

72 FLRA No. 82

UNITED STATES
DEPARTMENT OF THE ARMY
WHITE SANDS MISSILE RANGE
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 2049
(Union)

0-AR-5525

ORDER DISMISSING EXCEPTIONS

July 19, 2021

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

I. Statement of the Case

Since 2007, the parties have been litigating a Union grievance alleging widespread overtime violations of the Fair Labor Standards Act (FLSA)¹ and the parties' collective-bargaining agreement. The Authority has already ruled on different aspects of this case in 2012 and 2014: first finding, in *U.S. Department of the Army, White Sands Missile Range, White Sands Missile Range, New Mexico (White Sands I)*, that Agency exceptions were interlocutory² and then holding, in *U.S. Department of the Army, White Sands Missile Range, White Sands Missile Range, New Mexico (White Sands II)*, that the grievance was procedurally and substantively arbitrable.³ Upon the resolution of *White Sands II*, Arbitrator Diane Dunham Massey recused herself, and the parties appointed Arbitrator Lawrence E. Little to preside over the merits of this case.

Almost seven years after *White Sands II*, the proceedings still have not reached the merits of the grievance. Arbitrator Little, in a 2019 award, found, as relevant here, that (1) the scope of the grievance covered employees who joined the bargaining unit after the filing date of the grievance, and (2) the Agency would not be

violating § 7102 of the Federal Service Labor-Management Relation Statute (the Statute)⁴ or the parties' agreement by sending a notice to employees stating they could voluntarily meet with Union representatives. The Agency filed exceptions to this award.

As discussed further below, we determine that the Agency's exceptions are either untimely, interlocutory, or barred by the Authority's Regulations. Thus, we dismiss, without prejudice, the Agency's interlocutory exceptions, and dismiss the Agency's remaining exceptions.

II. Background and Arbitrators' Awards

Certain aspects of the background are more fully explained in *White Sands I* and *White Sands II*.⁶

In June 2007, the Union filed a grievance (the first grievance) alleging violations of several federal laws and regulations, including the FLSA, the Back Pay Act,⁷ Title 5,⁸ and the parties' agreement. The first grievance contended that the Agency failed to pay bargaining-unit employees overtime. In May 2009, the Union filed a grievance (the second grievance) making the same allegations as the first grievance.

A. Arbitrator Massey's 2009, 2011, and 2013 Arbitrability Awards

In December 2009, Arbitrator Massey issued her first of three arbitrability awards. The stipulated issue was: "Does the document dated June . . . 2007 . . . constitute a valid [g]rievance, and . . . was it properly served . . . in accordance with the [parties' a]greement?"⁹ The Arbitrator ultimately found that the first grievance was properly served on the designated management official under Article 11, Section 9, which states that union grievances "will be submitted in writing by the Union [p]resident . . . to the installation [c]ommander within fifteen . . . workdays of the occurrence which caused the grievance."¹⁰

In 2011, the Arbitrator issued her second award on arbitrability. In it, she determined that her findings from the first award "must be abandoned" because she had relied on a former local union president's testimony

¹ 29 U.S.C. §§ 201-219.

² 67 FLRA 1 (2012).

³ 67 FLRA 619 (2014).

⁴ 5 U.S.C. § 7102.

⁵ 67 FLRA at 1-3.

⁶ 67 FLRA at 619-26.

⁷ 5 U.S.C. § 5596.

⁸ See Federal Employees Pay Act, 5 U.S.C. §§ 5541-5550b.

⁹ Exceptions, Ex. 7, 2009 Arbitrability Award of Arbitrator Massey (2009 Massey Award) at 2.

