74 FLRA No. 30

NATIONAL LABOR RELATIONS BOARD
(Agency)

and

NATIONAL LABOR RELATIONS BOARD UNION
(Union)

0-AR-5903

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ORDER DISMISSING EXCEPTIONS

January 15, 2025

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

I. Statement of the Case

After the Union invoked arbitration over two related grievances, the Agency moved to dismiss both grievances as procedurally inarbitrable on the grounds that the Union did not prosecute them in a timely manner. Arbitrator Kenneth A. Perea bifurcated the proceedings to address the Agency's motion before considering the merits. Finding the Agency had not complied with the process in the parties' collective-bargaining agreement for dismissing grievances, the Arbitrator issued an award determining the grievances were procedurally arbitrable and retaining jurisdiction to resolve the grievances' merits.

The Agency filed four exceptions to the award, arguing the Arbitrator's procedural-arbitrability determination is contrary to law, fails to draw its essence from the parties' agreement, is so ambiguous as to make implementation impossible, and is contrary to public policy. For the following reasons, we dismiss the Agency's exceptions, without prejudice, as interlocutory.

II. Background and Arbitrator's Award

The Union filed two grievances in December 2009 and July 2012, respectively. In each case, the Agency denied the grievance and the Union referred the grievance to arbitration. In 2023, the Union initiated arbitration in both cases by requesting an arbitrator.

Following selection of the Arbitrator, the Agency filed a motion to dismiss both grievances for failure to prosecute the grievances in a timely manner. Specifically, the Agency argued that the grievances were stale and moot because the Union unreasonably delayed its initiation of arbitration. The Agency also contended that federal labor policy disfavors arbitration of old grievances.

In an interim award, the Arbitrator noted that he was "in philosophical alignment with the principles and concerns" the Agency raised, but he found that "the parties . . . agreed to specific terms concerning the processing of grievances."[1] Rather than specifying a deadline for invoking arbitration, Article 16, Section 1 provides that, "where the grieving party has not requested a panel within two years of the date of referral to arbitration, the responding party may request that the grievance be withdrawn by written request to th[e] party that appealed the grievance to arbitration."[2] It also states that, "[a]fter receiving such notification, the party that appealed to arbitration will have [thirty] days to either withdraw [the grievance] or request an arbitration panel."[3]

Noting that the parties' negotiated arbitration procedure was "uncommon,"[4] the Arbitrator concluded he was "nevertheless bound to enforce the terms of the [parties' a]greement."[5] Therefore, because the Agency did not request that the Union withdraw the grievances, the Arbitrator found the grievances procedurally arbitrable and denied the Agency's motion to dismiss. The Arbitrator "retain[ed] jurisdiction for purposes of adjudicating the . . . disputes on the merits."[6]

The Agency filed exceptions on June 29, 2023, and the Union filed an opposition to the Agency's exceptions on July 27, 2023.

III. Analysis and Conclusion: We dismiss the Agency's exceptions, without prejudice, as interlocutory.

Section 2429.11 of the Authority's Regulations provides that the Authority "ordinarily will not consider interlocutory appeals."[7] 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.[8] However, the Authority has held that it will grant interlocutory review under certain

[1] Award at 6.
[2] *Id.* at 7.
[3] *Id.*
[4] *Id.* at 6.
[5] *Id.* at 8.
[6] *Id.* at 9.
[7] 5 C.F.R. § 2429.11.
[8] *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 850 (2012).

"extraordinary circumstances."[9] As the Authority explained in *U.S. Department of the Army, Army Materiel Command, Army Security Assistance Command, Redstone Arsenal, Alabama* (*Redstone*),[10] the Authority will find such extraordinary circumstances 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.[11]

The Agency argues its exceptions are not interlocutory because the Arbitrator's denial of the Agency's motion to dismiss was "a final award."[12] According to the Agency, the award "decides the dispositive issue of arbitrability in this case, it entirely dispenses with the only remaining issue to be determined, and is outcome determinative with respect to the dispute overall."[13] However, in his "[i]nterim [a]ward,"[14] the Arbitrator "retain[ed] jurisdiction for purposes of adjudicating the . . . disputes on the merits" – specifically, the Union's allegations that the Agency violated the parties' agreement on multiple occasions.[15] Thus, the Arbitrator did not completely resolve the entire dispute submitted to arbitration.[16] Because the Arbitrator did not address the merits of the Union's grievances, the award is not final, and the Agency's exceptions are interlocutory.[17]

Alternatively, the Agency contends that, if its exceptions are interlocutory, then the Authority should grant interlocutory review because "the [A]rbitrator lacked jurisdiction as a matter of law and . . . resolving the exceptions would bring an end to the entire dispute . . . the parties submitted to arbitration."[18] According to the Agency, "the Arbitrator failed to apply the clear legal standards governing the staleness and mootness doctrines."[19] Although the Agency cites various authorities to support its argument that the Arbitrator *could have* dismissed the grievances on these grounds,[20] these authorities do not demonstrate the Arbitrator lacked jurisdiction as a matter of law over the grievances. Therefore, the Agency's exceptions concerning staleness and mootness do not demonstrate extraordinary circumstances warranting interlocutory review.[21]

