

**65 FLRA No. 113**

SOCIAL SECURITY ADMINISTRATION  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 3627  
(Union)

0-AR-4584

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**DECISION**

February 18, 2011

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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 Douglas F. Coleman filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator sustained the Union's grievance and found that the Agency violated the parties' agreement by relying on improper criteria to fill an Agency vacancy. For the reasons set forth below, we dismiss the Agency's exceptions.

**II. Background and Arbitrator's Award**

The Agency posted a vacancy announcement (the announcement) for three Senior Legal Assistant positions, General Schedule (GS)-6/GS-7/GS-8 (senior position(s)). *See* Award at 2; Exceptions, Attach. 5 at 2. The announcement required applicants to have familiarity with a certain set of duties, i.e., "specialized experience." Exceptions, Attach. 5 at 2. It also required applicants seeking a GS-6 senior position to have fifty-two weeks of "specialized experience at least equivalent" to a GS-5 level. *Id.* (emphasis added). However, it further stated that "specialized experience must be gained at the next lower grade" level. *Id.* (emphasis added).

Six employees applied; three applicants, including employee A, were placed on the best-qualified list. Award at 2. The Agency selected employee A to fill a GS-6 senior position. Employee A had held a GS-5 assistant position for only four months, Award at 5; however, she also had been a GS-10 supervisor at a different agency for over a year and that position involved many, but not all, of the same duties as a senior position, *id.* at 4-5.

The Union filed a grievance arguing that the Agency's selection of employee A violated Article 26 of the parties' agreement, which, in relevant part, requires the Agency to "ensure that applicants meet the minimum qualifications" for a position. Award at 2-3 (quoting Article 26, Section 10[A] of the parties' agreement). The Union contended that employee A should not have been selected because she did not meet the time and grade requirements for the position because she had held a GS-5 assistant position for four months rather than a full year. Award at 4; *see also* Exceptions, Attach. 4, Union's Grievance at 6-8. The Union requested that, if employee A did not meet the necessary requirements, the Agency vacate the selection and rerun the announcement. Award at 4; Exceptions, Attach. 4 at 4. The Arbitrator framed the issue as "[d]id the Agency violate the provisions of Article 26 Section[s] 1, 5A[,] 10A of the [parties' agreement] with respect to filing the Senior Legal Assistant vacancy[?]" Award at 2.

At the hearing, the Agency's Human Resources Specialist (specialist) responsible for creating the announcement and selecting employee A testified. She testified that she relied on Office of Personnel Management (OPM) classification standards (standards) and an OPM handbook (handbook) to select employee A. *See id.* at 7. The specialist acknowledged that the announcement stated that an applicant had to possess specialized experience at the next lower grade level for a period of a year and that employee A had been a GS-5 for only four months. *Id.* at 8. She also acknowledged that employee A did not have experience with all the duties necessary for the senior position. However, she testified that, under the standards and the handbook, employee A's time as a GS-10 supervisor satisfied the announcement's time and grade requirements and provided her with the experience necessary for the senior position. *Id.*

The Arbitrator concluded that the Agency violated the parties' agreement by selecting employee A. The Arbitrator determined that employee A did not satisfy the time and grade requirements of the

announcement. According to the Arbitrator, the announcement unambiguously stated that an applicant “must” have relevant experience at the lower level for a full year. Award at 11 (quoting Exceptions, Attach. 5 at 2). Because employee A had been a GS-5 assistant for only four months, the Arbitrator held she did not satisfy this requirement. Award at 11-12. The Arbitrator determined that the requirements of the announcement could not be satisfied by employee A’s year-long tenure as a GS-10 supervisor because that was contrary to the plain language requirements of the announcement. *See id.* at 10-11. Moreover, the Arbitrator found, contrary to the specialist’s testimony, that employee A’s GS-10 supervisor duties did not provide her with the skills necessary for the position. *See id.* at 11-12. The Arbitrator, accordingly, sustained the grievance.

