: whether the grievance was arbitrable; if so, did the Agency violate the parties’ agreement; and, if it did, what is the remedy.

As to arbitrability, the Union conceded that it failed to notify the Agency of its invocation of arbitration by the contractual deadline. However, the Union argued that the Arbitrator had the authority to waive that deadline and should waive the deadline—as a matter of public policy—because the invocation was only one day late and the Agency was not prejudiced by the delay.

As to the merits of the grievance, the Union argued, in part, that the Agency violated 5 C.F.R. §§ 531.503 and 531.506 because the Agency did not make the QSIs effective “as soon as practicable.”¹ The Union also relied on guidance from the Office of Personnel Management (OPM) stating that QSIs should be effective as close as practicable to the performance rating.² Additionally, the Union contended that the Agency had violated Article 18 of the parties’ agreement, which incorporates 5 C.F.R. part 531.

The Agency argued that the Union admitted that its invocation of arbitration was untimely and, therefore, that the grievance should be dismissed as not arbitrable.

Concerning the merits, the Agency argued, in part, that 5 C.F.R. § 531.506 only obligates the Agency to make a QSI effective “as soon as practicable after it is approved,”³ and Article 18 gives the Agency discretion as to when to approve a QSI after an employee’s qualifying performance evaluation. The Agency maintained that the new policy means that it approves

¹ 5 C.F.R. § 531.506.

² *Fact Sheet: Quality Step Increase* (OPM Guidance), available at <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/quality-step-increase>.

³ *Id.*

QSI only once a year and that it makes the approved QSI effective within two pay periods of their approval.

The Arbitrator issued his award on May 31, 2017. Addressing arbitrability, the Arbitrator acknowledged that the Union conceded that the invocation of arbitration was untimely. The Arbitrator then found that, despite having a deadline, the parties' agreement "does not mandate a consequence for the Union's failure to meet" the deadlines.⁴ The Arbitrator further found that the parties' agreement gives him "the authority to make all arbitrability and/or grievability determinations."⁵ The Arbitrator also considered the Union's unrefuted testimony that the Union had, in the past, permitted the Agency to take actions outside of the contractual time frames and the fact that the Agency did not argue that it was prejudiced by the Union's untimely invocation of arbitration in this case. Ultimately, the Arbitrator relied on "the strong presumption favoring arbitrability, the absence of any discrete consequence in the contractual language for failure to meet the time line, the absence of any prejudice[,] and [his] authority to rule on matters of arbitrability," and found that the grievance was arbitrable.⁶

As to the merits of the grievance, the Arbitrator, considering the language of 5 C.F.R. part 531 and the OPM guidance, found that the Agency is "obligated to make whatever decisions it must as soon as practicable and to correlate those decisions to the employee's rating period."⁷ As such, the Arbitrator concluded that the Agency's policy of approving QSI only once a year violated the parties' agreement.

Turning to the remedy, the Arbitrator found that "[t]he appropriate resolution of the complex interplay between the monthly performance appraisal process and the delayed, annual QSI approval process is through negotiations."⁸ Consequently, the Arbitrator ordered the parties to negotiate to determine an appropriate remedy.

The Agency filed exceptions to the award on June 30, 2017; the Union filed an opposition to those exceptions on August 3, 2017.

III. Preliminary Matter: The Agency's exceptions are interlocutory, but extraordinary circumstances warrant the consideration of the exceptions.

In its opposition, the Union argues that the award is not final because the Arbitrator did not issue a remedy.⁹ According to the Union, we should dismiss the Agency's exceptions as interlocutory under § 2429.11 of the Authority's Regulations.¹⁰

The Union is correct that the Authority ordinarily has not considered appeals that may be considered interlocutory.¹¹ Thus, the Authority will ordinarily not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all of the issues submitted to arbitration.¹² In this regard, the Authority has held that an award is *not* final when the arbitrator postpones the determination of an issue¹³ or directs the parties to fashion an appropriate remedy but retains jurisdiction to fashion a remedy in the event the parties fail to reach agreement.¹⁴ However, the Authority has found it *will* review interlocutory exceptions if there are "extraordinary circumstances"¹⁵ that warrant immediate review, such as when an exception raises a plausible jurisdictional defect which, if resolved, will advance the ultimate disposition of the case (i.e., will end the case).

