**64 FLRA No. 61**

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-4301

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DECISION

January 12, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

## I. Statement of the Case

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

The Arbitrator found that the Agency violated Department of Defense (DOD) Instruction 1342.26 by certifying its employees as eligible to participate in the DOD Domestic Dependents Elementary and Secondary Schools (DDESS) program in Puerto Rico and Guam only if they met criteria set forth in a policy bulletin issued by the Agency. [1] Accordingly, the Arbitrator ordered the Agency to (1) withdraw the bulletin, (2) provide a written statement that all Agency employees covered by the award are eligible for the DDESS program, and (3) reimburse covered employees for private educational expenses incurred during the period beginning 20 days prior to the filing of the grievance and ending when their dependents are able to attend DOD schools in Puerto Rico and Guam. For the reasons that follow, we dismiss the Agency's exceptions pursuant to § 2429.5 of the Authority's Regulations.

1. The relevant wording of the Instruction and the Agency bulletin is quoted below.

## II. Background and Arbitrator's Award

Through its DDESS program, the DOD operates schools for dependents of DOD employees in United States territories and overseas. DOD Instruction 1342.26 provides eligibility guidelines for civilian employees of other agencies of the Federal government whose dependent children may also participate in the DDESS program. Specifically, as relevant here, it provides for the eligibility of dependent children of civilian Federal employees in a United States territory or possession who "are subject by policy and practice to transfer or reassignment to a location where English is the language of instruction[.]" Award at 2-3. In an explanatory letter, the DOD clarified that, for a Federal civilian employee's dependents to be eligible for the program in Puerto Rico and/or Guam, the agency for which the employee works "must have the right to transfer the . . . employee without the consent of the . . . employee[.]" *Id.* at 3.

As relevant here, the Agency published FAA Human Resources Policy Manual Policy Bulletin #37 (PB #37), which provided the Agency's new eligibility criteria for dependents of Agency employees seeking to attend DOD schools. PB #37 states that the Agency would certify those dependents as eligible to participate in the DDESS program only if the employees met one or more of the following criteria:

- Employee is assigned to a position in Puerto Rico or Guam and has documented return rights to a position in the Continental United States (CONUS).
- Employee is assigned to a position in Puerto Rico or Guam and has a written mobility agreement that could require the employee's potential involuntary reassignment to a position in the CONUS.
- Employee is assigned to a facility in Puerto Rico or Guam that has been officially designated by management as under consideration for closure, with the potential involuntary reassignment of current employees to a position in the CONUS.

*Id.* at 8.

The Union filed a grievance alleging that the Agency's issuance of PB #37 violated DOD Instruction 1342.26 because PB #37 excludes from participation in the DDESS program certain Agency employees who would otherwise qualify for participation under DOD Instruction 1342.26. When the grievance was not

resolved, it was submitted to arbitration. At arbitration, the parties were unable to agree on a statement of the issue, and authorized the Arbitrator to formulate the issue. The Arbitrator framed the issue as follows:

> [W]hether the Agency violated, misapplied, or misinterpreted [DOD] Instruction 1342.26 in determining which . . . bargaining unit employees to certify as meeting the DOD's eligibility requirements to enroll their dependents in the [DDESS] program in Puerto Rico and Guam? More particularly, did the Agency violate, misapply or misinterpret DOD Instruction 1342.26 by limiting such eligibility to employees who meet one or more of the criteria set forth in [PB #37]?

*Id.* at 1.

The Arbitrator noted that application of DOD Instruction 1342.26 is central to the case, and that "[t]he Agency does not dispute that it is the DOD's interpretation and application of the eligibility standard in DOD's Instruction that is controlling." *Id.* at 19. The Union presented evidence that all Agency employees – not just those who meet the PB #37 criteria – are subject to transfer and reassignment as a condition of their employment and, thus, meet the criteria for DDESS participation set forth in DOD Instruction 1342.26. The Agency argued that the Union's interpretation of DOD Instruction 1342.26 would create a permanent paid benefit to all Agency employees and require the Agency to certify employees who it knows do not meet the DOD's eligibility criteria. In this connection, the Agency contended that the DOD Instruction requires both the policy *and* practice of transferring employees to the CONUS in order for the employees' children to be eligible, and that some employees are not subject to reassignment to the CONUS in practice.

