

73 FLRA No. 140

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 987
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
WARNER ROBINS AIR LOGISTICS CENTER
78 ABW/CIVILIAN PERSONNEL OFFICE
WARNER ROBINS AIR FORCE BASE, GEORGIA
(Agency)

0-AR-5867

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DECISION

November 9, 2023

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Before the Authority: Susan Tsui Grundmann,
Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Jack Clarke issued an award finding the Union's grievance procedurally arbitrable and denying it on the merits. On exceptions, the Union argues that the Arbitrator disregarded a contractual limitation on his authority by addressing the grievance's merits. Because the parties' master agreement expressly and unequivocally prohibits an arbitrator from resolving both a threshold arbitrability issue and a grievance's merits, we grant the Union's exceeded-authority exception, set aside the Arbitrator's merits findings, and remand the dispute to the parties.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated the master agreement when the Agency failed to schedule the grievant for overtime. Article 7 of the master agreement includes both "regular arbitration procedure[s]" and "[e]xpedited arbitration procedures."¹ The Agency denied the grievance, and the Union invoked

the "regular arbitration procedure" set forth in Article 7, Section 7.06 of the master agreement.² Before the scheduled arbitration hearing, the Agency sent an email to the Arbitrator "to serve as official notice" of a "thres[h]old issue[.]"³ In the email, the Agency asked "that the case be dismissed" because the Union designated its grievance as an unfair-labor-practice matter necessitating regular arbitration.⁴ Based on its contention that the grievance concerned overtime rather than an unfair labor practice, the Agency argued that the Union was required to use the expedited arbitration process in Article 7, Section 7.08 of the master agreement. That section requires, among other things, that overtime grievances "be arbitrated using the expedited procedure."⁵

Article 7, Section 7.05 of the master agreement (Section 7.05) authorizes arbitrators to "make all grievabil[i]ty and . . . arbitrability determinations" raised by the parties in pre-hearing briefs.⁶ Under Section 7.05, if an arbitrator makes a threshold determination that a grievance is "grievable . . . or arbitrable, the[n] the] next available arbitrator will . . . hear the merits of the grievance to avoid a perceived conflict of interest."⁷

In response to the Agency's email, the Arbitrator told the parties, "[I]n the event I were to . . . treat [the Agency's] email as a request to invoke the procedure set out in Section 7.05, . . . I would not find that the grievance lacked arbitrability."⁸ After receiving the Arbitrator's email, the Union claimed that the Arbitrator had made a Section 7.05 arbitrability determination, and the Union requested the Agency's participation in selecting a new arbitrator to hear the grievance's merits. However, the Arbitrator notified the Union that he had "not issued a Section 7.05 ruling" but, instead, provided the parties with an "advisory email."⁹ Thereafter, the parties attended the scheduled arbitration hearing before Arbitrator Clarke.

At the beginning of the hearing, the Agency argued again that the grievance "lacked arbitrability" because it did not raise an unfair labor practice and, therefore, "should have been submitted to [expedited] arbitration."¹⁰ Although the Arbitrator agreed that the grievance did not implicate an unfair labor practice, the Arbitrator found no contractual wording requiring the grievance's dismissal on that basis. Therefore, "the Arbitrator did not find [that] the grievance lacked arbitrability."¹¹

¹ Exceptions, Attach. 1, Master Collective-Bargaining Agreement (Master Agreement) at 27.

² *Id.* at 26-27.

³ Exceptions, Attach. 3, Jan. 31, 2023 Emails (Jan. Emails) at 5.

⁴ *Id.*

⁵ Master Agreement at 27-28.

⁶ *Id.* at 26.

⁷ *Id.*

⁸ Jan. Emails at 4; Award at 2 n.1.

⁹ Jan. Emails at 1-2.

¹⁰ Award at 1.

¹¹ *Id.* at 2.

Next, the Arbitrator considered the grievance's merits. The Arbitrator framed the merits issues as whether the Agency violated the master agreement "when it did not schedule the [g]rievant to work overtime . . . and, if so, what shall be the remedy?"¹² Interpreting the parties' overtime article, the Arbitrator found that the Agency was not required to schedule the grievant for overtime. As a result, the Arbitrator concluded that the Agency did not violate the master agreement and denied the grievance.

The Union filed exceptions to the award on February 23, 2023,¹³ and the Agency filed an opposition on March 29.

III. Preliminary Matter: We do not consider the Agency's opposition.

Based on the date of the Union's statement of service, the Agency's opposition appeared to be untimely. Accordingly, the Authority's Office of Case Intake and Publication ordered the Agency to show cause why the Authority should not dismiss the Agency's opposition as untimely. The order stated that the Agency's response was due on April 18 and that failure to respond to, or comply with, the order might result in the Authority declining to consider the Agency's opposition. Citing the Authority's Regulations, the order also stated that "the Agency's response must be filed by commercial delivery, by first class-mail, or by certified mail."¹⁴

In a response filed on April 19, the Agency alleges that it attempted to file its response using the Authority's eFiling system on April 18. The Agency concedes that its April 19 response is untimely but requests that the Authority consider it because the Agency "incorrectly presumed" that eFiling was a valid method for responding to an Authority order.¹⁵

Section 2429.24(f) of the Authority's Regulations does not permit a party to file a response to an

