

73 FLRA No. 36

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MIAMI, FLORIDA

(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3690
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5771

ORDER GRANTING
MOTION FOR RECONSIDERATION

August 22, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I. Statement of the Case

The Union filed a grievance alleging that the Agency misclassified certain employees as exempt from the overtime requirements of the Fair Labor Standards Act (FLSA). Arbitrator David J. Reilly issued an award finding that the grievance was procedurally arbitrable and that the Agency had violated the FLSA (initial award). Subsequently, the Arbitrator issued a remedial award.

The Agency filed exceptions to the initial award. The Authority issued an order to which the Agency was required to respond. When the Authority did not receive a response, it dismissed the Agency's exceptions.

The Agency now requests that we reconsider the dismissal of its exceptions. Because the Agency establishes that it timely complied with the Authority's order, we find that the Agency's motion for reconsideration (motion) establishes extraordinary circumstances warranting reconsideration of the dismissal and we consider the exceptions on their merits. However,

we deny the exceptions because the Agency does not establish that the initial award fails to draw its essence from the parties' collective-bargaining agreement.

II. Background**A. Grievance and Arbitrator's Awards**

The Agency, a low- and minimum-security facility of the Bureau of Prisons (Bureau), employs teachers. Based on a position description, the Bureau's human-resources division classified the teacher positions as exempt from the FLSA's overtime requirements. The Union filed a grievance alleging that the Agency violated the parties' agreement and the FLSA by classifying the facility's teachers as FLSA exempt even though their assigned duties did not meet the requirements for that classification. The Union filed the grievance with the regional director where the Agency is located.

When the regional director denied the grievance, the Union sent the Agency an arbitration invocation along with a partially completed form for requesting a panel of arbitrators from the Federal Mediation and Conciliation Service (FMCS). The Union asked the Agency to complete the form's remaining section, which concerned the Agency's payment information. The Union also requested that, within three working days, the Agency either submit the form directly to FMCS or return it to the Union so the Union could do so. After the Agency failed to take either action, the Union submitted an arbitration-panel request to FMCS.

In December 2020, the Arbitrator issued an initial award. In the absence of a stipulation, the Arbitrator framed the issues as: (1) whether the grievance was procedurally arbitrable; (2) whether the Agency violated laws and regulations or the parties' agreement by "classifying the [t]eacher position at the [A]gency as exempt from the FLSA;" and (3) what, if anything, the remedy should be.¹

Among other procedural matters, the Arbitrator considered whether the Union filed the grievance with the Agency official specified in Article 31, Section f of the parties' agreement (Article 31). Article 31 states that grievances against a facility's chief executive officer, such as a warden, "will be filed with the [r]egional [d]irector," and grievances against the Bureau's divisional employees "will be filed with the [a]ssistant [d]irector of that division."² The Arbitrator found that the grievance over the teachers' appropriate FLSA classification concerned the specific duties assigned by the Agency, rather than the general classification of the teacher position as determined

¹ Initial Award at 14.

² *Id.* at 15-16 (quoting Exceptions, Attach. D, Collective-Bargaining Agreement (CBA) Art. 31, § f).

by the Bureau's human-resources division.³ As there was "no dispute that [the] warden has responsibility for the [t]eachers' actual duties,"⁴ the Arbitrator concluded that the Union's grievance challenged the actions of the warden and so the Union properly filed the grievance with the regional director.

The Arbitrator also considered the Agency's challenge to the timeliness of the Union's request for an arbitration panel from FMCS. Article 32, Section b of the parties' agreement (Article 32) states that, when "arbitration is invoked, the parties (or the grieving party) shall" request an arbitration panel from FMCS within three working days.⁵

The Arbitrator found that Article 32 imposes a "joint obligation" on the parties to request an arbitration panel, while also giving the grievant "the option, but not the obligation, to unilaterally" make the request.⁶ The Arbitrator determined that the Union fulfilled its part of the obligation by including the partially completed request form with the invocation of arbitration. Further, the Arbitrator found that, to the extent that there was a delay in requesting the panel, it was partly attributable to "the Agency's failure to satisfy its joint obligation by honoring the Union's request or otherwise acting to [submit the form]."⁷ Therefore, the Arbitrator rejected the Agency's Article 32 argument, concluding that the Agency could not rely on an alleged procedural deficiency for which it was at fault to challenge the arbitrability of the grievance.⁸ Even if the Agency were not at fault, the Arbitrator noted that the Agency failed to provide sufficient evidence establishing that the request was untimely.⁹

