

72 FLRA No. 33

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY EMPLOYEES UNION
LOCAL 154
(Union)

0-AR-5601

ORDER DISMISSING EXCEPTIONS

April 9, 2021

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, the Agency filed interlocutory exceptions to Arbitrator Jeanne M. Vonhof's denial of its motion to exclude. For the reasons discussed below, we dismiss the Agency's interlocutory exceptions because they do not demonstrate extraordinary circumstances warranting interlocutory review.¹

II. Background and Order to Show Cause

The Union filed two grievances, one on behalf of a grievant who received a fourteen-day suspension, and a second concerning how the Agency conducted the investigation. Both grievances were submitted to the Arbitrator. Before a hearing was scheduled on either grievance, the Agency filed a motion to exclude the

Union's representative from both grievance proceedings before the Arbitrator. The Arbitrator concluded that she "[did] not have the authority to grant the Agency's [m]otion."² On February 27, 2020, the Agency filed exceptions to the Arbitrator's decision.

On March 5, 2020, the Authority's Office of Case Intake and Publication issued an Order to Show Cause (Order) directing the Agency "to show cause why the Authority should not dismiss its exceptions . . . as interlocutory."³ The Agency timely responded to the Order on March 19, 2020, asserting that the Arbitrator's denial of the Agency's motion to exclude was a "de facto[]" denial of the Agency's multiple requests that she address a clear procedural arbitrability bar prior to conducting a hearing on the merits,⁴ and that the Arbitrator's failure to remove the Union's representative from the arbitration proceedings would cause irreparable harm.

III. Analysis and Conclusion: We dismiss the Agency's interlocutory exceptions because they do not demonstrate extraordinary circumstances warranting review.

Section 2425.2(a) of the Authority's Regulations provides that "[e]ither party to arbitration . . . may file an exception to an arbitrator's award rendered pursuant to the arbitration."⁵ Further, 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.⁶ However, the Authority has determined that interlocutory exceptions present "extraordinary circumstances" that warrant review when their resolution will advance the ultimate disposition of the case by obviating the need for further arbitration.⁷

In its response to the Order, the Agency argues that extraordinary circumstances warrant review because the Arbitrator's failure to remove the Union's representative from the arbitration proceedings will cause irreparable harm.⁸ An allegation of irreparable harm, however, by itself, does not obviate the need for further arbitral proceedings.⁹ Furthermore, the Agency has failed

¹ See *U.S. DHS, U.S. CBP*, 71 FLRA 1244, 1245 (2020) (*CBP*) (then-Member DuBester concurring).

² Exceptions, Ex. B, Decision on Mot. to Exclude (Decision) at 12-13. The Arbitrator also noted that the Agency filed a separate grievance over the conduct of the Union's representative seeking the same relief it requested in the motion to exclude. *Id.* at 12.

³ Order to Show Cause (Order) at 1.

⁴ Agency's Resp. to Order to Show Cause (Resp.) at 1-2.

⁵ 5 C.F.R. § 2425.2(a).

⁶ *Id.* § 2429.11; *U.S. Dep't of the Army, Fort Stewart & Hunter Army Airfield, Fort Stewart, Ga.*, 72 FLRA 45, 46 (2021) (citing *NTEU*, 66 FLRA 696, 698 (2012)).

⁷ *CBP*, 71 FLRA at 1245 (citing *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (*IRS*) (then-Member DuBester dissenting)). The Agency concedes that its exceptions are interlocutory. Resp. at 2 ("Although the Authority generally does not hear interlocutory appeals, it will do so in certain 'extraordinary circumstances.'").

⁸ Exceptions Br. at 10; Resp. at 2.

⁹ *IRS*, 70 FLRA at 808 (finding 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 [Authority] review").

to demonstrate irreparable harm.¹⁰ Accordingly, we dismiss the Agency's exception.¹¹

The Agency also argues that "extraordinary circumstances" warrant review because the Arbitrator failed to address the Agency's claim that the parties' agreement required the Arbitrator to resolve a purported arbitrability issue before conducting a hearing.¹² However, the record shows that the Agency did not present this argument to the Arbitrator in its motion to exclude.¹³ As such, the Arbitrator did not address it in her decision.¹⁴ Without a decision on the procedural arbitrability issue, let alone the issues presented by the two grievances, there is still a need for further arbitral proceedings.¹⁵ Accordingly, we dismiss the exception.¹⁶

IV. Order

We dismiss, without prejudice, the Agency's exceptions.

Chairman DuBester, concurring:

I agree that the Agency's exceptions should be dismissed but, for reasons I have expressed before, I continue to disagree with the majority's decision to expand the grounds upon which the Authority will review interlocutory exceptions.¹

¹⁰ Exceptions Br. at 11 (arguing that the Union representative will "taint[] the proceeding, [and] the parties will be forced to hold a second hearing"); *id.* (arguing the Arbitrator's refusal to preclude the Union representative amounts to the denial of a fair hearing); *see also Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough" to demonstrate irreparable harm. (emphasis added) (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958))).

¹¹ The Authority has held that a union has the right to choose its own representatives, absent special circumstances. *See U.S. DHS, Border & Transp. Sec. Directorate, U.S. CBP, El Paso, Tex.*, 62 FLRA 241, 244 (2007) (Chairman Cabaniss dissenting on other grounds) (citing *GSA, Region 9, L.A., Cal.*, 56 FLRA 683, 685 (2000)); *see also Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal.*, 29 FLRA 594, 605-07 (1987). *But see U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 713-14 (1999) (finding that a union's right to choose its representative did not "trump the [agency's] legitimate security concerns").

¹² Exceptions Br. at 16-18; Resp. at 1-3.

¹³ Exceptions, Ex. A, Mot. to Exclude at 8 ("Therefore, the Agency requests that [the Union's representative] be excluded from acting as the [Union] representative in this matter.").

¹⁴ Decision at 1 ("The Agency has now filed a pre-hearing [m]otion to [e]xclude the Union's [a]ttorney . . . from representing the Union with regard to these grievances.").

¹⁵ *See id.* ("The Union has filed two grievances which have been assigned to this Arbitrator."); Order at 2 (stating that the Union invoked arbitration on two grievances).

¹⁶ *See CBP*, 71 FLRA at 1245 (dismissing exceptions because they did not obviate the need for further arbitral proceedings); *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 71 FLRA 713, 714 (2020) (then-Member DuBester concurring) (same).

¹ *U.S. Small Bus. Admin.*, 70 FLRA 885, 888-89 (2018) (Dissenting Opinion of then-Member DuBester); *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 VA, Veterans Benefits Admin.*, 72 FLRA 57, 62 (2021) (Dissenting Opinion of Chairman DuBester); *U.S. Dep't of the Army, Nat'l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 526 (2020) (Dissenting Opinion of then-Member DuBester); *U.S. Dep't of the Treasury, IRS*, 71 FLRA 192, 195 (2019) (Dissenting Opinion of then-Member DuBester).