

72 FLRA No. 67

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

and

NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 149
(Union)

0-AR-5673

June 14, 2021

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

Decision by Member Abbott for the Authority

I. Statement of the Case

Arbitrator Samuel A. Vitaro found three instances in which the Agency violated the parties' collective bargaining agreement (CBA) when it failed to follow the mandatory procedures for assigning overtime to Customs and Border Protection (CBP) Officers and Agricultural Specialists. The Arbitrator issued a remedy for three identifiable occasions where he concluded the Agency committed violations. However, he remanded the remaining two occasions to the parties to determine whether the Agency violated the CBA and to fashion an appropriate remedy. The Arbitrator retained jurisdiction to resolve any issues not agreed upon by the parties. The Agency excepted to the award under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute)¹ and § 2425.2 of the Authority's Regulations.²

For the reasons below, we find that the Arbitrator's award is not final and, thus, the Agency's exceptions are interlocutory. Furthermore, the Agency's exceptions do not present extraordinary circumstances warranting interlocutory review. Accordingly, we dismiss the Agency's exceptions.

II. Background and Arbitrator's Award

Article 35 of the parties' CBA sets forth a specific procedure for determining overtime assignments for CBP Officers and Agricultural Specialists.³ Based on Article 35's mandatory procedures, the Union identified at least five occasions upon which it alleged the Agency failed to properly follow the criteria for selecting and determining qualified employees for overtime assignments. As a result, the Union filed a grievance.⁴ The parties were unable to resolve the issue and the matter was submitted to arbitration. The relevant issue submitted to the Arbitrator was whether, "the Agency violated Article 35, Section 1.A, B, C, D or E when selecting officers for overtime in Passport Control Secondary or Cargo? If yes, what is the appropriate remedy?"⁵

The Union asserted that the primary justification for skipping otherwise qualified employees was their lack of computer access. It argued that access did not fall within the definition of "knowledge, skills, and abilities" necessary to qualify an employee for an overtime assignment and should not be a determining factor.⁶ In contrast, the Agency argued "that access [was] part of the 'knowledge' required for a position"⁷ and could not be immediately provided if an officer lost it.⁸

In the decision, the Arbitrator found that the Agency violated Article 35 of the CBA with respect to three of the Union's specific allegations of overtime assignment skips.⁹ With respect to the two remaining allegations, the Arbitrator did not make conclusive findings. For the first, he stated that "[t]here *may* be a violation here but that is unclear"¹⁰ because the position involved the operation of equipment that required training and certification. The Arbitrator requested that the parties "determine which, if any of the lower earnings CBP Officers were eligible and agree on who, if anyone, should receive that award (or put this matter back before me)."¹¹ For the second, the Arbitrator stated that "[t]here

³ Exceptions, Attach. 3, Joint Ex. 1 – Collective-Bargaining Agreement (CBA) at 168.

⁴ There were several issues before the Arbitrator, but the Agency only filed exceptions to the overtime selection portion of the award.

⁵ Award at 10.

⁶ The Union emphasized that "the loss of access . . . [was] not because of any lack of qualifications[,] but because an employee [had] not logged in for . . . days." *Id.* at 13.

⁷ *Id.*

⁸ The Agency also excepts based on non-fact and that the award fails to draw its essence from the parties' agreement. Exceptions Br. at 16, 18, 22.

⁹ The Arbitrator fashioned a backpay remedy with respect to these violations.

¹⁰ Award at 17.

¹¹ *Id.*

¹ 5 U.S.C. § 7122(a).

² 5 C.F.R. § 2425.2.

is likely a violation, here. But, unlike the above violations, the Agency has not had an opportunity to respond to this particular instance.”¹² Consequently, the Arbitrator instructed the parties to “seek to reach an agreement as to whether there was a violation and which employees (there are two eligible positions) are entitled to a remedy, and, if no agreement can be reached, to involve this [A]rbitrator.”¹³

The Agency filed exceptions to the award on November 16, 2020, and the Union filed an opposition to the exceptions on December 9, 2020.

