66 FLRA No. 168

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1858
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
RESEARCH DEVELOPMENT
AND ENGINEERING CENTER
REDSTONE ARSENAL, ALABAMA
(Agency)

0-AR-4846

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ORDER DISMISSING EXCEPTIONS

August 28, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Robert N. Covington 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 opposition.

The Arbitrator found that the Agency violated the parties' agreement because it improperly denied the grievant's requests for official time. The Arbitrator sustained the Union's grievance in part and awarded several remedies. In its exceptions, the Union contends that the award is contrary to law and that the Arbitrator exceeded his authority because the Arbitrator did not award the grievant compensatory damages. For the reasons set forth below, we find that the Union's exceptions are barred by the Authority's Regulations.

II. Background and Arbitrator's Award

The Agency decided that it would no longer grant the grievant, who is also the Union president, official time to conduct union-related activities on behalf of other bargaining units (cross-representational duties). Award at 1-2. The Union filed a grievance alleging that the Agency's decision violated several provisions of the parties' agreement, including the provision concerning equal employment opportunity (EEO) issues. Exceptions, Attach., Grievance at 1. The Union requested that the Agency reimburse the grievant for leave that he used when the Agency denied his requests for official time and that the Agency allow him to use official time to perform cross-representational duties. *See id.* at 1-2. The grievance was unresolved, and the parties proceeded to arbitration.

At arbitration, the Arbitrator framed the relevant issue as whether the Agency violated the parties' agreement when it denied the grievant's requests for official time, and, if so, what was the proper remedy? Award at 14. The Arbitrator found that the Agency violated the EEO provision of the parties' agreement. *Id.* at 19. Specifically, the Arbitrator found that the Agency retaliated against the grievant by denying his requests for official time because the grievant pursued EEO claims on behalf of other bargaining unit employees. *Id.*

The Arbitrator sustained the Union's grievance in part. As a remedy, the Arbitrator ordered the Agency to note in the grievant's personnel folder that the Agency had violated the parties' agreement. *Id.* at 23. He also ordered the director of the Agency to meet with the grievant twice a month, for a period of six months. *Id.* at 23-24. The Arbitrator did not award any monetary relief.

III. Preliminary Issue

The Authority issued an order directing the Agency to show cause why its opposition should not be dismissed as untimely. Order to Show Cause (Order) at 1-2. The Authority stated that the time limit for filing an opposition to exceptions is thirty days after the date of service of the exceptions. *Id.* at 1 (citing 5 C.F.R. § 2425.3(b)). The Authority noted that the Union, in its statement of service, asserted that its exceptions were served on the Agency representative (representative) by email on June 13, 2012. *Id.* at 2. The Authority stated that, because the exceptions were served by email, the Agency was not entitled to five additional days to file its opposition. *Id.* (citing 5 C.F.R. § 2429.22(b)). Therefore, to be considered timely, the Authority explained, the Agency's opposition had to be postmarked no later than July 13, 2012. *Id.* (citations omitted). Because the Agency's opposition was postmarked July 16, 2012, the Authority noted that the opposition appeared to be untimely. *Id.*

In response, the Agency contends that its opposition is timely because its representative did not agree to service by email. Agency Response to Order to Show Cause (Response) at 1-2. According to the Agency, under the Authority's Regulations, a party may

serve another by email "but *only* when the receiving party has agreed to" service in that manner. *Id.* at 1 (quoting 5 C.F.R. § 2429.27(b)(6)) (emphasis added). Because it did not consent to service by email, the Agency asserts that the method of service for calculating the due date of its opposition is first-class mail. As such, the Agency contends that it was entitled to five additional days to file its opposition, *id.* at 2 (citing 5 C.F.R. § 2429.22), and that its opposition is timely because it was filed within that time frame.

Under the Authority's Regulations, an opposition "must be filed within thirty (30) days after the date the exception is served on the opposing party." 5 C.F.R. § 2425.3(b). As relevant here, the date of service for exceptions is the date they are "deposited . . . in the U.S. mail . . . or transmitted . . . by email." 5 C.F.R. § 2429.27(d). Ordinarily, if exceptions are served by first-class mail, then an opposing party has an additional five days to file its opposition. 5 C.F.R. § 2429.22(b). However, the Authority's Regulations further provide that, if a party is served by first-class mail "on one day, and by any other method on the same day, then [the party] may not add 5 days." *Id.* Thus, if exceptions are served by first-class mail and email on the same day, the opposing party has only thirty days to file an opposition.

