

71 FLRA No. 95

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VETERANS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5441

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DECISION

January 10, 2020

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Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

In this case, we remind parties of two important procedural requirements: (1) where an arbitrator grants a remedy requested at arbitration, an excepting party may not challenge that remedy on grounds that it could have – but did not – raise to the arbitrator; and (2) an excepting party has the obligation to provide any “relevant documentation”¹ needed to support its arguments, particularly “documents . . . that the Authority cannot easily access,”² when filing exceptions with the Authority.

Arbitrator Steven R. Rutzick issued an award finding that the Union timely filed a grievance challenging the Agency’s denial of “authorized absence[s]” for certain employees who attended a Union-sponsored training.³ The main question before us is whether the award fails to draw its essence from the parties’ collective-bargaining agreement. Because the Agency did not provide documentation supporting its essence exception as required by § 2425.4(a)(2) and (3) of the Authority’s Regulations,⁴ we deny the exception as unsupported.

¹ 5 C.F.R. § 2425.4(a)(2).

² *Id.* § 2425.4(a)(3).

³ Award at 1-2.

⁴ 5 C.F.R. § 2425.4(a)(2)-(3).

II. Background and Arbitrator’s Award

In March 2017, Union officials attended a Union-sponsored training. The Agency granted authorized-absence leave for one of the Union officials who attended that training but denied it for others.⁵ As a result, at least three Union officials used personal leave to attend the training (the grievants). The Union filed a grievance challenging the denials, and, as the parties were unable to resolve the grievance, it proceeded to arbitration.

As relevant here, the Arbitrator addressed whether the Union timely filed the grievance under the timeframe established in the parties’ agreement. Article 43 of the parties’ agreement states that the “Union shall present the grievance . . . within [thirty] calendar days of [when] the employee or Union became aware, or should have become aware, of the [triggering] act or occurrence; or, anytime if the act or occurrence is of a continuing nature.”⁶ The Arbitrator did not hold that the Agency’s denials, or the training itself, triggered the thirty-day timeframe for filing a grievance. However, he found that by denying the grievants authorized-absence leave, the Agency violated a memorandum of understanding and the parties’ agreement, and those violations “ha[d] been ongoing” since the training.⁷ While the Arbitrator did not state when the Union filed its grievance, he concluded that it was timely based on the continuing nature of the Agency’s violations.

As remedies, the Arbitrator directed the Agency to (1) retroactively grant forty hours of authorized-absence leave to the grievants for the training, and (2) grant authorized-absence requests for “[a]ll future [U]nion[-]sponsored trainings.”⁸

On December 6, 2018, the Agency filed exceptions to the award, and, on January 30, 2019, the Union filed an opposition to the Agency’s exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar some of the Agency’s exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any arguments that “could have been, but were not,

⁵ At arbitration, the Arbitrator and parties used the terms “authorized absence” and “official time” interchangeably. Award at 7, 9.

⁶ Exceptions, Attach. 1, Master Agreement (MA) at 230.

⁷ Award at 9.

⁸ *Id.*

presented to the arbitrator.”⁹ And the Authority has specifically held that those sections bar challenges to a remedy if one of the parties requested the remedy at arbitration and the other party did not object.¹⁰

Here, the Agency claims that the awarded remedy – directing the Agency to grant all future authorized-absence requests for Union-sponsored trainings¹¹ – (1) is contrary to §§ 7106(a)(2)(B) and 7131(d) of the Federal Service Labor-Management Relations Statute,¹² and (2) fails to draw its essence from Article 4 of the parties’ agreement.¹³ However, the Union requested that exact remedy in its post-hearing brief,¹⁴ and the Agency did not file a post-hearing brief opposing the request, despite having an opportunity to do so.¹⁵ Further, there is no indication in the record that the Agency otherwise opposed that remedial request before the Arbitrator. Consequently, consistent with §§ 2425.4(c) and 2429.5, we dismiss the Agency’s exceptions to the awarded remedy.¹⁶

IV. Analysis and Conclusion: Because the Agency fails to provide the Authority with necessary supporting documents, the Agency’s essence exception is denied.