III. Analysis and Conclusion: The Agency’s exceptions are interlocutory.

Generally, the Authority will not consider interlocutory appeals¹⁴ and will resolve exceptions to awards that constitute a complete resolution of all of the issues submitted to arbitration.¹⁵ However, an exception that advances the disposition of a case and obviates the need for further arbitration constitutes extraordinary circumstances warranting immediate review.¹⁶

In this case, the Arbitrator did not completely resolve the issue before him. He did not determine whether the Agency violated the CBA in two of the alleged overtime skips.¹⁷ With respect to the unresolved allegations, the Arbitrator did not make a specific finding.¹⁸ As a result, he instructed the parties to resolve the remaining issues, but retained jurisdiction if they could not agree.¹⁹

Lastly, extraordinary circumstances do not exist that warrant immediate review of the Agency’s exceptions. The Agency’s exceptions would not obviate

the need for further arbitration. Two of the three issues submitted to arbitration have not yet been resolved and further arbitration is necessary to gather and hear necessary information not previously presented in order for the Arbitrator to resolve the remaining issues.

Because the parties failed to sufficiently prove their cases regarding whether the Agency failed to assign overtime assignments in accordance with Article 35 of the parties’ CBA, the Arbitrator was unable to resolve the remaining issues submitted to arbitration and the Agency’s exceptions do not present any extraordinary circumstances warranting immediate review. Accordingly, we dismiss the Agency’s exceptions as interlocutory.

IV. Decision

We dismiss the Agency’s exceptions.

¹² *Id.* at 18.

¹³ *Id.*

¹⁴ 5 C.F.R. § 2429.11.

¹⁵ An award does not constitute a complete resolution of all the issues when the arbitrator postpones the determination of an issue 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. *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 806, 807 (2018) (then-Member DuBester dissenting) (citing *U.S. Dep’t of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 850 (2012)).

¹⁶ *Id.*

¹⁷ The Arbitrator stated that “[t]here *may* be a violation here but it is unclear” and instructed the parties to “determine which, if any of the lower earnings CBP Officers were eligible and agree on who, if anyone, should receive that award (or put this matter back before me).” Award at 17.

¹⁸ *Id.* at 18 (“There is likely a violation, here. But, unlike the above violations, the Agency has not had an opportunity to respond to this particular instance.”).

¹⁹ *Id.* (“The parties should seek to reach an agreement as to whether there was a violation and which employees (there are two eligible positions) are entitled to a remedy, and, if no agreement can be reached, to involve this [A]rbitrator.”).

Chairman DuBester, concurring:

I agree with the Decision to dismiss the Agency's exceptions.

Member Kiko, concurring:

I agree that the exceptions are interlocutory. Consistent with Authority practice, before dismissal, I would have issued an order directing the Agency to show cause why its exceptions should not be dismissed as interlocutory.¹ However, because the Authority did not give the Agency the opportunity to respond to a show-cause order,² my review is constrained to the record before me. Accordingly, I agree that the exceptions should be dismissed.

¹ *E.g.*, *U.S. Dep't of Educ., Fed. Student Aid*, 72 FLRA 316, 316 (2021) (Chairman DuBester concurring) (Authority's Office of Case Intake and Publication issued an order directing the excepting party to show cause why the Authority should not dismiss its exceptions as interlocutory); *U.S. Dep't of VA*, 72 FLRA 194, 195 (2021) (Chairman DuBester dissenting) (same); *U.S. DHS, CBP*, 72 FLRA 166, 166 (2021) (Chairman DuBester concurring) (same); *U.S. Dep't of VA, Veterans Benefits Admin.*, 72 FLRA 57, 58 (2021) (Member Abbott concurring; Chairman DuBester dissenting) (same); *U.S. DHS, U.S. CBP*, 71 FLRA 1244, 1245 (2020) (then-Member DuBester concurring) (same).

² The Authority sometimes finds it unnecessary to issue a show-cause order where the excepting party has already addressed the interlocutory nature of its exceptions. *E.g.*, *U.S. Dep't of Educ.*, 72 FLRA 203, 204 (2021) (Chairman DuBester concurring); *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 71 FLRA 713, 714 (2020) (then-Member DuBester concurring). However, here, the Agency did not address the interlocutory nature of its exceptions.