

72 FLRA No. 44

UNITED STATES
DEPARTMENT OF THE ARMY
MONCRIEF ARMY HEALTH CLINIC
FORT JACKSON, SOUTH CAROLINA
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1214
(Union)

0-AR-5667

DECISION

April 28, 2021

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

I. Statement of the Case

In this case, we reaffirm that the Authority will grant review of interlocutory exceptions whose resolution will obviate the need for further arbitral proceedings.

Arbitrator Gail Smith issued a preliminary award finding that the Union properly filed its grievance under the parties' agreement. The Agency filed exceptions arguing that the award fails to draw its essence from the parties' agreement and is contrary to law. For the reasons set forth below, we grant the Agency's essence exception and set aside the award.

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of all bargaining-unit employees alleging violations of the Fair Labor Standards Act (FLSA), Title 5 of the United States Code, the Federal Employees Pay Act, and Articles 13 and 14 of the parties' agreement. The grievance alleges that the Agency failed to: properly designate employees as

FLSA nonexempt; pay proper compensation to exempt, nonexempt, and wrongfully exempt employees for overtime worked; allow exempt, nonexempt, and wrongfully exempt employees a choice of compensatory time or overtime; pay "suffer" or "permit" overtime to nonexempt and wrongfully exempt employees; and pay induced overtime to exempt employees.¹ As remedies for the alleged violations, the Union requested backpay and related damages "on behalf of . . . employees [in the bargaining-unit.]"²

The Union filed its grievance "under Article 31 [of the parties' agreement, or] . . . alternative[ly], . . . under Article 30" of the parties' agreement.³ Article 30, titled "Employee Grievance Procedure," allows grievances to be initiated by a bargaining-unit employee, or a group of employees, seeking "personal relief in a matter of concern or dissatisfaction to [employees]" regarding the parties' agreement.⁴ Conversely, Article 31 is titled "Union/Employer Grievance Procedure," and it specifies that it "cannot be used for grievances involving personal relief of individual employees."⁵

After the Agency denied the grievance, the parties submitted it to arbitration, where the Agency raised a threshold challenge to the arbitrability and scope of the grievance. The parties agreed to present arguments on these issues prior to consideration of the merits of the case. Among other things, the Agency argued that the Union failed to follow the procedures in the parties' agreement for a grievance filed under Article 30 and that the Union could not bring its grievance seeking relief for individual employees under Article 31.

The Arbitrator found the allegations in the grievance sufficient to satisfy the specificity requirements for an employee-filed grievance under Article 30. However, she determined that the "Union failed to follow the four-step procedure" provided in Article 30 when it did not submit its grievance to the lowest level management official.⁶ Thus, she concluded that the Union's grievance was not arbitrable under Article 30.

The Arbitrator acknowledged that Article 31 specifies that Union-initiated grievances "cannot be used for grievances involving personal relief of individual employees."⁷ But, she found that the Union's grievance concerned "*positions* within the unit as opposed to *individuals*."⁸ She also found that "administration of overtime eligibility is a fundamental responsibility of an

¹ Exceptions, Ex. 4, Grievance (Grievance) at 2.

² *Id.* at 3.

³ *Id.* at 1.

⁴ Exceptions, Ex. 3, Collective-Bargaining Agreement at 51-52.

⁵ *Id.* at 55.

⁶ Award at 20.

⁷ *Id.* at 13 (quoting Article 31).

⁸ *Id.* at 14.

exclusive representative.”⁹ Further, the Arbitrator concluded that “if liability is found upon sufficient facts, then relief can be determined on an individual basis” under Article 31.¹⁰ Accordingly, in her preliminary award on arbitrability, the Arbitrator found that the Union’s grievance was arbitrable under Article 31.

On September 8, 2020, the Agency filed exceptions to the award. The Union filed its opposition on October 13, 2020.

III. Preliminary Matter: The Agency’s exceptions are interlocutory, but extraordinary circumstances warrant granting review.

The Agency acknowledges that its exceptions to the preliminary award are interlocutory.¹¹ Under § 2429.11 of the Authority’s Regulations, the Authority ordinarily does not consider interlocutory appeals.¹² However, the Authority has determined that any exception that advances the ultimate disposition of a case by obviating the need for further arbitral proceedings presents an extraordinary circumstance warranting review.¹³

In its exceptions, the Agency asserts that the Arbitrator’s award fails to draw its essence from the parties’ agreement and is contrary to law.¹⁴ The Agency argues that the Authority should grant interlocutory review of those exceptions because resolution of them would “obviate the need for further arbitral proceedings.”¹⁵ Because the Agency’s essence exception, as demonstrated below, could conclusively determine whether further arbitral proceedings are required, we grant interlocutory review of that exception.¹⁶

⁹ *Id.*

¹⁰ *Id.* at 15.

¹¹ Exceptions Br. at 11.

¹² 5 C.F.R. § 2429.11.

¹³ *U.S. Dep’t of the Army, Nat’l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 523 (2020) (*Dep’t of the Army*) (then-Member DuBester dissenting).

