

72 FLRA No. 87

FRA TERNAL ORDER OF POLICE
LOCAL LODGE 168
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
87TH AIR BASE WING, JOINT BASE MCGUIRE-DIX
LA KEHURST, NEW JERSEY
(Agency)

0-AR-5716

DECISION

September 1, 2021

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and James T. Abbott, Members
(Member Abbott dissenting)

This matter is before the Authority on exceptions to an award of Arbitrator James W. Robinson filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute)¹ and part 2425 of the Authority's Regulations.² The Agency filed an opposition to the Union's exceptions.

We have determined that this case is appropriate for issuance as an expedited, abbreviated decision under § 2425.7 of the Authority's Regulations.³

As a preliminary matter, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar consideration of the Union's exception that the grievance was timely because it concerned a continuing violation.⁴ The Union should have known to raise this argument before the Arbitrator but acknowledges that it did not do so. Therefore, we dismiss this exception.⁵

¹ 5 U.S.C. § 7122(a).

² 5 C.F.R. pt. 2425.

³ *Id.* § 2425.7 ("Even absent a [party's] request, the Authority may issue expedited, abbreviated decisions in appropriate cases.").

⁴ *Id.* §§ 2425.4(c), 2429.5.

⁵ *U.S. DHS, U.S. CBP*, 66 FLRA 335, 337-38 (2011) (where a party should have known to make an argument to the arbitrator, but the record does not indicate that the party did so, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the party from raising that argument to the Authority).

Under § 7122(a) of the Statute,⁶ an award is deficient if it is contrary to any law, rule, or regulation, or it is deficient on other grounds similar to those applied by federal courts in private sector labor-management relations. Upon careful consideration of the entire record in this case and Authority precedent, we conclude that the award is not deficient on the ground raised in the exception and set forth in § 7122(a).⁷

Accordingly, we dismiss, in part, and deny, in part, the Union's exceptions.

⁶ 5 U.S.C. § 7122(a).

⁷ *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993) (award not deficient as based on a nonfact where excepting party either challenges a factual matter that the parties disputed at arbitration or fails to demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result).

Member Abbott, dissenting:

Just because a case *may* be dismissed procedurally without a full decision does not mean that it *should* be. For the reasons explained below, this case is not appropriate for an expedited, abbreviated decision.

As I noted just four months ago in *AFGE, Local 2338*,¹ the federal labor-management relations community is just now beginning to navigate the uncertain waters of and the unique challenges raised by grievances concerning any number of COVID-19 related matters. Now, once again, my colleagues pass on the opportunity to inform the labor-management relations community on issues presented by COVID-19 related grievances and how those issues have been addressed and resolved by the Authority.

In *AFGE, Local 2338*, I urged my colleagues that the unique circumstances of these cases and the timeliness issues they present might well require an approach that affords greater flexibility to account for the impact of COVID-19.² Therefore, it perplexes me why my colleagues would pass on this excellent opportunity to explain the facts of this case and why the Union's continuing-violation theory fails. To the contrary, I believe it is imperative that we provide guidance whenever possible on these matters.

The Union filed a grievance for hazard pay because of "the spread of . . . the COVID-19 outbreak and . . . lack of protective gear."³ The parties' agreement requires the Union to file a grievance "within [fifteen] calendar days of the incident or knowledge of the incident or knowledge of the incident which gave rise to the grievance."⁴ The Arbitrator ultimately found the grievance untimely because the Union was sufficiently aware of the dangers of COVID-19 well before March 21, 2020 when the "incident" giving rise to the grievance occurred.

What is problematic about this case, however, is that the Arbitrator seemingly ignores that in March 2020 many in the general public did not have a complete picture of the impending maelstrom that was and is COVID-19. But to look back now and say that the Union should have known enough to file a grievance in March 2020 fails to coincide with the reality that was Spring 2020. This is a missed opportunity to explain how the Authority will address "awareness" and timing issues in pending and future COVID-19 related grievances.

To dismiss this case without addressing the facts and circumstances in a full decision *by the Authority* does nothing to facilitate the resolution of similar disputes now or in the future.

¹ 72 FLRA 176, 178 (2021) (Dissenting Opinion of Member Abbott).

² *Id.*

³ Award at 2.

⁴ *Id.* at 4 (citing Art. 54, § 54.09).