69 FLRA No. 78

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL IMMIGRATION AND
NATURALIZATION SERVICE COUNCIL
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

0-AR-5167

DECISION

September 2, 2016

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Union and several individual employees filed grievances, which were subsequently consolidated, alleging that the Agency violated the law when it failed to upgrade inspection assistants from General Schedule (GS)-5 to GS-7. Arbitrator Salvatore J. Arrigo found that the grievances involved a classification matter and therefore denied them. The Union designated a bargaining-unit employee (the grievant) as its representative for purposes of filing exceptions to the award, and she filed the exceptions.

The first question we must decide is whether the grievant has standing to file the exceptions. Because the Union, even though no longer the unit's exclusive representative, was a party to the arbitration and it authorized the grievant to file the exceptions on the Union's behalf, the answer is yes.

The second question is whether the award is contrary to law and regulation because, contrary to the Arbitrator's determination, the grievances do not involve a classification matter. Because the grievant fails to explain how the Arbitrator erred in finding that the grievances involve a classification matter, the answer is no.

The third question is whether the grievant's remaining exceptions support the grounds on which each exception is based, as required by § 2425.6 of the Authority's Regulations.[1] Because the remaining exceptions are unsupported and, therefore, do not demonstrate that the award is deficient, the answer is no.

II. Background and Arbitrator's Award

The Union and several employees filed grievances alleging that the Agency violated the Enhanced Border Security and Visa Entry Reform Act of 2002 (the Act)[2] when it failed to upgrade inspection assistants from GS-5 to GS-7, as authorized by the Act.[3] The grievances were unresolved and the Union and the Agency submitted them to arbitration.

Before the Arbitrator, the Union argued, as relevant here, that the Act required the Agency to upgrade inspection assistants because it both authorized *and* appropriated funds for upgrading employees. But the Arbitrator found otherwise, concluding that the Act did not require the Agency to upgrade employees because it did "not constitute an appropriation of public funds,"[4] and that the Agency's appropriations statute "did not address any specific salary levels of Agency employees, nor did it refer to [the Act]."[5] The Arbitrator next considered whether the grievances concerned a classification matter, and were therefore excluded from the parties' negotiated-grievance procedure under the parties' agreement and § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute).[6] Finding that the grievances concerned a classification matter, the Arbitrator concluded that the grievances were not arbitrable and dismissed them.

The grievant sought to file exceptions to the award. She emailed the Union, which by that time was no longer the bargaining unit's exclusive representative, expressing her concern that "[a] private person such as [her]self . . . c[ould] not appeal" because "[t]he appeal must be filed by an agency or a union."[7] The Union replied that it "w[ould] provide a letter giving [the grievant] the power to appeal."[8] The grievant later followed up with the Union to request "a letter from [the Union] . . . giving [her] the power to appeal [the] Arbitrator['s] . . . decision [a]nd taking [the matter] out of [the Union]'s hands."[9] The Union's attorney replied,

[1] 5 C.F.R. § 2425.6.
[2] 8 U.S.C. §§ 1701-1778.
[3] *See id.* § 1711(b)(1)(B).
[4] Award at 7.
[5] *Id.* at 9.
[6] 5 U.S.C § 7121.
[7] Exceptions, Ex. 13 at 1 (emphasis omitted).
[8] *Id.*
[9] *Id.* at 2.

"Betty, power granted."[10] The grievant then filed exceptions and requested an expedited, abbreviated decision under § 2425.7 of the Authority's Regulations.[11] The Agency filed an opposition to the grievant's exceptions, asserting, among other things, that the grievant lacked standing to file the exceptions because the Union was no longer the exclusive representative of the bargaining unit and did not have the authority to authorize the grievant to file exceptions.[12] The Agency also objected to an expedited, abbreviated decision.[13]

III. Preliminary Matters

A. We will not consider the grievant's motion to deny the Agency's motion to correct its opposition.

The Authority issued a deficiency order advising the Agency that it failed to attach its brief and attachments that it referenced in its electronically filed opposition, and ordered the Agency to correct the deficiency within a specified time.[14] The Agency timely cured the deficiencies.[15] Subsequently, the grievant filed a motion to deny the Agency's motion to correct the deficiencies[16] without requesting leave to file it under § 2429.26 of the Authority's Regulations.[17] As the grievant failed to request leave to file this supplemental submission, we will not consider it.

