

72 FLRA No. 124

UNITED STATES
DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 214
(Union)

0-AR-5694

DECISION

January 24, 2022

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

Decision by Member Abbott for the Authority

I Statement of the Case

In this case, we find that the Arbitrator properly found the Union's grievance procedurally arbitrable, in part.

The parties' agreement requires the Union to file a grievance within thirty days of becoming aware of a claimed violation. The Agency alleged that the Union became aware of the alleged violations eighty-eight days prior to the filing of its grievance and was thus untimely. Arbitrator Michael S. Lazan initially determined that the parties' agreement barred any claims that occurred more than thirty days prior to the filing of the grievance. However, the Arbitrator also found that the Union's remaining claims were timely.

The Agency argues that the award is based on a nonfact. We deny the Agency's nonfact exception because it fails to demonstrate that any of the Arbitrator's findings are clearly erroneous. The Agency's remaining exceptions are either denied or dismissed.

II Background and Arbitrator's Award

On March 12, 2020,¹ the Union sent the Agency a variety of proposals relating to in-person employment during the COVID-19 pandemic—including personal protective equipment, hand sanitizer, cleaning products, and hazard pay. This dispute arose after the parties could not agree on whether the Agency owed any bargaining-unit employees (BUEs) hazard pay for working in-person during the pandemic. Consequently, the Union filed a grievance on June 9, claiming that the Agency was failing to guarantee the safety of BUEs and pay hazard pay for work performed during the pandemic. The Agency denied the grievance and the parties proceeded to arbitration. Pursuant to the parties' agreement, the parties bifurcated the issue of arbitrability and submitted briefs to the Arbitrator on that issue.

The Agency argued that the grievance was not arbitrable under Article 6, Section 6.10 of the parties' agreement because it requires the Union to file a grievance within thirty days of becoming aware of a claimed violation.² Specifically, because the Union initially sent proposals to the Agency regarding hazard pay on March 12, the Agency claimed that the Union became aware of the alleged violations at least eighty-eight days prior to the filing of its grievance on June 9. Therefore, the Agency argued that the Union's grievance was untimely by fifty-eight days. The Union asserted that the grievance pertained to an "ongoing matter that the parties have not been able to resolve through partnership or bargaining and . . . that we are in fact timely even if we were to file the grievance today."³

The Arbitrator determined that the grievance was procedurally arbitrable under the parties' agreement, but only in part. Initially, the Arbitrator held that the Union became aware of the alleged violations by March 12. Therefore, the Arbitrator found that the grievance was untimely as to any claims that occurred more than thirty days prior to the filing of the June 9 grievance because of the thirty-day requirement in the parties' agreement. However, the Arbitrator noted that the Union claimed that the Agency's failure to pay hazard pay was a continuing violation. The Arbitrator also found that the Agency "did not contend, in any correspondence, that the 'continuing violation' doctrine is inapplicable to these facts."⁴ The Arbitrator concluded that the Agency could be committing a continuing violation by failing to pay the BUEs hazard pay through the date of the award. Accordingly, the Arbitrator held

¹ All dates hereinafter mentioned are in 2020 unless otherwise indicated.

² Exceptions, Attach. 2, Collective-Bargaining Agreement at 23.

³ Exceptions, Attach. 1, Union's Pre-Hr'g Br. (Pre-Hr'g Br.) at 2.

⁴ Award at 10.

that any claims that occurred on or after May 10 were procedurally arbitrable and ordered the parties to select a separate arbitrator for the merits of the grievance.

The Agency filed exceptions to the award on December 10, 2020 and the Union did not file an opposition.

III. Preliminary Matters

- A. The Agency's exceptions are interlocutory, but we find extraordinary circumstances warranting review.

Typically, the Authority does not consider interlocutory appeals.⁵ However, the Authority has held that an exception which would advance the ultimate disposition of a case and obviate the need for further arbitral proceedings presents an "extraordinary circumstance" warranting review.⁶ Here, the Agency argues that the grievance is not procedurally arbitrable under the parties' agreement because it was untimely.⁷ Therefore, because the resolution of the Agency's exceptions could obviate the need for further arbitration in the instant case, we grant interlocutory review and turn to the substance of the Agency's exceptions.⁸

- B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.⁹ In the award, the Arbitrator noted that "[t]he Agency did not address the 'continuing violation' doctrine in its brief and did not contend, in any correspondence, that the 'continuing violation' doctrine is inapplicable to these facts."¹⁰ While the Agency does not refute this finding, it claims that "[t]he first time the 'continuing violation doctrine' was raised was in the arbitrator's award, which

the Agency had no opportunity to address until it filed its exceptions."¹¹

We disagree. The record evidence demonstrates that the Union alleged that the failure to pay hazard pay to BUEs was a continuing violation that forced BUEs "to continue to work in duty status under hazardous conditions."¹² Furthermore, in its invocation of arbitration and in its brief to the Arbitrator, the Union alleged that the violation was an "ongoing matter" that had not been resolved by the parties.¹³

In its exceptions, the Agency argues that the award fails to draw its essence from the parties' agreement because the grievance is untimely and the "the parties included no language providing an exception to their requirement for a written mutual agreement to extend for any special categories of incidents (such as an alleged continuing violation)."¹⁴ The Agency also argues that the Arbitrator's finding of a continuing violation is contrary to law.¹⁵ Additionally, the Agency admits that it did not provide any of these arguments to the Arbitrator.¹⁶ Because the Agency was on notice that the grievance alleged a continuing violation and it never addressed this issue at arbitration, we dismiss the Agency's contrary-to-law and essence exceptions.¹⁷

IV. Analysis and Conclusion: The award is not based on a nonfact.

When the Arbitrator found that the grievance alleged a continuing violation, the Arbitrator noted that the grievance's "substantive issues" related to a repeated allegation that the Agency "did not do enough to safeguard its employees from the virus and that BUEs are

¹¹ Exceptions Br. at 7 n.42.

