65 FLRA No. 172

BROADCASTING BOARD
OF GOVERNORS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1812
(Union)

0-AR-4571

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ORDER DISMISSING EXCEPTIONS

May 23, 2011

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Suzanne R. Butler 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 suspended the grievant in violation of the parties' collective bargaining agreement (CBA), and she sustained the grievance. For the reasons that follow, we dismiss the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency suspended the grievant for allegedly failing to follow instructions and Agency policy. Award at 6-7. The Union filed a grievance alleging that the Agency did not have sufficient cause under the CBA to suspend the grievant.[1] *Id.* at 2, 7. The grievance was unresolved and was submitted to arbitration, where, as relevant here, the parties stipulated to the following issues for resolution:

> 1. Did the Agency prove . . . that the [g]rievant failed to follow instructions . . ., as charged? If not, what shall be the remedy?
>
> 2. Did the Agency prove . . . that the [g]rievant failed to follow Agency policy . . ., as charged? If not, what shall be the remedy?

Id. at 2, 7.

Both the proposing and deciding officials (the officials) involved with the grievant's suspension testified at the arbitration hearing. *See id.* at 30. Based on their testimonies, the Arbitrator found that the Agency had suspended the grievant because the officials believed that he "intentionally act[ed] in insubordinate defiance of authority, disregard[ed] directive[s,] and refus[ed] to comply with a proper order," which were category fifteen offenses in the "Table of [Actions] incorporated into the [CBA.]" *Id.* (internal quotation marks omitted); *see also id.* at 4 (quoting category fifteen offenses from CBA's table of actions).

The Arbitrator found that the Agency failed to prove its charge of "intentional insubordination" in connection with the grievant's alleged failure to follow instructions. *See id.* at 30, 36, 39. With regard to whether the grievant failed to follow Agency policy, the Arbitrator found it uncontested that the grievant's actions were not consistent with the policy at issue. *Id.* at 37. Nevertheless, because the deciding official testified that she suspended the grievant based on her belief that he "knew or should have known" that the Agency policy applied to his circumstances, the Arbitrator found that the question before her involved whether "the [g]rievant *intentionally* failed" to follow a policy that "he knew or should have known" applied to his circumstances. *Id.* In that regard, the Arbitrator determined that the Agency did not prove that the grievant "intentionally failed to follow the [Agency] . . . policy as charged." *Id.* at 37-38; *see also id.* at 39.

Because she found that the Agency had not proven either charge "by a preponderance of the evidence," the Arbitrator sustained the grievance and

1. The CBA provides, in pertinent part: "An employee will be subject to disciplinary . . . actions only for such cause as will promote the efficiency of the Federal Service[.]" Award at 3 (quoting CBA Art. 20, § 1.B.); *see also id.* at 2 (identifying, among other provisions, CBA Art. 20, § 1.B. as "relevant contract language" in the parties' dispute).

directed the Agency to compensate the grievant for lost pay and to expunge the suspension from its records. *Id.* at 38-39.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator "relied on nonfacts" by finding that the charges against the grievant included "insubordination" and "an intentional failure to follow [Agency] policy[.]" Exceptions at 10 (internal quotation marks omitted). In addition, the Agency contends that the Arbitrator "re-formulat[ed]" the charges against the grievant in a manner contrary to law. *Id.* at 11. Specifically, the Agency asserts that the Arbitrator's "rewritt[en]" charges required the Agency to prove that the grievant intentionally violated instructions and Agency policy, whereas the Agency asserts that the grievant's intent was "irrelevant" to the charges for which the Agency disciplined him. *Id.* at 11-12 (citations omitted). Finally, the Agency alleges that the Arbitrator exceeded her authority by "re-defin[ing]" the charges to require a showing of intentionality. *Id.* at 8-9 (citations omitted).

