73 FLRA No. 94

INTERNATIONAL FEDERATION
OF PROFESSIONAL
AND TECHNICAL ENGINEERS
LOCAL 4
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD
(Agency)

0-AR-5842

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DECISION

March 20, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Timothy J. Buckalew found a grievance was not procedurally arbitrable under the parties' collective-bargaining agreement. Because the Union's exceptions comprise arguments that it could have – but did not – raise to the Arbitrator, we dismiss the exceptions under §§ 2425.4 and 2429.5 of the Authority's Regulations.[1]

II. Background and Arbitrator's Award

In October 2020, the Agency suspended the grievant for sending an email to several hundred bargaining-unit employees' official email addresses. The email contained a link to an inappropriate photograph posted on the then-Union president's (the president's) social media. The Union did not grieve the suspension at that time.

On February 18, 2021, the Union notified the Agency that the president emailed the same inappropriate photograph to fourteen employees. On July 21, 2021, the Union filed a grievance alleging the Agency violated the parties' agreement by treating the grievant unfairly and inequitably – namely, that it disciplined the grievant for inappropriate conduct but did not discipline the president for similar conduct.[2] The Agency denied the grievance as untimely, and the Union invoked arbitration.

Addressing an Agency argument that the grievance was not timely filed, the Arbitrator noted that the parties' agreement requires grievances to be filed "within ten (10) workdays after the incident out of which the grievance arose or within ten days of the date the employee or the Union became aware of the incident."[3] Then, assuming "for purposes of argument" that the parties' agreement prohibited "inequitable discipline or disparate disciplinary treatment,"[4] the Arbitrator determined that "[t]he incident giving rise to the grievance" was either (1) the grievant's suspension in October 2020 or (2) "the date the Union or grievant knew" the president had not been disciplined for the same conduct as the grievant.[5]

The Arbitrator concluded the grievance was untimely with respect to either incident. With respect to the second incident, the Arbitrator rejected the Union's argument that the grievant and the Union did not know, until July 2021, that the president was not disciplined. Instead, the Arbitrator found the Union knew in February 2021 that the president had engaged in the same conduct for which the Agency had disciplined the grievant. The Arbitrator concluded that the Union should have filed the grievance within ten days but failed to do so. Accordingly, he found the grievance was not arbitrable.

The Arbitrator also noted that the award "exceeds the recommended thirty-day deadline for rendering the award" set forth in the parties' agreement, but that he "advised the parties of the reasons for the delay and there were no objections."[6]

On September 9, 2022, the Union filed exceptions to the award, and on October 10, 2022, the Agency filed an opposition to the Union's exceptions.[7]

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[1] 5 C.F.R. §§ 2425.4(c), 2429.5.
[2] Award at 5, 14.
[3] *Id.* at 16; *see also id.* at 7 (quoting Art. 7, § 5).
[4] *Id.* at 14.
[5] *Id.* at 16.
[6] *Id.* at 12 n.1.
[7] On November 17, 2022, the Union requested leave to file, and did file, a "response" to the opposition, in which the Union requested the Authority dismiss the opposition based on deficient service by the Agency to the Union. Supplemental Submission at 1-2. We need not resolve whether the opposition is properly before us because, for the reasons discussed in Section III, we find the Authority's Regulations bar the Union's exceptions. Accordingly, we do not consider the opposition in reaching our decision. *See AFGE, Loc. 2328*, 61 FLRA 510, 511 (2006) (Chairman Cabaniss concurring) (citing *AFGE, Loc. 131*, 60 FLRA 999, 999 n.* (2005); *AFGE, Loc. 3599*, 53 FLRA 1267, 1267 n.* (1998)) (finding it unnecessary to resolve whether opposition was timely where Authority did not rely on it).

III. Analysis and Conclusions: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments or issues that could have been, but were not, presented to the arbitrator.[8] The Union argues that the Arbitrator denied it a fair hearing and the award is based on a nonfact because the Arbitrator failed to consider dispositive testimony of the Agency's executive director (the director).[9] According to the Union, at the hearing, the director testified that the Agency did not discipline the president for emailing the photograph.[10] To support both exceptions, the Union argues this testimony demonstrates the Union only learned that the president had not been disciplined *at the arbitration hearing*, and that the Arbitrator should have determined the grievance's timeliness based on the hearing date.[11]

Under the "Other Grounds" heading on its exceptions form, the Union makes an additional argument.[12] The Authority's Regulations – and thus, the exceptions-filing form – permit a party to allege that an award is deficient "on the basis of a private-sector ground" not otherwise listed in the Regulations.[13] However, to support such an exception, the Regulations require the excepting party to "provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions."[14] The Union argues that the award is deficient on the "[o]ther [g]round[]" that the Arbitrator allegedly "lost his notes."[15] Before issuing the award, the Arbitrator allegedly emailed the parties to explain that the award would be delayed because his computer was broken.[16] Citing the email, the Union alleges the Arbitrator relied only on the parties' briefs, instead of "actual testimony," to render the award.[17] Even assuming that this argument raises and supports a ground under the Authority's Regulations, we dismiss it for the reasons below.