Here, the Arbitrator framed the issues to include whether there was a violation and, if so, "what shall be the remedy."¹⁶ The Arbitrator found a violation but never fashioned a remedy. Instead, the Arbitrator sent the matter back to the parties for them to develop a remedy that would be "appropriate" for the violation that he found.¹⁷ He retained jurisdiction in case the parties needed his help in figuring out an appropriate remedy.¹⁸

Section 2429.11 of the Authority's Regulations reflects a longstanding judicial policy which discourages fragmenting appeals of the same case.¹⁹ Because the

⁴ Award at 34.

⁵ *Id.* (quoting Article 43, Section 4.A.6 of the parties' agreement).

⁶ *Id.*

⁷ *Id.* at 39.

⁸ *Id.* at 40.

⁹ Opp'n at 7-8.

¹⁰ *Id.* at 5.

¹¹ 5 C.F.R. § 2429.11.

¹² *U.S. DHS, U.S. CBP*, 65 FLRA 603, 605 (2011).

¹³ *U.S. Dep't of the Air Force, Pope Air Force Base, N. C.*, 66 FLRA 848, 850 (2012) (*Pope AFB*).

¹⁴ *Id.*; *U.S. Dep't of the Air Force, Air Force Flight Test Ctr., Edwards Air Force Base, Cal.*, 65 FLRA 1013, 1014 (2011) (*Dep't of the Air Force*); *U.S. Dep't of the Treasury, Customs Serv., Tucson, Ariz.*, 58 FLRA 358, 359 (2002).

¹⁵ 5 C.F.R. § 2429.11 ("[T]he Authority . . . ordinarily will not consider interlocutory appeals."); *Pope AFB*, 66 FLRA at 851.

¹⁶ Award at 2.

¹⁷ *Id.* at 40.

¹⁸ *Id.* at 41.

¹⁹ *U.S. Dep't of the Treasury, IRS, L.A. Dist.*, 34 FLRA 1161, 1163 (1990) (*IRS*).

Arbitrator did not resolve all of the issues before him, the award is not “final,” as the Authority has applied that term through § 2429.11 and has interpreted it in its past decisions.²⁰

We agree with that overarching policy, but the circumstances of this case illustrate why we must clarify what circumstances present extraordinary circumstances that warrant review of interlocutory exceptions. We do not agree that only exceptions which raise a “plausible jurisdictional defect” present extraordinary circumstances which warrant review. Therefore, we clarify that any exception which advances the ultimate disposition of a case—by obviating the need for further arbitral proceedings—presents an extraordinary circumstance which warrants our review. In other words, we will no longer turn a blind eye to exceptions, which if decided, could obviate the need for further arbitration.

This approach most surely advances Congress’s intent that the Statute “should be interpreted in a manner consistent with the requirement of an effective and efficient Government.”²¹ Consequently, we will consider interlocutory exceptions where they will advance the ultimate disposition of the case—not just when those exceptions raise a plausible jurisdictional defect. And we will no longer follow Authority case law that holds otherwise.²²

Here, as discussed further below, the resolution of the timeliness issue renders the grievance not arbitrable and avoids the need for further arbitration and the unnecessary expenditure of resources by both parties. Accordingly, we grant interlocutory review of the Agency’s exceptions.²³

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

The Agency argues²⁴ that the Arbitrator’s failure to dismiss the grievance as untimely²⁵ does not draw its

essence from the parties’ agreement.²⁶ The Agency argues, and we agree, that the Arbitrator impermissibly ignored the time limits set out in the parties’ agreement and, thus, that the award fails to draw its essence from the parties’ agreement.²⁷ Articles 42 and 43 of the parties’ agreement “require that the Union invoke arbitration within [thirty] days of the date it receives the [Agency]’s final decision.”²⁸ The Union conceded that it did not meet this thirty-day deadline.²⁹ The Arbitrator, however, ignored the plain words of the agreement, relying instead on a general “presumption favoring arbitrability” to find the grievance arbitrable.³⁰

It is clear to us that when the parties agreed to a thirty-day “require[ment]” to invoke arbitration, they meant just that—the Union had thirty days to make the request. To conclude that a generic “presumption” somehow waives the parties’ agreed-to requirement renders the plain language of the agreement meaningless³¹ and, thus, evidences³² a manifest disregard of the agreement.³³ Consequently, the Arbitrator’s award

²⁵ *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (Member DuBester concurring, in part, and dissenting, in part) (Parties may directly challenge procedural-arbitrability determinations on essence grounds.).