Authority order through the eFiling system.¹⁶ Consistent with the Regulations, the Authority does not consider erroneously eFiled documents.¹⁷ The Agency's mistaken assumption that it could eFile a response to an Authority order provides no basis for considering the Agency's untimely response.¹⁸ Further, the Agency does not allege that any extraordinary circumstances exist to warrant waiving the expired time limit.¹⁹

Accordingly, we do not consider the Agency's response. The Agency has failed to show cause why the Authority should not dismiss the Agency's opposition as untimely. As such, we do not consider the opposition.²⁰

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

The Union asserts that the Arbitrator lacked the authority to consider the grievance's merits.²¹ According to the Union, Section 7.05 required the parties to submit the merits dispute "to another arbitrator" once the Arbitrator issued "a determination . . . on a threshold [arbitrability] issue."²² As relevant here, the Authority will find that arbitrators exceed their authority when they disregard specific limitations on their authority.²³

Under Section 7.05, an arbitrator who receives a threshold arbitrability question must either dismiss the grievance or, after finding the grievance arbitrable, relinquish jurisdiction so that the parties may choose "the next available arbitrator" to resolve the grievance's merits.²⁴ In other words, Section 7.05 expressly and unequivocally limits arbitrators' authority, prohibiting them from resolving both a threshold arbitrability issue and a grievance's merits.

Here, the Agency provided the Arbitrator with "official notice" of a "thres[h]old issue[]" regarding the grievance's arbitrability before the arbitration hearing.²⁵ In a pre-hearing email, the Arbitrator advised the parties

¹² *Id.* at 4.

¹³ All subsequent dates occurred in 2023 unless otherwise noted.

¹⁴ Order to Show Cause at 2 (citing 5 C.F.R. § 2429.24(e)).

¹⁵ Agency's Resp. to Order to Show Cause at 1.

¹⁶ 5 C.F.R. § 2429.24(f); see *U.S. DOD, Educ. Activity, U.S. DOD Dependents Schs.*, 70 FLRA 84, 86 (2018) (Member Pizzella dissenting on other grounds) (observing that "eFiling is not an authorized method for filing a response to an Authority order").

¹⁷ See, e.g., *SSA, Region VII, Kansas City, Mo.*, 70 FLRA 106, 108 (2016) (*SSA*) (where party erroneously eFiled response to Authority show-cause order, Authority did not consider response).

¹⁸ *Id.*; see also *AFGE, Loc. 4052*, 65 FLRA 720, 720 (2011) ("[I]t is well established that parties filing documents with the Authority are 'responsible for being knowledgeable' of the statutory and regulatory filing requirements." (quoting *AFGE, Loc. 2065*, 50 FLRA 538, 539-40 (1995))).

¹⁹ 5 C.F.R. § 2429.23(b) (permitting Authority to waive expired time limits in "extraordinary circumstances").

²⁰ See *U.S. Dep't of VA, John J. Pershing Med. Ctr., Poplar Bluff, Mo.*, 68 FLRA 852, 853 (2015) (Member DuBester concurring on other grounds; Member Pizzella dissenting on other grounds) (finding opposition untimely after opposing party failed to timely respond to Authority show-cause order); *SSA*, 70 FLRA at 108 (declining to consider show-cause-order response that was improperly eFiled and consequently rejecting opposition as untimely).

²¹ Exceptions at 6.

²² *Id.*

²³ *U.S. Dep't of the Army, Mil. Dist. of Wash., Fort Myer, Va.*, 72 FLRA 772, 775 (2022).

²⁴ Master Agreement at 26.

²⁵ Jan. Emails at 5.

that he would not find the grievance non-arbitrable. Then, after the Agency reiterated its threshold arbitrability argument at arbitration, the Arbitrator ultimately concluded – in his award – that the grievance “did not . . . lack[] arbitrability.”²⁶ At that point, the Arbitrator had exhausted his authority, as Section 7.05 clearly mandates that “the next available arbitrator . . . hear the merits of the grievance to avoid a perceived conflict of interest.”²⁷ Despite this express, unequivocal contractual limitation on his arbitral authority, the Arbitrator addressed the merits. As such, we find that he exceeded his authority.²⁸

We grant the Union’s exception and set aside the merits portion of the award.²⁹ We also remand the dispute to the parties, absent settlement, for resubmission to a different arbitrator to resolve any remaining merits issues.

V. Decision

We grant the Union’s exceeded-authority exception, set aside the merits portion of the award, and remand the dispute to the parties for resubmission of the merits to a different arbitrator, absent settlement.

²⁶ Award at 1-2 & n.1.

²⁷ Master Agreement at 26.

²⁸ *Cf. SSA, Off. of Hearings Operations*, 71 FLRA 589, 590 (2020) (Member DuBester dissenting in part on other grounds) (denying exceeded-authority exception where excepting party “d[id] not identify an express contractual limitation on the [a]rbitrator’s authority”); *U.S. DHS, U.S. CBP*, 66 FLRA 838, 844 (2012) (Member DuBester dissenting in part on other grounds) (rejecting claim that “[a]rbitrator disregarded specific limitations on his authority” because excepting party neither “cited any such express limitations” nor “established that the [a]rbitrator disregarded such limitations”).

²⁹ Because we set aside the merits portion of the award, we do not consider the Union’s remaining exceptions, all of which challenge the Arbitrator’s authority to consider the grievance’s merits. See *U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017) (finding it unnecessary to address remaining exceptions after vacating award on exceeded-authority grounds).