

65 FLRA No. 77

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE COMMISSARY AGENCY
FORT BRAGG, NORTH CAROLINA
(Agency)

0-AR-4342

DECISION

December 21, 2010

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 Robert W. Kilroy, filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an untimely opposition to the Union's exceptions.¹

1. The Agency concedes that its opposition was untimely filed. *See* Agency's Response to Order to Show Cause at 1. Under 5 C.F.R. § 2429.23(b), an expired time limit can be waived upon a showing of "extraordinary circumstances" justifying the waiver. The Agency requests that the Authority amend its Regulations so that submissions deposited with commercial delivery services for delivery to the Authority are considered filed on the day that they are deposited for delivery rather than when the submissions are received by the Authority. Effective November 9, 2009, 5 C.F.R. § 2429.21(b) was amended to provide that the filing date of submissions sent by commercial delivery is the date on which they are deposited with a commercial delivery service (rather than the date received by the Authority). However, as the Regulations that apply here are those that were in effect at the time the submission was filed, the opposition is still considered untimely. *See AFGE, Local 2145*, 61 FLRA 661 (2010). Further, as the Agency fails to make any claim that extraordinary

A grievance was filed disputing the grievant's performance review. Award at 2. The Arbitrator determined that the Agency did not violate the Master Labor Agreement (MLA) or the Agency's performance appraisal system in assessing the grievant's performance and denied the grievance. *Id.* at 6.

For the reasons set forth below, we both deny and dismiss the Union's exceptions.

II. Background and Arbitrator's Award

The Defense Commissary Agency operates commissaries at bases operated by the Department of Defense. The grievance arose when the grievant, working as a Sales Store Checker (Cashier), disputed her performance rating. *Id.* at 1.

The Agency implemented a performance appraisal system to use as the basis for making personnel decisions relating to pay increases, awards, grade reductions, reductions in force, and the like. *Id.* The performance appraisal system is comprised of performance elements for each position. Performance standards are applied to each of the elements to evaluate the employees' level of compliance with each element. The performance standards attempt to measure employees' performance by evaluating indicators such as quality of work, results achieved, manner of performance, and quantity and timeliness of work. *Id.* Once evaluations are complete, the performance appraisal system categorizes employees with one of the following five ratings: (1) unacceptable; (2) minimally acceptable; (3) fully successful; (4) excellent; or (5) outstanding. *Id.* at 2.

The grievant's duties as a Cashier are described as follows:

Operates electronic cash register, scans grocery, meat and produce items. Accepts media from customers for payment, makes change and performs other duties as required, or assigned.

Id. The Arbitrator found that there are eight critical elements and one non-critical element that must be met to execute the duties of this position. *Id.*

circumstances warrant a waiver of the time limit, we will not consider the Agency's opposition.

In her grievance, the grievant argued that she incorrectly received a rating of “fully successful” from her supervisor rather than a rating of “excellent.” *Id.* In order to achieve a rating of “excellent,” employees must receive an “exceeded” grade on more than half of the critical performance elements assigned to their respective positions. The grievant received a rating of “exceeded” on four of the Cashier position’s critical elements and a rating of “met” on the remaining four critical elements. *Id.* The grievant also received an “exceeded” rating on the one non-critical element of her position. *Id.* Accordingly, for the one-year rating period, the grievant’s supervisor provided her with a rating of “fully successful.” *Id.*

The grievant grieved her performance rating through the negotiated grievance procedure. The Agency denied the grievance and the matter was submitted to arbitration.

Each party presented arguments before the Arbitrator. The Union argued that the instances of “failures or errors” recorded in the grievant’s evaluation should not be a bar to her receiving a rating of “excellent.” *Id.* at 3. The Agency claimed that the grievant was aware that her “variances” under the critical elements and one customer complaint prevented her from achieving a rating of “excellent.” *Id.* at 4.

The issue to be decided by the Arbitrator was whether the Agency violated Article 27 of the MLA and/or the performance appraisal system in its evaluation of the grievant.² *Id.*

First, the Arbitrator determined that the Union did not prove by a preponderance of the evidence that the Agency violated Article 27 of the MLA. The Arbitrator noted that the grievant’s argument that she was not fairly evaluated was general and did not make any specific allegations under Article 27 of the MLA. *Id.* Accordingly, the Arbitrator found no violation.

Second, the Arbitrator found that the Union failed to prove by a preponderance of the evidence that the Agency violated its performance appraisal system. In the Arbitrator’s view, the facts and circumstances did not demonstrate clear and convincing evidence of an abuse of discretion that would justify sustaining the grievance. In this respect, the Arbitrator noted that the grievant had two

2. The text of Article 27, Employees Rights, is set forth in the attached appendix.

variances and one customer complaint. The Arbitrator determined that these were legitimate reasons why the grievant was not given a rating of “exceeds” on all of her critical elements. *Id.* at 6. Although the Union argued that the infractions were within the tolerances allowed, the Arbitrator noted that, if the grievant did not have any infractions at all, then she would have achieved a rating of “exceeds.” *Id.* Accordingly, the Arbitrator found no violation of the performance appraisal system and denied the grievance. *Id.*

III. Union’s Exceptions

In its exceptions, the Union lists several “issues presented” by the arbitration award, which appear to be the bases upon which it challenges the award. Exceptions at 2. As relevant here, the Union then argues that the Arbitrator erred as a matter of law in his assessment of the grievance and the performance standard.³

The Union claims that the Arbitrator erroneously imposed a heightened standard in evaluating the Union’s challenge to the grievant’s rating. According to the Union, the Arbitrator improperly required it to show that the rating was both incorrect and made in bad faith. *Id.* at 3. The Union contends that the grievant demonstrated that the performance standards were not properly applied to her. As there were no performance errors, the Union argues that the grievant should have received a higher rating. *Id.*