²⁶ 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998) (In reviewing an arbitrator’s interpretation of an agreement, the Authority ordinarily applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (*OSHA*) (1990) (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.).

²⁷ Exceptions at 15.

²⁸ Award at 33.

²⁹ *Id.*

³⁰ *Id.* at 34.

³¹ We also reject the Arbitrator’s reliance on a past practice. There are no ambiguous contract provisions at issue, and the Arbitrator cannot rely on a past practice to modify the clear terms of a contract. *U.S. Dep’t of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755-56 (2018) (Member DuBester dissenting).

³² *OSHA*, 34 FLRA at 575; see also *U.S. Dep’t of the Treasury, IRS*, 68 FLRA 1027, 1037-38 (2015) (Dissenting Opinion of Member Pizzella); *U.S. DHS, U.S. CBP*, 68 FLRA 1015, 1025 (2015) (Dissenting Opinion of Member Pizzella).

³³ We similarly find fault in the Arbitrator’s reliance on other, vague notions absent from the text of the parties’ agreement such as an “absence of any prejudice.” Award at 34.

²⁰ *Dep’t of the Air Force*, 65 FLRA at 1014.

²¹ 5 U.S.C. § 7101(b).

²² See, e.g., *Pope AFB*, 66 FLRA 848.

²³ We reject the dissent’s framing of this decision. Our decision does not “expand[] the grounds for granting interlocutory review.” Dissent at 8. Rather, our decision correctly interprets our regulations “in a manner consistent with the requirement of an effective and efficient Government.” 5 U.S.C. § 7101(b). We further reject the dissent’s characterization of the Agency as “reneg[ing] on [its] choice” to go to arbitration. Dissent at 9. As our colleague well knows, the Statute leaves minimal choice of avoiding binding arbitration for unresolved grievances. 5 U.S.C. § 7121(b)(1)(C)(iii). There is little to be gained in such mischaracterizations of Authority decisions or unnecessary disparagement of the parties.

²⁴ Exceptions at 15.

does not draw its essence from the parties' agreement, and we vacate the award.³⁴

This approach does not disregard, but actually supports, the longstanding policy of discouraging the fragmenting of cases into multiple appeals, a principle upon which there is no disagreement. Contrary to the dissent's assertions, however, this approach fully respects the parties' choice to not separate arbitrability from the merits of the case. This is not a case, as the dissent implies, where the Agency initiates an appeal from the Arbitrator's arbitrability determination as a delay tactic without proceeding on the merits of the case. As noted above, the parties disputed, and the Arbitrator made a determination, on both the arbitrability and merits of the case.³⁵ It is from those determinations that the Agency challenges the award, arguing that the Arbitrator was wrong on both the arbitrability *and* merits of the grievance. Therefore, because we address the Agency's exceptions, there is no need for the parties to proceed through additional litigation concerning an unnecessary remedy dispute. Our determination does not interrupt the arbitration proceeding (but rather advances the ultimate disposition), respects the parties' choices, and brings about the peaceful resolution of this dispute.

Our Statute instructs us that we must determine and apply our "procedures" in a manner that meets "the special requirements and needs of the Government" and to interpret its provisions in a manner that is consistent with the requirements of "an effective and efficient government."³⁶ The approach we adopt today—to consider exceptions which raise plausible jurisdictional defects which will advance the ultimate disposition of the case—is consistent with our statutory mandate.

Because we vacate the award, it is unnecessary for us to address³⁷ the Agency's remaining exceptions.³⁸

V. Decision

We set aside the award.

³⁴ We distinguish this case from those setting up "technical trapfalls." *U.S. DOD, Defense Contract Mgmt. Agency*, 70 FLRA 370, 371 n.22 (2018). Failures to comply with contractual deadlines, or statutory deadlines, differ from minor oversights or failing to invoke magic words.

