

70 FLRA No. 173

UNITED STATES
SMALL BUSINESS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 228
(Union)

0-AR-5290

DECISION

September 28, 2018

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

Decision by Member Abbott for the Authority

I. Statement of the Case

Over the span of only a few months in 2015, the Union filed two grievances. The first grievance alleged that the Agency violated the Fair Labor Standards Act (FLSA) and the parties’ agreement when it designated bargaining-unit employees as FLSA-exempt, and so failed to properly pay overtime to the grievants. The second grievance alleged that the Agency failed to fully participate in the first grievance. The parties hired Arbitrator Andrée Y. McKissick to resolve the second grievance. On May 14, 2016, Arbitrator McKissick found that the second grievance was arbitrable and she unilaterally assumed jurisdiction over the first grievance. She then issued a number of subsequent orders and awards.

The Agency has filed two sets of exceptions: one to the Arbitrator’s May 15, 2017 order, filed on June 13, 2017, and the second to a June 28, 2017 interim award, filed on August 2, 2017. We have consolidated the cases for decision.

The main question before us is whether the Arbitrator exceeded her authority in the second grievance in May 2016, when she departed from the parties’ stipulated issue on arbitrability, by asserting jurisdiction

over the merits of the first grievance. Because extraordinary circumstances warrant that we consider this interlocutory appeal, we resolve the Agency’s exceptions and find that the Arbitrator exceeded her authority when she expanded her jurisdiction.

II. Background and Arbitrator’s Awards

As relevant to this decision, and as mentioned above, the Union filed, in quick succession, two grievances.¹ The first grievance, filed May 27, 2015, alleged that the Agency improperly designated any and all of the Agency’s bargaining-unit employees as FLSA-exempt and so, failed to properly pay overtime (Grievance 1). Immediately after the Agency denied Grievance 1, on August 14, 2015, the Union filed another grievance alleging that the Agency failed to participate in Grievance 1 and advance it to arbitration (Grievance 2).

In November 2015, the parties agreed to select Ralph Colflesh as the arbitrator for Grievance 1. However, in December 2015, the Federal Mediation and Conciliation Service informed the parties that Mr. Colflesh was no longer available. In January 2016, the parties selected Andrée Y. McKissick to arbitrate Grievance 2. The Union submitted a request for a new panel in Grievance 1. But in February 2016, the Union informed the Agency that it would be inappropriate to select a new arbitrator for Grievance 1 before Arbitrator McKissick resolved Grievance 2.

In May 2016, the parties presented the following stipulated issue to Arbitrator McKissick: “[w]hether or not the [Agency] and the [Union] shall proceed to arbitrate [Grievance 2], filed on August 15, 2015 by the Union?”²

Before the Arbitrator, the Agency argued that it did not delay responding to Grievance 1, that it had satisfied its obligations under the parties’ agreement, and that the Union had erred by failing to engage in informal discussions before filing Grievance 1. The Agency

¹ Member Abbott notes that the filing of the second grievance is the type of process that “does not ‘facilitate[]’ or ‘encourage[]’ the amicable settlement of disputes’ between employees, unions, and federal agencies. When the Federal Service Labor-Management Relations Statute (Statute) was enacted, Congress led with the mandate that the rights, privileges, and obligations contained in the Statute are to be interpreted in a manner consistent with the requirement of an effective and efficient government.” *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Englewood, Littleton, Colo.*, 70 FLRA 372, 376 (2018) (Concurring Opinion of Member Abbott) (quoting 5 U.S.C. § 7101). Member Abbott observes that filing a separate grievance immediately after an earlier grievance only to challenge the processing of the first is the antithesis of the amicable settlement of disputes.

² May 2016 Award at 3.

argued that relief should have been sought in the arbitration of Grievance 1. Because Grievance 2 was inextricably linked to Grievance 1, Grievance 2 was not arbitrable and was moot. The Agency argued it was not obligated to arbitrate Grievance 2 because Grievance 1 was “on track to proceed to arbitration before a different arbitrator on a new panel and should continue to resolution.”³

The Union argued that Grievance 2 provided the Arbitrator with jurisdiction over Grievance 1. The Union contended that had the Agency fully participated in advancing Grievance 1 before an arbitrator, Grievance 2 would have been unnecessary. The underlying motivation for filing Grievance 2 was to advance the resolution of Grievance 1. The Union argued that the Agency was on notice that the relief sought in Grievance 2 would include the resolution of Grievance 1, and asserted that both grievances should be resolved by the same arbitrator. Because the parties had not selected a new arbitrator for Grievance 1, the Union argued that Arbitrator McKissick would not encroach on another arbitrator’s jurisdiction.