¹⁰ Exceptions, Ex. 4, Collective-Bargaining Agreement at 20.

that was “not credible.”¹¹ Consequently, the Arbitrator found the Union’s first grievance procedurally inarbitrable,¹² but, based on different evidence, she concluded that the Union’s second grievance was procedurally arbitrable under Article 11.¹³

Following the second award, the Arbitrator recused herself, concluding that all pre-hearing matters were resolved and the dispute could proceed to the merits. The Agency refused to select a new arbitrator and raised new allegations regarding the second grievance’s arbitrability. After being notified of the Agency’s new procedural allegations, the Arbitrator withdrew her recusal. The Agency filed exceptions to the Arbitrator’s reassertion of jurisdiction. But, in *White Sands I*, the Authority dismissed the Agency’s exceptions, without prejudice, as interlocutory.¹⁴

In 2013, the Arbitrator issued her third arbitrability award. She found that the parties had stipulated to a very narrow procedural-arbitrability issue in 2009 focusing on whether the Union properly filed under Article 11. The Arbitrator noted that after she determined that the second grievance was arbitrable and recused herself for a new arbitrator to hear the merits, the Agency raised new procedural- and substantive-arbitrability challenges. Based on the Agency waiting four years to raise these arguments, and failing to raise them during the designated hearings on arbitrability, the Arbitrator found that the Agency had waived any new procedural-arbitrability arguments.

The Arbitrator did, however, address the Agency’s substantive-arbitrability arguments. She found that Article 4 “unambiguously state[d] that the Union may file a [g]rievance relating to any claimed violation, misinterpretation[,] or misapplication of any law, which would include the FLSA.”¹⁵ The Arbitrator further concluded that Article 11, Section 5 gave the Union the right “to file a collective action to ensure the FLSA rights of employees.”¹⁶

In 2013, the Agency filed exceptions to the Arbitrator’s award, which the Authority resolved in *White Sands II*.

B. *White Sands II*

In *White Sands II*, the Authority denied all of the Agency’s exceptions, including those challenging Arbitrator Massey’s procedural- and substantive-arbitrability determinations. As relevant here, the Authority held that Arbitrator Massey did not err in concluding that the parties’ agreement authorized the second grievance; the “grievance in this case [wa]s neither a class action nor a collective action because there is only one ‘plaintiff’: the Union”;¹⁷ and the Agency did not demonstrate that a public policy “that employers must be protected against being forced into class arbitration without clear contractual language” existed.¹⁸ The Authority also upheld the Arbitrator’s finding that the Agency had waived any further procedural-arbitrability arguments related to the grievance.

After *White Sands II* became final, Arbitrator Massey withdrew from the case and, in 2015, the parties selected Arbitrator Little to resolve the merits of the dispute.

C. Arbitrator Little’s 2019 award

Before Arbitrator Little, the Agency continued to dispute pre-merits issues. During the arbitration proceedings before Arbitrator Little, the Union requested that the Agency notify employees that they could participate in interviews with Union representatives regarding the matters at arbitration (pre-hearing notices). The Agency rejected the Union’s request and this issue proceeded before the Arbitrator along with the Agency’s identified issues.

The issues that the Arbitrator examined, as relevant here, were whether the second grievance covered employees who entered the bargaining unit after the Union filed it, and whether the pre-hearing notices to employees violated any laws.

At arbitration, the Agency argued the grievance covered only employees who were in the bargaining unit on May 2009 – when the Union filed the second grievance – and the preceding fifteen days. But the Arbitrator concluded that the scope of the second grievance included employees hired “from the effective date of th[e] grievance until the conclusion of this arbitration”¹⁹ because the parties had “operated for

¹¹ Exceptions, Ex. 9, 2011 Order of Arbitrator Massey (2011 Massey Award) at 14; *id.* at 16 (noting that the testimony had a “material impact” on her holding in the 2009 award).

¹² *Id.* at 14 (“[T]he prior ruling regarding the viability of the [first g]rievance is reversed.”).

¹³ In addition, Arbitrator Massey determined that “[a]ny [rulings] found in the . . . 2009[a]ward . . . [will] be subject to . . . the [second] grievance.” *Id.*

¹⁴ *White Sands I*, 67 FLRA at 3 (finding there was not a complete resolution of all the issues submitted to arbitration because the Agency “raised a new issue that concerned the arbitrability . . . of the grievance”).