B. An expedited, abbreviated decision is inappropriate in this case.

The grievant asks us to resolve the exceptions in an expedited, abbreviated decision.[18] The Agency objects to the grievant's request.[19]

An expedited, abbreviated decision is a decision that "resolves the parties' arguments without a full explanation of the background, arbitration award, parties' arguments, [or] analysis of those arguments."[20] Under § 2425.7 of the Authority's Regulations, when a party requests such a decision, the Authority will determine whether such a decision is appropriate by considering "all of the circumstances of the case," including whether the opposing party objects to issuance of such a decision, and "the case's complexity, potential for precedential value, and similarity to other, fully detailed decisions involving the same or similar issues."[21]

After considering the circumstances of this case, including its "complexity, potential for precedential value, and [dis]similarity to other, fully detailed decisions involving the same or similar issues,"[22] and considering the Agency's objection, we find that an expedited, abbreviated decision is inappropriate. Accordingly, we deny the grievant's request for an expedited, abbreviated decision.

C. The grievant has standing to file the exceptions.

The Agency argues that the grievant lacks standing to file exceptions, because (1) the grievant provided only "an informal email from [the Union] purporting to grant her authority to file her exceptions"; and (2) the Union is no longer the exclusive representative of the grievant's bargaining unit, and thus, may not itself file exceptions.[23]

The Authority has held that grievants are not parties that may file exceptions to arbitration awards.[24] A union, however, may designate a grievant as its representative for purposes of filing exceptions to an arbitration award.[25] But a union's mere acquiescence to a grievant's request to file exceptions on his or her own behalf, does not provide a grievant the necessary authority to file exceptions under the Statute.[26] Thus, where a grievant files exceptions to an award, the

[10] *Id.*
[11] 5 C.F.R. § 2425.7.
[12] Opp'n at 9.
[13] *Id.* at 18.
[14] Order at 1.
[15] Agency's Motion to Correct Agency's Timely Filed Opposition to Add Pages Missing From the FLRA's E-Filing System.
[16] Motion to Deny Petition of DHS-CBP.
[17] 5 C.F.R. § 2429.26.
[18] Exceptions Form at 50.
[19] Opp'n at 18.
[20] 5 C.F.R. § 2425.7.
[21] *Id.*
[22] *Id.*
[23] Opp'n at 9.
[24] *See, e.g.*, *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 85-86 (2011) (citing *AFGE, Local 2904*, 20 FLRA 3, 3-4 (1985)).
[25] *NFFE, Local 1984*, 56 FLRA 38, 38 n.1 (2000) (*NFFE*); *see also AFGE, Local 3495*, 60 FLRA 509, 509 n.1 (2004); *but see id.* ("noting that the [a]gency d[id] not dispute the grievant's standing to file the exceptions").
[26] *U.S. DOD, Military Entrance Processing Station, Pittsburgh, Penn.*, 45 FLRA 976, 976-77 (*Pittsburgh I*), *recons. denied*, 46 FLRA 101 (1992) (*Pittsburgh II*) (letter to grievant stating "since you insist [o]n filing an [e]xception with the . . . Authority, you may always do so on your own behalf"); *Pittsburgh I*, 45FLRA at 977 ("There is nothing in the letter that clearly shows that [the grievant] either participated as a 'party' in the proceeding before the Arbitrator, *or was authorized by the Union to file the exceptions . . . .*"), *accord Pittsburgh II*, 46 FLRA at 102 ("[T]he grievant was not a party to the arbitration proceedings *and . . . the Union had not authorized her to file exceptions on the Union's behalf.*"); *U.S. Dep't of the Army, Tooele Army Depot, Tooele, Utah*, 38 FLRA 454, 455 (1990) (letter stating that union "d[id] not feel further appeal is merited" but had "no objection to [the grievant] proceeding with his exceptions").