In her May 2016 award, the Arbitrator found that Grievance 2 should proceed to the merits. She cited to Article 39, § 1 of the parties’ agreement, and found that “to proceed to the merits of Grievance [2] should also require that the Agency participate in the advancement of Grievance [1] on its merits.”⁴ Her “continuous oversight of the process until all of Grievance [1’s] issues are resolved[] is required for the continuity and consistency of the grievance process.”⁵

She found that Grievance 2 was not moot because the relief sought in Grievance 2 included the “Agency’s participation in the advancement of [Grievance 1].”⁶ She found that the Agency had notice from the Union that the Union would file Grievance 2 if Grievance 1 was not resolved. Finally, she invoked U.S. Supreme Court precedent holding that there exists “a strong presumption in favor of arbitrability”⁷ and Article 40, § 10 of the parties’ agreement which provides an arbitrator with the authority to rule on a threshold issue of arbitrability. Therefore, because no arbitrator had been selected for Grievance 1, she would not be encroaching on another arbitrator’s jurisdiction. She also cited the common practice of arbitrators retaining jurisdiction over

the implementation of remedies, and she later issued a number of substantive “orders” and “awards.”

The Union filed oppositions to the Agency’s first set of exceptions on July 13, 2017, and to the second set of exceptions on September 6, 2017.

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

The Union argues that the Agency’s exceptions are interlocutory because “further rulings by the Arbitrator will be required to ultimately resolve all issues submitted to arbitration.”⁸ Ordinarily, under § 2429.11 of the Authority’s Regulations, the Authority does not consider interlocutory appeals, unless the award constitutes a complete resolution of all of the issues submitted to arbitration.⁹

However, in *U.S. Department of the Treasury, IRS*,¹⁰ we recently determined that any exception which advances the ultimate disposition of a case and obviates the need for further arbitral proceedings, constitutes an extraordinary circumstance warranting review.¹¹ Here, how we resolve the question of whether Arbitrator McKissick exceeded her authority when she moved beyond the scope of the stipulated issue and assumed jurisdiction over Grievance 1 will conclusively determine whether any further proceedings are required. Therefore, we will consider the Agency’s exceptions on this point.

IV. Analysis and Conclusion: The Arbitrator exceeded her authority.

The Agency argues that the Arbitrator exceeded her authority when she assumed jurisdiction over Grievance 1.¹² Specifically, it contends that it did not agree that the Arbitrator could address Grievance 1 and argued that Arbitrator McKissick had no jurisdiction over Grievance 1.¹³

³ *Id.* at 7.

⁴ *Id.* at 9.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 10 (citing *Nolde Bros. v. Local 358, Bakery & Confectionary Workers Union, AFL-CIO*, 430 U.S. 243, 254 (1977); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)).

⁸ July 2017 Opp’n at 9.

⁹ 5 C.F.R. § 2429.11; *U.S. DHS, U.S. CBP*, 65 FLRA 603, 605 (2011).

¹⁰ 70 FLRA 806 (2018).

¹¹ *Id.* at 807-08.

¹² Aug. 2017 Exceptions Br. at 5, 17-19; *see also* June 2017 Exceptions Br. at 16-17.

¹³ Aug. 2017 Exceptions Br. at 17-18. The Agency also claims that the Arbitrator has “enlarge[d] her own jurisdiction” in other cases. *Id.* at 18 (citing *U.S. DOD Educ. Activity, U.S. DOD Dependents Schs.*, 70 FLRA 84, 89 n.2 (2016) (*DODEA*); *U.S. Dep’t of HUD*, 68 FLRA 631, 636 (2015) (*HUD*) (Dissenting Opinion of Member Pizzella)).