The Union acknowledges that it did not raise the arguments upon which it bases its exceptions to the Arbitrator.[18] As to its fair-hearing and nonfact arguments regarding the director's testimony, the Union asserts that it did not know to raise them until the award issued.[19] However, the Arbitrator addressed the grievance's timeliness as a threshold issue, and the Agency argued to the Arbitrator that the grievance was untimely because the Union knew of the alleged inequitable treatment in February 2021.[20] According to the Union's timeline, both parties' post-hearing briefs were due to the Arbitrator by May 27, 2022.[21] The Union submitted its brief to the Arbitrator on May 24, and the Agency's brief is undated. The award did not issue until September 6, 2022, and there is no evidence that the Union attempted to raise the arguments it makes now to the Arbitrator.[22]

Although the Union generally asserted to the Arbitrator that the director's testimony established the president was not disciplined, the Union did not argue to the Arbitrator that he should determine timeliness of the grievance based upon the hearing date.[23] Because the Union could have, but did not, raise this argument to the Arbitrator, it cannot do so now. As the Union's fair-hearing and nonfact exceptions are both based on this argument, the Authority's Regulations bar them.

Similarly, the Union knew of the issue it raises in its exception regarding the Arbitrator's notes before the

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[8] 5 C.F.R. §§ 2425.4(c), 2429.5; *e.g.*, *NTEU*, 73 FLRA 315, 317 (2022) (Chairman DuBester concurring) (citing *U.S. Dep't of the Army, White Sands Missile Range*, 72 FLRA 435, 439 (2021) (Chairman DuBester concurring); *U.S. DHS, U.S. CBP, U.S. Border Patrol, San Diego Sector*, 68 FLRA 642, 642-43 (2015)) (dismissing nonfact exception because argument was not raised to arbitrator); *U.S. DHS, CBP*, 68 FLRA 824, 825 (2015) (*CBP*) (dismissing fair-hearing arguments that were not raised to the arbitrator).

[9] Exceptions at 4-5.

[10] *Id.*

[11] *Id.* at 5 (alleging that, until the director's testimony, "[i]t was impossible for the [U]nion to know for sure that [the president] was not disciplined"); *id.* at 4 ("The Arbitrator should have started the clock for any timeliness concerns the moment [the director] testified that [the president] was not disciplined.").

[12] *Id.* at 5-6.

[13] 5 C.F.R.§ 2425.6(b)(2)(v).

[14] *Id.* § 2425.6(c); *see also U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys.*, 69 FLRA 608, 609-10 (2016) (dismissing exception that failed to either raise a ground recognized by the Authority or cite any legal authority to support a ground not currently recognized by the Authority).

[15] Exceptions at 5-6.

[16] *Id.* at 6.

[17] *Id.*

[18] *Id.* at 4 (fair hearing), 5 (nonfact), 6 (Arbitrator's notes).

[19] *Id.* at 4, 5.

[20] Exceptions, Attach. 9, Agency Post-Hr'g Br. at 8-11.

[21] Exceptions, Attach. 4, Union Post-Hr'g Br. (Union Br.) at 2.

[22] *See USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.4 (2011) (concluding that agency failed to present argument to arbitrator, even where union raised the issue in post-hearing brief filed after agency's brief, because "nearly a month elapsed before the [a]rbitrator issued her award" after the union filed its brief).

[23] Union Br. at 15, 23. As noted, the Union argued to the Arbitrator that it timely filed the grievance upon becoming aware of the alleged inequitable treatment on July 20, 2021. *Id.* at 6, 15. In this regard, we note that where a party makes an argument to the Authority that is inconsistent with its position before the arbitrator, the Authority applies § 2429.5 to bar the argument. *AFGE, Loc. 3294*, 70 FLRA 432, 433 (2018) (Member DuBester concurring) (citing *U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 328 (2009)).

award issued.[24] The Arbitrator stated that he notified the parties of the reason for the delayed award and that neither party objected.[25] As the Union could have also raised this argument to the Arbitrator, but did not do so, we dismiss it.[26]

IV. Decision

We dismiss the Union's exceptions.

[24] *See* Exceptions at 6 (citing an email the Arbitrator allegedly sent more than a month before issuing the award).
[25] Award at 12 n.1.
[26] 5 C.F.R. §§ 2425.4(c), 2429.5 (the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator); *see CBP*, 68 FLRA at 825.