¹⁵ Exceptions, Ex. 15, 2013 Arbitrator Massey Award (2013 Massey Award) at 18.

¹⁶ *Id.*

¹⁷ *White Sands II*, 67 FLRA at 621.

¹⁸ *Id.* at 622.

¹⁹ Award at 6.

years on the assumption that [a]fter [h]ires were included.”²⁰ In addition, the Arbitrator found that from 2009 to 2013, Arbitrator Massey “conducted an exhaustive examination of all [arbitrability] issues,” and both parties acknowledged that there were no remaining arbitrability issues in 2015, when the parties began the merits phase of the hearing before this Arbitrator.²¹

Regarding the pre-hearing notices, the Agency argued that it should not be required to send them to affected employees because it “may” constitute an unfair labor practice and was not required by the parties’ agreement.²² The Arbitrator found that the Agency did not support its argument, and he remarked that employees may “decline [the interview] at any time.”²³ Therefore, the Arbitrator directed the Agency to send the pre-hearing notices.

The Agency filed exceptions on July 22, 2019. The Union filed its opposition to the Agency’s exceptions on September 4, 2019,²⁴ asserting, in part, that the Agency’s exceptions are untimely and interlocutory.

III. Analysis and Conclusions

A. The Agency’s exceptions are, in part, untimely.

The Agency raises several exceptions to Arbitrator Little’s 2019 award. In the Union’s opposition, it alleges that the bulk of the Agency’s exceptions are untimely.²⁵ Specifically, the Union contends that the Agency seeks reconsideration of Arbitrator Massey’s procedural- and substantive-arbitrability determinations several years after the Authority issued *White Sands II*.²⁶

Under § 2429.17 of the Authority’s Regulations, a party may move for reconsideration “within ten . . . days after service of the Authority decision.”²⁷ But the Authority does not entertain relitigation of matters that were already decided in earlier proceedings.²⁸ Thus, exceptions that directly challenge matters decided in an

earlier Authority decision are untimely if filed more than ten days after service of the earlier decision, and the Authority will not consider them.²⁹

The Agency argues that the Union failed to follow the grievance procedures in Article 11, Sections 8 and 9, when it filed both the first and second grievance.³⁰ Specifically, the Agency contends that Arbitrator Massey and Arbitrator Little erred by not dismissing the grievance in its entirety after Arbitrator Massey determined, in 2011, that the first grievance was procedurally inarbitrable.³¹ This argument challenges Arbitrator Massey’s procedural-arbitrability determinations from the 2009, 2011, and 2013 arbitrability awards. In those awards, Arbitrator Massey addressed the Agency’s contentions that the first and second grievance were not filed according to Article 11,³² and she determined in 2011 and 2013 that the second grievance was properly filed pursuant to Article 11.³³ Additionally, in Arbitrator Massey’s 2013 award, she found that the Agency waived any further procedural-arbitrability arguments³⁴—a determination that the Authority upheld in *White Sands II*.³⁵ That decision became final and binding in 2014;³⁶ the Agency did not file a motion for

²⁰ *Id.*

²¹ *Id.* at 5.

²² *Id.* at 9.

²³ *Id.* at 11. Additionally, the notice stated that employees have the right to either decline or appear for this meeting under 5 U.S.C. § 7102 et al. *Id.*

²⁴ On July 30, 2019, the Union requested an extension of time to file its opposition, and on July 31, 2019, the Authority’s Office of Case Intake and Publication granted the extension. Accordingly, the opposition is timely.

²⁵ Opp’n Br. at 11-13.

²⁶ *Id.* at 12.

²⁷ 5 C.F.R. § 2429.17.

²⁸ *U.S. DHS, ICE*, 64 FLRA 908, 909 (2010).

²⁹ See *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 69 FLRA 512, 515 (2016).

