

71 FLRA No. 235

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

and

NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 160
(Union)

0-AR-5638

ORDER DISMISSING EXCEPTIONS

December 28, 2020

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

I. Statement of the Case

In this case, we decline interlocutory review of an arbitrator's award where the raised exceptions, even if granted, would not advance the ultimate disposition of the case.

The parties agreed to bifurcate arbitration into a merits phase and a remedy phase. In the merits phase, Arbitrator Danielle L. Hargrove issued an award finding that the Agency violated the parties' collective-bargaining agreement by moving employees out of their selected work units. She directed the Agency to cease and desist further violations. The Agency filed exceptions to this award before the remedial phase of the arbitration proceedings. Because the exceptions are interlocutory – and resolution of them would not obviate the need for further arbitral proceedings – we dismiss the exceptions without prejudice.

II. Background and Arbitrator's Award

In 2018, the Union filed a grievance alleging that the Agency impermissibly moved Customs and Border Protection officers (officers) and agriculture specialists (specialists) out of their cargo-enforcement work unit.

Specifically, the Union claimed that the Agency, in violation of Article 13 of the parties' agreement, included "catch-all phrases" within cargo-enforcement bid announcements that required these employees to perform passenger-operations duties.¹ Article 13, Section 2(B) states, as relevant here, that the Agency "will not include 'catch-all' phrases in unit descriptions so as to require employees to work in units other than their bid work unit. A catch-all phrase is a statement within a work[-]unit description that captures duties that are not regular or recurring within the work unit."²

After the Agency denied the grievance, the parties submitted the matter to arbitration and agreed to bifurcate the proceedings into a merits phase and a remedy phase. The Arbitrator framed the issue as follows: "Did the Agency violate the [parties' agreement], including Article[] 13 . . . , when it scheduled [o]fficers and . . . [s]pecialists assigned to the [c]argo[-e]nforcement work unit to work [p]assengers [o]perations?"³

In addressing the issue, the Arbitrator observed that the bid announcements for officers in fiscal years 2018, 2019 and 2020, and the bid announcements for specialists in fiscal years 2019, and 2020, included wording that required those employees to perform passenger-operations duties. The Arbitrator determined that passenger-operations work was not a regular, recurring duty of the cargo-enforcement work unit. Accordingly, she concluded that the bid announcements for these years included a catch-all phrase in violation of Article 13 of the parties' agreement.

As for the bid announcements for specialists in fiscal year 2018, the Arbitrator noted that those cargo-enforcement bids contained "no similar notation" informing the specialists that the Agency would require them to perform passenger-operations work.⁴ Yet, in that year, the Agency required specialists to cover passenger operations on a daily basis. The Arbitrator noted that the "Agency concede[d] a violation for [fiscal year] 2018" for the specialists.⁵

Consistent with the parties' agreement to bifurcate the proceedings "with the remedy to be briefed by the parties consistent with th[e merits] award," the Arbitrator retained jurisdiction to "resolve any matters related to any requested remedies."⁶ She also directed the Agency to cease and desist from adding catch-all phrases in its bid announcements, in violation of Article 13.

¹ Award at 8.

² *Id.* at 6.

³ *Id.* at 2.

⁴ *Id.* at 12.

⁵ *Id.* at 16-17; *see also id.* at 12 (finding that the fiscal year 2018 specialists bid announcements violated the parties' agreement).

⁶ *Id.* at 17.

On June 3, 2020, the Agency filed exceptions to the award, and, on July 5, 2020, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The Agency's exceptions are interlocutory, and it has not demonstrated extraordinary circumstances warranting review.

