70 FLRA No. 26

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
TOPEKA, KANSAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 906
(Union)

0-AR-5237

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ORDER DISMISSING EXCEPTIONS

December 29, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

The Union filed a grievance alleging that the Agency failed to comply with Article 17 of the parties' collective-bargaining agreement (the agreement) by failing to provide employees with a list of the systems of records in which the Agency maintained and retrieved information by employee name, social security number, or other personal identifier. The grievance went to arbitration.

Arbitrator Thomas A. Cipolla found that "[t]o the extent the Agency ha[d] complied" with the agreement by providing the Union *some* of the contractually required information prior to arbitration, "there [was] no violation."[1] However, the Arbitrator found that the Agency should have given the Union additional information, and he directed the Agency to do so.

Further, the Arbitrator found that "[t]o the extent that an employee has been disciplined based upon information on one of these undisclosed systems of records, the [agreement] is . . . clear – it cannot be used against the employee."[2] The Arbitrator found that the Union raised one instance wherein the Agency disciplined an employee, in part, for some phone-related matters. The Arbitrator determined that if the Agency's disciplinary charges against the employee "were based solely upon information that was contained on an undisclosed system of record[s,] . . . then any discipline imposed and the record of that discipline relating to [the] charge . . . should be removed from [the] . . . employee's record."[3]

The Agency filed exceptions to the Arbitrator's award. The Union filed a motion to dismiss the Agency's exceptions and an opposition to the Agency's exceptions.

As an initial matter, the Union moves to dismiss the Agency's exceptions because the Agency allegedly failed to file the exceptions within thirty days of the date on which the Arbitrator served the award on the parties by email. Under § 2425.2(b) of the Authority's Regulations, the thirty-day period for filing exceptions begins to run the day after the award's date of service.[4] Here, the Arbitrator served the award on the parties by email on September 30, 2016, which would normally make the due date for the Agency's exceptions October 30, 2016. But October 30 was a Sunday. Under § 2429.21(a)(1)(v) of the Authority's Regulations, if the thirty-day period for filing arbitration exceptions falls on a Sunday, then the due date is "the next day on the calendar that is not a Saturday, Sunday, or federal legal holiday."[5] In this case, that date was Monday, October 31. As the Agency filed its exceptions on that date, the Agency's exceptions are timely. Therefore, we deny the Union's motion to dismiss.

Turning to the Agency's exceptions, the Agency claims that the Arbitrator exceeded his authority by awarding a remedy to a former employee who was not a grievant.[6] The Agency also claims that this remedy fails to draw its essence from the agreement because it "disregard[s] other procedures in the [agreement] governing discipline and grievances."[7] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[8] At arbitration, the Union requested that the Arbitrator expunge the disciplinary actions of any employees who were disciplined as a result of their use of certain phone applications because the Agency did not provide information concerning those phone applications in the systems-of-records list that it had provided to the Union.[9] The Agency had notice that it could, and should, present any arguments to the Arbitrator regarding the Union's

[1] Award at 19.
[2] *Id.* at 20.
[3] *Id.*
[4] 5 C.F.R. § 2425.2(b).
[5] *Id.* § 2429.21(a)(1)(v).
[6] Exceptions Br. at 7-8.
[7] *Id.* at 8; *see also id.* at 8-10.
[8] 5 C.F.R. §§ 2425.4(c), 2429.5.
[9] Award at 17.

requested remedy, but the record contains no indication that the Agency did so. Thus, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar these exceptions, and we dismiss them.[10]

Finally, in its remaining exception, the Agency argues that it "complied with the Privacy Act" when it published a notice, and that this notice made relevant information available to employees.[11] Although the Agency cites the Privacy Act,[12] the Agency does not argue that the award conflicts with the Privacy Act, and the Agency indicates that it is not arguing that the award is contrary to law.[13] Under § 2425.6(e)(1) of the Authority's Regulations, an exception "may be subject to dismissal . . . if . . . [t]he excepting party fails to raise" a recognized ground for review listed in § 2425.6(a)-(c) of the Authority's Regulations,[14] or "otherwise fails to demonstrate a legally recognized basis for setting aside the award."[15] This exception fails to articulate grounds currently recognized for review by the Authority, and does not cite any private-sector precedent that establishes a ground for review. Thus, we dismiss this exception under § 2425.6 of the Authority's Regulations.[16]

In sum, we dismiss the Agency's exceptions.