³⁰ Exceptions Br. at 65-77. The Union concedes that this grievance is not an employee grievance under Article 11, Section 8, but contends the grievance is arbitrable under Article 11, Section 9. Opp’n Br. at 47-49.

³¹ See Exceptions Br. at 75-76.

³² See 2013 Massey Award at 1-16; 2011 Massey Award at 4-6; 2009 Massey Award at 5-6.

³³ See 2013 Massey Award at 12; 2011 Massey Award at 16. Arbitrator Massey found the first grievance procedurally inarbitrable in 2011. See 2011 Massey Award at 14 (“[T]he prior ruling regarding the viability of the [first g]rievance is reversed.”).

³⁴ 2013 Massey Award at 16.

³⁵ See 67 FLRA at 622 (“[T]he Agency [did not] explain[] why the Arbitrator’s interpretation of the [negotiated grievance procedure wa]s irrational, unfounded, implausible, or in manifest disregard of the parties’ agreement.”).

³⁶ See *U.S. Dep’t of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 56 FLRA 848, 852 (2000) (“An award becomes final and binding when there are no timely exceptions filed or when timely-filed exceptions are denied by the Authority.”).

reconsideration of that decision.³⁷ Therefore, we dismiss the Agency's essence exceptions as untimely.³⁸

Next, the Agency alleges that Arbitrator Little exceeded his authority by asserting jurisdiction over a grievance that was not submitted to arbitration.³⁹ Specifically, the Agency claims that the first grievance was the only grievance before the Arbitrator, and the second grievance was improperly submitted to arbitration.⁴⁰ As a result, the Agency asserts that Arbitrator Little disregarded the limitations imposed by Article 12, Section 8, and certain U.S. Supreme Court precedent.⁴¹ However, Arbitrator Massey found in 2011 that the second grievance was filed in accordance with Article 11,⁴² and in 2013, Arbitrator Massey rejected the Agency's argument that the second grievance was not properly processed through the negotiated grievance procedure.⁴³ Because this exception challenges Arbitrator Massey's final and binding 2011 and 2013 awards, the exception is untimely, and we dismiss it for the same reason we dismiss the Agency's essence exceptions.⁴⁴

The Agency further argues that the award is contrary to law and public policy because the Union did not have standing to bring a representational grievance under the FLSA.⁴⁵ But the Agency raised similar substantive arguments in *White Sands II*,⁴⁶ and the

Authority denied the Agency's exceptions, stating that the second grievance "is neither a class action nor a collective action because there is only one 'plaintiff': the Union."⁴⁷ Accordingly, we also dismiss the Agency's contrary-to-law and public-policy exception as untimely because the Agency did not file a motion for reconsideration to *White Sands II*.⁴⁸

Accordingly, we dismiss these Agency exceptions.

B. The Agency's remaining exceptions are interlocutory, but extraordinary circumstances warrant granting review of one of them.

The Authority issued a show-cause order directing the Agency to explain why its exceptions should not be dismissed as interlocutory.⁴⁹ In response, the Agency concedes its exceptions are interlocutory.⁵⁰ The Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration.⁵¹ However, the Authority has determined that interlocutory exceptions present "extraordinary circumstances" that warrant review when their resolution will advance the ultimate disposition of a case by obviating the need for further arbitration.⁵²

The Agency makes the following other arguments in its exceptions: (1) Arbitrator Little exceeded his authority by including the claims of employees hired before and after the second grievance was filed;⁵³ (2) the award violates the doctrine of sovereign immunity because the Union seeks monetary damages under the FLSA;⁵⁴ (3) the award is contrary to

³⁷ See 5 C.F.R. § 2429.17. Moreover, the Agency effectively concedes that its essence exceptions challenge those earlier awards by stating that it has "continually argued that the Union's failure to adhere to the provisions of the [negotiated grievance procedure] in bringing this grievance renders this matter inarbitrable." Exceptions Br. at 65.

