72 FLRA No. 61

UNITED STATES
DEPARTMENT OF EDUCATION
FEDERAL STUDENT AID
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 252
(Union)

0-AR-5465

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ORDER DISMISSING EXCEPTIONS

May 28, 2021

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

I. Statement of the Case

The parties submitted a grievance to arbitration but disagreed about whether a collective-bargaining agreement unilaterally imposed by the Agency (the 2018 agreement) governed the proceedings.[1] In an email, Arbitrator Barry E. Simon notified the parties that he was placing the arbitration in abeyance pending resolution of an unfair-labor-practice (ULP) charge related to the 2018 agreement. The Agency excepted to the Arbitrator's email on several grounds. For the reasons that follow, we find that the exceptions are interlocutory and that the Agency does not establish extraordinary circumstances warranting our review.

II. Background

In April 2018, the Union filed a grievance alleging that the Agency failed to timely pay the Union president and took retaliatory actions against her. The grievance proceeded to arbitration, where the Agency argued in a motion to dismiss that the Union's grievance was not arbitrable. The Arbitrator denied the motion, but directed the parties to address arbitrability at the scheduled hearing.

Leading up to the hearing, the parties disagreed about whether the 2018 agreement – or an earlier agreement – governed the grievance and arbitration proceedings. In a July 2018 email, the Arbitrator stated that the validity of the 2018 agreement was a threshold issue that needed resolution but that he was not empowered to consider it. Accordingly, he postponed the hearing for five months to allow the Federal Labor Relations Authority (FLRA) to resolve a ULP charge concerning the validity of the 2018 agreement.

Several months later, the Union requested that the Arbitrator place the arbitration in abeyance pending resolution of the ULP charge.[2] The Agency objected, arguing that the Arbitrator should apply the terms of the 2018 agreement to resolve the grievance.

In December 2018, after considering the arguments on this issue, the Arbitrator emailed the parties. He stated that, because resolution of the grievance depended on an issue that was not before him and would "not be resolved in the foreseeable future," he was placing the arbitration in abeyance until the validity of the 2018 agreement was resolved in the ULP process.[3]

On January 14, 2019, the Agency filed exceptions to this email and, on January 28, 2019, the Union filed its opposition.

III. Analysis and Conclusions: The exceptions are interlocutory, and the Agency has not shown extraordinary circumstances warranting review.

On May 1, 2019, the Authority's Office of Case Intake and Publication (CIP) issued an order to the Agency to show cause why the Authority should not dismiss its exceptions as interlocutory.[4] 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.[5] 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

[1] Certain aspects of the dispute concerning the imposition of the 2018 agreement are more fully explained in *U.S. Dep't of Educ.*, 71 FLRA 516, 516-17 (2020) (*Educ.*) (then-Member DuBester concurring).

[2] The FLRA was without a General Counsel, the official authorized to prosecute ULPs, from November 2017 to March 2021.

[3] Email at 1.

[4] Order to Show Cause (Order) at 1.

[5] 5 C.F.R. § 2429.11; *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 71 FLRA 713, 713 (2020) (*Norfolk*) (then-Member DuBester concurring).

arbitration.[6] For example, exceptions raising plausible jurisdictional defects[7] warrant interlocutory review only when their resolution "would end the litigation."[8]

The Agency acknowledges that its exceptions are interlocutory but argues that they present "a plausible jurisdictional defect."[9] According to the Agency, the validity of the 2018 agreement was not an issue before the Arbitrator. Therefore, the Agency argues, he had no authority to place the arbitration in abeyance pending the FLRA's resolution of that issue in the ULP charge.[10] This, paired with the Agency's contention that the Arbitrator should have instead proceeded under the 2018 agreement, forms the basis for all of the Agency's exceptions.[11]

The Agency concedes that resolution of its exceptions concerning the issue of the 2018 agreement will not end the arbitration proceedings, but it argues that resolving them "will put the [grievance] proceeding forward and on the proper track."[12] In other words, even if we granted the Agency's exceptions, and found that the Arbitrator erred by placing the grievance in abeyance,[13] this grievance would need to proceed to arbitration in order to resolve arbitrability questions and, possibly, the grievance's merits.[14] Thus, resolution of the exceptions could not advance the ultimate disposition of the case by ending litigation over the grievance, which is a requirement for interlocutory review under Authority precedent.[15]

As the Agency has not established extraordinary circumstances warranting our review, we dismiss the exceptions.[16]

IV. Decision

We dismiss the exceptions, without prejudice.

[6] *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (*IRS*) (then-Member DuBester dissenting); *see also U.S. Dep't of the Army, Nat'l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 523 (2020) (then-Member DuBester dissenting) (finding extraordinary circumstances when "exceptions could conclusively determine whether any further arbitral proceedings are required").

