66 FLRA No. 51

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
ATLANTA COMPLIANCE SERVICES
JACKSONVILLE, FLORIDA
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 16
(Union)

0-AR-4553

_____

ORDER DISMISSING EXCEPTIONS

October 25, 2011

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Jack Clarke 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 violated the Statute and Article 8 of the parties' National Agreement (agreement) when the Agency discontinued invitations to the Union to attend weekly team meetings. The Arbitrator directed the Agency to restore the status quo ante and post a notice informing employees that the Union will be invited to attend the weekly team meetings. For the reasons discussed below, we dismiss the Agency's exceptions.

II. Background and Arbitrator's Award

For many years, the Agency invited the Union to attend all weekly team meetings. Award at 10-11. The Agency, however, decided to discontinue routine invitations to the Union to attend those meetings. *Id.* at 11. The Union filed a grievance requesting, among other things, that the Agency restore the status quo with respect to the Union's attendance at the weekly team meetings. *See id.* at 1-2. When the grievance was unresolved, it was submitted to arbitration. The issues as stipulated by the parties were, in relevant part, whether "the Agency violate[d] Article 8 [of the agreement],[2] . . . and 5 U.S.C. [§] 7116 (a)(1) and (8) by unilaterally implementing the change of [the Union] attending the group meetings . . .? If so, what is the appropriate remedy?"[3] *Id.* at 18.

The Union argued to the Arbitrator that the weekly team meetings were formal discussions under § 7114(a)(2)(A)[4] and that the Agency violated § 7116(a)(1) and (8), and the agreement, by refusing to invite the Union to attend them.[5] *Id.* at 15-16. The Union asked the Arbitrator to direct the Agency to restore the status quo ante, post a notice, and bargain over the change. *Id.* at 15-16; *see also id.* at 2 (quoting the grievance, which requests a "roll[-]back of the change to a status quo"); *id.* at 3 (quoting an Agency letter, which acknowledges that the Union requests "a roll[-]back of the change to status quo"); and *id.* at 4 (quoting an

[1] Chairman Pope's separate opinion, dissenting in part, is set forth at the end of this order.

[2] Article 8, Section 1.A.1. provides, in the pertinent part, that the Union "will be given the opportunity to be represented at formal discussions" in accordance with 5 U.S.C. § 7114(a)(2)(A). Award at 8.

[3] The Union withdrew its claim that the Agency's unilateral change regarding the Union's attendance at the weekly team meetings also violated a Customer Service Memorandum of Agreement between the parties, which provided for weekly meetings of thirty minutes, with additional time allotted as agreed by the parties at the local level. Award at 1-2. Therefore, the Arbitrator did not address the merits of that claim. *See id.* at 2 n.1. Also, the Arbitrator did not address the Union's alternative claim, that the Agency violated § 7116(a)(5) by failing to bargain with the Union with respect to the Union's attendance at these meetings, because he found a violation under §§ 7114(a)(2)(A) and 7116(a)(8). *See id.* at 23 n.39.

[4] The Agency refers to the weekly meetings as "formal meetings" within the meaning of the Statute and the parties' agreement. *See, e.g.*, Exceptions at 2. As the Arbitrator found that these weekly meetings constituted "formal discussions" under the Statute, Award at 20-23, we refer to them as "formal discussions."

[5] Section 7114(a)(2)(A) provides:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at . . . any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.

Section 7116(a)(8) provides that it shall be an unfair labor practice for an agency to "fail or refuse to comply with any provision" of the Statute.

Agency letter, which acknowledges that in a meeting between the parties, the Union "reiterated that the remedy sought was a roll-back to the previous meeting format with [Union] attendance").

The Agency argued that the weekly team meetings were not formal discussions. Therefore, the Agency claimed that it did not violate the Statute or the agreement. *Id.* at 16-17. The Agency also argued that it did not have any obligation to bargain with the Union when it unilaterally changed meeting attendance procedures. *Id.* The Agency requested that the Arbitrator deny the grievance. *Id*. at 17.

The Arbitrator determined that the weekly team meetings constituted formal discussions under § 7114(a)(2)(A). *Id.* at 20-23. As such, he found that the Agency was required to invite the Union to attend them. *Id.* at 22-23. The Arbitrator further found that the Agency's refusal to do so violated the Statute and Article 8, Section 1.A.1. of the agreement. *Id*. As a remedy, the Arbitrator directed the Agency to restore the status quo ante and to post a notice, as requested by the Union. *See id.* at 24-26.