³⁸ See *Def. Sec. Assistance Dev. Ctr.*, 60 FLRA 292, 295 n.4 (2004) (*Def. Sec.*) (refusing to consider untimely exception that directly challenged an earlier Authority decision where the excepting party had not filed a motion for reconsideration). Additionally, we also deny the Agency's public-policy exception alleging the Union disregarded the terms of the parties' agreement in violation of § 7121 of the Statute because the Agency's argument challenges Arbitrator Massey's final and binding 2011 and 2013 awards. See Exceptions Br. at 83-84.

³⁹ See Exceptions Br. at 29-37.

⁴⁰ See *id.*

⁴¹ See *id.* at 35-37 (referring to *Stolt-Nielson, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010)).

⁴² See 2011 Massey Award at 16.

⁴³ See 2013 Massey Award at 9-12.

⁴⁴ See *White Sands II*, 67 FLRA at 622-23; *Def. Sec.*, 60 FLRA at 295 n.4. Moreover, the U.S. Supreme Court decision that the Agency relies on here is the same case it relied on in *White Sands II* and, there, the Authority found that the Agency failed to establish that the cited Supreme Court precedent applied. See *White Sands II*, 67 FLRA at 622-23.

⁴⁵ Exceptions Br. at 45-51, 79.

⁴⁶ See *White Sands II*, 67 FLRA at 621 (the Agency alleged that "parties must consent to class arbitration and that 'an arbitration

agreement that [i]s silent [regarding] class arbitration [cannot] be construed to allow arbitration by a class of plaintiffs'").

⁴⁷ *Id.* Additionally, the Agency also contends that *White Sand II* was wrongly decided. Exceptions Br. at 51-52. However, the Agency did not file a motion for reconsideration for *White Sands II*, and as a result, this exception is also untimely. 5 C.F.R. § 2429.17. And the Authority recently declined to revisit *White Sands II*. See *U.S. Dep't of the Army, Nat'l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 524 n.39 (2020) (then-Member DuBester dissenting).

⁴⁸ See *Def. Sec.*, 60 FLRA at 295 n.4; see also *U.S. Dep't of HHS, FDA*, 60 FLRA 789, 791 (2005) (denying the party's motion for reconsideration because it raised substantively similar arguments that were present in its opposition and did not establish that reconsideration was warranted).

⁴⁹ Order to Show Cause (Order) at 1-2.

⁵⁰ Resp. to Order (Resp.) at 2.

⁵¹ See *U.S. DHS, U.S. CBP*, 71 FLRA 1244, 1245 (2020) (then-Member DuBester concurring).

⁵² *Id.*

⁵³ Exceptions Br. at 37-43.

⁵⁴ *Id.* at 52-56.

§ 7102 because it “[r]equir[ed] . . . employee[s] to appear at a meeting or participate in interviews with [the] Union”;⁵⁵ (4) the parties’ agreement “does not require the Agency to direct employees to meet with the Union”;⁵⁶ and (5) the award violates public policy because it represents the antithesis of fair and efficient government under § 7101(b).⁵⁷

Regarding the Agency’s first and second arguments, the Agency does not dispute that the grievance properly includes employees in the bargaining unit when the second grievance was filed,⁵⁸ and the Agency concedes that the Union has “equitable remedies available.”⁵⁹ Thus, even if the Authority granted the exceeded-authority and contrary-to-sovereign-immunity exceptions,⁶⁰ that would not conclusively obviate the need for further arbitral proceedings.

As for the Agency’s third and fourth arguments, the award does not require employees to meet with the Union; instead, the pre-hearing notice states that employees can decline to meet with the Union.⁶¹ And even if the Authority granted those exceptions, there is no evidence that arbitral proceedings would end as a result.⁶² Given this, we find that the Agency fails to demonstrate that these four interlocutory exceptions would obviate the need for further arbitration. Thus, we dismiss them as interlocutory.

