74 FLRA No. 27

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
YAZOO CITY, MISSISSIPPI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 4036
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5743

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DECISION

December 18, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members
(Chairman Grundmann concurring, Member Kiko dissenting)

I. Statement of the Case

Arbitrator Gerard A. Fowler issued an interim award finding the Union's grievance procedurally arbitrable. The Agency filed interlocutory exceptions on the ground that the interim award fails to draw its essence from the parties' agreement. Because the Agency does not demonstrate that the Arbitrator lacks jurisdiction as a matter of law, we find interlocutory review is not warranted, and dismiss the Agency's exceptions without prejudice.

II. Background and Arbitrator's Award

The Agency temporarily assigned employees from one of its correctional institutions to another institution. The Union filed a grievance alleging that the Agency violated the parties' agreement by denying those employees overtime assignments. As a remedy, the grievance sought that the employees be made whole, with retroactive overtime, and other relief under the Fair Labor Standards Act. When the parties were unable to resolve the dispute, the Union invoked arbitration.

In an interim award, the Arbitrator framed the issue, in relevant part, as whether the grievance was timely under the parties' agreement. On this issue, the Arbitrator concluded that the Agency failed to establish that the grievance did not meet the filing deadline required under the parties' agreement, and therefore, the grievance was arbitrable as timely filed. Specifically, the Arbitrator found that the grievance alleged "continuing" violations and was timely filed as to all violations that occurred "forty (40) day[s] prior to [the date of the grievance] and forward."[1] Consequently, the Arbitrator directed the parties to "move forward for hearing" on the merits.[2]

On July 14, 2021, the Agency filed exceptions to the interim award. On August 13, 2021, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The Agency's exceptions are interlocutory.

The Agency asserts that its exception is "not [i]nterlocutory,"[3] but argues that its exception "warrant[s] interlocutory review."[4] Because the Arbitrator had not yet ruled on the grievance's merits, we find that the exception is interlocutory.[5]

Section 2429.11 of the Authority's Regulations pertinently provides that the Authority "ordinarily will not consider interlocutory appeals."[6] In the arbitration context, this means that the Authority ordinarily will not resolve exceptions to an arbitrator's award unless the award completely resolves all of the issues submitted to arbitration.[7]

As the Authority explained in *U.S. Department of the Army, Army Materiel Command, Army Security Assistance Command, Redstone Arsenal, Alabama* (*Redstone*),[8] the Authority will review interlocutory exceptions only when the excepting party demonstrates both that the arbitrator lacks jurisdiction as a matter of law and that resolving the exceptions would bring an end to the entire dispute that the parties submitted to arbitration.[9] In

[1] Award at 13-14.
[2] *Id.* at 14.
[3] Exceptions Br. at 6.
[4] *Id.* at 7.
[5] *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 71 FLRA 713, 714 (2020) (Member DuBester concurring) (exceptions interlocutory where arbitrator resolved arbitrability as threshold matter but had not yet resolved merits).
[6] 5 C.F.R. § 2429.11.
[7] *U.S. Dep't of the Army, Army Materiel Command, Army Sec. Assistance Command, Redstone Arsenal, Ala.*, 73 FLRA 356, 356 (2022) (Member Kiko dissenting) (citing *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 850 (2012) (*Pope AFB*)).
[8] *Id.* at 362.
[9] *Id.*

Redstone, the Authority further explained it will not extend interlocutory review to alleged jurisdictional defects that rely on contractual limitations to an arbitrator's jurisdiction.[10]

The Agency argues that interlocutory review is warranted because the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement.[11] The Agency also argues that the Arbitrator's finding that the grievance was timely is contrary to law because the Arbitrator did not discuss why he found a "continuing violation" in interpreting the requirements for filing a grievance under the parties' agreement.[12] These arguments both ultimately challenge the grievance's arbitrability under the terms of the parties' *agreement*. The Agency neither asserts, nor demonstrates, that the Arbitrator lacked jurisdiction over the grievance as a matter of *law*.[13] Moreover, we note that the Authority decisions the Agency cites do not require an arbitrator to discuss the rationale for applying a continuing-violation principle in interpreting the requirements for filing a grievance under a parties' agreement.[14]

Thus, the Agency fails to meet the first part of the *Redstone* standard, and we find interlocutory review is not warranted. Accordingly, we dismiss the exceptions without prejudice to the Agency's ability to refile when the Arbitrator issues a final award.