III. Positions of the Parties

A. Agency's Exceptions

The Agency "takes issue only with regard to the status quo ante and posting remedies ordered by the Arbitrator." Exceptions at 1. The Agency asserts that the award's status quo ante remedy is unlawful. *Id*. at 3. The Agency bases this assertion on three grounds: (1) the award fails to draw its essence from the agreement; (2) the Arbitrator exceeded his authority; and (3) the award is contrary to law. *Id*. at 3, 5. The Agency also challenges the breadth of the posting. *Id*. at 11.

The Agency argues that the status quo ante remedy fails to draw its essence from the agreement because it imposes an obligation on the Agency to invite the Union to all future meetings whether or not they are formal discussions as defined in the agreement and the Statute. *Id*. at 3-4. The Agency also alleges that the Arbitrator exceeded his authority because, it claims, there is no nexus between the violation found and the remedy. *Id.* at 5. In this connection, the Agency argues that a status quo ante remedy is appropriate only where there is a finding that an agency failed to meet a bargaining obligation, an issue that the Arbitrator did not address. *Id*. In addition, the Agency claims, the award is contrary to law because the status quo ante remedy violates management's rights to assign work, and to direct the Union representatives attending the weekly team meetings. *See id.* at 5-10.

Finally, the Agency contends that the posting is too broad because it "invites" the Union to attend all future weekly team meetings. *Id.* at 11. The Agency claims that an appropriate notice would limit Union participation to meetings that constitute formal discussions under the statutory and contractual definitions. *Id.*

B. Union's Opposition

The Union asserts that the Agency's exceptions are simply an attempt to relitigate the matter. Opp'n at 3-4. The Union contends that the Arbitrator correctly found that the weekly team meetings are formal discussions under the agreement and the Statute. *Id*. at 4. The Union further argues that the Arbitrator did not exceed his authority because he addressed the issue before him and awarded an appropriate remedy pursuant to his broad remedial discretion. *Id.* at 5-6. Finally, the Union asserts, § 7131(d) allows for official time to conduct representational duties, which carves out an exception to management's right to assign work.[6] *Id.* at 6. Therefore, the Union argues, the award is not contrary to law.

IV. Analysis and Conclusions

Under § 2429.5 of the Authority's Regulations, the Authority will not consider arguments that could have been, but were not, presented to the arbitrator.[7] *See, e.g.*, *U.S. Dep't of Transp., FAA*, 64 FLRA 387, 389-90 (2010). Where a party makes an argument for the first time in its exception that it could, and should, have made before the arbitrator, the Authority applies § 2429.5 to bar the argument. *See, e.g.*, *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Wash. D.C.*, 65 FLRA 98, 101 (2010) (*Customs & Border Prot.*) (agency's exceptions to remedy barred by § 2429.5 where issue could have been, but was not, presented to arbitrator); *U.S. Dep't of Justice, Fed. Bureau of Prisons, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA

[6] Section 7131(d) provides:

> Except as provided in the preceding subsections of this section-
>
> (1) any employee representing an exclusive representative, or
>
> (2) in connection with any other matter cover by this chapter, any employee in an appropriate unit represented by 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.

[7] Section 2429.5 was revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency's exceptions were filed before that date, we apply the prior version of the Regulations.

1168, 1170 (2010) (agency exception barred by § 2429.5 where agency could have, but did not, argue before arbitrator that requested remedy was contrary to law); *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 502 (2000) (agency exception barred by § 2429.5 where agency could have, but did not, argue before arbitrator that requested remedy violated agency's management rights).

The record clearly establishes that the Agency was on notice, while before the Arbitrator, that the Union was requesting a status quo ante remedy and a posting. However, the record contains no indication that the Agency ever argued to the Arbitrator, as it does now, that a status quo ante remedy would fail to draw its essence from the agreement, exceed the Arbitrator's authority, or be contrary to law. Nor did the Agency challenge the breadth of the posting requested by the Union. Because the Agency did not present these arguments to the Arbitrator, it may not do so now. Accordingly, we find that the Agency's exceptions are barred by § 2429.5 and we dismiss them. *See Customs & Border Prot.*, 65 FLRA at 101 (§ 2429.5 barred agency exceptions where agency could have, but did not, argue before the arbitrator that union's requested remedy was contrary to law and exceeded arbitrator's authority).

V. Order

The Agency's exceptions are dismissed.

Chairman Pope, dissenting in part:

I agree that § 2429.5 of the Authority's Regulations (§ 2429.5) bars the Agency's management rights exceptions. However, for the following reasons, I do not agree that § 2429.5 bars the Agency's essence and exceeded authority exceptions. Instead, I would resolve, and deny, those exceptions on the merits. Accordingly, I dissent in part.