The Arbitrator sustained the grievance, finding that the Agency should have classified the teachers as eligible for overtime under the FLSA based on their assigned duties. As to the remedy, the Arbitrator retained jurisdiction and directed the parties to "meet and confer promptly in an effort to reach agreement."¹⁰

³ See *id.* at 43 (finding that the grievance did not contest the "classification of the teacher[s] as FLSA exempt based upon the intended design of the teacher job per the [Bureau's] position description," but rather grieved "the manner in which the [Agency] has actually deployed the [t]eachers").

⁴ *Id.* at 44.

⁵ *Id.* at 16 (quoting CBA Art. 32, § b).

⁶ *Id.* at 49 (finding that "the inclusion of the parenthetical '(or the grieving party)' [could not] be construed as imposing a unilateral obligation on the Union to file the [f]orm . . . where the Agency declines or fails to do so"); see also *id.* (noting that "if the parties had intended to make . . . submission [of the form] the unilateral obligation of the Union, they could have easily done so and dispensed with the statement that the parties would do so jointly").

⁷ *Id.* at 49-50.

Later, when the parties were unable to agree on a remedy, they returned to the Arbitrator. In a September 2021 remedial award, the Arbitrator stated that the teachers were entitled to liquidated damages; backpay was limited by a two-year statute of limitations; and the Agency would keep teachers in a non-exempt status until most of their duties were FLSA exempt.¹¹ The Arbitrator directed the parties to try to "mutually agree upon the amount to be paid by the Agency" and retained jurisdiction over the remedy in the event they did not agree.¹²

The Agency filed exceptions to the initial award on October 27, 2021. The Union filed an opposition on December 1, 2021.

B. Authority's Orders

After receiving the Agency's exceptions, the Authority's Office of Case Intake and Publication (CIP) issued an order directing the Agency to show cause why the exceptions should not be dismissed as interlocutory, given that the Arbitrator retained jurisdiction over the remedy in the remedial award.¹³ The Agency responded to the order.¹⁴

Because the Agency had waited until after the remedial award to file exceptions that concerned the arbitrability determinations from the initial award, CIP issued a second order directing the Agency to show cause why the Authority should not dismiss the exceptions as untimely.¹⁵ When CIP did not receive a response from the Agency in the allotted time, it issued an order dismissing the Agency's exceptions.¹⁶

The Agency filed a motion for reconsideration of the order dismissing the exceptions on March 25, 2022.

III. Motion for Reconsideration

The Authority has repeatedly held that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to

⁸ *Id.* at 50.

⁹ *Id.* at 49 n.27 (noting that the only arbitration-panel request form in the record was identified as the "second submission" and the Agency failed to provide documents or testimony to establish "the exact date" that the Union initially filed a request with FMCS).

¹⁰ *Id.* at 58.

¹¹ Exceptions, Attach. G (Remedial Award) at 24.

¹² *Id.* at 23, 24.

¹³ First Show-Cause Order (First SCO) at 2-3.

¹⁴ We address the interlocutory status of the exceptions in Section IV.

¹⁵ Second Show-Cause Order (Second SCO) at 2-3. We address the timeliness of the exceptions in Section IV.

¹⁶ Order Dismissing Exceptions at 2 (dismissing exceptions for failing to comply with Authority order).

justify this unusual action.¹⁷ In the context of untimely filings, the Authority has found extraordinary circumstances where a party is able to establish that the Postal Service misdelivered a correctly addressed and timely mailed filing.¹⁸

The Authority's second show-cause order directed the Agency to file its response by February 7, 2022.¹⁹ In its motion, the Agency presents delivery-tracking information establishing that it mailed its response by certified mail to the correct address on February 7, but the Postal Service misdelivered the response to an unknown address.²⁰ As the Agency timely filed its response, and the Authority did not receive it because Postal Service actions were beyond the control of the Agency,²¹ we find that the Agency has established extraordinary circumstances. Therefore, we grant the motion and consider the Agency's responses to the show-cause orders.

IV. Preliminary Matter: The Agency timely excepted to a final award.

On receiving the Agency's exceptions, CIP issued two procedural orders, which we address below.