It is well established that arbitrators exceed their authority when they resolve an issue not submitted to arbitration or they disregard specific limitations on their authority.¹⁴ Arbitrators must confine their awards to the issues that the parties have submitted.¹⁵ They may not decide matters that are not before them.¹⁶

Arbitrator McKissick expanded her jurisdiction when she went beyond the narrow issue presented to her and assumed jurisdiction over Grievance 1. Here, the parties stipulated to a narrow and specific issue: “Whether or not the [Agency] and the [Union] shall proceed to arbitrate [Grievance 2], filed on August 15, 2015 by the Union?”¹⁷ Simply put, Arbitrator McKissick was not hired to resolve Grievance 1; she was selected to resolve the narrow issue stipulated in Grievance 2.¹⁸ Therefore, she exceeded her authority.¹⁹ Accordingly, we grant the Agency’s exceeds-authority exception.²⁰

The Arbitrator exceeded her authority with the May 2016 award, so we set aside that award and all of her later pronouncements as to any aspect of Grievance 1. The parties are not prejudiced from pursuing Grievance 1.

V. Decision

We grant the Agency’s exceeds-authority exception.

¹⁴ *E.g.*, *U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996) (*DOD*).

¹⁵ *U.S. Dep’t of Transp., FAA*, 64 FLRA 612, 613-14 (2010) (*FAA*).

¹⁶ *Id.* at 614; *see also DODEA*, 70 FLRA at 88-91 (Dissenting Opinion of Member Pizzella); *HUD*, 68 FLRA at 639; *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 68 FLRA 537, 544-45 (2015) (Dissenting Opinion of Member Pizzella).

¹⁷ May 2016 Award at 3.

¹⁸ Member Abbott observes again that his dissenting colleague seems to raise arbitral awards to an entirely unprecedented decisional pedestal. It would appear Authority review truly is inconsequential. Even decisions of the United States Court of Appeals for the District of Columbia Circuit and decisions of any state’s supreme court are subject to judicial review. *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 749 n.15 (2018) (Member DuBester, dissenting).

¹⁹ *E.g.*, *U.S. Dep’t of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 65 FLRA 969, 973-74 (2011); *FAA*, 64 FLRA at 613-14; *DOD*, 51 FLRA at 1378.

²⁰ Because of this disposition, it is unnecessary to address the Agency’s other exceptions: that the Arbitrator’s May 2017 order and June 2017 interim award are contrary to law (June 2017 Exceptions Br. at 6-9; Aug. 2017 Exceptions Br. at 11-15); that the May 2017 order is based on a nonfact (June 2017 Exceptions Br. at 12-14); that the May 2017 order and June 2017 interim award fail to draw their essence from the parties’ agreement (June 2017 Exceptions Br. at 14-15; Aug. 2017 Exceptions Br. at 25-26); that the June 2017 interim award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible (Aug. 2017 Exceptions Br. at 22-24); and that the Arbitrator was biased (Aug. 2017 Exceptions Br. at 19-22).

Member DuBester, dissenting:

For reasons explained in my dissent in *U.S. Department of the Treasury, Internal Revenue Service (IRS)*,¹ I do not agree with the majority that the Agency's exception warrants granting interlocutory review. The majority makes two mistakes. The majority applies *IRS*'s "weakened"² interlocutory-review standard to erroneously allow the Agency to avoid a merits determination on a grievance that the Agency failed to properly process under the parties' agreement. And "continuing its non-deferential treatment of arbitrators and their awards,"³ the majority's exceeds-authority analysis ignores basic principles of deference to an arbitrator's determination of the issue submitted to arbitration.

The only basis for granting interlocutory review should be where an interlocutory appeal raises a plausible jurisdictional defect.⁴ Further, "[e]xceptions 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."⁵ Consequently, "the Authority has repeatedly declined to extend interlocutory review to alleged jurisdictional defects that do not preclude arbitration of the grievance as a matter of law."⁶ Following *IRS*, the majority's decision violates these well-founded principles.

