

68 FLRA No. 102

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
U.S. BORDER PATROL, SAN DIEGO SECTOR
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 1613
(Union)

0-AR-5086

ORDER DISMISSING EXCEPTION

May 26, 2015

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

I. Statement of the Case

Arbitrator Wilma R.K. Rader found that the Agency's assignment of bargaining-unit employees to work in another component of U.S. Customs and Border Protection (the other component) violated Article 3A of the parties' collective-bargaining agreement (Article 3A) and a detail-management-team policy (the policy) that the parties had agreed to follow locally. To remedy those violations, as relevant here, she directed the Agency to "adhere to the provisions" of Article 3A and the policy.¹ The Agency filed an exception contending that the direction to comply with both Article 3A and the policy is contrary to law. Because the Agency could have raised its contrary-to-law argument before the Arbitrator, and as the record does not show that the Agency did so, we dismiss the Agency's exception under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.²

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency improperly assigned bargaining-unit employees to work in the other component without: (1) satisfying its notice-and-bargaining obligations under Article 3A; or

(2) following the assignment procedures in the policy. As relevant here, the grievance proceeded to arbitration, where the Arbitrator framed the issues before her to include whether the Agency was "required to follow" the policy "and/or Article 3A . . . in assigning" bargaining-unit employees to the other component, and, if so, what was the "appropriate remedy" for its failure to do so in this case.³

Before the Arbitrator, the Agency contended that neither Article 3A nor the policy applied to the disputed assignments. In contrast, the Union argued that both Article 3A and the policy applied, and it requested that the Arbitrator "order the Agency" to follow them when making assignments like those that gave rise to the grievance.⁴ As pertinent here, after finding that both Article 3A and the policy applied in this case, the Arbitrator sustained the grievance and "order[ed] that . . . the Agency . . . adhere to provisions of Article 3A . . . [and the] policy" when making future assignments.⁵

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

III. Analysis and Conclusion: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's exception.

The Agency argues that the award is contrary to law because the Arbitrator directed the Agency to comply with both Article 3A and the policy,⁶ and the Agency requests that the Authority set aside the direction to comply with Article 3A.⁷ Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,⁸ the Authority will not consider arguments that could have been, but were not, presented to the arbitrator.⁹ The Authority applies §§ 2425.4(c) and 2429.5 to bar challenges to arbitral remedies where one party requested, and the record does not show that the other party challenged, those remedies before the arbitrator.¹⁰

³ Award at 3.

⁴ *Id.* at 15.

⁵ *Id.* at 26.

⁶ Exception at 4, 5, 7.

⁷ *Id.* at 1.

⁸ 5 C.F.R. §§ 2425.4(c), 2429.5.

⁹ *E.g.*, *U.S. Dep't of the Treasury, IRS*, 68 FLRA 329, 331 (2015) (citing *AFGE, Local 3571*, 67 FLRA 218, 219 (2014)).

¹⁰ *Id.* (citing *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 357 (2014)).

¹ Award at 26.

² 5 C.F.R. §§ 2425.4(c), 2429.5.

Here, the record shows that, at arbitration, the Union repeatedly requested the very remedies that the Arbitrator directed in her award.¹¹ Therefore, the Agency could have argued to the Arbitrator that awarding those remedies would be contrary to law. But the record does not reflect that the Agency did so. Consequently, consistent with the principles set forth above, we dismiss the Agency's challenge to the awarded remedies under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.

IV. Order

We dismiss the Agency's exception.

¹¹ Award at 15; *see* Exception, Attach. 4, Arbitration-Hr'g Tr. at 15 ("Union contends [that Agency] must go by the [policy,] and . . . also . . . by . . . [Article] 3A."), 16 ("Union wants . . . recognition" that both Article 3A and the policy apply), 56 ("[Union] should have been given a[n Article] 3A notice," and disputed assignments "should have gone through the . . . policy."), 74-75 (further testimony about "[r]equested [r]emedies," including compliance with Article 3A and the policy (internal quotation marks omitted)).