Noting that the Arbitrator had retained jurisdiction in the remedial award, CIP first ordered the Agency to establish that the award was final and that the exceptions were not interlocutory.²² The Authority ordinarily will not resolve an exception to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration.²³ As relevant

here, an award is final where the arbitrator retains jurisdiction solely to assist the parties in the implementation of awarded remedies, including determining the amount of monetary relief individuals are owed.²⁴

The Arbitrator resolved the arbitration's final issue in the remedial award, which provided backpay and liquidated damages within specified parameters.²⁵ Although the Arbitrator retained jurisdiction over the remedy, he did so only to assist the parties in determining the amount of damages due.²⁶ Moreover, there is no indication that the Arbitrator contemplated any new measure of relief.²⁷ Therefore, the remedial award is final and the Arbitrator's retention of jurisdiction does not render the Agency's exceptions interlocutory.

CIP's second order emphasized that the Agency's exceptions challenged only procedural-arbitrability determinations made in the initial award.²⁸ Thus, CIP directed the Agency to explain why it had not filed its exceptions within thirty days of the initial award.²⁹ But had the Agency filed exceptions at that time – before the Arbitrator determined a remedy – those exceptions would have been interlocutory.³⁰ Although the Agency could have filed exceptions immediately after issuance of the initial award, nothing *required* the Agency to file interlocutory exceptions.³¹ Under Authority precedent, parties are permitted to wait until an award is final before filing exceptions to it.³²

With the issuance of the remedial award, the Arbitrator resolved all issues submitted to arbitration, and

¹⁷ *AFGE, Loc. 2338*, 71 FLRA 644, 644 (2020).

¹⁸ *See, e.g., U.S. Dep't of HHS, Nat'l Insts. of Health*, 64 FLRA 266, 268 n.7 (2009) (where party's filing was correctly addressed and timely mailed, but Postal Service misdelivered it, Authority found that extraordinary circumstances permitted resubmission of the filing because the Authority's failure to receive the filing was due to circumstances "beyond [party's] control"); *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 71 FLRA 304, 305 (2019) (*Army*) (then-Member DuBester concurring) (considering filing timely where agency demonstrated that Postal Service returned timely-mailed exceptions as undeliverable for "unknown reasons").

¹⁹ Second SCO at 3.

²⁰ *See Mot.*, Attach. 1, Postal Service tracking history at 1-2 (stating that the response was "delivered to an individual at the address," but listing a different ZIP code than was part of the mailing address).

²¹ *See Army*, 71 FLRA at 305 (finding properly mailed exceptions timely where Postal Service mishandled delivery).

²² First SCO at 2-3.

²³ *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 684, 684 (2022) (Chairman DuBester concurring) (citing 5 C.F.R. § 2429.11).

²⁴ *U.S. Dep't of VA, Boise Veterans Admin. Med. Ctr.*, 72 FLRA 124, 126 (2021) (Member Abbott concurring; Chairman DuBester dissenting, in part, on other grounds) (citing

U.S. Dep't of Educ., Fed. Student Aid, 71 FLRA 1166, 1167 n.10 (2020) (then-Member DuBester concurring); *AFGE, Nat'l Council of EEOC Locs. No. 216*, 65 FLRA 252, 253-54 (2010)).

²⁵ Remedial Award at 25.

²⁶ *Id.* at 24; *see U.S. DOD, Domestic Dependent Elementary & Secondary Schs.*, 72 FLRA 601, 603 n.17 (2021) (*DOD*) (Chairman DuBester concurring) (finding that award was final where arbitrator awarded backpay, but retained jurisdiction to assist in determining the amount of the backpay).

²⁷ *See NTEU, Chapter 164*, 67 FLRA 336, 337 (2014) (holding that an "award is final for purposes of filing exceptions" if it "does not indicate that the arbitrator or the parties contemplate the introduction of some new measure of damages").

²⁸ Second SCO at 2.

²⁹ *Id.* at 2-3.

³⁰ *E.g., U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012) (finding exceptions interlocutory where the question of an appropriate remedy was submitted to arbitration, but the arbitrator had not made a final disposition as to a remedy).

³¹ *NTEU, Chapter 103*, 66 FLRA 416, 417 (2011) (rejecting opposing party's argument that excepting party was required to file interlocutory exceptions to a threshold ruling in an initial award).