However, the Agency’s public-policy exception regarding a violation of § 7101(b), if granted, would advance the ultimate disposition of this case by obviating the need for further proceedings.⁶³ But before turning to the substance of that exception, we must determine

whether the Authority’s Regulations permit considering it.

- C. Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar considering the Agency’s public-policy argument.

The Agency alleges that the award violates public policy because it represents the “antithesis of ‘effective and efficient government’” under § 7101(b) of the Statute.⁶⁴ Specifically, the Agency alleges that the Union is “stall[ing] the resolution of employee[s]’ claims and embroils [the Agency] in years of arbitration in an effort to extract liquidated damages, interest, and attorney’s fees” in violation of § 7101(b).⁶⁵ Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.⁶⁶ A review of the record demonstrates that the Agency failed to raise this claim to Arbitrator Little.⁶⁷ Therefore, we dismiss the Agency’s public-policy exception concerning § 7101(b).⁶⁸

IV. Decision

We dismiss, without prejudice, the Agency’s interlocutory exceptions, and dismiss the Agency’s remaining exceptions.

⁵⁵ *Id.* at 58 (emphasis omitted); *see* 5 U.S.C. § 7102.

⁵⁶ Exceptions Br. at 61 (emphasis omitted).

⁵⁷ *Id.* at 83-84; *see* 5 U.S.C. § 7101(b).

⁵⁸ *See* Exceptions Br. at 43 (stating “the Authority . . . should find that the only employees . . . who were part of the bargaining unit on the day the [g]rievance was filed” and during the fifteen-day window should be included in the grievance).

⁵⁹ *Id.* at 56.

⁶⁰ Granting these exceptions would remove some – but not all – employees from the scope of the second grievance and bar the Arbitrator from awarding some – but not all – of the available remedies.

⁶¹ *See* Award at 11.

⁶² The Agency alleges that “the Union has confirmed that without the Agency requiring employees to meet with the Union that the Union [would] ha[ve] no additional witnesses to call and no further arbitral proceedings would be necessary.” Resp. at 12. However, the Agency does not provide any documentation to support that allegation, and the record reveals no such concession by the Union.

⁶³ The Agency contends that “[a]llowing this [g]rievance to proceed is contrary to public interest,” seeks the dismissal of the second grievance, and asks the Authority to vacate Arbitrator Little’s award. Exceptions Br. at 84.

⁶⁴ *Id.*; *see* 5 U.S.C. § 7101(b).

⁶⁵ Exceptions Br. at 83-84.

⁶⁶ 5 C.F.R. §§ 2425.4(c); 2429.5; *see also* U.S. DOL, 70 FLRA 497, 498 (2018) (then-Member DuBester dissenting) (applying §§ 2425.4(c) and 2429.5 to bar arguments relating to extraordinary circumstances that warranted granting interlocutory review).

⁶⁷ Specifically, the Agency did not raise a public-policy argument involving § 7101(b) of the Statute with Arbitrator Little. *See* Exceptions, Ex. 33, April 20, 2018 Agency Supplemental Brief at 15-17.

⁶⁸ *See* U.S. DOJ, *Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 1262, 1264 n.24 (2020) (then-Member DuBester concurring) (declining to consider arguments a party should have known to make to the arbitrator).

Chairman DuBester, concurring:

I agree that the Agency's untimely exceptions to the Arbitrator's award should be dismissed for the reasons set forth in Part III.A of the majority's decision. And while I continue to disagree with the majority's expansion of the grounds upon which the Authority reviews interlocutory exceptions,¹ I agree with the majority's decision in Part III.B. to dismiss the Agency's exceptions as interlocutory because they fail to raise a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case.

Applying this standard, I would not find that the Agency's public-policy exception presents extraordinary circumstances warranting interlocutory review. On this basis, I agree that the Agency's exception should be dismissed.

¹ See *U.S. Dep't of VA, Veterans Benefits Admin.*, 72 FLRA 57, 62 (2021) (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)).