The Arbitrator found that Agency employees who are assigned to positions in Puerto Rico and Guam are "subject by policy and practice to transfer or reassignment to a location where English is the language of instruction" for purposes of DOD Instruction 1342.26. *Id.* at 2-3, 22. The Arbitrator noted that the DOD Instruction and the DOD's subsequent letter explain eligibility by focusing on "the Agency's right to transfer employees without their consent, not on whether they have rights to return to CONUS or are 'routinely' transferred or reassigned to CONUS." Id. at 20. The Arbitrator determined that PB #37 improperly imposes heightened eligibility criteria by restricting eligibility to only those Agency employees who are *routinely* reassigned to the CONUS despite the fact that "all of the affected employees in Puerto Rico and Guam are subject to involuntary transfer by the Agency." *Id.* The Arbitrator concluded that, by imposing these heightened criteria, the Agency misinterpreted and misapplied DOD Instruction 1342.26.

As remedies, the Arbitrator ordered that the Agency withdraw PB #37, "[p]rovide a written statement in accordance with DOD Instruction 1342.26 that dependents of all [Agency] employees covered by [the] Award located in Puerto Rico and Guam meet the eligibility requirements set forth therein[,]" and reimburse affected employees for private educational expenses incurred as of 20 days prior to the filing of the grievance until such time as their dependents are able to attend DOD schools. *Id.* at 23.

## III. Positions of the Parties

### A. Agency's Exceptions

The Agency asserts that the remedy ordered by the Arbitrator is contrary to law, rule, or regulation and exceeds his authority under the parties' agreement.

The Agency argues that employees' eligibility for participation in the DDESS program constitutes "compensation and benefits[,]" which are governed by the Air Traffic Management System Performance Improvement Act of 1996 ("the Act"). Exceptions at 3. The Agency argues that the Act limits the Agency's ability to negotiate such benefits, and "also provides that the Administrator [of the Agency] is not bound by any requirement including other laws, rules, or regulations in setting compensation or benefits." *Id.* at 4 (citing 49 U.S.C. § 106(*l*)). [2] The Agency argues that its interpretation of the Act is entitled to deference by the Authority and that, therefore, the Agency has the right to issue and apply policies governing the eligibility of its employees to participate in the DDESS program.

2. Section 106(*l*) provides, in pertinent part, that, in fixing compensation and benefits, the Agency's Administrator "shall not engage in any type of bargaining, except to the extent provided for in section 40122(a), nor shall the Administrator be bound by any requirement to establish such compensation or benefits at particular levels." 49 U.S.C. § 106(*l*)(1).

The Agency further argues that the award is contrary to § 40122(a) of the Act because it requires the Agency to retract a policy that the Agency has the right to issue. [3] In this regard, the Agency contends that § 40122(a) requires it to bargain with unions before implementing any changes to its personnel management system. According to the Agency, the obligation to bargain was not at issue before the Arbitrator, and, thus, he had no authority to order the Agency to rescind a personnel policy issued under the Agency's statutory authority. The Agency asserts that by requiring it to withdraw its own policy, the Arbitrator effectively established Agency policy, and therefore exceeded his authority.

B. Union's Opposition

As an initial matter, the Union argues that the Agency's framing of the issue in its exceptions specifically limits the Agency's argument to whether the Arbitrator exceeded his authority, and, therefore, the Agency is barred from additionally arguing that the Arbitrator's remedy is contrary to law, rule or regulation.

The Union also argues that the award is not contrary to law, rule or regulation because the remedy does not implicate the bargaining and mediation provisions cited by the Agency. The Union contends that at the hearing, the parties sought the Arbitrator's decision on whether PB #37 was "either an appropriate or inappropriate vehicle for the administration and implementation of the DOD Instruction[,]" and that the deference owed to an agency's interpretation of its own statute is thus not at issue. Opp'n at 8-9. The Union notes that the parties agreed at arbitration that the DOD's interpretation and application of the DOD Instruction controlled their dispute about PB #37. According to the Union, the award does not preclude the Agency from issuing policy, but merely requires the Agency to revise its policy to conform to the controlling DOD Instruction.

Finally, the Union argues that the Arbitrator did not exceed his authority. *See id.* at 5 (citing *AFGE Local 1770*, 51 FLRA 1302 (1996)). The Union contends that the Agency excepted to the Arbitrator's remedy, but not his underlying findings on the merits, and argues that if the Agency had believed that the Arbitrator exceeded his authority, then it "would have never allowed the case to proceed to arbitration in the first place." Opp'n at 4.