Authority will determine whether the record demonstrates that the grievant has been duly designated by a union as its representative for purposes of filing exceptions to the award.[27]

Here, the record shows that the Union designated the grievant to file exceptions on the Union's behalf. The grievant asked for a letter from the Union giving her the authority to file exceptions and "taking [the matter] out of [the Union]'s hands."[28] The Union advised the grievant that it "w[ould] provide a letter giving [the grievant] the power to appeal."[29] When the grievant later followed up with the Union requesting that letter, the Union's attorney replied by email: "Betty, power granted." [30] Thus, undisputed facts in the record clearly indicate that both the Union and the grievant understood, through their email exchanges, that the Union was designating the grievant as its representative to file exceptions.

Nonetheless, the Agency asserts that the grievant does not have standing to file the exception because the Union was replaced by a different exclusive representative.[31] Thus, the Agency claims that the Union could not file exceptions to the award or give the grievant the authority to do so.[32]

We disagree. The Statute provides, in pertinent part, that "[e]ither party to arbitration . . . may file . . . an exception to any arbitrator's award."[33] Further, as relevant here, the Authority's Regulations define "party" as "[a]ny labor organization . . . [w]ho participated as a party . . . [i]n a matter where the award of an arbitrator was issued."[34]

Applying this language to the facts of this case, there is no dispute that the Union filed the grievance pursuant to the parties' agreement and was – along with the Agency – a party to the arbitration. Therefore, under the plain language of the Statute and the Authority's Regulations, the Union is a party permitted to file exceptions to the award.[35] As such, we find that the Union, despite ceasing to be the unit's exclusive representative, is a party that may file exceptions to the award, and had the authority to designate the grievant as its representative to file exceptions on its behalf.[36]

This finding is consistent with private-sector labor-law precedent. The courts have held that decertification does not affect a union's substantive right to act on behalf of employees under the collective-bargaining agreement in existence at the time of a grievance,[37] or "deprive [a union] of its standing to pursue [a] grievance . . . under and according to the terms of the [a]greement."[38] National Labor Relations Board precedent also holds that a decertified union has the right and duty to represent employees in pre-decertification grievances under the parties' collective-bargaining agreement, despite being replaced by a different exclusive representative.[39]

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[27] *See, e.g.*, *Pittsburgh I*, 45 FLRA at 976-77.
[28] Exceptions, Ex. 13 at 2.
[29] *Id* at 1.
[30] *Id.* at 2.
[31] Opp'n at 9.
[32] *Id.*
[33] 5 U.S.C. § 7122(a).
[34] 5 C.F.R. § 2421.11(b)(3)(ii).
[35] 5 U.S.C. § 7122(a); 5 C.F.R. § 2421.11(b)(3)(ii).
[36] *NFFE*, 56 FLRA 41 n.4. *Cf. Air Force, OK City Air Logistics, Ctr., Tinker AFB, OK,* 49 FLRA 968, 968 (1994) (finding that a grievant who had not been a party to the arbitration, and who had not been authorized to file exceptions on behalf of a party to the arbitration, lacked standing to file exceptions.)
[37] *U.S. Gypsum Co. v. United Steel Workers of America, AFL-CIO,* 384 F.2d 38, 45-46 (5th Cir. 1967).
[38] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of America v. Telex Computer Prod.,* 816 F.2d 519, 524 (10th Cir. 1987).
[39] *See Local 888, AFGE*, 308 NLRB 646, 650-51 (1992) (ALJ decision adopted by Board), *vacated on the grounds that the law was unclear at the time of the alleged unfair labor practice (ULP)*, 323 NLRB 717 (1997) (union violated duty of fair representation by failing to arbitrate grievances "solely because it had been replaced as collective-bargaining representative") (citing *Ariz. Portland Cement Co.*, 302 NLRB 36, 37 (1991) (employer did not commit ULP when it refused to arbitrate, with newly certified union, grievances that were pending at time of change in exclusive representative)); *see also Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1004 (2015) (finding that provisions of a collective-bargaining agreement "remain in full effect . . . following the decertification of one exclusive representative and the installation of a new one").

