

67 FLRA No. 38

SOCIAL SECURITY ADMINISTRATION
REGION V
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3448
(Union)

0-AR-4900

ORDER DISMISSING EXCEPTIONS

December 19, 2013

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

I. Statement of the Case

Arbitrator James Abernathy found that the Agency violated the parties' collective-bargaining agreement, law, rule, and regulations when it did not give the grievant a top score in one of the four categories in his performance appraisal. The Arbitrator further found that if the Agency had rated the grievant properly, then the grievant would have been eligible to receive a Quality Step Increase (QSI). A QSI is "an increase in an employee's rate of basic pay from one step or rate of the grade of his or her position to the next higher step of that grade or next higher rate within the grade."¹ As a remedy, the Arbitrator canceled the grievant's lower rating and awarded him a QSI, retroactive to the date of the appraisal.

The issues before us are whether the award fails to draw its essence from the parties' agreement, is contrary to law, exceeds the Arbitrator's authority, and is based on a nonfact. Because the Agency could have made its arguments to the Arbitrator, but did not do so, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency from raising these arguments to the Authority.²

¹ 5 C.F.R. § 531.502.

² *Id.* §§ 2425.4(c), 2429.5.

II. Background and Arbitrator's Award

The Agency did not give the grievant a top score in one of the four categories in his performance appraisal (the fourth category). Because he did not obtain a top rating in the fourth category, he was not eligible for a QSI. The Union filed a grievance claiming that the grievant merited a top score in the fourth category and requested a QSI as a remedy. The matter was not resolved, and it proceeded to arbitration.

The issue before the Arbitrator was: "Whether the Agency violated the [parties' agreement], or any other law, rule, or regulation when it gave [the grievant an] appraisal score of three instead of five [in the fourth category]. If so, what is the remedy?"³ In its opening statement at the hearing, the Union requested as a remedy that the Arbitrator "make [the grievant] whole, . . . includ[ing] but . . . not limited to finding that the rating [in the fourth category] was in error and [raising it to the top rating] . . . and by granting [the grievant] a QSI award."⁴ The Union also requested in its closing statement that, as pertinent here, "the grievant . . . be awarded a [QSI] retroactively to the date of the erroneous appraisal."⁵

As relevant here, the Arbitrator found that the Agency violated the parties' agreement, law, rule, and regulations when it did not give the grievant a top rating in the fourth category. As a remedy, the Arbitrator canceled the grievant's fourth-category rating and awarded him a top rating in that category. In addition, the Arbitrator directed the Agency to "make [the] grievant eligible for a QSI retroactive[] to the date of the erroneous appraisal[,] with interest."⁶

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusions

The Agency excepts only to the portion of the award directing the Agency to grant a QSI retroactive to the date of the appraisal, with interest.

Specifically, the Agency argues that the award fails to draw its essence from the parties' agreement and a 2011 memorandum of understanding because: (1) the Arbitrator modified the parties' agreement by taking away the Agency's discretion to award either a QSI or a cash award; and (2) the parties' agreement bars receipt of

³ Award at 3.

⁴ Exceptions, Attach. at 174 (Union's opening statement at the arbitration hearing).

⁵ *Id.* at 179 (Union's closing statement at the arbitration hearing).

⁶ Award at 21.

more than one award for each appraisal year.⁷ In this regard, the Agency claims that the grievant had already received an unrelated monetary award during the same appraisal year.⁸

The Agency also claims that the award is contrary to 5 U.S.C. § 5336 and 5 C.F.R. § 531.504 because those regulations provide that “[QSI]s shall not be required.”⁹ Further, the Agency asserts that the Arbitrator exceeded his authority by awarding a QSI because the only issue submitted to arbitration involved the grievant’s performance rating, not any monetary award.¹⁰ Finally, the Agency asserts that the award is based on a nonfact that QSIs for appraisals in the pertinent year became effective on the date of the appraisal.¹¹

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 before the arbitrator.¹² The record demonstrates that, at arbitration, the Union requested a QSI – retroactive to the date of the erroneous appraisal – as an award for the grievant.¹³ Therefore, the Agency could have made all of its arguments before the Arbitrator. But there is no evidence that it did so. Accordingly §§ 2425.4(c) and 2429.5 bar the Agency’s exceptions, and we dismiss them.¹⁴

IV. Order

We dismiss the Agency’s exceptions.

⁷ Exceptions at 7-9.

⁸ *Id.* at 9.

⁹ *Id.* at 9-10 (quoting 5 C.F.R. § 531.504).

¹⁰ *Id.* at 4.

¹¹ *Id.* at 12-13.

¹² 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g., Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011).

¹³ Exceptions, Attach. at 179 (Union’s closing statement at the arbitration hearing).

¹⁴ *U.S. DOL, Bureau of Labor Statistics*, 67 FLRA 77, 79 (2012) (dismissing essence exception where agency did not argue that any provision of the parties’ agreement precluded the arbitrator from awarding the union’s requested remedy); *U.S. DHS, U.S. CBP, Border Patrol, Del Rio Sector, Del Rio, Tex.*, 66 FLRA 865, 866 (2012) (dismissing nonfact exception where agency could have raised factual argument before the arbitrator, but did not); *U.S. Dep’t of the Treasury, IRS, Atlanta Compliance Servs., Jacksonville, Fla.*, 66 FLRA 295, 296-97 (2011) (dismissing exceeds-authority exception where agency could have objected, but failed to object, to the remedy requested); *U.S. DHS, U.S. CBP, Wash., D.C.*, 65 FLRA 98, 101 (2010) (dismissing contrary-to-law exception where agency could have, but did not, raise argument before the arbitrator).