### **III. Positions of the Parties**

#### **A. Agency’s Exceptions**

The Agency contends that the award is contrary to law because it impermissibly interferes with management’s right to select under § 7106(a)(2)(C) of the Statute.<sup>1</sup> Exceptions at 6. Accordingly, the Agency asserts that the Authority should apply the two-prong test set forth in *United States Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*). *Id.* The Agency contends that the Arbitrator’s award fails to satisfy prong I of *BEP* because the award excessively interferes with management’s rights to fill positions and select appointments from properly ranked and certified candidates. *Id.* at 6-7. Specifically, the Agency alleges that the award creates this excessive interference, and is therefore contrary to § 7106(a)(2)(C), because: (1) the Arbitrator did not defer to the specialist’s testimony regarding employee A’s qualifications, *id.* at 8-9; (2) the award “affects the determination of whether applicants possess the requisite qualifications, skills

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1. Section 7106(a)(2)(C) of the Statute provides, in pertinent part:

Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency . . . in accordance with applicable laws . . . with respect to filling positions, to make selections for appointments from (i) among properly ranked and certified candidates for promotion; or (ii) any other appropriate source[.]

5 U.S.C. § 7106(a)(2)(C)(i) & (ii).

and abilities[,] *id.* at 9; and (3) the Arbitrator improperly “second-guess[ed]” the specialist’s interpretation of the announcement, *id.*

#### **B. Union’s Opposition**

According to the Union, the Agency’s assertion that the award excessively interferes with management’s right to select is “incorrect[.]” Opp’n at 3. The Union contends that the specialist’s testimony, in conjunction with the record, actually establishes that employee A did not have the necessary qualifications for the senior position. *See id.* The Union also asserts that, although the Agency may determine the necessary qualifications, skills, and abilities for a position, it must also determine that an applicant actually *has* the necessary qualifications, skills and abilities. *See id.* at 3-4.

### **IV. The Agency’s exceptions are barred by § 2429.5 of the Authority’s Regulations**

The Authority’s Regulations that were in effect when the Agency filed its exceptions provided that “[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator.” 5 C.F.R. § 2429.5.<sup>2</sup>

As discussed above, the Arbitrator framed the issue as whether the Agency violated the parties’ agreement by selecting employee A for the senior position. *See* Award at 2. The Union raised this allegation in its grievance. *See* Exceptions, Attach. 4 at 3-4. Moreover, in its grievance, the Union requested that the Agency vacate the selection if the selection was made in violation of the parties’ agreement. *See id.* at 4. The Union requested similar relief at the hearing. *See* Award at 4. Thus, the Agency was aware that the Union was: (1) challenging the Agency’s selection of employee A; and (2) seeking to vacate this selection. The Agency, therefore, had the opportunity to argue to the Arbitrator that the award could violate management’s right to select by “affect[ing] the determination of whether applicants possess the requisite qualifications, skills and abilities[.]” Exceptions at 9. However, the record contains no indication that this argument was presented below.

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2. The Authority’s Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including 5 C.F.R. § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). Because the Agency’s exceptions in this case were filed before that date, we apply the prior Regulations.

Similarly, the Agency had an opportunity to argue to the Arbitrator that, under § 7106(a)(2)(C) of the Statute, the Arbitrator was required to defer to the specialist's examination of employee A's qualifications and her interpretation of the announcement. The specialist was the Agency's witness. *See* Award at 1. The record contains no indication, however, that the Agency argued at the hearing that the Arbitrator should defer to the specialist's testimony. Likewise, although the parties' filed post-hearing briefs, *see* Exceptions at 2, the record contains no indication that the Agency argued that a failure to defer to the specialist's testimony would excessively interfere with management's right to select.

Because the foregoing issues could have been, but were not, presented to the Arbitrator, we find that § 2429.5 of the Authority's Regulations precludes the Agency from raising them for the first time in its exceptions. *See, e.g., SSA, Newark, N.J.*, 64 FLRA 259, 260-61 (2009) (citations omitted) (Authority dismissed agency's argument that award violated management's right to select because agency failed to present argument below). Accordingly, we dismiss the Agency's exceptions.

#### **V. Decision**

The Agency's exceptions are dismissed.