Accordingly, we find that the grievant, acting on behalf of the Union, has standing to file the exceptions.[40]

D. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the exhibits that the grievant submitted with the exceptions.

The Agency argues that the Authority should not consider certain exhibits included with the grievant's exceptions because the Union did not present those exhibits to the Arbitrator.[41] 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 before the Arbitrator.[42]

The grievant claims that some of the exhibits attached to her exceptions "w[ere] omitted from the documents of the case,"[43] and "never seen by the Arbitrator,"[44] because the Union prevented the grievant from submitting them.[45] But the Union was the party to the arbitration and the grievant has filed exceptions as the Union's designated representative. Thus, the question is not whether the grievant was prevented from submitting the evidence, but rather, whether the Union was. And there is nothing in the record to indicate that the Union was prevented from presenting these exhibits to the Arbitrator. Because the Union could have presented this evidence to the Arbitrator, but did not, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the grievant's exhibits attached to the exceptions that were not presented to the Arbitrator, and we do not consider them.[46]

IV. Analysis and Conclusions

A. The award is not contrary to law.

The grievant argues that the award is contrary to law.[47] We review the questions of law raised by the grievant's exceptions de novo.[48] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[49] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[50]

The grievant argues that the award is contrary to law because the Act "was used . . . to upgrade"[51] journeyman border patrol agents and inspectors, and that the Act never involved a classification matter because "it was meant to be a straight across the board 'upgrade' for all [j]ourneyman [o]fficers and [i]mmigration [a]ssistants."[52] But the grievant does not provide any legal authority, other than a citation to the Act, to support her arguments. And she does not explain, nor is it otherwise apparent, how the Arbitrator erred when he determined that the grievances involved a classification matter.[53]

Accordingly, because the grievant fails to explain how the award is contrary to law and regulation, we deny these exceptions.[54]

B. The remaining exceptions do not demonstrate that the award is deficient.

The grievant claims that the award is deficient on numerous private-sector grounds. Specifically, she asserts that the Arbitrator: (1) was biased;[55] (2) denied

[40] Member Pizzella agrees that the communications of record, in this case, sufficiently demonstrate that the Union intended to, and did in fact, designate and authorize the grievant to act on its behalf in filing these exceptions. Member Pizzella is nonetheless concerned that the analysis does not adequately explain under what circumstances a purported designation would, or would not be, sufficient. In many, if not most, circumstances a curt three-word email would be insufficient to demonstrate that the Union was unmistakably authorizing someone to act on its behalf. But, under these circumstances, it does because of the preceding trail of communications. Although the Authority has not had many opportunities to weigh in on such designations, when it has done so, the Authority has applied a "sufficiency" standard − i.e. that the record sufficiently demonstrates that both parties understand that the grievant or another individual was actually and unmistakably, designated to act on behalf of the union. *See DOJ BOP Guaynabo*, 66 FLRA 81, 85-86 (2015), *AFGE Local 3495*, 60 FLRA 509, 509 n.1 (2004); *Pittsburgh I*, 45 FLRA 976, and *DOT FAA San Diego*, 15 FLRA 407(1984).

[41] Opp'n at 9-10.

[42] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also, e.g.*, *NTEU, Chapter 83*, 68 FLRA 945, 947 (2015) (citing *AFGE, Local 3571*, 67 FLRA 218, 219 (2014)).

[43] Grievant's letter to the Authority (Exceptions Br.) at 2.