[7] *E.g.*, *U.S. Dep't of the Treasury, IRS, L.A. Dist.*, 34 FLRA 1161, 1163-64 (1990) (allowing interlocutory review where "the arbitrator lack[ed] jurisdiction because the matter [wa]s not grievable under the Statute").

[8] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 66 FLRA 414, 415 (2011) (*Terminal Island*) (interlocutory review "advance[s] the ultimate disposition of the case" when "resolving the exceptions would end the litigation"). As we said in *IRS*, "[o]ur decision does not 'expand[] the grounds for granting interlocutory review.'" 70 FLRA at 808 n.23. We remind the concurrence, like we did in *IRS*, that the Authority should interpret our regulations "in a manner consistent with the requirement of an effective and efficient Government." *Id.* (quoting 5 U.S.C. § 7101(b)). Considering interlocutory exceptions that obviate the need for further arbitration proceedings does just that. *Id.*

[9] Agency's Resp. to Order (Resp.) at 3-4.

[10] *Id.* at 4.

[11] Exceptions at 5 (contrary to law), 10 (public policy), 13 (nonfact), 16 (essence), 27 (exceeded authority).

[12] Resp. at 4.

[13] In related cases between these same parties, but under circumstances different from those presented here, the Authority specifically authorized arbitrators to resolve the issue of whether the 2018 agreement, or its predecessor, governs the grievances. *See U.S. Dep't of Educ.*, 72 FLRA 203, 206 (2021) (Chairman DuBester concurring) (stating that the parties could request that the arbitrators "determine whether the 2013 or 2018 agreement govern the respective disputes"); *Educ.*, 71 FLRA at 519 (stating that, on remand, the arbitrator could determine "whether the 2013 or 2018 agreement is in effect"). Nothing would prevent the Arbitrator here from doing the same.

[14] *See Norfolk*, 71 FLRA at 714 (dismissing interlocutory exceptions that would not resolve entire case); *U.S. Dep't of the Interior, Bureau of Reclamation*, 59 FLRA 686, 687-88 (2004) (denying argument that interlocutory exceptions "would materially advance the ultimate resolution of th[e] litigation" where they would not dispose of the entire grievance).

[15] *See Terminal Island*, 66 FLRA at 415 (declining interlocutory review where granting an exception that challenged an arbitrator's "jurisdiction over" certain allegations would not "end the litigation").

[16] The CIP Order also requested that the Agency establish that the Arbitrator's December 2018 email is an "award" subject to review under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute). Order at 1 (citing 5 U.S.C. § 7122(a)). In response, the Agency argues that the email "has all of the characteristics of an award" because the Arbitrator specified an issue, considered the parties' positions, and gave a rationalized decision. Resp. at 3. Conversely, the Union asserts that the email is merely a "scheduling order." Union Reply to Agency Resp. at 2; *see also* Opp'n at 11 (arguing that the email "ruled only on a prehearing scheduling matter"). However, we need not reach the question of whether this email is an "award" under the Statute; even treating the email as an award, the exceptions are appropriately dismissed as interlocutory. Nevertheless, we take this opportunity to remind the federal labor-management community that it is not the Authority's role "to referee email communications between parties and an arbitrator." *U.S. Dep't of VA, Gulf Coast Veterans Healthcare Sys.*, 71 FLRA 752, 753 (2020) (then-Member DuBester concurring) (citing *AFGE, Loc. 3749*, 69 FLRA 519, 524 (2016) (Dissenting Opinion of Member Pizzella)).

Chairman DuBester, concurring:

For reasons expressed in my dissenting opinion in *U.S. Department of the Treasury, IRS*,[1] I continue to disagree with the majority's decision to expand the grounds upon which the Authority will review interlocutory exceptions. In my view, 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]

Here, the exceptions do not raise a plausible jurisdictional defect because they do not "present a credible claim that the arbitrator lacked jurisdiction over the subject matter as a matter of law."[3] And on this basis, I agree with the decision to the extent it finds that the Agency's interlocutory exceptions should be dismissed, without prejudice.

[1] 70 FLRA 806, 810-11 (2018) (Dissenting Opinion of then-Member DuBester).
[2] *U.S. Dep't of Treasury, IRS*, 71 FLRA 192, 195 (2019) (*IRS*) (Dissenting Opinion of then-Member DuBester) (citing *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012)); *see also U.S. Dep't of VA, Veterans Benefit Admin.*, 72 FLRA 57, 62 (2021) (Dissenting Opinion of Chairman DuBester) (citations omitted).
[3] *IRS*, 71 FLRA at 195 (quoting *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 1, 3 (2012)).