¹⁴ Exceptions Br. at 23.

¹⁵ *Id.* at 12.

¹⁶ *Dep’t of the Army*, 71 FLRA at 523.

¹⁷ Exceptions Br. at 12-19. The Authority will find that an arbitration award fails to draw its essence from a collective-bargaining agreement when the excepting 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. Dep’t of the Treasury, IRS, Kan. City Campus*, 71 FLRA 1161, 1162 n.16 (2020) (*IRS*) (then-Member DuBester dissenting) (citing *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (*SBA*) (then-Member DuBester concurring, in part, and dissenting, in part)). The Authority has found that an award fails to draw its essence from a collective-bargaining agreement where the award

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

As relevant here, the Agency argues that the award fails to draw its essence from the parties’ agreement by evidencing a manifest disregard of Article 31.¹⁷ In particular, the Agency asserts that the Arbitrator disregarded the plain wording of that article when she found that the Union’s grievance was arbitrable.¹⁸

Article 31 expressly excludes grievances seeking personal relief. Nonetheless, the Arbitrator found that the Union had an institutional interest in the proper FLSA classification of positions in the unit but also that, if any violation occurred, any remedy would constitute personal relief for affected employees.¹⁹ The grievance seeks damages on behalf of misclassified employees.²⁰ As noted above, the parties’ agreement plainly states that grievances filed under Article 31 “cannot be used for . . . personal relief of individual employees.”²¹ Therefore, the Arbitrator evidenced a manifest disregard of Article 31’s exclusion of grievances seeking personal relief when she concluded that the grievance was arbitrable.²² Thus, the Arbitrator’s interpretation of Article 31 conflicts with the plain wording of the parties’ agreement.²³ Accordingly, we set aside the Arbitrator’s award.²⁴

V. Decision

We grant the Agency’s essence exception and set aside the award.

conflicts with the agreement’s plain wording. *SBA*, 70 FLRA at 527.

¹⁸ Exceptions Br. at 13.

¹⁹ See Award at 14-15.

²⁰ Grievance at 3 (requesting “damages on behalf of . . . employees wrongfully designated as FLSA [e]xempt; employees always designated as FLSA [none]xempt; employees properly designated as FLSA [e]xempt . . . paid at or below . . . a [General Schedule]-10, Step 10; and employees properly designated as FLSA [e]xempt”).

²¹ Award at 13 (emphasis added) (quoting Art. 31).

²² See *SBA*, 70 FLRA at 527.

²³ See *IRS*, 71 FLRA at 1163 (arbitrator’s award failed to draw its essence from the parties’ agreement where the agreement required the union to provide the names of all grievants at the time of filing but the union included one name at the time of filing and provided remaining names at a subsequent meeting); *SSA*, 64 FLRA 1119, 1122 (2010) (then-Member DuBester concurring; Chairman Pope dissenting) (“When an arbitrator’s award is clearly inconsistent with the terms of the parties’ agreement . . . the award cannot . . . draw its essence from the agreement.”).

²⁴ See *IRS*, 71 FLRA at 1163 (setting aside finding of arbitrability that clearly conflicted with plain wording of parties’ agreement).

Member Abbott, concurring:

I agree with every aspect of the instant decision and the granting of the Agency's essence exception. However, I write separately to address the Chairman's insistence that the Authority should only consider interlocutory exceptions when they raise a plausible jurisdictional defect.¹

In *U.S. Department of the Treasury, IRS (IRS)*, the Authority emphasized that it will consider interlocutory exceptions when they advance the ultimate disposition of the case and that it "do[es] not agree that only exceptions which raise a 'plausible jurisdictional defect' present extraordinary circumstances which warrant review."² Specifically, we clarified that the Authority "will no longer turn a blind eye to exceptions, which if decided, could obviate the need for further arbitration."³ We also noted that this interpretation was consistent with the Federal Service Labor-Management Relations Statute's (the Statute) requirement that the Authority "interpret[] our regulations 'in a manner consistent with the requirement of an effective and efficient Government.'"⁴

IRS is not only consistent with the Statute, it is also congruent with the Authority's previous interpretation of interlocutory review. Prior members of the Authority have separately emphasized that it is ineffective and inefficient to require parties to go through the entire arbitral process—the process which the dissent doggedly defends—before it may raise an issue, whether or not jurisdictional, that would obviate the need for further proceedings.⁵ It is worth repeating. Consistent with the Statute's mandate to interpret its provisions consistent with the requirements of an effective and efficient government, the Authority will consider interlocutory exceptions which, if decided, could obviate the need for further proceedings.

¹ Dissent at 6.

² 70 FLRA 806, 808 (2018) (then-Member DuBester dissenting).

³ *Id.*

⁴ *Id.* at 808 n.23 (quoting 5 U.S.C. § 7101(b)).