[10] *E.g.*, *U.S. DHS, U.S. CBP*, 66 FLRA 335, 338 (2011).
[11] Exceptions Br. at 6-7.
[12] 5 U.S.C. § 552a.
[13] Exceptions Form at 4.
[14] 5 C.F.R. § 2425.6(a)-(c).
[15] *Id.* § 2425.6(e)(1); *see also AFGE, Local 2272*, 67 FLRA 335, 335 n.2 (2014) (*Local 2272*) (citing *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011)).
[16] *See, e.g.*, *NAGE, Local R3-10, SEIU*, 69 FLRA 510, 510 (2016); *Local 2272*, 67 FLRA at 335 n.2.

Member Pizzella, dissenting:

As I have pointed out to my colleagues in what is now an all too familiar refrain,[1] the United States Court of Appeals for the District of Columbia Circuit has made clear that the Authority may *not* require parties "to invoke 'magic words' in order to adequately raise an argument before the Authority."[2]

One might presume that my colleagues in the majority simply forgot the Court's guidance, because once again today they set a technical trapfall for the Veterans Affairs Medical Center in Topeka, Kansas and do not even address its meritorious essence and exceeds-authority exceptions.[3]

This is not a complicated case.

American Federation of Government Employees, Local 906 (AFGE Local 906) complained that the Agency did not provide it with certain lists as required by the parties' agreement. Article 17, Section 6 has two distinct parts. The first part specifies a "right" for employees − "employees have a right to be made aware of any information specifically maintained under their name and/or social security number or any other personal identifiers."[4] The second part specifies a different responsibility for the Agency to "annually provide employees with a list of systems of records" which contain "documents maintained in their [electronic Official Personnel Folder] eOPF, Merged Record Personnel Folder (MRPF) . . . [w]hen no copy . . . is automatically provided [to] the employee" and "in which information is maintained and retrieved by employee name, social security number or other personal identifier."[5] The grievance concerns only the second part of Section 6.

Thus, the question before Arbitrator Thomas A. Cipolla was not complex − either the Agency provided the lists required by the second part of Section 6, or it did not. The evidence is quite clear that the Agency provided AFGE Local 906 a list of all of those records[6] even though the Union tried to bring in no less than twenty-two (22) witnesses to give their opinion on a rather matter-of-fact issue. The Agency objected that the witnesses were "not relevant" because the Agency provided "the sole remedy requested" − all of the lists required by Section 6.[7]

Had Arbitrator Cipolla confined himself to that issue we would have nothing more than a simple dispute concerning interpretation of the parties' agreement. But Arbitrator Cipolla went far beyond the confines of the grievance. Sounding like Bud Collyer (the long time host of the popular *To Tell the Truth* game show revealing the week's mystery guest) the Arbitrator ordered the Agency to expunge "the disciplinary record of [an unnamed] employee [supposedly] identified in Union Exhibit #8."[8] It is to this portion of the award which the Agency objects.

We can only surmise who the mystery grievant, and beneficiary of the Arbitrator's award, is because the Union does not provide us Exhibit 8. Taking the Union at its word, however, it appears that the mystery "employee" – Erik Guerrero[9] − is not currently an "employee" of the Agency and was not a "grievant" or an "employee" of the Agency when AFGE Local 906 filed its grievance.[10]

There are several obvious problems with the Arbitrator's award and remedy. These problems should have been, but are not, addressed by the majority.