3. In addition to its contrary to law argument, the Union lists the following five issues: (1) Does the award fail to draw its essence from the MLA? (2) Did the Arbitrator exceed his authority by finding that the grievant was subject to an adverse action? (3) Did the Arbitrator exceed his authority when he decided the Agency violated the MLA under unspecified provisions other than those in the stipulated issues? (4) Did the Arbitrator exceed his authority when he ordered action taken that is properly under the purview of another organization? (5) Is the Arbitrator’s award inconsistent with the Back Pay Act? The Union does not provide any arguments supporting these claims. Exceptions at 2. When a party fails to provide any arguments or authority to support its exceptions, the Authority will deny the exceptions as bare assertions. *See U.S. Dep’t of Homeland Sec., U.S. Customs & Border Prot., Port of Seattle, Seattle, Wash.*, 60 FLRA 490, 492 n.7 (2004) (Chairman Cabaniss concurring). Therefore, to the extent that these “issues presented” were intended to operate as exceptions, we reject them as bare assertions.

The Union also argues that the award is contrary to law because the Arbitrator did not conclude that the performance standards were improper. *Id.* at 4. According to the Union, the performance standards merely describe the duties assigned rather than provide an objective standard by which performance can be measured. *Id.* at 5. The Union further claims that the standards are both “impermissibly vague” and “absolute.”⁴ *Id.* The Union maintains that a single customer complaint should not “lead[] to a failure of the standard.” *Id.* In the Union’s view, the performance standard is similar to other impermissible “absolute standards” invalidated by the Merit Systems Protection Board (MSPB). *Id.* (citing *Smith v. Dep’t of Veterans Affairs*, 59 M.S.P.R. 340 (1993)). Accordingly, the Union argues that the award is contrary to law and asks that the Authority reverse the award on that basis.

IV. The award is not contrary to law.

The Union claims that the award is contrary to law because (1) the Arbitrator imposed a heightened standard in evaluating the Union’s challenge to the grievant’s performance rating, and (2) the performance standards upheld by the Arbitrator are inconsistent with the law. When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law. *See U.S. Dep’t of Def., Dep’ts of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*Dep’t of Defense*). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings. *See id.*

The Union has failed to demonstrate that the award is contrary to law because the Arbitrator required it to meet a heightened standard of review. The Union does not cite any law to which the award is contrary. Additionally, the Union does not show how the Arbitrator required it to establish, as it claims, the Agency’s “bad faith” when rating the grievant’s performance. Instead, the Arbitrator determined whether the facts supported the grievant’s

rating. Specifically, the Arbitrator found that the grievant’s supervisor identified events that prevented the grievant from receiving an overall rating of “excellent.” In this respect, the Arbitrator found, and it is undisputed, that the grievant had two variances and was also the subject of a validated customer complaint. Award at 5. Accordingly, the Arbitrator concluded that the facts warranted the grievant’s rating of “met” rather than “exceeds” on four of her critical elements and, therefore, an overall rating of “fully successful,” rather than one of “excellent.” *Id.* at 6. Thus, as the Arbitrator found that the facts supported the grievant’s rating and that the Union failed to demonstrate that the Agency violated Article 27 of the MLA, he denied the grievance.

As indicated above, the Union does not cite any law to which the award is contrary. Moreover, deferring to the Arbitrator’s undisputed factual findings in determining whether his legal conclusions are consistent with the law, *Dep’t of Defense*, 55 FLRA at 40, the Union has not demonstrated that the Arbitrator rejected the Union’s contentions because of a failure to show “bad faith” by the Agency. We therefore reject the Union’s argument and deny the exception.

The Union’s arguments that the performance standards are either impermissibly vague or absolute and that, therefore, the award is contrary to law, are not properly before the Authority. Section 2429.5 of the Authority’s Regulations provides in pertinent part that “[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator.”⁵ 5 C.F.R. § 2429.5. Authority precedent makes clear that § 2429.5’s provisions will be applied to bar consideration of a parties’ exceptions where an issue could have been, but was not, presented to an 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).

4. Specifically, the Union claims that “performance standards 3 and 5 are absolute as written.” Exceptions at 4.

5. The Authority’s Regulations concerning the review of arbitration awards, as well as certain related procedural regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency’s exceptions were filed before that date, we apply the earlier Regulations.

Application of § 2429.5's provisions in this case mandates dismissal of the Union's exception. There is no evidence in the record that the Union claimed before the Arbitrator that the performance standards were impermissibly vague or absolute. As the Union did not present, but could have presented those issues to the Arbitrator in the first instance, it may not do so now. We therefore dismiss the Union's exception.

V. Decision

The Union's exceptions are respectively denied and dismissed.

APPENDIX

ARTICLE 27 EMPLOYEE RIGHTS

Section 1. Pursuant to Title 5 Section 7102, United States Code, employees have the right, freely and without fear of penalty or reprisal, to form, join and assist the **UNION** or to refrain from such activity. The freedom of employees to assist the **UNION** shall extend to participation in the management of the **UNION** and acting for the **UNION** in the capacity of a **UNION** official.

Section 2. All personnel shall be treated with fairness, equity and dignity in all matters without favoritism or regard to political affiliation, race, color, religion, natural origin, sex, marital status, age or handicapping condition. Employees' constitutional rights will be protected and employees will be treated with proper regard and protection of their privacy. Employees have the right to fully pursue their private lives, personal welfare and personal beliefs without interference, coercion, or discrimination by management so long as such activities do not conflict with the government-wide ethics requirements as outlined in regulatory guidance or with job responsibilities; the standard of nexus shall apply.

Exceptions, Attach., MLA, at 70; *see also* Award at 3.