IV. Decision

We dismiss the Agency's exceptions without prejudice.

[10] *Id.*; *see Pope AFB*, 66 FLRA at 851.
[11] Exceptions Br. at 8-14.
[12] *Id.* at 13 n.4.
[13] *Redstone*, 73 FLRA at 362; *Pope AFB*, 66 FLRA at 851; *see also, e.g.*, *U.S. Dep't of the Army, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 70 FLRA 172, 174 (2017) (granting interlocutory review where arbitrator made a bargaining-unit determination, because, under §§ 7105(a)(2)(A) and 7112(a) of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has exclusive jurisdiction to resolve questions regarding employees' bargaining-unit status); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div. Keyport, Keyport, Wash.*, 69 FLRA 292, 293-94 (2016) (granting interlocutory review and setting aside award where arbitrator lacked jurisdiction under § 7121(d) of the Statute); *U.S. DOL*, 63 FLRA 216, 217-18 (2009) (granting interlocutory review and setting aside award where arbitrator lacked jurisdiction under § 7121(c)(5) of the Statute); *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 60 FLRA 247, 249 (2004) (noting that "the few cases in which the Authority has granted interlocutory review have involved jurisdictional issues that arise pursuant to a statute" (citing *U.S. DOD, Nat'l Imagery & Mapping Agency, St. Louis, Mo.*, 57 FLRA 837, 837 n.2 (2002) (Member Pope dissenting); *U.S. Dep't of the Interior, Bureau of Indian Affs., Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1232 (2000))).
[14] Exceptions Br. at 13 n.4 (citing *NAIL, Loc. 5*, 70 FLRA 550, 552 (2018); *IFPTE, Loc. 386*, 66 FLRA 26, 31-32 (2011)).

Chairman Grundmann, concurring:

In *U.S. Department of the Army, Army Materiel Command, Army Security Assistance Command, Redstone Arsenal, Alabama* (*Redstone*), a majority of the Authority – myself included – held that the Authority will review interlocutory exceptions only when the excepting party demonstrates both that the arbitrator lacks jurisdiction as a matter of law and that resolving the exceptions would bring an end to the entire dispute that the parties submitted to arbitration.[*] That decision issued on December 8, 2022.

After we issued *Redstone*, the agency in that case filed a motion for reconsideration and requested that I recuse myself from participation in the case. The reason for the request was that when the National Federation of Federal Employees (NFFE) filed the underlying grievance on May 29, 2009 – more than thirteen years before *Redstone* issued – I was NFFE's General Counsel, and the grievance identified me as one of two points of contact, along with NFFE's outside counsel, for the grievance.

Other than my designation as one of the points of contact, I did not (and still do not) recall having any additional participation in the underlying matter. Two months after the grievance in that case was filed, I was nominated to be a Member and Chairman of the Merit Systems Protection Board (MSPB), and I joined the MSPB on November 12, 2009. Since then, I have not worked for NFFE, as I have served as: a Member and Chairman of the MSPB from 2009 through 2017; and the Executive Director of the Office of Congressional Workplace Rights from 2017 until 2022, when I became a Member of the Federal Labor Relations Authority (FLRA), and then was designated FLRA Chairman on January 3, 2023.

I consulted the FLRA's Ethics Office, which concluded that I had no actual conflicts of interest in that case. Nevertheless, I chose to recuse myself from further participation in that case out of an abundance of caution, in order to avoid any perceived appearance of impropriety. The Authority notified the parties of my recusal, and the agency later withdrew its request for reconsideration of *Redstone*.

The instant case is the first case, since *Redstone*, in which the Authority has applied the test set forth in that case. Given the circumstances surrounding *Redstone*, I believe it is important to state here that I wholeheartedly agree with, and affirmatively adopt, the rationale and test set forth in that decision. Further, for the reasons stated in the decision in this case, I agree that applying the *Redstone* test warrants dismissing the Agency's exceptions, without prejudice.

Therefore, I concur.