Section 2429.5 bars a party from raising, for the first time on exceptions, arguments that "could have been, but were not, presented" before the arbitrator. However, it is undisputed that § 2429.5 does *not* bar arguments where: (1) the excepting party *did* raise those arguments before the arbitrator, *see, e.g., U.S. Dep't of HUD*, 66 FLRA 106, 108 (2011) (*HUD*); or (2) it is unclear whether the party reasonably should have known to raise those arguments before the arbitrator, *see, e.g., SSA, Louisville, Ky.*, 65 FLRA 787, 789 (2011) (Member Beck dissenting in part on other grounds) (*SSA*). The majority's dismissal of the essence and exceeded authority exceptions disregards these principles.

With regard to the essence exception, the Agency argued to the Arbitrator that "its refusal to invite the Union to weekly team meetings" did not violate the Statute or the parties' agreement (agreement), which mirrors the Statute in pertinent part. Award at 16. Specifically, the Agency contended that the meetings were "outside the scope" of § 7114(a)(2)(A) of the Statute -- and the agreement -- because the meetings did not involve "personnel policies, practices, or general conditions of employment." *Id.* at 17. On exceptions, the Agency contends that the Arbitrator's direction that the Agency permit the Union to attend the meetings is contrary to the agreement because the meetings do not always involve "personnel policies, practices, or other general conditions of employment." Exceptions at 4 (quoting Award at 13). Thus, the Agency is clearly repeating an argument that it made to the Arbitrator. Accordingly, contrary to the majority, I find that § 2429.5 does not bar this argument. *See HUD*, 66 FLRA at 108.

With regard to the exceeded authority exception, the Union argued to the Arbitrator that the Agency violated § 7116(a)(8) of the Statute or, alternatively, § 7116(a)(5) of the Statute, and the Union requested status quo ante (SQA) relief. *See* Award at 15-16. The Agency denied violating either § 7116(a)(8) or § 7116(a)(5) and requested the Arbitrator to deny the grievance. *See id.* at 16-17. The Arbitrator found that the Agency violated § 7116(a)(8) and, as a result, that it was unnecessary to resolve the Union's alternative § 7116(a)(5) claim. *See id.* at 23 & n.39. As a remedy, the Arbitrator directed SQA relief. On exceptions, the Agency argues that the Arbitrator could not grant SQA

relief without finding a § 7116(a)(5) violation. By finding that § 2429.5 bars this argument, the majority effectively finds that, at arbitration, the Agency was required to anticipate that the Arbitrator would find it unnecessary to address (or, perhaps, would reject) the § 7116(a)(5) argument, but would nonetheless grant the requested SQA relief. In my view, requiring the Agency to have such predictive powers is unsupported by § 2429.5, as interpreted by the Authority. *See, e.g., SSA*, 65 FLRA at 789. Accordingly, I would address this exception as well.

Addressing the exceptions on the merits, the essence exception is based on a misinterpretation of the award. In this regard, the Agency claims that the Arbitrator found that "not all of the[] prior weekly meetings were 'formal meetings.'" Exceptions at 4. However, that is not what the Arbitrator found. In this regard, the Arbitrator stated, in the "background" section of his award that sets forth the parties' disagreement over this issue, that it was undisputed that "sometimes" the weekly meetings constituted formal discussions. Award at 13. Nevertheless, in finding a violation, he stated, without exception, that the Union had demonstrated that the "weekly team meetings . . . involved discussions concerning personnel policies or practices or other general conditions of employment." *Id.* at 22. Thus, the Agency's essence exception does not provide a basis for finding the award deficient. *See, e.g., SSA, Indianapolis, Ind.*, 66 FLRA 62, 65-66 (2011) (Member DuBester dissenting in part on other grounds) (exceptions based on misinterpretations of awards do not demonstrate awards are deficient).

The exceeded authority exception alleges that the Arbitrator could not grant SQA relief without finding a § 7116(a)(5) violation. As discussed above, the Arbitrator found (without exception) that the weekly meetings constitute formal discussions that the Union is entitled to attend. The SQA relief directs the Agency to notify the Union of, and allow the Union to attend, those meetings. The Agency cites authority for the proposition that SQA relief is appropriate to remedy a § 7116(a)(5) violation. *See* Exceptions at 5. However, the Agency cites no authority for its claim that SQA relief is available *only* in that situation. Accordingly, the Agency's exception provides no basis for finding that the Arbitrator exceeded his authority, and I would deny this exception.

For the foregoing reasons, I would resolve, and deny, the Agency's essence and exceeded authority exceptions. Accordingly, I dissent in part.