

67 FLRA No. 56

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3571
(Union)

and

SOCIAL SECURITY ADMINISTRATION
(Agency)

0-AR-4878

ORDER DISMISSING EXCEPTIONS

January 31, 2014

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Arbitrator Barry Goldman found that a particular grievance was not procedurally arbitrable under the parties' 2005 national agreement. The question before us is whether the Union is permitted to argue, in exceptions to the Arbitrator's award, that the Arbitrator should have found the grievance arbitrable under the parties' 2012 national agreement. Because the Union could have presented its arguments and evidence to the Arbitrator, but the record does not indicate that the Union did so, the answer is no.

II. Background and Arbitrator's Award

A grievance was submitted to arbitration, where the parties disputed whether the grievance was arbitrable under "Side Bar Article 25" (Side Bar 25) of their 2005 agreement.¹ As relevant here, Side Bar 25 provides that if the parties do not schedule the arbitration of a grievance within one year of assigning an arbitrator to the case, then the grievance in that case "is withdrawn."²

The Agency argued to the Arbitrator that the Union failed to timely schedule the arbitration and, consequently, that the grievance should be "dismiss[ed]

... as withdrawn" under Side Bar 25.³ The Union responded that the "hearing ... was scheduled timely according to" Side Bar 25,⁴ and that the Agency made "false"⁵ statements about "[w]hether the Union's efforts ... complied with the requirements of" Side Bar 25.⁶

The Union also argued that certain decisions that the Agency cited to support its position were inapposite. But the Union acknowledged that one of the decisions cited by the Agency

has some relevance to this case in that it dealt with a limitation imposed by a change in contract language. ... [W]e also have a new contract, a contract that was ratified during the process of the arbitration. All previous cases have been addressed, and new deadlines have been set for all situations "except" for issues where arbitrations have been scheduled, but not yet heard. *If* we applied the [decision cited by the Agency] to this case, and state that the new contract limits supersede, there would be *no* deadline for this case.⁷

After considering the parties' arguments, the Arbitrator found that the grievance "ha[d] been withdrawn by operation of" Side Bar 25, and thus, the grievance was not arbitrable.⁸

The Union then filed the exceptions at issue here, and the Agency filed an opposition to the Union's exceptions. In addition, the Authority issued an order to the Union to cure a procedural deficiency in its exceptions.⁹ In the Union's response to that order, the Union not only cured the procedural deficiency, but also submitted additional attachments to supplement its exceptions.¹⁰ Because the Union filed the additional attachments after the deadline for filing exceptions to the award, and as the order did not direct or permit the Union to submit supplemental attachments, we decline to consider any unsolicited, supplemental attachments.¹¹ We discuss the parties' arguments below.

³ Opp'n, Attach. 13 (Agency's Arbitration Brief) at 1 (identifying 2005 agreement as basis for decision), 4 (arguing that Union failed to comply with one-year scheduling deadline).

⁴ Exceptions, Attach. 2 (Union's Arbitration Brief) at 4.

⁵ *Id.* at 2.

⁶ *Id.* at 1.

⁷ *Id.* at 5 (emphasis added).

⁸ Award at 5.

⁹ Order (Oct. 4, 2012) at 1.

¹⁰ Union's Cure of Deficiencies (Oct. 19, 2012), Enclosures 5 & 6.

¹¹ *Cf. U.S. Dep't of VA, VA Med. Ctr., Fayetteville, N.C.*, 65 FLRA 191, 192 (2010) (declining to consider certain supplemental submissions).

¹ Award at 1.

² *Id.* at 2 (quoting Article 25); *see also* Opp'n, Attach. 6 (complete text of Article 25 of the 2005 agreement).

III. Analysis and Conclusions

The Union argues that the award is based on a nonfact that the 2005 agreement applied,¹² and that the award fails to draw its essence from the 2012 agreement, which the Union claims controls over the 2005 agreement.¹³ In addition, the Union claims that its arguments regarding the 2012 agreement were raised before the Arbitrator.¹⁴ The Agency responds that “the Union asked the Arbitrator to use the 2005 [a]greement when [the Union] briefed the arbitrability issue . . . and did not argue that the 2012 [a]greement was controlling.”¹⁵ Accordingly, the Agency argues that the Authority should dismiss the exceptions under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations.¹⁶

Under §§ 2425.4(c) and 2429.5, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.¹⁷ For example, the Authority has declined to consider an argument that an award failed to draw its essence from the parties’ agreement, where the excepting party did not advance its interpretation of the agreement at arbitration.¹⁸ In addition, the Authority has refused to consider documents supporting exceptions if those documents existed at the time of arbitration, but were not presented to the arbitrator.¹⁹