¹² Award at 3.

¹³ Pre-Hr'g Br. at 2 (alleging the grievance was timely because "this is an ongoing matter" that could be timely grieved "even if we were to file the grievance today"); *see* Exceptions, Attach. 19, Union's Invocation of Arbitration at 1 (alleging the Agency was violating the contract by "forcing [BUEs] . . . to continue to report to duty during COVID-19" (emphasis added)).

¹⁴ Exceptions Br. at 6.

¹⁵ *Id.* at 7-8.

¹⁶ *Id.* at 7 n.42.

¹⁷ *U.S. Dep't of the Army*, 72 FLRA 363, 366 (2021) (Member Abbott concurring; Chairman DuBester dissenting) (dismissing a contrary-to-law exception because the agency failed to present the argument to the arbitrator); *U.S. DHS, U.S. CBP, Del Rio, Tex.*, 72 FLRA 236, 237 (2021) (Chairman DuBester concurring; Member Abbott concurring; Member Kiko dissenting) (barring essence claim where no indication in record that agency raised it at arbitration); *U.S. Dep't of Energy, W. Area Power Admin., Lakewood, Colo.*, 67 FLRA 376, 377 (2014) (same).

⁵ 5 C.F.R. § 2429.11; *see also U.S. Dep't of VA, Veterans Benefits Admin.*, 72 FLRA 57, 58 (2021) (*VBA*) (Member Abbott concurring; Chairman DuBester dissenting); *U.S. Dep't of Educ.*, 71 FLRA 516, 517-18 (2020) (*DOE*) (then-Member DuBester concurring); *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 807 (2018) (*IRS*) (then-Member DuBester dissenting).

⁶ *VBA*, 72 FLRA at 58; *DOE*, 71 FLRA at 517-18; *see also IRS*, 70 FLRA at 808.

⁷ Exceptions Br. at 1.

⁸ *VBA*, 72 FLRA at 58; *DOE*, 71 FLRA at 517-18.

⁹ 5 C.F.R. §§ 2425.4(c), 2429.5.

¹⁰ Award at 10.

therefore entitled to hazard pay.”¹⁸ The Agency argues that this statement establishes that the award is based on a nonfact because the Arbitrator addressed issues that either did not concern arbitrability or that had already been resolved by the parties.¹⁹ However, neither of these arguments demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.²⁰

Although the Agency argues that the Arbitrator’s findings are clearly erroneous, there is nothing in the record before us that demonstrates that any of the Arbitrator’s findings go beyond the arbitrability of the grievance.²¹ We also do not agree with the Agency’s argument that the Arbitrator addressed the merits of the grievance; more specifically whether the Agency provided personal protective equipment, hand sanitizer, or cleaning supplies.²² To the contrary, the Arbitrator simply summarized the grievance’s allegations that since March 12, BUEs continue to be exposed to an unsafe work environment because of COVID-19 and they are, therefore, owed hazard pay.²³ Accordingly, the Agency fails to demonstrate that the award is based on a nonfact and we deny this exception.²⁴

V. Decision

We deny the Agency’s exceptions in part, and dismiss them, in part.

¹⁸ Award at 10.

¹⁹ Exceptions Br. at 9.

²⁰ *AFGE, Loc. 3369*, 72 FLRA 158, 159 (2021) (*Loc. 3369*) (“To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.”).

²¹ *See* Award at 10-11.

²² Exceptions Br. at 9.

²³ *See* Award at 10 (“The substantive issues in this case all relate to the same exact type of allegation, i.e., contentions that the Agency did not do enough to safeguard its employees from the virus and that BUEs are therefore entitled to hazard pay.”); Exceptions, Agency Attach. 11, Union’s Grievance at 2 (alleging that the Agency has forced BUEs “to report to duty during the COVID-19 virus, forcing these employees to continue to work in duty status under hazardous conditions, without proper [personal protective equipment] and without following the Center [for] Disease Control . . . guidance.”). The Agency’s exceeded-authority exception also argues that the Arbitrator improperly considered issues that were not submitted to arbitration. Exceptions Br. at 10. For the reasons stated above, we also deny this exception.

²⁴ *See Loc. 3369*, 72 FLRA at 159 (“Moreover, the [u]nion does not establish that the [a]rbitrator’s findings are clearly erroneous.”); *AFGE, Loc. 2076*, 71 FLRA 1023, 1025 (2020) (then-Member DuBester concurring) (in the absence of evidence demonstrating that the arbitrator’s conclusions were clearly erroneous, the Authority denied the nonfact exception); *AFGE, Loc. 3254*, 70 FLRA 577, 580 (2018) (“A challenge that fails to identify clearly erroneous factual findings does not demonstrate that an award is based on a nonfact.”).

Chairman DuBester, dissenting:

In my view, the Agency's exceptions should be dismissed as interlocutory. As I have expressed previously,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 And "[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."³ Applying this standard, I would dismiss, without prejudice, the Agency's interlocutory exceptions.

Accordingly, I dissent from the majority's decision to grant interlocutory review.⁴

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)).

³ *Id.* (first quoting *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 1, 3 (2012); and then citing *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 68 FLRA 640, 641 (2015)).

⁴ Had I agreed with the majority to grant interlocutory review of the Agency's exceptions, I would have also found that the exceptions should be dismissed or denied.