74 FLRA No. 1

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 228
(Union)

and

UNITED STATES
SMALL BUSINESS ADMINISTRATION
(Agency)

0-AR-5954

_____

ORDER DISMISSING EXCEPTION

August 15, 2024

_____

Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

After the Agency denied a Union representative's (the grievant's) request for official time to prepare for a meeting, the Union grieved. Arbitrator Carl F. Jenks issued an award finding the grievant was not entitled to official time to prepare for the meeting under the parties' collective-bargaining agreement.

The Union filed an exception arguing that the Arbitrator's interpretation of the parties' agreement conflicts with § 7131(b) and (d) of the Federal Service Labor-Management Relations Statute (the Statute).[1] The Union could have argued, at arbitration, that the Arbitrator was required to apply statutory standards in interpreting the parties' agreement. Because it did not do so, it cannot raise these arguments now. Therefore, we dismiss this exception.

II. Background and Arbitrator's Award

The parties established the National Performance Systems Committee (the Committee) with an equal number of Agency officials and Union representatives to examine, and recommend changes to, the Agency's performance-appraisal system. The grievant, one of the Union's Committee representatives, requested official time to attend a Committee meeting, as well as an hour of official time to prepare for the meeting. The Agency approved the request for official time to attend the meeting, but denied the request for preparation time. Alleging the denial violated the parties' agreement, the Union grieved, and the grievance proceeded to arbitration.

At arbitration, the parties stipulated the issue, as relevant here, as: "Whether the Agency violated Article 12 . . . of the [parties' a]greement . . . in denying one hour of official time to [the grievant] to prepare for the . . . Committee . . . meeting."[2] The parties also stipulated the parties' agreement does not expressly provide for, or prohibit, official time to prepare for Committee meetings.

Article 12, Section 2(a) provides "Union [r]epresentatives shall be authorize[d] such official time as is reasonable and necessary for Union representation activities," while Article 12, Section 2(b) provides "[o]fficial time shall not include time spent on internal union business."[3]

At arbitration, the Union argued that, despite not expressly providing for official time to prepare for Committee meetings, the parties' agreement "fully incorporates prep[aration] time by implication" because it is "reasonable and necessary" for effective representation.[4] Additionally, the Union claimed the parties had a past practice whereby the Agency would approve official-time requests to prepare for Committee meetings.

Based on the grievant's testimony at arbitration, the Arbitrator found the grievant intended to use the preparation time for a "coordinated group effort" with other Union representatives.[5] He concluded that such activity "constitute[d] 'internal union business' [that] is technically prohibited by Article 12, Section 2[(b)]" of the parties' agreement.[6] Thus, the Arbitrator concluded that Article 12 did not entitle the grievant to official time to prepare for Committee meetings.

Regarding the Union's argument that a past practice "modified the contract language,"[7] the Arbitrator found "no evidence that the alleged past practice . . . ever

[1] 5 U.S.C. § 7131(b), (d).
[2] Award at 2.
[3] *Id.* (emphasis omitted).
[4] *Id.* at 5-6 (emphasis omitted).
[5] *Id.* at 15.
[6] *Id.*
[7] *Id.* at 13.

existed."[8] Consequently, the Arbitrator concluded the Agency did not violate the parties' agreement, and he denied the grievance.

The Union filed an exception on February 22, 2024, and the Agency filed an opposition on March 28, 2024.

III. Analysis and Conclusion: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union's exception.

The Union argues the Arbitrator's interpretation of Article 12 conflicts with § 7131(b) and (d) of the Statute.[9] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments or evidence that could have been, but were not, presented to the arbitrator.[10]

At arbitration, the parties disputed the meaning of the term "internal union business" in Article 12 of the parties' agreement.[11] Thus, the Union could have argued, as it does now,[12] that the term has the same meaning as "internal business of a labor organization" in § 7131(b) of the Statute.[13] It did not do so. The Union could also have argued, as it does now,[14] that § 7131(d) required the Arbitrator to interpret Article 12 as authorizing official time to not only perform – but also prepare for – representational activities.[15] The Union did not raise this argument to the Arbitrator either. Rather than making statutory arguments or citing the Statute, the Union contended at arbitration that the grievance concerned "a simple case of contract interpretation."[16] Because the Union could have raised its statutory arguments at arbitration, but did not, we do not consider them.[17]

IV. Decision

We dismiss the Union's exception.

---

[8] *Id.* at 14.
[9] Exception Br. at 7-10 (citing 5 U.S.C. § 7131(b), (d)).
[10] 5 C.F.R. §§ 2425.4(c), 2429.5.
[11] Award 6-12 (summarizing parties' arguments concerning the meaning of "internal union business" under Art. 12); Exception, Attach. 5, Union's Arbitration Br. (Union's Arbitration Br.) at 6-7 (arguing that preparation for representational meetings falls under "reasonable and necessary" activities under Art. 12, § 2(a)).
[12] Exception Br. at 7 (arguing for the first time that "[c]lassifying prep[aration] time as internal union business is directly contrary to [§ 7131(b) and] the [Authority's] definition of internal union business").
[13] 5 U.S.C. § 7131(b) ("Any activities performed by any employee relating to the internal business of a labor organization . . . shall be performed during the time the employee is in a non-duty status.").
[14] Exception Br. at 7 ("Prep[aration] time is a representational activity permitted by [§ 7131(d) of] the [S]tatute when negotiated by the parties, as it was here.").
[15] 5 U.S.C. § 7131(d) ("Except as provided in the preceding subsections of this section . . . any employee representing an exclusive representative . . . shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.").
[16] Union's Arbitration Br. at 1.
[17] *See U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 914, 915 (2024) (Chairman Grundman concurring on other grounds) (dismissing exception where excepting party did not raise argument regarding § 7131(b) before the arbitrator, but could have).