The Union does not provide the Authority with Exhibit 8, which according to AFGE Local 906, supports its assertion that Guerrero is entitled to relief. But without that evidence it is impossible for the Authority to determine whether the Arbitrator exceeded his authority. If Guerrero was not a "grievant" or a bargaining-unit employee, then the Arbitrator would have exceeded his authority as the Agency argues.[11]

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[1] *See U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington Ky.*, 69 FLRA 10, 17 (2015) (Dissenting Opinion of Member Pizzella); *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 607 (2014) (Dissenting Opinion of Member Pizzella).

[2] *NTEU v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014).

[3] *See AFGE, Local 1897*, 67 FLRA 239, 240 (2014) (Member Pizzella concurring) (Authority finding that union's exception that asserts "using the '*Douglas* [f]actors as guidance . . . the Agency's five[-]day suspension of [the grievant] is excessive'" does not state a contrary to law claim); *AFGE, Local 1738*, 65 FLRA 975, 976 (2011) (Member Beck concurring) (Authority finding that union's exception that asserts an award is "contrary to the plain language of the negotiated agreement" does not establish an essence exception); *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck concurring) (Authority finding that union's exception that asserts arbitrator erred by "relying on Article 32 of the parties' agreement" and "citing [*AFGE, Fed. Prison*] *Council 33*, 51 FLRA 1112 [(1996)], in support of his award" does not establish an essence or contrary to law exception).

[4] Opp'n at 45.

[5] *Id.*

[6] *See* Award at 18.

[7] Opp'n at 39.

[8] Award at 21.

[9] Exceptions Br. at 7.

[10] *Id.*

[11] *Id.*

The majority ignores entirely this glaring evidentiary omission, yet refuses to consider the exceeds-authority exception because the Agency purportedly did not address its concerns about Guerrero before the Arbitrator. First, the witness list submitted by AFGE Local 906 to the Arbitrator does not include Guerrero as a grievant.[12] Therefore, it seems obvious that the Agency should not be penalized for not objecting to a witness who was not listed. Second, the majority ignores that the Agency specifically argued that it provided AFGE Local 906 everything to which it was entitled under Article 17, Section 6. That provision has nothing whatsoever to do with the discipline of employees and certainly has nothing to do with non-employees.[13]

Furthermore, the majority is wrong that the Agency did not preserve its essence arguments. First, the Agency argued that it had no obligation to provide any list because the second part of Article 17, Section 6, which concerns documents *in an eOPF or MRPF* (the records in which an employee's disciplinary record would presumably be found), only requires a list of the system of record be provided when no copy of the document was provided to the employee and is "retrieved by employee name, social security number, or other personal identifier."[14]

Once again, the majority ignores entirely that AFGE Local 906 provides not one iota of evidence that mystery grievant Guerrero was *not* provided a copy of the disciplinary documentation. Only if he was not provided a copy of that document would the Agency have any obligation to include such a system of records on any list provided to AFGE Local 906. Also, the Union fails to provide any evidence that the eOPF and MRPF are "maintained and retrieved by employee name, social security number, or other personal identifier," an argument which was specifically raised to the Arbitrator by the Agency.[15]

As I noted above, the United States Court of Appeals for the District of Columbia Circuit warned the Authority that "an argument is preserved if the party has *fairly brought* the argument 'to the Authority's attention.'"[16] Following this mandate, I would conclude, unlike my colleagues, that the Agency properly raised, and the record (and lack of evidence to the contrary provided by AFGE Local 906) demonstrates, that the Arbitrator exceeded his authority and that the award does not draw its essence from Article 17, Section 6.

Thank you.

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[12] Opp'n at 35-36.
[13] Award at 17-18; *see also* Opp'n at 37-43.
[14] Opp'n at 45.
[15] *Id.* at 47 (citing Step 3 Grievance).
[16] *NTEU*, 754 F.3d at 1040 (quoting *U.S. Dep't of Commerce v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993)).