³² *See id.*

both the initial and remedial awards became final.³³ Because the Agency filed its exceptions within thirty days of the initial award becoming final,³⁴ the exceptions are timely.³⁵

Since the Agency timely filed exceptions to a final award, we consider those exceptions below.

V. Analysis and Conclusion: The Agency does not establish that the initial award fails to draw its essence from the parties' agreement.

The Agency argues that two of the Arbitrator's arbitrability determinations fail to draw their essence from the parties' agreement.³⁶ The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.³⁷ The Authority has found that an award fails to draw its essence from a collective-bargaining agreement where the award conflicts with the agreement's plain wording.³⁸

First, the Agency argues that the initial award does not comport with Article 31.³⁹ As noted, that article identifies the Agency official with whom the Union must file various grievances: grievances against a warden should be filed with a regional director and grievances against the Bureau's divisional employees should be filed with the assistant director of the relevant division.⁴⁰

The Agency contends that the grievance concerned position classification, and as such the Union

should have filed it with the assistant director of the Bureau's human-resources division, which is responsible for classifying positions.⁴¹ However, the Arbitrator found that the grievance concerned the duties performed by the teachers, and that the warden had undisputed responsibility for assigning those duties.⁴² These findings support the Arbitrator's conclusion that the Union grieved the warden's actions. Therefore, the Arbitrator's determination that the Union appropriately filed the grievance with the regional director is consistent with Article 31.⁴³ Accordingly, the Agency fails to establish that the initial award does not draw its essence from Article 31.⁴⁴

Second, the Agency argues that the Arbitrator's rejection of the Agency's timeliness challenge conflicts with Article 32 because the Union sent the arbitration-panel request to FMCS more than three working days after invoking arbitration.⁴⁵

Article 32 provides that "the parties (or the grieving party) shall" request an arbitration panel from FMCS within three working days of a party invoking arbitration.⁴⁶ According to the Agency, this wording allows a grievant to request a panel unilaterally and does not contain any exception to the three-work-day deadline.⁴⁷ However, the Arbitrator found that "the inclusion of the parenthetical '(or the grieving party)' cannot be construed as imposing a unilateral obligation on the Union to file the [f]orm . . . , where the Agency declines or fails to do so."⁴⁸ Instead, the Arbitrator determined that Article 32 creates a joint obligation to timely submit arbitration-panel requests and provides grievants the option, but not the obligation, to submit

³³ See *Dep't of VA, Edith Nourse Rogers Mem'l VA Med. Ctr., Bedford, Mass.*, 71 FLRA 232, 233 n.7 (2019) (*Bedford VA*) (then-Member DuBester concurring) (finding that merits award was final only when the arbitrator "completed the process of fashioning a remedy" in remedial award); see also *DOD*, 72 FLRA at 603 n.17 (award was final where arbitrator retained jurisdiction to assist with implementation of awarded remedy).

³⁴ Second SCO at 2 (noting that the Arbitrator served the remedial award on Sept. 27, 2021 and the Agency mailed exceptions on October 27, 2021); 5 C.F.R. § 2425.2(b) (stating that the time limit for filing exceptions is thirty days "after the date of service of the award").

³⁵ See *Bedford VA*, 71 FLRA at 233 n.7 (exceptions challenging merits award were timely filed after arbitrator issued remedial award that resolved final issue in arbitration).

³⁶ Exceptions Br. at 6-7, 10.

³⁷ *U.S. Dep't of the Army, Mil. Dist. of Wash., Fort Myer, Va.*, 72 FLRA 772, 774 n.21 (2022).

³⁸ *NLRB*, 72 FLRA 226, 229 (2021) (Member Abbott concurring; Chairman DuBester dissenting in part on other grounds).

³⁹ Exceptions Br. at 6-7.

⁴⁰ CBA Art. 31, § f.

⁴¹ Exceptions Br. at 8.

⁴² Initial Award at 43 (finding that the grievance did not contest the "classification of the teacher[s] as FLSA exempt based upon the intended design of the teacher job per the [Bureau's] position description," but rather grieved "the manner in which the [Agency] has actually deployed the [t]eachers").

⁴³ See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 71 FLRA 997, 998 (2020) (finding arbitrator's determination that grievance was properly filed with a regional director was factually supported and consistent with Article 31 where warden was responsible for grieved actions).