³⁵ Award at 41 ("The grievance is arbitrable. The Union proved that the Agency violated the National Agreement. The grievance is sustained.").

³⁶ 5 U.S.C. § 7101(b).

³⁷ See *U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017) (citation omitted).

³⁸ See Exceptions at 11 (arguing the Arbitrator exceeded his authority); *id.* at 17 (arguing that the award is contrary to law); *id.* at 21 (arguing that the award further fails to draw its essence from the parties' agreement).

Member DuBester, dissenting:

The majority's decision is another example of their disregard for well-reasoned Authority and judicial precedent, established labor-management-relations policies, and the parties' labor-relations practices. The majority makes two mistakes. Contrary to strong judicial, and Authority, policies and precedent, the majority expands the grounds for granting interlocutory review of arbitrators' interlocutory determinations by erroneously broadening what the Authority considers to be "extraordinary circumstances"¹ that warrant granting review.² And continuing its non-deferential treatment of arbitrators and their awards, the majority overturns the Arbitrator's well-reasoned, contractually-based arbitrability determination. I dissent.

The weakened interlocutory-review standard that the majority adopts clashes with the tight constraints that adjudicatory bodies, from the Supreme Court down, place on interlocutory appeals. Under the weakened standard, "extraordinary circumstances" for granting interlocutory review exist whenever a party decides to challenge an arbitrator's potentially dispositive, interlocutory ruling. And applying this new standard here allows the Agency, facing an interlocutory merits ruling against it, to interrupt the arbitration proceeding with an interlocutory appeal of the Arbitrator's threshold determination that the grievance is arbitrable.

Judicial and Authority precedent call for a different outcome. As the Supreme Court has stated in an analogous context, "[t]he general principle of . . . appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of [trial-court] proceedings await their termination by final judgment This insistence on finality and prohibition of piecemeal review discourage[s] undue litigiousness and leaden-footed administration of justice."³ In a similar vein, the courts "have repeatedly emphasized that 'interlocutory certification . . . should be used sparingly and only in exceptional circumstances, and where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority.'"⁴

¹ E.g., *AFGE, Local 2145*, 69 FLRA 563, 564 (2016) (citing *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 68 FLRA 640, 641 (2015)).

² See Majority at 4 ("We do not agree that only exceptions which raise a 'plausible jurisdictional defect' present extraordinary circumstances which warrant review.")

³ *U.S. v. Hollywood Motor Car Co.*, 458 U.S. 263, 264-65 (1982) (quoting *Cobbledick v. U.S.*, 309 U.S. 323, 324-326 (1940)).

⁴ *Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005) (quoting *Palandjian v. Pahlavi*, 782 F.2d 313, 314 (1st Cir. 1986) (quoting *McGillicuddy v. Clements*, 746

There are many reasons for placing tight restrictions on interlocutory appeals. As one commentator has written, interlocutory appeals can "cause considerable disruption to the conduct of the trial proceedings, and flood appellate courts with additional work. Likewise, [tight restrictions] discourage[] parties from employing the delay tactics of filing repetitive interlocutory appeals throughout the trial that are aimed at harassing their opponents and, in some instances, trying to force them into settlement. Furthermore, a party who wants to challenge a court's ruling may emerge from the case victorious, thus eliminating the need to appeal."⁵

In addition to adjudicatory policy issues, the majority's application of its weakened interlocutory-review standard undercuts respect for the parties' choices in conducting their collective-bargaining relationship. Here, the parties jointly chose not to separate the arbitration's arbitrability phase from its merits phase.⁶ Where the parties have agreed not to bifurcate the arbitrability and the merits phases of an arbitration proceeding, that choice should be respected. But instead, the majority's approach enables a party to renege on that choice and challenge that result with an interlocutory appeal on threshold arbitrability grounds, *after* the party sees the result of the merits phase of the proceeding. This wastes the parties' and the government's resources and time.

