

66 FLRA No. 159

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
BORDER PATROL, DEL RIO SECTOR
DEL RIO, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2366
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-4824

ORDER DISMISSING EXCEPTIONS

August 8, 2012

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 George E. Larney 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.

The Arbitrator found that the Agency improperly refused to provide certain videos to the Union and that the grievant's five-day suspension did not promote the efficiency of the service. He directed the Agency to "pay [the Union's] reasonable attorney fees, to be supported by an after-award petition." Award at 39. For the reasons that follow, we dismiss the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency suspended the grievant for five days for neglect of duty. *See* Award at 27; *see also* Exceptions, Attach., Ex. 1 (Decision Letter, Oct. 20). The Union filed a grievance challenging the suspension. Award at 28. When the grievance was unresolved, the parties proceeded to arbitration, *see id.*,

and they stipulated to the following issues: "Was the five (5) [d]ays [s]uspension without pay of [the grievant] . . . taken only for such reasons as will promote the efficiency of the [s]ervice[, and i]f not, what shall be the proper remedy?" *Id.* at 7.

Before the Arbitrator, the Union argued that the Agency had refused to disclose certain potentially exculpatory evidence – in particular, video recordings of Canine Handlers, including the grievant, performing their duties. *See* Award at 26 & n.28; *id.* at 26-27. *Accord id.*, App. B (Union's Post-Hearing Br.) at 12-13. In response, the Agency argued that "[s]uch video is irrelevant[,] and the [g]rievant [did] not suggest[] how those videos would help him." Award, App. A (Agency's Post-Hearing Br.) at 8. In his award, the Arbitrator found that the Agency still had not disclosed the requested video by the date of the arbitration hearing, *see* Award at 26 n.28, and he determined that the Agency's "failure to turn over this video . . . represents a violation" of the parties' collective-bargaining agreement, *id.* at 38.¹

In addition, the Arbitrator found that the grievant's suspension did not promote the efficiency of the service, and, consequently, he "sustain[ed] the . . . grievance in its entirety." *Id.* at 39. Moreover, he directed the Agency to "pay [the Union's] reasonable attorney fees, to be supported by an after-award petition." *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is based on a nonfact because the Arbitrator erroneously found that, as of the date of the hearing, the Agency still had not provided the Union with the videos that it requested. Exceptions at 32-34 (citing Award at 26 n.28). According to the Agency, its "attorney sent video copies to [the] Union's attorney . . . well in advance of the hearing." *Id.* at 32. The Agency further contends that the Arbitrator's award of attorney fees is contrary to law because the Arbitrator did not make the "foundational findings" required to support such an award. *Id.* at 6.

¹ Article 32, Section D(3) of the parties' collective-bargaining agreement states that an "employee against whom a disciplinary action is proposed is entitled to: . . . upon request, a copy of the material relating to the proposed action, regardless of whether relied upon in the proposed action." Award at 8 (quoting Art. 32, § D(3)).

B. Union's Opposition

The Union argues that the award is not based on a nonfact. *See* Opp'n at 5-7. In addition, the Union contends that the Agency's contrary-to-law exception is "moot" because the Union "is withdrawing its request for attorney fees" and "will not . . . pursue . . . attorney fees in this case." *Id.* at 8.

IV. Sections 2425.4 and 2429.5 of the Authority's Regulations bar the Agency's nonfact exception.

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.² 5 C.F.R. §§ 2425.4(c), 2429.5. *See AFGÉ, Local 1546*, 65 FLRA 833, 833 (2011). In its nonfact exception, the Agency challenges the Arbitrator's finding that the Agency did not provide the requested video to the Union. Exceptions at 32-34. The Agency could have argued to the Arbitrator that it provided the requested video to the Union, but nothing in the record indicates that the Agency made that argument. *See Award, App. A (Agency's Post-Hearing Br.)* at 8 (arguing only that "[s]uch video is irrelevant[,] and the [g]rievant [did] not suggest[] how those videos would help him"). Thus, §§ 2425.4(c) and 2429.5 bar that argument and the nonfact exception based on it. *See AFGÉ, Local 1546*, 65 FLRA at 833. Accordingly, we dismiss the Agency's nonfact exception.

V. The Agency's contrary-to-law exception is moot.

The Authority will find that an exception is moot, and will dismiss that moot exception, when the parties no longer have a legally cognizable interest in the dispute. *See U.S. Dep't of Veterans Affairs, Veterans Affairs Long Beach Healthcare Sys., Long Beach, Cal.*, 63 FLRA 332, 334 (2009) (citing *AFGE, Local 171, Council of Prison Locals 33*, 61 FLRA 661, 663 (2006) (*Local 171*)). The Agency's contrary-to-law exception challenges the Arbitrator's direction to the Agency to pay the Union's attorney fees. Exceptions at 6 (citing *Award* at 39). But the Union has withdrawn its attorney-fees request and states that it will not pursue attorney fees in this case. Opp'n at 8. As such, the parties no longer have a cognizable interest in

resolution of the Agency's attorney-fees exception. *See Local 171*, 61 FLRA at 663. Therefore, we dismiss the Agency's contrary-to-law exception as moot.

VI. Order

The Agency's exceptions are dismissed.

² Section 2425.4(c) provides, in pertinent part, that exceptions may not rely on "any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented to the arbitrator." Section 2429.5 provides, in pertinent part, that the "Authority will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented . . . before the . . . arbitrator."