The Agency also argues the award fails to draw its essence from the parties' agreement because Article 16 does not preserve the arbitrability of stale grievances where the Agency fails to request withdrawal.[22] However, in *Redstone*, the Authority held it would no longer grant interlocutory review of exceptions arguing that grievances are inarbitrable under the terms of collective-bargaining agreements.[23] As the Agency argues the Arbitrator should have found the grievance inarbitrable under Article 16 of the parties' agreement, its essence exception does not demonstrate extraordinary circumstances warranting interlocutory review.[24]

In its remaining exceptions, the Agency argues that the award is so ambiguous as to make implementation impossible, and that the Arbitrator's denial of its motion to dismiss conflicts with public policy.[25] In neither of these exceptions does the Agency contend the Arbitrator lacked jurisdiction as a matter of law. Accordingly, those

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[9] *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 1, 2 (2012).

[10] 73 FLRA 356 (2022) (Member Kiko dissenting).

[11] *Id.* at 362; *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 74 FLRA 157, 158 (2024) (*BOP, Yazoo City*) (Chairman Grundmann concurring; Member Kiko dissenting) (dismissing interlocutory exceptions where agency did not demonstrate arbitrator lacked jurisdiction as a matter of law).

[12] Exceptions Br. at 4.

[13] *Id.* at 4-5.

[14] Award at 2.

[15] *See id.* at 9.

[16] *See also id.* at 3 (summarizing grievances alleging Agency improperly denied grievant official time for representational activities on behalf of Union).

[17] *See U.S. DHS, U.S. CBP*, 72 FLRA 340, 341 n.15 (2021) (Chairman DuBester concurring; Member Kiko concurring) (noting that "[a]n award does not constitute a complete resolution of all the issues when the arbitrator postpones the determination of an issue"); *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 71 FLRA 713, 714 (2020) (Member DuBester concurring) (finding award interlocutory where "the [a]rbitrator considered arbitrability as a threshold matter and did not reach the merits of the grievance still before him").

[18] Exceptions Br. at 7.

[19] *Id.* at 11.

[20] *See, e.g.*, *id.* at 7-8 (citing *Loc. Lodge No. 1424 v. NLRB*, 362 U.S. 411, 419 (1960) (noting that the limits on continuing-violation claims under the National Labor Relations Act were intended to "bar litigation over past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused" (internal quotation marks omitted)); *Garrison v. Int'l Paper Co.*, 714 F.2d 757, 760 (8th Cir. 1983) (holding that federal district court did not abuse its discretion by dismissing a six-year-old complaint where court "could reasonably discern a pattern of intentional delay in the history of th[e] case")).

[21] *See BOP, Yazoo City*, 74 FLRA at 158 (finding interlocutory review was not warranted when "[t]he [a]gency neither assert[ed], nor demonstrate[d], that the [a]rbitrator lacked jurisdiction over the grievance as a matter of *law*"); *Redstone*, 73 FLRA at 362.

[22] Exceptions Br. at 11-14.

[23] *Redstone*, 73 FLRA at 362.

[24] *See BOP, Yazoo City*, 74 FLRA at 158; *Redstone*, 73 FLRA at 362 (dismissing interlocutory exception "arguing that the grievance [wa]s inarbitrable under the terms of the parties' agreement" (emphasis omitted)).

[25] Exceptions Br. at 14-15.

exceptions also do not demonstrate extraordinary circumstances warranting interlocutory review.[26]

The dissent argues that "the *Redstone* standard creates a system under which the Authority will be tasked with resolving the merits of the same exception twice."[27] That may be true in some cases. However, if nothing relevant happens in the intervening arbitration proceedings, then the Authority should be able to expeditiously deny that exception if the excepting party raises it a second time. If something relevant *does* happen in the intervening arbitration proceedings, then the Authority may find merit to the exception in the second decision – but at least the intervening arbitration proceedings will have "develop[ed] a record that will enable the Authority to resolve [the] . . . challenges" the second time around.[28] Of course, after the Authority dismisses interlocutory exceptions, the excepting party may also end up with a favorable outcome in the subsequent arbitration proceedings – thus making it unlikely that it will again file exceptions. Whatever the case may be – as the current case demonstrates – the *Redstone* standard avoids the Authority prematurely resolving the merits of exceptions that do not go to the Arbitrator's jurisdiction as a matter of law. As *Redstone* stated, this approach is consistent with the private sector's well-established "complete-arbitration rule," while also recognizing that, "in the federal sector[,] . . . certain matters are excluded, as a matter of law, from negotiated grievance procedures and grievance arbitration."[29]

Because the Agency has not established extraordinary circumstances warranting interlocutory review, we dismiss its exceptions without prejudice to the Agency's ability to refile them when the Arbitrator issues a final award.[30]

IV. Decision

We dismiss the Agency's exceptions without prejudice.