[44] *Id.*

[45] *Id.* at 2-3; *see* Exceptions Form at 28.

[46] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also, e.g.*, *U.S. Dep't of VA, Cent. Tex. Veterans Health Care Sys., Temple, Tex.*, 66 FLRA 71, 72 (2011).

[47] Exceptions Form at 6.

[48] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).

[49] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

[50] *U.S. Dep't of the Air Force, Warner Robins Air Logistics Complex, Robins Air Force Base, Ga.*, 68 FLRA 102, 103 (2014).

[51] Exceptions Br. at 5.

[52] *Id.* at 7.

[53] *Id.*

[54] 5 C.F.R. § 2425.6(e)(1); *see also Fraternal Order of Police, Pentagon Police Labor Comm.*, 65 FLRA 781, 784 (2011) (*Fraternal Order*) (exceptions are subject to denial under § 2425.6(e)(1) of the Authority's Regulations if they fail to support arguments that raise recognized grounds for review).

[55] Exceptions Form at 20.

the grievant a fair hearing;[56] and (3) exceeded his authority.[57] She also contends that the award is (4) based on a nonfact,[58] (5) against public policy,[59] and (6) contrary to Agency regulation.[60] And she appears to contend that the award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible.[61] [62] Last, the grievant asserts that the award is deficient on other grounds not listed in the Authority's Regulations.[63]

Under § 2425.6(b) of the Authority's Regulations, a party arguing that an award is deficient on private-sector grounds has an express duty to "explain how, under standards set forth in the decisional law of the Authority or Federal courts[,]"[64] the award is deficient. And a party arguing that an award is deficient on grounds other than the private-sector grounds identified in the Authority's Regulations, "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions."[65] In addition, § 2425.6(e)(1) provides that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground as required in"[66] § 2425.6(b).[67]

The grievant bases the remaining exceptions on a general assertion that the Union denied her the opportunity "to speak directly" to the Arbitrator "to raise any argument" regarding the matter, and that it failed to submit her statements on the matter to him.[68] She additionally states that the award is contrary to public policy because it is contrary to "public law."[69] And her contrary-to-Agency-regulation exception largely restates her contrary-to-law exception without identifying any Agency regulations with which the award is alleged to conflict.[70] Thus, the grievant does not support her bias, exceeds-authority, nonfact, impossible-to-implement, contrary-to-public-policy, contrary-to-Agency-regulation, and other-grounds exceptions with anything other than general assertions, and therefore fails to explain how the award is deficient under the standards set forth in Authority precedent. As for the fair-hearing exception, although the grievant asserts that she was "represented (unfairly) by the [Union]," and that the Union prevented her from contacting the Arbitrator and did not submit her briefings to the Arbitrator,[71] this assertion does not demonstrate that the *Union* was denied a fair hearing.

Accordingly, we deny the remaining exceptions.[72]

V. Decision

We deny the exceptions.

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[56] *Id.* at 28.
[57] *Id.* at 42.
[58] *Id.* at 32.
[59] *Id.* at 24.
[60] *Id.* at 12.
[61] *Id.* at 16.
[62] Chairman Pope would not find that the grievant has sufficiently raised an "incomplete, ambiguous, or contradictory" exception, as she has neither claimed that the award is "incomplete," "ambiguous," or "contradictory," nor checked the box for that ground on her exceptions form. *See* Exceptions Form at 16.
[63] *Id.* at 46.
[64] 5 C.F.R. § 2425.6(b).
[65] *Id.* § 2425.6(c).
[66] *Id.* § 2425.6(e)(1).
[67] *Id.* § 2425.6(b).
[68] Exceptions Form at 10, 14, 18, 28; Exceptions Br. at 4, 7.
[69] Exceptions Form at 24.
[70] *Id.* at 12.
[71] *Id.* at 28; *see also* Exceptions Br. at 8.
[72] 5 C.F.R. § 2425.6(e)(1); *see also Fraternal Order* 65 FLRA at 784.