B. Union's Opposition

The Union asserts that, before the Arbitrator, "the Agency's position" was that it suspended the grievant because he "intentional[ly]" failed to follow instructions and Agency policy. Opp'n at 14. For support, the Union quotes an exchange between the Arbitrator and the Agency's counsel at the hearing (Counsel), in which the Arbitrator asked Counsel to characterize the charges, and Counsel described them as "insubordinate defiance of authority, disregard of directive, [and] refusal to comply with [a] proper order[.]" *Id.* at 13 (quoting Tr. at 548). The Union asserts that Counsel's response included only "intentional misconduct charges[]" that qualified as category fifteen offenses under the CBA's table of actions, *id.*, and, when the Arbitrator inquired whether any of the Agency's charges qualified as category fourteen offenses under the table – i.e., a category of offenses that need not include intent – Counsel replied, "No[,]" *id.* (quoting Tr. at 547-48).

Further, the Union asserts that the Agency's post-hearing brief alleged that the grievant "*disregarded . . . instructions and decided to single-handedly call the shots . . . as he desired*" while on assignment. *Id.* (quoting Agency's Post-Hearing Br. at 12 (emphasis added by Union)). Moreover, the Union quotes the deciding official's testimony that she believed that the grievant "knew" that he was not following the Agency's policy, and that belief was her "basis for . . . upholding the two-day[]" suspension. *Id.* (internal quotation marks omitted) (quoting Tr. at 278-79). Based on the foregoing, the Union contends that the Authority should not "hear[] . . . argu[ments] on appeal [of the award that are] in opposition to the position [that the Agency] presented to the Arbitrator at [the] hearing." *Id.* at 20.

IV. Analysis and Conclusions

Under § 2429.5 of the Authority's Regulations (§ 2429.5), the Authority will not consider issues that could have been, but were not, presented to the arbitrator.[2] *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008). Where a party makes an argument before the Authority that is inconsistent with its position before the arbitrator, the Authority applies § 2429.5 to bar the argument and to dismiss exceptions based on that argument. *See, e.g., U.S. Dep't of Transp., Fed. Aviation Admin., Detroit, Mich.*, 64 FLRA 325, 328 (2009) (*FAA*); *U.S. Dep't of the Treasury, Internal Revenue Serv.*, 57 FLRA 444, 448 (2001) (Chairman Cabaniss concurring).

The officials' testimonies, Counsel's assertions at the arbitration hearing, and the Agency's post-hearing brief all establish that, before the Arbitrator, the Agency argued that it had sufficient cause to suspend the grievant because he *intentionally* failed to follow instructions and Agency policy. *See* Exceptions, Attach. B(1) (hearing transcript, part 1) at 74-78, 84-85 (testimony of Proposing Official); *id.*, Attach. B(2) (hearing transcript, part 2) at 278-79 (testimony of Deciding Official); *id.* at 547-49 (exchange between Counsel and Arbitrator on category of offenses); Opp'n, Attach., CBA at 60 (listing offenses within categories fourteen and fifteen of table of actions); *id.*, Attach., Agency's Post-Hearing Br. at 10, 12 (alleging grievant "disregarded" instructions and "decided to

2. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations – including § 2429.5 – were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the exceptions in this case were filed before the effective date of the revised Regulations, we apply the prior version of the Regulations. Under the prior Regulations, § 2429.5 stated, in pertinent part: "The Authority will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the . . . arbitrator."

single-handedly call the shots . . . as he desired"). Moreover, in her award, the Arbitrator relied on those Agency allegations of intentionality when interpreting the issues and deciding the questions before her. *See* Award at 30, 37 (relying on officials' testimonies); *id.* at 2-4 (quoting CBA table of actions' wording of category fifteen offenses, but not category fourteen offenses, as "relevant contract language"); *id.* at 23-24 (summarizing Agency's position based on assertions in its post-hearing brief). In contrast, the premise of all of the Agency's exceptions is that the grievant was not charged with or suspended for intentionally failing to follow instructions and Agency policy. *E.g.*, Exceptions at 8-9, 10, 11-12. As such, the exceptions are inconsistent with the arguments that the Agency made before the Arbitrator, and we dismiss them as barred by § 2429.5. *See FAA*, 64 FLRA at 328.

V. Order

The Agency's exceptions are dismissed.