[*] 73 FLRA 356, 362 (2022) (Member Kiko dissenting).

Member Kiko, dissenting:

As I stated in my dissent in *U.S. Department of the Army, Army Materiel Command, Army Security Assistance Command, Redstone Arsenal, Alabama* (*Redstone*),[1] it is a mistake to draw an arbitrary and unsupported distinction between interlocutory exceptions that challenge an arbitrator's jurisdiction as a matter of law and those that challenge an arbitrator's jurisdiction under the terms of the parties' collective-bargaining agreement.[2] In both scenarios, the arbitrator potentially lacks the authority to resolve the grievance, and, thus, resolution of interlocutory exceptions could obviate the need for further arbitration.[3] But the *Redstone* majority, without satisfactorily explaining the need for such a distinction, severely curtailed the scope of interlocutory review by rejecting potentially meritorious exceptions that challenge an arbitrator's contractual jurisdiction.[4]

In accordance with § 7121 of the Federal Service Labor-Management-Relations Statute (the Statute), parties bargain over the procedures for filing grievances, including the prerequisites for proceeding to arbitration.[5] These prerequisites are wide ranging, and often include filing deadlines,[6] as well as notification and specificity requirements.[7] When a party fails to meet one of these negotiated threshold requirements for arbitrability, the party may not bring that grievance to arbitration.[8] However, the majority invalidates the parties' choices concerning these threshold requirements for arbitrability by ignoring them until after the parties have *completed arbitration*.[9]

The *Redstone* standard is also inefficient because it forces unnecessary litigation over contractually barred grievances.[10] Even when an arbitrator lacks contractual jurisdiction to resolve a grievance,[11] the parties must expend taxpayer money litigating the grievance's merits at arbitration before the Authority will consider an argument that the arbitrator lacked jurisdiction all along.[12] Because this limit conflicts with Congress' intent that the Statute "should be interpreted in a manner consistent with the requirement of an effective and efficient Government,"[13] I continue to disagree with the majority's

[1] 73 FLRA 356, 362 (2022) (Member Kiko dissenting).

[2] *Id.* at 363 (Dissenting Opinion of Member Kiko) ("[T]he majority does not explain why an arbitrator may issue a merits award without contractual jurisdiction. Nor does the majority provide any private-sector case law to support distinguishing between legal- and contract-based challenges to an arbitrator's authority.").

[3] *See U.S. Marine Corps, Marine Corps Air Ground Combat Ctr., Twentynine Palms, Cal.*, 72 FLRA 473, 475 (2021) (Chairman DuBester dissenting) (granting interlocutory review of essence challenge to arbitrator's procedural-arbitrability determination because the challenge, if resolved, "will advance the ultimate disposition of the case by obviating the need for further arbitration").

[4] *Redstone*, 73 FLRA at 362 ("[T]he Authority will now consider interlocutory exceptions only when the excepting party demonstrates *both* that the arbitrator lacks jurisdiction as a matter of law *and* that resolving the exceptions would bring an end to the entire dispute that the parties submitted to arbitration.").

[5] 5 U.S.C. § 7121; *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (defining procedural arbitrability as addressing whether the parties have satisfied the prerequisites for arbitration); *Peabody Holding Co. v. United Mine Workers of Am.*, 815 F.3d 154, 162 (4th Cir. 2016) (noting that the parties "agree among themselves which questions will go to arbitration, which law the arbitrator will apply in the arbitration, and which procedural rules the arbitrator will use to manage the arbitration").

[6] *E.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Terre Haute, Ind.*, 72 FLRA 711, 712-13 (2022) (*Terre Haute*) (Chairman DuBester dissenting) (deadline to file grievances); *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 947, 948-49 (2020) (*Pershing VA*) (Member DuBester dissenting) (deadline to invoke arbitration).

[7] *E.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Aliceville, Ala.*, 72 FLRA 497, 498 (2021) (Chairman DuBester dissenting) (requiring grievances to be filed with specific agency representative); *AFGE, Loc. 1741*, 72 FLRA 501, 502 (2021) (Member Abbott dissenting) (requiring specific information about the date and nature of grieved offense and the contractual provision allegedly violated).