At arbitration, the Union was aware that the arbitrability of the grievance was at issue, as it specifically addressed arbitrability in its post-hearing brief.²⁰ Thus, the Union could, and should, have argued to the Arbitrator that the 2012 agreement controlled over the 2005 agreement, including Side Bar 25. Although the Union’s post-hearing brief referenced the parties’ “new contract” in the context of explaining why a decision cited by the Agency was inapposite,²¹ the Union did not argue that the 2012 agreement controlled over the 2005 agreement.²² In fact, as the Agency notes, the Union’s brief framed the arbitrability issue before the Arbitrator as “[w]hether the Union’s efforts . . . complied with the requirements of [Side Bar 25] of the 2005 . . . [a]greement.”²³ Moreover, the record does not indicate that the Union provided the Arbitrator with the 2012

agreement. As the Union could have presented, but did not present, its arguments and evidence at arbitration, §§ 2425.4(c) and 2429.5 bar the Union’s claims regarding the 2012 agreement.²⁴

IV. Order

We dismiss the Union’s exceptions.

¹² Exceptions at 5-6.

¹³ *Id.* at 6-7.

¹⁴ *Id.* at 6, 8.

¹⁵ Opp’n at 9.

¹⁶ *Id.* at 9, 11.

¹⁷ 5 C.F.R. §§ 2425.4(c), 2429.5; *e.g.*, *U.S. DHS, CBP*, 66 FLRA 495, 497 (2012).

¹⁸ *AFGE, Council 215*, 66 FLRA 771, 773 (2012) (*AFGE*).

¹⁹ *U.S. Dep’t of HUD*, 64 FLRA 247, 249 (2009) (*HUD*).

²⁰ Exceptions, Attach. 2 (Union’s Arbitration Brief) at 1-8.

²¹ *Id.* at 5.

²² *Cf. AFGE*, 66 FLRA at 773.

²³ Exceptions, Attach. 2 (Union’s Arbitration Brief) at 1 (emphasis added).

²⁴ *See HUD*, 64 FLRA at 249.

Member Pizzella, concurring:

I join with my colleagues in denying the Union's exceptions under § 2425.4(c) and § 2429.5 of our Regulations even though the exceptions could also be dismissed because they directly challenge the Arbitrator's procedural-arbitrability determination.¹

Further, as I noted in my concurring opinion in *AFGE, Local 2595, National Border Patrol Council (Local 2595)*,² I conclude that the filing of these exceptions by AFGE, Local 3571 of Indianapolis, Indiana does not contribute to the "effective conduct of public business"³ or to those "progressive work practices [that] facilitate and improve employee performance."⁴

The record in this case establishes that the original arbitrator was assigned in January 12, 2011, and that the parties' agreement clearly requires arbitration to be scheduled within one year from the date an arbitrator is assigned – in this case by January 12, 2012.⁵ Nonetheless, the Union representative failed to make any contact with the Agency representative until December 19, 2011⁶ – just three weeks before the contractual deadline. Despite contacts by the Agency representative (and his designated alternate) to the Union representative on December 21, 2011, and January 9, 2012, attempting to schedule arbitration dates, the Union representative made no contact with the Agency *after* the Union representative's contact with the Agency representative on December 22, 2011, *until after* February 7, 2012 (nearly one month *after* the deadline had already expired), when the Agency representative declared that "the matter [could] no longer be arbitrated."⁷

Under these circumstances, it is inexplicable to me that the Union would continue to pursue this matter (and incur additional Union, Agency, and taxpayer resources) *after* the originally-scheduled arbitrator "withdrew from the case"⁸ because no date for arbitration was scheduled, request a new arbitration and pick a new arbitrator to argue that "the failure to schedule the arbitration" was "the fault of the Agency,"⁹ and *then* file

exceptions with the Authority after the Arbitrator concluded that the Union, not the Agency, failed to act in a timely manner.¹⁰ It is unlikely that Congress envisioned that such futile endeavors would "contribute[] to the effective conduct of [the government's] business"¹¹ or facilitate the "amicable settlement[] of disputes."¹²

Thank you.

¹ See *Union of Pension Emps.*, 67 FLRA 63, 65 (2012).

² 67 FLRA 190, 192 (2014) (Concurring Opinion of Member Pizzella).

³ 5 U.S.C. § 7101(a)(1)(B).

⁴ *Id.* § 7101(a)(2); see also *Local 2595*, 67 FLRA at 192 (Concurring Opinion of Member Pizzella) (citing *INS v. FLRA*, 855 F.2d 1454, 1460 (9th Cir. 1988)).

⁵ Award at 2.

⁶ *Id.* at 3.

⁷ *Id.* at 4-5.

⁸ *Id.* at 2.

⁹ *Id.* at 3.

¹⁰ *Id.* at 5.

¹¹ 5 U.S.C. § 7101(a)(1)(B).

¹² *Id.* § 7101(a)(1)(C); see also *U.S. DHS, CBP*, 67 FLRA 107, 112 (2013) (Concurring Opinion of Member Pizzella).