

**65 FLRA No. 122**

UNITED STATES  
DEPARTMENT OF DEFENSE  
DEPARTMENT OF DEFENSE  
DEPENDENTS SCHOOLS, EUROPE  
(Agency)

and

FEDERAL EDUCATION ASSOCIATION  
(Union)

0-AR-4401

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DECISION

February 28, 2011

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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 Arbitrator Edward J. O'Connell filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.<sup>1</sup>

The Arbitrator sustained, in part, the grievance over the fourteen-day suspension of the grievant, and the Arbitrator directed that: the record of the suspension be expunged from the grievant's personnel file; and the arbitration award be placed in the grievant's permanent record. For the reasons that follow, we conclude that the Arbitrator's remedies are deficient, and we set them aside.

**II. Background and Arbitrator's Award**

The Agency suspended the grievant for fourteen days, and the Union filed a grievance on the grievant's behalf that was submitted to arbitration. Award at 7-8, 10. The Arbitrator denied the grievance, in part, and sustained the grievance, in

1. The parties also filed supplemental submissions, which are discussed below.

part. The Arbitrator determined that, under all of the circumstances relating to the incident, the fourteen-day suspension was for just cause. *Id.* at 21. However, he explained that "a finding that[,] under the circumstances[,] the [g]rievant exercised poor judgment and must be punished does not end the inquiry." *Id.* He found that "the unique circumstances of this case require[d] modification of the full penalty imposed by the Agency." *Id.* at 24. Accordingly, he directed that: the record of the suspension be expunged from the grievant's personnel file; and the arbitration award be placed in the grievant's permanent record. *Id.* Because of the "unusual nature" of the ordered remedies, the Arbitrator retained jurisdiction to resolve any issues that might arise in their implementation. *Id.*

**III. Positions of the Parties****A. Agency's Exceptions**

The Agency contends that the Arbitrator's direction to expunge the record of the fourteen-day suspension from the grievant's personnel records is contrary to 5 C.F.R. § 293.304 (§ 293.304).<sup>2</sup> The Agency maintains that § 293.304 prescribes that an employee's official personnel file (OPF) must contain all the long-term records affecting the employee's status and service that are required by Office of Personnel Management (OPM) instructions and that are designated in the OPM Guide to Personnel Recordkeeping (Recordkeeping Guide). Exceptions at 16. The Agency further maintains that the Recordkeeping Guide refers to the OPM Guide to Processing Personnel Actions (Personnel Actions Guide) for the identification of events that must be documented in an OPF, and that these events include suspensions, which are officially documented by a Standard Form 50 (SF-50). *Id.* The Agency also argues that the expungement is contrary to Department of Defense Educational Activity Regulation 5791.9, which the Agency claims requires it to maintain a file for all disciplinary actions taken.<sup>3</sup> *Id.* at 19.

The Agency further contends that the direction to place a copy of the award in the grievant's permanent personnel records is contrary to OPM regulatory requirements pertaining to the maintenance of

2. The pertinent wording of § 293.304 is set forth below.

3. The Agency does not provide the wording of Department of Defense Educational Activity Regulation 5791.9.

employee personnel records. In support, the Agency asserts that the Recordkeeping Guide specifically prohibits the placement of arbitration awards in permanent personnel records. *Id.* at 18.

The Agency also contends that the Arbitrator exceeded his authority by directing the expungement of the grievant's personnel file and the placement of the award in the grievant's permanent record. *Id.* at 4-13. In addition, the Agency contends that the award is deficient because the remedies are contradictory. *Id.* at 13-15. Finally, the Agency contends that the direction to expunge the grievant's records is deficient because it is contrary to management's right to take disciplinary action under § 7106(a)(2)(A) of the Statute. *Id.* at 20-22.

#### B. Union's Opposition

The Union contends that the Agency's exceptions are "premature" because of the Arbitrator's retention of jurisdiction and that the Authority should remand the award to the Arbitrator. Opp'n at 1.

#### IV. Preliminary Issues

As stated above, in its opposition, the Union contends that the Agency's exceptions are "premature" because of the Arbitrator's retention of jurisdiction, *id.*, which we construe as a claim that the Agency's exceptions are interlocutory. In response to the Union's opposition, the Agency filed a motion for leave to file a supplemental submission to address this issue and, in the submission, claims that its exceptions are not premature. Thereafter, the Union filed a response to the Agency's motion, claiming that the Authority should not consider the Agency's supplemental submission because the Agency did not request permission to file it.