Under the Authority’s Regulations, an excepting party must ensure its exceptions are “self-contained and that it sets forth, in full,” all arguments “in support of” its exceptions, “including specific references to the record . . . and any other relevant documentation” and “[l]egible copies of any documents” that “the Authority cannot easily access.”¹⁷

The Agency argues that the award fails to draw its essence from Article 43.¹⁸ As noted above, Article 43 states that the “Union shall present the grievance . . . within [thirty] calendar days of [when] the employee or

Union became aware, or should have become aware, of the [triggering] act or occurrence; or, anytime if the act or occurrence is of a continuing nature.”¹⁹

The Agency alleges that the Union untimely filed the grievance on June 30, 2017 – more than thirty days after the March 2017 training.²⁰ But the Arbitrator did not conclude that the training itself triggered the contractual timeframe for filing the grievance. Instead, he found that the Agency’s violations were “ongoing,”²¹ and the Agency does not directly challenge that finding. Moreover, the Arbitrator did not state in the award when the Union filed its grievance, and the Agency does not provide a copy of the grievance, a transcript of the arbitration hearing, or any other documentary evidence, to support the alleged filing date.

Because the Agency failed to meet its obligation under § 2425.4(a)(2) and (3) to “set[] forth, in full” its argument in support of its essence exception, including any relevant supporting documents,²² we deny the exception as unsupported.²³

V. Decision

We dismiss, in part, and deny, in part, the Agency’s exceptions.

⁹ 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g., U.S. Dep’t of Commerce, Nat’l Oceanic & Atmospheric Admin., Nat’l Weather Serv.*, 67 FLRA 356, 357 (2014) (*Nat’l Weather Serv.*).

¹⁰ *U.S. Dep’t of the Treasury, IRS*, 68 FLRA 329, 331 (2015) (*IRS*); *Nat’l Weather Serv.*, 67 FLRA at 357.

¹¹ Award at 9.

¹² Exceptions at 4-5.

¹³ *Id.* at 9-10.

¹⁴ Opp’n, Attach. 2, Union’s Post-Hr’g Br. at 30-31 (requesting that the Arbitrator direct the Agency to “grant official time/authorized absence” for “[a]ll future [U]nion[-]sponsored trainings”).

¹⁵ Award at 8 (stating that, unlike the Union, the Agency did not file a post-hearing brief).

¹⁶ *See IRS*, 68 FLRA at 331 (dismissing exception challenging awarded remedy where there was no evidence the excepting party opposed the requested remedial relief before the arbitrator).

¹⁷ 5 C.F.R. § 2425.4(a)(2)-(3).

¹⁸ Exceptions at 7-8.

¹⁹ MA at 230. The Agency is not barred from raising the argument to the Authority because the Agency presented the argument to the Arbitrator. Award at 5, 9.

²⁰ Exceptions at 8.

²¹ Award at 9.

²² 5 C.F.R. § 2425.4(a).

²³ *Id.* § 2425.6(e)(1); *U.S. Dep’t of the Air Force, Pope Air Force Base, N.C.*, 71 FLRA 338, 340 & n.24 (2019) (Member DuBester concurring) (denying exception where party did not provide arbitration exhibits relied upon to demonstrate alleged arbitrator error); *U.S. Dep’t of the Navy, Puget Sound, Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 71 FLRA 240, 242 (2019) (Member DuBester concurring) (denying exception where party failed to provide any document “substantiating [its] assertions”); *AFGE, Local 12*, 68 FLRA 754, 755 (2015) (Member DuBester dissenting) (denying essence exception where party failed to provide the parties’ agreement supporting its exception, and arbitrator did not set forth relevant contractual wording in award).