[8] *AFGE, Loc. 310*, 74 FLRA 22, 23 (2024) (upholding arbitrator's procedural denial of grievance "because it was not filed within thirty days of when the grievant or the [u]nion knew or should have known there was a violation," as required by the parties' agreement).

[9] *See Redstone*, 73 FLRA at 363 (Dissenting Opinion of Member Kiko) ("[A]lthough the majority states that it must either apply private-sector arbitration principles or explain . . . [its] departure from those principles, the majority does neither when it comes to the private-sector tenet that, [t]he agreement fashioned by the parties deserves judicial respect." (internal quotation marks omitted)).

[10] *See id.* at 362 (dismissing exception as interlocutory because "the [a]gency . . . argu[ed] that the grievance [wa]s inarbitrable under the terms of the parties' *agreement* – not that the [a]rbitrator lacked jurisdiction as a matter of *law*").

[11] *See U.S. DOD Educ. Activity*, 70 FLRA 937, 938 (2018) (*DODEA*) (Member DuBester dissenting) (vacating award where "[t]he [a]rbitrator cited no authority or contractual language allowing him to disregard the parties' explicit forty-five-day [filing deadline]"); *Pershing VA*, 71 FLRA at 948-49 (granting essence exception where arbitrator applied "the doctrine of continuing violation" to find the grievance arbitrable despite the clear invocation deadline in the parties' agreement).

[12] *See Redstone*, 73 FLRA at 362.

[13] 5 U.S.C. § 7101(b).

decision to substantially restrict the scope of interlocutory review.[14]

This case illustrates my concern with *Redstone*'s excessive limitation on interlocutory review. The Agency argues that the Arbitrator's procedural-arbitrability determination fails to draw its essence from Article 31(d) of the parties' agreement and that his conclusory application of continuing-violation theory is contrary to law.[15] Under the standard established in *U.S. Department of the Treasury, IRS* (*IRS II*), the Authority would have granted review of these exceptions because their resolution could obviate the need for further arbitration.[16] But, applying *Redstone*, the majority dismisses these exceptions simply because "both ultimately challenge the grievance's arbitrability under the terms of the parties' agreement."[17]

As the Arbitrator noted, the terms of the parties' agreement "clearly state[] that [a] grievance must be filed within forty . . . calendar days."[18] Specifically, Article 31(d) of the parties' agreement provides that "[g]rievances must be filed within forty . . . days [from] the date of the alleged grievable occurrence," or "from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence."[19] The Arbitrator noted that, under Authority precedent, when the parties agree to a contractual deadline, the parties intend to be bound by that deadline.[20] Applying Article 31(d), the Arbitrator found that November 24, 2018, was the date "when the grieved event occurred,"[21] and that, "[d]espite the Union's protestations to the contrary, . . . [bargaining-]unit employees could . . . have become aware of the alleged grievable event on November 24, 2018."[22] Yet, the Union did not file its grievance until January 22, 2019[23] – fifty-nine days after "the grieved event occurred."[24] Based on the Arbitrator's interpretation of Article 31(d) and his factual findings, the grievance was untimely.[25]

However, disregarding his own factual findings and interpretation of this "clear[]" negotiated limitation, the Arbitrator concluded the grievance was arbitrable under the doctrine of continuing violation – an exception *not* provided by the parties' agreement.[26] Generally, a cause of action must be filed within the applicable filing period, whether that filing period is statutory, regulatory, or contractual.[27] But the judicial doctrine of continuing violation is an exception to that rule, which preserves a claim when: (1) a series of events that alone may not be unlawful combine to create a cause of action, and (2) some, but not all, of the events occurred outside of the applicable deadline.[28] Further, the Authority has held that the existence of a continuing violation is a legal conclusion based on factual findings.[29]

Here, the Arbitrator did not identify any alleged violations that occurred after November 24,[30] nor did he find that the assignment was part of a series of related

[14] *See Redstone*, 73 FLRA at 363-64 ("Despite the Statute's clear mandate that parties define the conditions precedent to arbitration, the majority's new standard forces parties to engage in unnecessary, costly arbitration when these conditions have not been satisfied. As a result, the majority denies parties the ability to meaningfully enforce their agreements.").

[15] Exceptions 8-14.