With regard to the Agency's motion, as an initial matter, we note that, contrary to the Union's claim, the Agency did request permission to file its supplemental submission. As to whether we should grant that request, the Authority has granted leave to file supplemental submissions and has considered the submissions when the submissions respond to arguments raised for the first time in an opposing party's filing. *E.g., U.S. Dep't of Homeland Sec., Immigration & Customs Enforcement*, 64 FLRA 1003, 1005 (2010) (*ICE*). Here, as in *ICE*, the Union raised the issue of whether the Agency's exceptions are interlocutory for the first time in its opposition, and the Agency's supplemental submission addresses

that issue. Accordingly, we grant the Agency's motion and consider its supplemental submission.

With regard to the Union's response, the Union did not request leave or permission to file the response. The Authority has declined to consider a response when the filing party did not request permission to file it. *E.g., AFGE, Local 1815*, 65 FLRA 430, 431 (2011) (*AFGE, Local 1815*). Accordingly, consistent with *AFGE, Local 1815*, we do not consider the Union's response.

With regard to the issue of whether the exceptions are interlocutory, the Authority has specifically held that "[e]xceptions to an award are not interlocutory where an arbitrator has retained jurisdiction solely to assist the parties in the implementation of awarded remedies[.]" *AFGE, Nat'l Council of EEOC Locals No. 216*, 65 FLRA 252, 253-54 (2010). As the Arbitrator viewed his remedies to be "unusual" and retained jurisdiction solely "to resolve any issues that may arise in [their] implementation[.]" Award at 24, we conclude that the exceptions are not interlocutory.

#### V. Analysis and Conclusions

Section 293.304 prescribes that an employee's OPF "shall contain long-term records affecting the employee's status and service as required by OPM's instructions and as designated in the [Recordkeeping Guide]." As discussed further below, the Recordkeeping Guide provides instructions not only for what documents must be contained in an employee's OPF, but also for what records may *not* be filed in the OPF. As § 293.304 specifically references the Recordkeeping Guide as governing the maintenance of records in the OPF, we interpret § 293.304 -- when read in conjunction with the Recordkeeping Guide -- as prescribing both the records that must be contained, and those that may not be contained, in OPFs.

With regard to the records that must be contained in OPFs -- i.e., "long-term records affecting the employee's status and service[.]" § 293.304 -- Section 3-F of the Recordkeeping Guide refers to the Personnel Actions Guide for a list of personnel actions that have long-term effects on an employee's status and service. The Personnel Actions Guide specifically identifies a "suspension that is effected under 5 U.S.C. chapter 75" and "[i]s for [fourteen] calendar days or less" as such a personnel action. Personnel Actions Guide, Ch. 15 at 15-12. The record that documents a fourteen-day suspension is an SF-50, and the Recordkeeping Guide provides that

SF-50s are filed in the OPF. Recordkeeping Guide, Section 3-F. Thus, we find that, when read in conjunction with the Recordkeeping Guide and the Personnel Actions Guide, § 293.304 requires that an OPF must contain an SF-50 documenting a fourteen-day suspension. As such, we find that the Arbitrator's direction to expunge the record of the grievant's fourteen-day suspension from his personnel file is contrary to § 293.304.<sup>4</sup>

With regard to the records that may not be contained in an OPF, Section 3-G of the Recordkeeping Guide provides, in pertinent part, "Do not file copies of decisions . . . in the personnel folder[.]" and specifically lists "[a]n arbitral award" as a decision that is not to be filed in the OPF. Recordkeeping Guide at 3-20. Accordingly, we find that the Arbitrator's direction to include his award in the grievant's permanent record is contrary to § 293.304.

For the foregoing reasons, we find that the Arbitrator's remedies are deficient, and we set them aside.

## VI. Decision

The Arbitrator's remedies are contrary to § 293.304 and are set aside.<sup>5</sup>

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4. OPM has advised the Authority that an agency may delete an SF-50 based on an administrative determination that the disciplinary action was unjustified or unwarranted. *Naval Plant Representative Office, Dallas, Tex.*, 2 FLRA 307, 311-12 (1979). As the Arbitrator specifically found that the fourteen-day suspension was for just cause, there is no administrative determination in this case that the suspension was unjustified or unwarranted.

5. In view of this decision, and as the remaining exceptions challenge the Arbitrator's remedies, we do not address those remaining exceptions.