⁵ See *AFGE, Loc. 2145*, 69 FLRA 563, 566 (2016) (Dissenting Opinion of Member Pizzella) ("Therefore, withholding our ruling on this issue does nothing to advance this case to final resolution. My colleagues' reticence to make a final determination requires both parties on remand (which I would

conclude is unnecessary) to readdress the same issue and then to refile exceptions on the same matter should this case come back before us."); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R.I.*, 65 FLRA 50, 53 (2010) (Dissenting Opinion of Member Beck) ("What the Majority has failed to explain is this: If the [a]gency is precluded from presenting its exceptions to the Authority now, at what point will the [a]gency be permitted to present its exceptions?").

Chairman DuBester, dissenting:

In my view, the Agency's exceptions should be dismissed as interlocutory. As I have previously explained,¹ 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.²

This is particularly true where, as here, the majority grants interlocutory review to vacate an award based upon an action that has yet to be taken – namely, the awarding of individual relief to the employees affected by the violations alleged in the grievance.³ But even looking beyond the flawed basis for granting interlocutory review of the Arbitrator's procedural-arbitrability ruling, the majority's rationale for setting aside the award violates the basic principles governing the review of arbitral awards under the essence standard.

The majority's sole basis for reversing the Arbitrator's conclusion that the Union was entitled to file its grievance under Article 31 of the parties' collective-bargaining agreement is that the Arbitrator "disregard[ed]" the article's provision stating that it "cannot be used for [grievances involving] personal relief of individual employees."⁴ In the majority's view, this "plain language" precluded the Arbitrator from finding that the Union could potentially recover damages on behalf of individual employees as a remedy for the alleged violations.

However, the Arbitrator did not "disregard" this contractual language. To the contrary, she specifically addressed the question of whether this provision rendered the Union's grievance non-arbitrable under Article 31. On this point, the Arbitrator noted that Article 30 of the parties' agreement "provides that a grievance 'by a bargaining unit employee or group of employees is a request for personal relief in a matter of concern or

dissatisfaction to the employee or group of employees,'"⁵ while Article 31 "provides simply . . . 'that disputes about interpretation of this agreement may be grieved under this Article.'"⁶ And finding that this created "a latent ambiguity in the contract" as it pertained to the Union's grievance – which, she found, "concerns [the Agency's] consistent bargaining unit wide application of an essential condition of employment . . . to *positions* within the unit as opposed to *individuals*" – the Arbitrator resolved this ambiguity by concluding that the Union's allegations could "properly be asserted as a grievance under Article 31."⁷

Indeed, the Arbitrator found that, "[a]s a matter of efficacy," such disputes "cannot be submitted on an individual employee basis under Article 30."⁸ And she concluded that if the Agency was found liable for the Union's claims, the remedy would necessarily include relief for the individual employees affected by the violation because "[t]o conclude otherwise places the Union in a position of having demonstrated an injury without any remedy."⁹

The Authority was recently reminded by the U.S. Court of Appeals for the D.C. Circuit that its "sole inquiry" in resolving an essence exception to an arbitral award should be "whether the Arbitrator was 'even arguably construing or applying the [CBA].'"¹⁰ As I have consistently noted, this deferential approach is appropriate "because it is the *arbitrator's* construction of the agreement for which the parties have bargained."¹¹

Disregarding these principles, the majority's decision sets aside the award without addressing the Arbitrator's careful analysis of the parties' agreement, much less explaining how her interpretation of the "plain language" of Article 31 is implausible. Applying the proper standard of review, I would find that the Arbitrator's rationale for concluding that the Union's

¹ *U.S. Dep't of the Treasury, IRS*, 71 FLRA 192, 195 (2019) (*IRS*) (Dissenting Opinion of then-Member DuBester); *U.S. Small Bus. Admin.*, 70 FLRA 885, 888-89 (2018) (Dissenting Opinion of then-Member DuBester).

² *IRS*, 71 FLRA at 195 (citing *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012)). "Exceptions 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." *Id.* (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)).

³ Award at 21 (ruling that, because "the record remains undeveloped as to which specific liability and remedy period or periods" would apply to the grievance, "those questions will be open to further briefing by the parties, to be followed by an additional ruling by the Arbitrator").

⁴ Majority at 4 (quoting Award at 13).

⁵ Award at 14 (emphasis omitted).

⁶ *Id.*

⁷ *Id.* (further finding that the Union's grievance "is not a 'request for personal relief in a matter of concern or dissatisfaction to the employee' which is the primary bellwether of grievances asserted under Article 30," but instead concerns "a broad[-]based or bargaining[-]wide dispute that is proper under Article 31").

⁸ *Id.*

⁹ *Id.* at 15.

¹⁰ *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 881 (D.C. Cir. 2020) (quoting *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 38 (1987)); see also *id.* (further concluding that "[w]hether the [a]rbitrator correctly interpreted the [collective-bargaining agreement] was beyond the scope of the Authority's review").

¹¹ *U.S. DOD, Domestic Elementary & Secondary Schs.*, 71 FLRA 236, 238 (2019) (Dissenting Opinion of then-Member DuBester) (quoting *U.S. Small Bus. Admin.*, 70 FLRA 525, 532 (2018) (Dissenting Opinion of then-Member DuBester)).

grievance was arbitrable readily survives the Agency's essence challenge.

Accordingly, I dissent.