⁴⁴ See *id.*

⁴⁵ Exceptions Br. at 10-11.

⁴⁶ CBA Art. 32, § b.

⁴⁷ Exceptions Br. at 12.

⁴⁸ Initial Award at 49.

requests unilaterally.⁴⁹ Despite its disagreement with the Arbitrator's interpretation, the Agency has not shown that the interpretation is inconsistent with the plain wording of Article 32.⁵⁰

Based on this interpretation, the Arbitrator found that the Union "fulfilled its obligation[]" under Article 32 by providing the Agency a partially completed request form along with the arbitration invocation.⁵¹ Because the Arbitrator also found that the Agency failed to meet its own Article 32 obligation, the Arbitrator rejected the Agency's procedural challenge alleging a violation of that provision.⁵² As these findings are supported by the record, the Agency fails to establish that the Arbitrator's Article 32 conclusions do not draw their essence from the agreement.⁵³

The Agency relies on *U.S. Small Business Administration (SBA)*⁵⁴ to support its essence exception,⁵⁵ but *SBA* is distinguishable from this case. In *SBA*, the arbitrator excused the union's failure to adhere to a procedural time frame in the parties' agreement.⁵⁶ Consequently, the Authority found that the arbitrator erred by relying on "extraneous considerations" rather than the plain wording of the parties' agreement.⁵⁷ By contrast, the Arbitrator here found that the Union *complied* with the procedural obligation created by Article 32,⁵⁸ and the Agency fails to establish that this conclusion conflicts with the plain wording of the parties' agreement.⁵⁹ Moreover, we note that even if the Arbitrator had interpreted Article 32 as imposing a unilateral obligation on the Union to timely submit the FMCS form – which the Arbitrator did not – the Agency failed to prove before the Arbitrator that the arbitration-panel request was untimely.⁶⁰

Accordingly, we deny the Agency's essence exceptions.⁶¹

VI. Order

We grant the motion for reconsideration, consider the Agency's exceptions, and deny them.

⁴⁹ *Id.* (stating that this interpretation "endeavor[ed] to give meaning to all words used by the parties" and that "if the parties had intended to make . . . submission [of the form] the unilateral obligation of the Union, they could have easily done so and dispensed with the statement that the parties would do so jointly").

⁵⁰ See *SSA*, 71 FLRA 580, 581 (2020) (*SSA*) (then-Member DuBester concurring) (where term in parties' agreement was not defined, argument based "merely [on] disagreement" failed to establish that arbitrator's interpretation was implausible).

⁵¹ Initial Award at 49.

⁵² *Id.* at 49-50.

⁵³ See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 1262, 1263 (2020) (*FCI Miami*) (then-Member DuBester concurring) (denying essence exception concerning arbitrator-selection provision where arbitrator's findings were consistent with provision's requirements).

⁵⁴ 70 FLRA 525, 527-28 (2018) (then-Member DuBester concurring in part and dissenting in part).

⁵⁵ Exceptions Br. at 11-12 (citing *SBA*, 70 FLRA at 528).

⁵⁶ 70 FLRA at 525-26.

⁵⁷ *Id.* at 528.

⁵⁸ Initial Award at 49.

⁵⁹ See *SSA*, 71 FLRA at 581 n.10 (finding *SBA* distinguishable in case where arbitrator "relied on the specific language of the parties' agreement, and . . . findings of fact as derived from the parties' conduct" rather than using "past practice and alleged waiver to disregard the specific language of the parties' agreement").

Chairman DuBester notes his continuing disagreement with *SBA*. However, he agrees that *SBA* is entirely distinguishable from the case before us.

⁶⁰ Initial Award at 49 n.27 (finding that the Agency failed to establish the exact date upon which the form was filed); see *FCI Miami*, 71 FLRA at 1263 (in denying essence exception challenging procedural-arbitrability determination, noting agency's failure to provide evidence to support its position that a union action was untimely).

⁶¹ See *SSA*, 71 FLRA 352, 353 (2019) (then-Member DuBester concurring) (denying essence exception where arbitrator plausibly interpreted contract wording as imposing a "mutual responsibility to ensure that a hearing occurred within the established timeframe," and therefore refused to find grievance non-arbitrable where agency "failed to do its share").