[16] 70 FLRA 806, 808 (2018) (Member DuBester dissenting) ("[A]ny exception which advances the ultimate disposition of a case – by obviating the need for further arbitral proceedings – presents an extraordinary circumstance which warrants our review [and] . . . we will no longer turn a blind eye to [those] exceptions.").

[17] Majority at 3 (emphasis omitted).

[18] Award at 13.

[19] *Id.* at 3.

[20] *Id.* at 13 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 790, 791 (2020) (Member DuBester dissenting)); *see also U.S. Dep't of the Treasury, Off. of the Comptroller of the Currency*, 71 FLRA 387, 388-89 (2019) (Member DuBester dissenting in part) (setting aside procedural-arbitrability determination that conflicted with "clear and unambiguous" deadline for scheduling arbitration); *DODEA*, 70 FLRA at 938 (setting aside award where "[t]he [a]rbitrator cited no authority or contractual language allowing him to disregard the parties' explicit forty-five-day [filing deadline]").

[21] Award at 13.

[22] *Id.*

[23] *Id.* at 2.

[24] *Id.* at 13.

[25] *See Terre Haute*, 72 FLRA at 712 (vacating award where arbitrator failed to apply clear forty-day filing deadline in Article 31(d) of the parties' agreement by relying on "continuing-violation theory").

[26] Award at 13-14.

[27] *Terre Haute*, 72 FLRA at 712 n.11.

[28] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-17 (2002) (*Morgan*).

[29] *NAIL, Loc. 5*, 70 FLRA 550, 551 (2018) (*NAIL*) (Member DuBester concurring) (citing *IFPTE, Loc. 386*, 66 FLRA 26, 31-32 (2011)).

[30] *But see Earle v. D.C.*, 707 F.3d 299, 306 (D.C. Cir. 2012) (*Earle*) ("[M]ere failure to right a wrong . . . cannot be a continuing wrong . . . for that is the purpose of any [cause of action] and the exception would obliterate the rule." (quoting *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977))); *see also Valentino v. U.S. Postal Serv.*, 674 F.2d 56, 65 (D.C. Cir. 1982) (finding continuing-violation doctrine inapplicable and observing that the "critical question is not whether past practices have current consequences, but whether 'any present violation exists'" (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977))).

events that was not grievable until after the deadline.[31] Thus, the Arbitrator did not *actually rely on* the doctrine of continuing violation; he simply referenced the doctrine before waiving the parties' grievance-filing deadline.[32] As the Arbitrator did not make *any* factual findings or offer *any* explanation that supports his application of continuing-violation doctrine,[33] I would find that doctrine inapplicable and conclude that the award conflicts with the clear grievance-filing deadline in Article 31(d) of the parties' agreement.[34]

Because I continue to disagree with the majority's excessive limitation on interlocutory review, as well as its application of that limitation in this case, I dissent.

[31] *But see Palmer v. Kelly*, 17 F.3d 1490, 1496 (D.C. Cir. 1994) ("In order to recover based on a theory of continuing violations, a plaintiff must prove either a 'series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [filing] period.'" (quoting *Berger v. Iron Workers Reinforced Rodmen, Loc. 201*, 843 F.2d 1395, 1422 (D.C. Cir. 1988))); *Keohane v. United States*, 669 F.3d 325, 329 (D.C. Cir. 2012) ("[A] continuing violation 'is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period, typically because it is only its cumulative impact . . . that reveals its illegality.'" (quoting *Taylor v. FDIC*, 123 F.3d 753, 765 (D.C. Cir. 1997))).

[32] Award at 13 (stating that continuing-violation doctrine "acts as a narrow exception to the strict enforcement of time limits in a grievance procedure," without explaining its application to the facts of the grievance).

[33] *See NAIL*, 70 FLRA at 551 (treating arbitrator's determination about applicability of continuing-violation doctrine as a legal conclusion and deferring to arbitrator's unchallenged factual findings concerning when the grievant was aware of the grieved action).

[34] *See Terre Haute*, 72 FLRA at 712 (granting essence exception and vacating award where arbitrator applied continuing-violation doctrine to avoid enforcing the plain wording of Article 31(d) of the parties' agreement).