

68 FLRA No. 123

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
(Agency)

0-AR-5112

ORDER DISMISSING EXCEPTION

July 23, 2015

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

I. Statement of the Case

Arbitrator Ezio E. Borchini found that the Union's grievance was not arbitrable because it concerned a classification matter.¹

The issue before us is whether the Union raises recognized grounds, or cites legal authority to support private-sector grounds not currently recognized by the Authority, to support its exception. We find that the Union fails to do so, and we therefore dismiss the Union's exception.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement (parties' agreement) by failing to promote the grievant from a GS-5 to a GS-6 level. The grievance was unresolved and submitted to arbitration. The parties stipulated the issue before the Arbitrator: "Is the grievance arbitrable? If it is arbitrable, then did the Agency improperly hire the grievant as a GS-5 Medical Support Assistant, instead of a GS-6 Advanced Medical Support Assistant because the position was not properly graded or classified? If so, then what shall be the appropriate remedy?"²

As a preliminary matter, the Union claimed that the Agency had waived its arbitrability argument because the Agency failed to invoke non-grievability or non-arbitrability in any of its responses to the Union's grievance. The Arbitrator, however, found that the Agency had not waived its arbitrability argument, citing to Authority precedent that holds that neither party can make a matter grievable that the Statute makes non-grievable.³

On its merits, the Arbitrator reviewed Authority precedent and concluded that the grievance was not arbitrable because it concerned a classification matter.⁴

The Union then filed an exception to the award, asking the Authority to set aside the award and award backpay to the grievant under the Back Pay Act. The Agency filed an opposition to the Union's exception.

III. Preliminary Matter: We will not consider the Agency's opposition.

The Union filed its exception to the award on April 8, 2015. The Union's statement of service indicates that it served the exception on the Agency's representative of record by first-class mail and email on April 8, 2015.⁵ Even assuming that the Union served its exception on the Agency only by mail, thus affording the Agency five additional days to file its opposition, the Agency's opposition had to be filed with the Authority no later than May 13, 2015, in order to be timely.⁶ However, the Authority's Office of Case Intake and Publication (CIP) did not receive the Agency's exception until May 20, 2015.

On May 27, 2015, CIP issued an order directing the Agency to show cause why the Authority should consider its untimely opposition. The Agency timely responded to this order, stating that the Agency's representative was not in the office to receive the Union's exception until April 20, 2015. Authority precedent is well settled that the date of service – and not the date of receipt – controls in determining the timeliness of parties'

³ *Id.* at 22 (citing *AFGE, Local 1923*, 66 FLRA 424, 425 (2012) (*AFGE, Local 1923*)).

⁴ *Id.* at 19-22 (citing *AFGE, Local 1923*, 66 FLRA at 425; *SSA*, 60 FLRA 62, 64 (2004); and *U.S. Dep't of the Army, U.S. Army Corps. of Eng'rs, Nw. Div., Portland, Or.*, 59 FLRA 443, 445 (2003)).

⁵ 5 C.F.R. § 2429.21(a).

⁶ *Id.* §§ 2425.3(b), 2429.21(b), 2429.22(a)-(b).

¹ Award at 22.

² *Id.* at 4.

filings, except where the Authority expressly requires that a filing be received by a particular date.⁷ As that exception does not apply here, we decline to consider the Agency's opposition.

IV. Analysis and Conclusion: The Union fails to raise a recognized ground.

The Authority's Regulations specifically enumerate the grounds that the Authority currently recognizes for reviewing awards.⁸ In addition, the Regulations provide that if exceptions argue that an arbitration award is deficient based on private-sector grounds not currently recognized by the Authority, then the excepting party "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions."⁹

Further, Section 2425.6(e)(1) of the Regulations also provides that an exception "may be subject to dismissal or denial if: [t]he excepting party fails to raise and support" a ground listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award."¹⁰ Thus, an exception that does not raise a recognized ground is subject to dismissal under the Regulations.¹¹

The Union contends that "[t]he award was based on a fact."¹² In accordance with § 2425.6 of the Authority's Regulations, the Authority "no longer construe[s] parties' exceptions as raising grounds that the exceptions do not raise."¹³ Because the Union's contention does not raise a recognized ground for reviewing an award under 5 C.F.R. § 2425.6(a)-(b), or cite legal authority to support a ground not currently recognized by the Authority, we dismiss the Union's exception.¹⁴

V. Order

We dismiss the Union's exception.

⁷ *U.S. DOD, Def. Logistics Agency, Def. Distrib. Region E., New Cumberland, Pa.*, 47 FLRA 791, 791-92 (1993); see also *U.S. Dep't of Transp., FAA, Flight Standards Serv. 220 & 230 Branches, Nw. Mountain Region, Renton, Wash.*, 68 FLRA 702, 703 (2015).

⁸ 5 C.F.R. § 2425.6(a)-(b)

⁹ *Id.* § 2425.6(c).

¹⁰ *Id.* § 2425.6(e)(1).

¹¹ *AFGE, Local 1858*, 66 FLRA 942, 943 (2012); *AFGE, Local 1738*, 65 FLRA 975, 975 (2011) (Member Beck concurring in the result); *AFGE, Local 738*, 65 FLRA 931, 932 (2011) (*AFGE, Local 738*); *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (*AFGE, Local 3955*) (Member Beck dissenting in part).

¹² Exceptions at 4.

¹³ *AFGE, Local 3955*, 65 FLRA at 889.

¹⁴ 5 C.F.R. § 2425.6(a)-(c); *AFGE, Local 738*, 65 FLRA at 932; *NFFE, Local 1804*, 66 FLRA 512, 514 (2012) (Member Beck dissenting in part).