Further, contrary to the majority's assertion, allowing a party to challenge the result of a merits hearing with an interlocutory appeal on threshold matters, after it has already occurred, does not promote "an effective and efficient government."⁷ Moreover, the majority generally "puts way too much stock in the [Statute]'s statements about an 'effective' and 'efficient'

F.2d 76 n.1 (1st Cir. 1984) (citing *In re Heddendorf*, 263 F.2d 887, 888-89 (1st Cir. 1959)); see also *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012) (The Authority has long held that interlocutory review should only be undertaken where an interlocutory appeal raises a plausible jurisdictional defect that, if resolved, will advance the ultimate resolution of the case.)

⁵ Michael E. Solimine and Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 Wm. & Mary L. Rev. 1531 (2000).

⁶ Award at 1.

⁷ Majority at 4 (citing 5 U.S.C. § 7101(b)).

government.”⁸ It is stable *collective bargaining* relationships that “contribute[] to the *effective* conduct of public business . . . and . . . facilitate[] . . . the efficient accomplishment of the operations of the Government.”⁹ In this case, the majority’s failure to respect the parties’ choice (agreeing not to bifurcate proceedings) destabilizes their collective-bargaining relationship by allowing one party to unilaterally alter the manner by which they previously agreed to arbitrate this dispute.

The majority’s lack of deference to the Arbitrator’s well-reasoned, contractually-based arbitrability ruling is also a mistake. The Agency asserts, and the majority agrees, that the Arbitrator “impermissibly ignored” the agreement’s thirty-day time limit for invoking arbitration.¹⁰ The majority faults the Arbitrator for relying on “a general ‘presumption favoring arbitrability’” to find the grievance arbitrable.¹¹ But, reflecting the lack of reasoning in the majority’s decision, the majority gives little consideration to, and casually dismisses, the many pertinent, valid considerations on which the Arbitrator bases his determination that the grievance is arbitrable.

First, the Arbitrator considers Article 43, Section 4(A)(6), which grants an arbitrator “the authority to make all arbitrability and/or grievability determinations.”¹² Second, the Arbitrator considers the parties’ practice of not strictly adhering to time limits set forth in their agreement.¹³ Third, he cites “the absence of any prejudice” to the Agency as a result of the Union’s

one day delay in invoking arbitration.¹⁴ Only finally, more generally does the Arbitrator consider the judicially recognized presumption of arbitrability to encourage the parties to achieve the peaceful resolution of their disputes.¹⁵ These pertinent, valid considerations, which reflect long-standing labor-relations norms, demonstrate that the Arbitrator’s arbitrability finding is at least “plausible.”¹⁶ It therefore draws its essence from the parties’ agreement. But the majority, arbitrarily, does not address these considerations.

Accordingly, I would deny the Agency’s essence exception to the Arbitrator’s arbitrability determination, and reach the Agency’s remaining exceptions.

⁸ *AFGE, AFL-CIO v. Trump*, No. 1:18-CV-1261 (KBJ), 2018 WL 4053398, at *38 n.14 (D.D.C. Aug. 25, 2018) (*AFGE*); *see also id.* (“It is certainly true that [the] goal [of an effective and efficient government] reflects one key aspect of the careful balance that Congress was attempting to strike between management and labor” under the Statute. However, “the overall thrust of the [Statute] is unquestionably Congress’s stated belief that ‘labor organizations and collective bargaining in the civil service are in the public interest[,]’ . . . , rather than any concern that, by accommodating collective bargaining rights, government agencies were becoming ineffective or inefficient and thus not serving the public.”).

⁹ *Id.* (citing § 7101(a)(1)(B), (a)(2)).

¹⁰ Majority at 5 (citing Exceptions at 15).

¹¹ *Id.* at 6.

¹² Award at 34 (citing Art. 43, § 4(A)(6) of the parties’ agreement).

¹³ *Id.*; *see U.S. Small Bus. Admin.*, 70 FLRA 525, 531 (2018) (Dissenting Opinion of Member DuBester) (citing *Elkouri & Elkouri, How Arbitration Works*, 12-28 (Kenneth May ed., 8th ed. 2016); *Dep’t of the Navy, Naval Underwater Systems Ctr., Newport Naval Base*, 3 FLRA 413, 414 (1980)) (The predominant view of the courts and arbitrators, and the Authority’s well-established precedent, is that “[a]n arbitrator’s award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties’ intent.”).

¹⁴ Award at 34.

¹⁵ *Id.*; *see also id.* at 33.

¹⁶ 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. *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).