

71 FLRA No. 35

NATIONAL LABOR RELATIONS BOARD
(Agency)

and

NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION
(Union)

0-AR-5507

DECISION

June 20, 2019

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

This matter is before the Authority on exceptions to an award of Arbitrator Elliot H. Shaller filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute)¹ and part 2425 of the Authority's Regulations.² The Union filed an opposition to the Agency's exceptions.

The Agency requests an expedited, abbreviated decision under § 2425.7 of the Authority's Regulations.³ The Union does not oppose the Agency's request.⁴ Upon full consideration of the circumstances of this case – including the case's complexity, potential for precedential value, and similarity to other, fully detailed decisions involving the same or similar issues, as well as the absence of any allegation of an unfair labor practice – we grant the Agency's request.

As a preliminary matter, the Authority does not ordinarily consider interlocutory appeals.⁵ However, any

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 Because resolution of the Agency's exceptions could conclusively determine whether any further arbitral proceedings are required, we grant interlocutory review.⁷

Under § 7122(a) of the Statute,⁸ an award is deficient if it is contrary to any law, rule, or regulation, or it is deficient on other grounds similar to those applied by federal courts in private sector labor-management relations. Upon careful consideration of the entire record in this case and Authority precedent, we conclude that the award is not deficient on the grounds raised in the exceptions and set forth in § 7122(a).⁹

exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration).

⁶ *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (Member DuBester dissenting).

⁷ *See U.S. Small Bus. Admin.*, 70 FLRA 885, 886 (2018) (Member DuBester dissenting) (granting interlocutory review where resolution of exceptions would "conclusively determine whether any further proceedings are required"); *see also* Opp'n Br. at 1 (conceding that the exceptions present "'extraordinary circumstances' warrant[ing] immediate consideration").

⁸ 5 U.S.C. § 7122(a).

⁹ *See AFGE, Local 1802*, 50 FLRA 396, 398 (1995) (award not deficient as based on a nonfact where excepting party challenges a conclusion based on the arbitrator's interpretation of the parties' collective-bargaining agreement); *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993) (award not deficient as based on a nonfact where excepting party either challenges a factual matter that the parties disputed at arbitration or fails to demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (award not deficient as failing to draw its essence from the parties' collective-bargaining agreement where excepting party fails to establish that the award cannot in any rational way be derived from the agreement; is so unfounded in reason and fact and so unconnected to the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; does not represent a plausible interpretation of the agreement; or evidences a manifest disregard of the agreement).

Regarding the Agency's argument that the award is contrary to § 7106(b)(1) of the Statute, Exceptions at 9-11, the Arbitrator neither (1) directed the Agency to reinstate any terminated provisions of the parties' expired collective-bargaining agreement nor (2) made any determination regarding the legitimacy of Agency's decision to terminate permissive matters. Thus, the Agency's argument is based on a misunderstanding of the award and does not demonstrate that the award is contrary to law. *See SPORT Air Traffic Controllers Org.*, 66 FLRA 552, 554 (2012) ("Exceptions that are based on misunderstandings of an arbitrator's award do not show that an award is contrary to law.").

¹ 5 U.S.C. § 7122(a).

² 5 C.F.R. pt. 2425.

³ Exceptions at 1; *see also* 5 C.F.R. § 2425.7 (in certain circumstances, "the excepting party may request" an expedited, abbreviated decision).

⁴ Opp'n Br. at 1 ("The Union believes that the Agency's exceptions are appropriate for resolution in an expedited, abbreviated decision.").

⁵ 5 C.F.R. § 2429.11; *see also U.S. DHS, U.S. CBP*, 65 FLRA 603, 605 (2011) (generally, the Authority will not resolve

Accordingly, we deny the Agency's exceptions.¹⁰

¹⁰ With its exceptions, the Agency filed a motion to stay a previously scheduled arbitration hearing on the merits of the parties' underlying dispute. Agency's Mot. at 1. The Authority's Office of Case Intake and Publication (CIP) issued an order stating that the Authority was taking no action on the Agency's motion. Order at 1. The Union filed motions opposing both the CIP order and the Agency's stay request. Because the Agency's motion asks "to stay arbitration proceedings pending an Authority decision on [the Agency's] exceptions," Agency's Mot. at 1, and we deny the Agency's interlocutory exceptions, we now deny the Agency's motion to stay as moot. *See U.S. DHS, U.S. CBP*, 68 FLRA 807, 809 (2015) (where excepting party requested stay of an award until the Authority resolved its arguments, Authority decision that resolved those arguments rendered request moot). Additionally, we vacate the CIP order and its contents.

Member DuBester, dissenting:

Based on the majority's decision, my understanding is that this matter should proceed to a hearing on the merits, now scheduled for June 21, 2019. And I agree that this matter should so proceed.

However, for the reasons expressed at length in my dissents in *U.S. Small Business Administration*¹ and *U.S. Department of the Treasury, IRS*,² I disagree with the majority's decision to grant interlocutory review of the Agency's exceptions.

¹ 70 FLRA 885, 888-89 (2018) (Dissenting Opinion of Member DuBester).

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