## IV. Analysis and Conclusions

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented to the arbitrator. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008). Where a party makes an argument for the first time on exception that it could, and should, have made before the arbitrator, the Authority applies § 2429.5 to bar the argument. *See, e.g., U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 57 FLRA 4, 5 (2001) (Chairman Cabaniss concurring) (where agency relied upon position description at arbitration hearing, Authority refused to consider agency's argument, raised for the first time on exception, that position description was abolished during the relevant time frame).

In addition, "in the absence of a stipulated issue, an arbitrator's formulation of the issue is accorded substantial deference." *AFGE Council 238*, 62 FLRA 466, 468 (2008). *See also AFGE, Local 505, Nat'l Immigration & Naturalization Serv. Council*, 60 FLRA 774, 776 (2005) ("The Authority accords substantial deference to the arbitrator's framing of the issue.").

The Arbitrator framed the issue as whether the Agency violated, misapplied, or misinterpreted DOD Instruction 1342.26 by limiting eligibility to employees who met the criteria in PB #37. *See* Award at 1. According to the Arbitrator — and uncontested in the Agency's exceptions — the parties agreed at arbitration that the DOD's interpretation and application of the eligibility standard in DOD Instruction 1342.26 controlled resolution of the contested issue. *See id.* at 19.

There is no indication in the record that the Agency argued before the Arbitrator, as it does in its exceptions, that 49 U.S.C. §§ 106(*l*) and 40122(a) limit the Arbitrator's authority to require the Agency to revise or retract PB #37 so that its eligibility requirements are

3. 49 U.S.C. § 40122(a) provides, in pertinent part:

> (1) Consultation and negotiation. — In developing and making changes to the personnel management system initially implemented by the Administrator of the Federal Aviation Administration on April 1, 1996, the Administrator shall negotiate with the exclusive bargaining representatives of employees of the Administration certified under section 7111 of title 5 and consult with other employees of the Administration.

in accordance with DOD Instruction 1342.26. [4] Rather, the Agency conceded the applicability of DOD Instruction 1342.26, and argued that PB #37 was developed in consultation with the DOD in order to better comply with DOD eligibility policy. *See* Award at 19. An argument that §§ 106(*l*) and 40122(a) rather than DOD Instruction 1342.26 controlled resolution of the grievance could, and should, have been presented to the Arbitrator. *See, e.g., U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 502 (2000) (agency that argued about the proper interpretation of a Panel decision could not argue for the first time in its exceptions that an order to implement the decision violated the agency's management rights). As the Agency failed to do so, we find that § 2429.5 bars the Agency from raising it for the first time before the Authority.

Furthermore, a review of the record makes clear that the Agency was on notice that the relief sought by the Union included an order that the Agency withdraw PB #37. Award at 16; Attachment 2 to Exceptions (Hrg. Tr. 13:16-22, Apr. 4, 2007) (Union opening argument). However, there is no evidence in the record that the Agency ever argued to the Arbitrator that awarding this remedy would violate §§ 106(*l*) and 40122(a). *See U.S. Dep't of Labor, Mine Safety & Health Admin.*, 61 FLRA 232, 235 (2005) (§ 2429.5 barred the argument that awarding the remedy sought by the union would violate law or regulation where the issue could have been, but was not, presented to the arbitrator).

Based on the foregoing, we find that § 2429.5 of the Authority's Regulations bars the Agency's exceptions. Accordingly, we dismiss the exceptions. [5]

## V. Decision

The Agency's exceptions are dismissed.

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4. Although the Arbitrator noted that the Agency maintained that it was under "no obligation to continue to participate in the DOD schools program, but [chose] to continue to do so in accordance with the DOD Instruction and PB #37," there is no evidence in the record that the Agency cited 49 U.S.C. §§ 106(*l*) and 40122(a), or disputed the applicability of the DOD Instruction for determining DDESS eligibility.

5. Given this holding, it is unnecessary to address the Union's argument that the Agency's arguments should be limited by the issue as framed in the Agency's exceptions brief. However, we note that the Agency set forth its intention to argue that the Arbitrator exceeded his authority *and* that the remedy ordered is contrary to law, rule, or regulation in the last sentence of its "Background" section. Exceptions at 2.