Although the Authority's Regulations establish that a party is not entitled to an additional five days if the party is served by first-class mail and email on the same day, the record in this case does not demonstrate that the Agency was properly served by email. Section 2429.27(b)(6) states that documents may be served by email, "but *only* when the *receiving party has agreed to be served by email*." 5 C.F.R. § 2429.27(b)(6) (emphasis added). The Union does not dispute the Agency's assertion that the Agency did not agree to service by email. Response at 1. Thus, the Union's exceptions were not properly served by email within the meaning of § 2429.27(b)(6).

It is undisputed that the exceptions also were served by first-class mail. As explained above, this method of service granted the Agency five additional days to file its opposition, i.e., until July 18, 2012. Because the Agency filed its opposition on July 16, 2012, we find that the opposition is timely, and we will consider it.

IV. Positions of the Parties

A. Union's Exceptions

The Union asserts that the award is in "non-conformance with law[s], rules, and regulations" because the Arbitrator did not award the grievant compensatory damages. Exceptions at 1. According to the Union, because the Arbitrator made a "clear finding of blatant racial discrimination," the grievant is entitled to $300,000 in such damages. *Id.* It contends that the Arbitrator provided no remedy "in regards to Title XII of the Civil Rights Act of 1964, 29 CFR 1614[,] and the Civil Rights Act of 1991." *Id.* at 3. Additionally, the Union avers that the Arbitrator exceeded his authority by failing to award the grievant compensatory damages. *Id.* at 1.

B. Agency's Opposition

The Agency disputes the Union's assertion that the award is contrary to law, rule, or regulation. The Agency contends that the Union's argument is misplaced because the Arbitrator based his award on a contractual violation, rather than a violation of any law, rule, or regulation. *See* Opp'n at 5-6 (citations omitted). The Agency further asserts that, because the Union did not present its claim regarding compensatory damages to the Arbitrator, § 2429.5 of the Authority's Regulations prohibits the Union from raising this claim in its exceptions. *Id.*

The Agency also disagrees with the Union's assertion that the Arbitrator exceeded his authority. According to the Agency, the relevant issue before the Arbitrator was whether the Agency violated the parties' agreement and, if so, what remedy was appropriate. *Id.* at 5 (citing Award at 23). The Agency contends that the Arbitrator resolved this issue and fashioned an appropriate remedy. *Id.*

V. Analysis and Conclusion

The Union argues that the Arbitrator's award is contrary to law and that the Arbitrator exceeded his authority because he did not award the grievant compensatory damages. Exceptions at 1. Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator. 5 C.F.R. §§ 2425.4(c) & 2429.5; *see U.S. Dep't of Homeland Sec., Customs & Border Prot.*, 66 FLRA 495, 497 (2012). As relevant here, § 2429.5 states that the Authority will not consider "any evidence, factual assertions, arguments (including affirmative defenses), *requested remedies*, or challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5 (emphasis added); *see also Fraternal Order of Police, Pentagon Police Labor Comm.*, 65 FLRA 781, 783-84 (2011) (*Pentagon Police*) (union's argument regarding its entitlement to attorney fees barred by § 2429.5 because union could have presented, but did not present, argument to arbitrator); *Int'l Ass'n of Fire*

Fighters, Local F-89, 50 FLRA 327, 329 (1995) (union's argument regarding its entitlement to attorney fees and compensatory damages barred by § 2429.5 because union could have presented, but did not present, arguments to arbitrator).

The record demonstrates that, before the Arbitrator, the Union asserted that the Agency discriminated against the grievant. *See* Award at 16-19. However, the record does not contain any indication that the Union requested compensatory damages as a remedy for this alleged discrimination. To the contrary, the record establishes that the Union only requested that the Agency reimburse the grievant's leave and remove restrictions on the grievant's ability to use official time for cross-representational duties. *See* Exceptions, Attach., Grievance at 1-2; Exceptions, Attach., Union's Post-Hearing Brief at 32-33. Because the Union could have requested compensatory damages in the proceedings before the Arbitrator, but did not, it is barred by §§ 2425.4(c) and 2429.5 from doing so now. *See* 5 C.F.R. §§ 2425.4(c), 2429.5; *Pentagon Police*, 65 FLRA at 783-84. Accordingly, we dismiss the Union's exceptions.

VI. Order

The exceptions are dismissed.