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[26] *See 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.").
[27] Dissent at 7.
[28] *Redstone*, 73 FLRA at 361-62.
[29] *Id.* at 361.
[30] *See BOP, Yazoo City*, 74 FLRA at 158 (dismissing interlocutory exceptions without prejudice where excepting party did not demonstrate extraordinary circumstances warranting review); *Redstone*, 73 FLRA at 362 (same).

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] I disagree that the Authority should restrict interlocutory review only to exceptions demonstrating an arbitrator lacks jurisdiction as a matter of law.[2] By excessively limiting interlocutory review, the *Redstone* standard not only disregards parties' decisions at the bargaining table, but it establishes arbitrary and inefficient rules governing which exceptions the Authority will consider.[3]

Under § 7121 of the Federal Service Labor-Management Relations Statute, the parties' collective-bargaining agreement establishes the procedures for the settlement of grievances, including the jurisdictional prerequisites for arbitrability.[4] Because arbitrators derive their authority to resolve grievances from the parties' agreement, an arbitrator lacks contractual jurisdiction to resolve a grievance if an excepting party fails to meet a negotiated requirement for arbitration.[5] However, under the severely restricted interlocutory-review standard the majority employs, parties must engage in costly and time-consuming litigation over the merits of a grievance before the Authority will permit the parties to challenge their arbitrator's contractual jurisdiction.[6] Here, by denying interlocutory review, the majority requires the parties to arbitrate *twelve- and fifteen-year-old grievances* before considering whether these grievances remain viable.[7]

Conversely, under the *Redstone* standard, the Authority will only grant review of interlocutory exceptions when a party successfully "demonstrates" that an arbitrator lacks jurisdiction as a matter of law.[8] Thus, whenever a party alleges that an arbitrator lacked jurisdiction as a matter of law, the Authority will consider the exception *on its merits*.[9] If the Authority finds the exception is meritorious, it will grant review.[10] But if the Authority rejects the excepting party's arguments on the merits, then it will dismiss the exception *without prejudice* to the party's ability to refile after the arbitrator issues a final award.[11] In fact, that is precisely what the majority does in this case: despite concluding the Agency's contrary-to-law argument *lacks merit*, the majority dismisses it without prejudice.[12] Consequently, in addition to delaying consideration of meritorious exceptions by

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

[2] *Id.* at 363 (Dissenting Opinion of Member Kiko) ("Under the new standard, the Authority will no longer consider interlocutory exceptions even when the excepting party has proven that the arbitrator lacks the contractual authority to hear the grievance.").

[3] *See* 5 U.S.C. § 7101(b) (providing that the Statute "should be interpreted in a manner consistent with the requirement of an effective and efficient [g]overnment"); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 74 FLRA 157, 160 (2024) (*BOP, Yazoo City*) (Chairman Grundmann concurring; Member Kiko dissenting) (Dissenting Opinion of Member Kiko) ("[I]t 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.").

[4] 5 U.S.C. § 7121(a)(1) ("[A]ny collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability.").

[5] *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Terre Haute, Ind.*, 72 FLRA 711, 712-13 (2022) (Chairman DuBester dissenting) (vacating award where arbitrator disregarded contract's clear time limit for filing grievances).

[6] *See BOP, Yazoo City*, 74 FLRA at 160 (Dissenting Opinion of Member Kiko) ("The *Redstone* standard is also inefficient because it forces unnecessary litigation over contractually barred grievances."); *Redstone*, 73 FLRA at 363 (Dissenting Opinion of Member Kiko) ("With this decision, even where a meritorious exception could obviate the need for further proceedings, the majority obligates parties to engage in unnecessary arbitration in all but a few limited circumstances . . . [including] when the excepting party has proven that the arbitrator lacks the contractual authority to hear the grievance.").

[7] Award at 2-3.

[8] *Redstone*, 73 FLRA at 361 (The Authority will only grant interlocutory review "where an excepting party has *demonstrated* that the arbitrator lacks jurisdiction as a matter of law. It will not be sufficient to merely allege, or even present a 'plausible' claim, regarding legal bars to jurisdiction.").

[9] *Id.*

[10] *Id.*

[11] *Id.* at 362; *see also id.* at 364 n.16 (Dissenting Opinion of Member Kiko) ("I fail to see how a standard that dismisses an exception without prejudice after the Authority has considered – and rejected – the merits of that exception improves the efficiency of Authority operations.").

[12] Majority at 3-5.

creating additional litigation,[13] the *Redstone* standard creates a system under which the Authority will be tasked with resolving the merits of the same exception twice.

Because this standard reduces government efficiency, increases cost to the taxpayer, and disregards the parties' negotiated procedures, I dissent.

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[13] *See Redstone*, 73 FLRA at 366-67 (Dissenting Opinion of Member Kiko) (noting that, despite the "[a]rbitrator's refusal to enforce the plain language of the [parties' grievance procedure,] . . . the majority refuse[d] to consider this error [as an interlocutory matter] – preferring instead to delay consideration of it until after the parties have expended additional time and government resources on litigating the merits of the grievance.").