On July 27, 2020, the Authority's Office of Case Intake and Publication issued an order directing the Agency to show cause why its petition should not be dismissed as interlocutory.⁷ 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.⁸ An award is not final where the arbitrator postpones determination of an issue⁹ or directs the parties to attempt to develop a remedy.¹⁰ 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 arbitration.¹¹

In response to the show-cause order, the Agency concedes that its exceptions are interlocutory, given that the remedial phase of the arbitration is still pending.¹² Nevertheless, the Agency argues that extraordinary circumstances warrant review because granting its exceptions would "obviate the need for further arbitral proceedings."¹³ In this regard, the Agency makes three related arguments: (1) the award fails to draw its essence from the parties' agreement because the Arbitrator misinterpreted Article 13, Section 2(B) of the agreement;¹⁴ (2) the Arbitrator based her award on nonfacts;¹⁵ and

(3) the award is contrary to law because it excessively interferes with management rights.¹⁶

The Agency's exceptions exclusively concern the Arbitrator's application of Article 13, Section 2(B) – the "catch-all phrases" provision – to the bid announcements for officers in 2018, 2019, and 2020, and the specialists in 2019 and 2020. None of the Agency's exceptions challenge the Arbitrator's finding that the Agency also violated the parties' agreement in 2018, by moving specialists without first providing notice in that year's bid announcement.¹⁷ Therefore, even if we granted the Agency's exceptions, further arbitration would still be required to address remedies for this violation.

As resolution of the Agency's exceptions would not obviate the need for further arbitration proceedings,¹⁸ we find that the Agency has failed to demonstrate extraordinary circumstances that warrant review. Accordingly, we dismiss the Agency's exceptions as interlocutory.¹⁹

IV. Decision

We dismiss, without prejudice, the Agency's exceptions.

⁷ Order to Show Cause (Order) at 1-2.

⁸ 5 C.F.R. § 2429.11; *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Div., Norfolk, Va.*, 71 FLRA 713, 713 (2020) (*Dep't of the Army*) (Member DuBester concurring).

⁹ *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 850 (2012).

¹⁰ *Id.*; *Dep't of the Air Force, Flight Test Ctr. Edwards Air Force Base, Cal.*, 65 FLRA 1013, 1014 (2011); *Dep't of the Treasury, Customs Serv., Tucson, Ariz.*, 58 FLRA 358, 359 (2002).

¹¹ *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (Member DuBester dissenting); *see also U.S. Dep't of the Army, Nat'l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 523 (2020) (Member DuBester dissenting) (finding extraordinary circumstances when "exceptions could conclusively determine whether any further arbitral proceedings are required").

¹² Agency's Resp. to Order at 2; *see also U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 68 FLRA 640, 641 (2015) (holding that an award was interlocutory where the issue of appropriate remedies remained pending before the arbitrator); *U.S. DOJ, BOP, Fed. Med. Ctr., Carswell, Tex.*, 64 FLRA 566, 568 (2010) (denying interlocutory review where the parties agreed to divide the arbitration into "subsets" of issues, and a hearing was scheduled to "resolve remaining issues").

¹³ Agency's Resp. to Order at 3.

¹⁴ Exceptions at 20-30.

¹⁵ *Id.* at 15-20.

¹⁶ *Id.* at 31 (asserting, without elaboration, that the award impermissibly affects the right to assign work under 5 U.S.C. § 7106).

¹⁷ *See* Award at 12 (finding that the fiscal year bid announcements for specialists violated the parties' agreement); *id.* at 16-17 (stating that the "Agency concedes a violation for [fiscal year] 2018" related to the specialists bid announcements).

¹⁸ *Compare U.S. DHS, CBP*, 70 FLRA 992, 993 (2018) (Member DuBester concurring) (interlocutory review denied when granting exceptions would not obviate the need for the arbitrator to resolve the merits of the grievance), *with U.S. Dep't of Educ.*, 71 FLRA 516, 517-18 (2020) (Member DuBester concurring) (granting interlocutory review where resolution of exception "could conclusively determine whether any further arbitral proceedings [were] required").

¹⁹ *Dep't of the Army*, 71 FLRA at 714 (denying interlocutory review of Agency's exceptions when granting them would still leave arbitrable claims before the arbitrator).

Member DuBester, concurring:

For reasons expressed in my dissenting opinion in *U.S. Department of the Treasury, IRS*,* I disagree with the majority's decision to expand the grounds upon which the Authority will review interlocutory exceptions. However, because the award before us does not constitute a complete resolution of all of the issues submitted to arbitration, I agree that the Agency's interlocutory exceptions should be dismissed, without prejudice.

* 70 FLRA 806, 810-11 (2018) (Dissenting Opinion of Member DuBester).