In *IRS*, the majority erred by "expand[ing] the grounds for granting interlocutory review of arbitrators' interlocutory determinations" in a way that "clashes with the tight constraints that adjudicatory bodies, from the Supreme Court down, place on interlocutory appeals."⁷ As I explained in *IRS*, "there are many reasons for placing tight restrictions on interlocutory appeals."⁸ Interlocutory appeals "cause considerable disruption to the conduct of the trial proceedings, and flood appellate

courts with additional work."⁹ And strict restrictions on interlocutory appeals "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."¹⁰ Because the majority's weakened standard does not adhere to Authority and judicial precedent and policies, I would deny the Agency's request for interlocutory review.

The majority's decision to grant the Agency exceeds-authority exception is also flawed. In determining what issues were submitted to arbitration, the Authority gives arbitrators the same substantial deference that the Authority grants an arbitrator's interpretation of a collective-bargaining agreement.¹¹ That deferential standard of review is the same standard that federal courts use in reviewing arbitration awards in the private sector.¹² Deferential review of arbitrators' interpretations of the issues submitted to arbitration does not "raise arbitral awards to an unprecedented decisional pedestal."¹³ Instead, that deferential review ensures that arbitrator's awards are accorded a status consistent with the letter and spirit of the Statute and longstanding Authority precedent. The majority's exceeds-authority analysis ignores the principles of deference to an arbitrator's determination of the issues before her.

The Arbitrator's interpretation of the stipulated issue is not deficient. The majority faults the Arbitrator for interpreting the issue before her in the second grievance to allow her to assert jurisdiction over the first grievance.¹⁴ But, the Arbitrator properly interpreted the stipulated issue in the context of the entire grievance proceeding. For example, the Arbitrator found "that the

¹ 70 FLRA 806, 810 (2018) (Dissenting Opinion of Member DuBester).

² *Id.*

³ *Id.*; see also *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 750 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of Transp., FAA*, 70 FLRA 687, 690 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 70 FLRA 680, 683-84 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of VA, Med. Ctr., Asheville, N.C.*, 70 FLRA 547, 549 (2018) (Dissenting Opinion of Member DuBester).

⁴ *E.g., U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012).

⁵ *U.S. Dep't of the Army, White Sands Missile Range, N.M.*, 67 FLRA 1, 4 (2012).

⁶ *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 68 FLRA 640, 641 (2015).

⁷ *IRS*, 70 FLRA at 810.

⁸ *Id.*

⁹ *Id.* (citing 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)).

¹⁰ *Id.*

¹¹ *E.g., U.S. Dep't of VA, VA Reg'l Office, St. Petersburg, Fla.*, 70 FLRA 799, 802 (2018) (Dissenting Opinion of Member DuBester); *AFGE, Local 3911*, 69 FLRA 233, 235-36 (2016) (*Local 3911*) (Under the deferential "essence" standard that the Authority applies to an arbitrator's interpretation of a collective-bargaining agreement, the Authority will uphold the arbitrator's interpretation unless the interpretation: (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 collective-bargaining 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 Interior, Bureau of Reclamation, Great Plains Region, Colo./Wyo. Area Office*, 68 FLRA 992, 994 (2015) (same).

¹² *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

¹³ Majority at 5 n.18.

¹⁴ *Id.* at 2, 5.

specific relief requested in [the second grievance] includes the Agency's advancement of [the first grievance] to its full resolution."¹⁵ She further found that this "provided sufficient information for the Agency 'to determine the nature of the dissatisfaction and the requested remedy,' as required" by the provision of the parties' agreement addressing the information a grievance should provide the other party.¹⁶ The Arbitrator also relied on the requirement in the parties' agreement that the grievance process "provide an effective and efficient process that is fair, equitable, and consistent[,] to timely resolve disputes in the workplace."¹⁷ Considering the Arbitrator's findings, it is clear that the Arbitrator's interpretation of the stipulated issue is not irrational, unfounded, implausible, or in manifest disregard of the issue the parties framed.¹⁸

Therefore, were the Authority to grant the Agency's request for interlocutory review, I would defer to the Arbitrator's determination of the issues before her, deny the Agency's exceeds-authority exception, and reach the Agency's other exceptions.

For these various reasons, I dissent from the majority's disposition of this case.

¹⁵ Exceptions, Attach. 5, Award (May 14, 2016) at 9.

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 5 (referencing Article 35, § 1 of the parties' agreement).

¹⁸ *Local 3911*, 69 FLRA at 236.