73 FLRA No. 97

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VA ROSEBURG
HEALTHCARE SYSTEM/WHITE CITY-SORCC
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1042
(Union)

0-AR-5818

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DECISION

March 30, 2023

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

I. Statement of the Case

Arbitrator Susan J.M. Bauman issued an award finding the Agency violated the parties' agreement by requiring some employees to use sick leave, annual leave, or leave without pay (LWOP) under particular circumstances during the COVID-19 pandemic (the pandemic).

The Agency filed exceptions, arguing the award is contrary to law. Nothing in the record indicates that the Agency raised its arguments at arbitration, even though it could have done so. Therefore, we dismiss the exceptions under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.[1]

II. Background and Arbitrator's Award

At the beginning of the pandemic, the Agency began screening employees upon entering the Agency's facility. As a result of its screening procedures, the Agency would sometimes send employees home because of possible COVID-19 symptoms or exposure. On April 30, 2020, the Union filed a class-action grievance alleging, as relevant here, that the Agency was improperly requiring employees to take personal leave when the employees were required to remain at home in certain circumstances.

The grievance went to arbitration, where the Arbitrator framed the pertinent issues as: "Has the [Agency] violated the requirements of the [parties' a]greement and/or federal law by failing to grant appropriate leave options to bargaining[-]unit employees impacted by the . . . pandemic since March 1, 2020? If so, what shall be the remedy?"[2]

Article 30, Section 7 of the parties' agreement specifically addresses employee entitlement to leave during a pandemic. The Arbitrator interpreted that provision to require that an employee who has not been diagnosed with COVID-19 will not be charged personal leave if: (1) they are sent home because they display certain symptoms of, or are suspected of having contact with, COVID-19; or (2) they are ordered to quarantine due to possible COVID-19 exposure.[3] The Arbitrator found the Agency violated the provision by requiring some employees to use their own sick leave, personal leave, or LWOP in those circumstances.

In addition, the Arbitrator determined that, at various times throughout the pandemic, different legal authorities permitted the Agency to give employees paid time off without requiring them to use their own personal leave. Specifically, the Arbitrator found that, depending on the time period at issue, the Agency had authority to provide: weather and safety leave under 5 U.S.C. § 6329c; emergency paid sick leave under the Families First Coronavirus Response Act; or emergency paid leave under the American Rescue Plan. However, the Arbitrator stated that, under the parties' agreement, "the Agency never had the option to require employees to use their own sick leave or annual leave, or take [LWOP,] if they were ready, willing[,] and able to work."[4]

Regarding weather and safety leave, the Arbitrator noted an Agency argument that granting such

[1] 5 C.F.R. §§ 2425.4(c), 2429.5.
[2] Award at 3.
[3] *Id.* at 22. Article 30, Section 7 of the parties' agreement provides, in relevant part: "The employee who is ill as a result of a pandemic will be granted sick leave or [LWOP] upon request," but "[i]f the employee is suspected to have contracted a communicable disease, and is sent home from the worksite without valid verification of the illness, there will be no charge to leave." *Id.*
[4] *Id.* at 25.

leave was at the Agency's discretion. The Arbitrator responded that, "[t]hough discretionary to the Agency, any such leave had to be . . . administered in a fair and equitable manner," and "[s]imilarly situated employees must be granted [such] [l]eave if any employee is granted such leave."[5]

The Arbitrator concluded that the Agency violated the parties' agreement "and/or federal law by failing to grant appropriate leave options" to any affected employees.[6] Noting that the grievance was a class-action grievance and "[t]he Union elicited testimony from only a small number of employees" who may have been affected, the Arbitrator declined to limit her remedies to the employees who testified.[7] Rather, she directed the Agency to: review all absences since the start of the pandemic; restore affected employees' personal leave; pay backpay with interest for any employees erroneously charged with LWOP or placed on absence without leave; and pay attorney fees.

On May 31, 2022, the Agency filed exceptions to the award. On June 29, 2022, the Union filed an opposition to the Agency's exceptions.

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

The Agency argues that the award is contrary to law – specifically, 5 U.S.C. § 6329c, 5 C.F.R. § 630.1604(a) and (b), and an Agency bulletin.[8] According to the Agency, the authorization to grant employees certain types of leave changed over the course of the pandemic, and the Arbitrator's direction to restore employees' personal leave "is inconsistent with the legal authority available at such a point in time."[9] In this regard, the Agency asserts that none of the categories for granting weather and safety leave in 5 U.S.C. § 6329c(b) apply in this case.[10]

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 to the arbitrator.[11]

Before the Arbitrator, the Union expressly argued that federal law and Agency policy authorized the Agency to grant employees various forms of leave, including weather and safety leave,[12] and requested leave restoration as a remedy.[13] Thus, the Agency could have argued, to the Arbitrator, that it would be contrary to the cited statute, regulation, and Agency bulletin, for the Arbitrator to grant employees leave. However, there is no basis in the record for finding the Agency made such arguments. Although the Agency asserts that it "raised the aforementioned arguments" at arbitration, the testimony it cites does not support this assertion,[14] and the Agency did not include its post-hearing brief in the documents it filed with its exceptions.[15] Accordingly, §§ 2425.4(c) and 2429.5 bar those arguments, and we dismiss the Agency's exceptions.[16]

IV. Decision

We dismiss the exceptions.

[5] *Id.* at 23-24.
[6] *Id.* at 30.
[7] *Id.* at 29.
[8] Exceptions Br. at 3-4.
[9] *Id.* at 4.
[10] *Id.* at 5.
[11] 5 C.F.R. §§ 2425.4(c), 2429.5.
[12] Opp'n, Attach., Union Post-Hr'g Br. at 22-24.
[13] *Id.* at 34-36.
[14] Exceptions Br. at 6 (citing Exceptions, Ex. 3, Tr. at 288-90 (testimony that the use of weather and safety leave for COVID-19 exposure and quarantine was discretionary), 311-12 (testimony that the "parameters for weather and safety [leave] or other types of leave – those all came from [the] central office, and those changed throughout the pandemic"), 330-31 (testimony that an employee would be eligible for weather and safety leave if they "were restricted from movement because [they] were quarantined and . . . asymptomatic[,]" i.e., if they were "ready and able to go to work but . . . [their] movements were restricted by a government health authority")).
[15] *See* 5 C.F.R. § 2425.4(a) (requiring a party to "set[] forth, in full" the arguments "in support of" its exceptions, including "specific references to the record . . . and any other relevant documentation," as well as "[l]egible copies of any documents . . . reference[d]" that "the Authority cannot easily access").
[16] *See, e.g., NTEU, Chapter 149*, 73 FLRA 413, 414 (2023) (dismissing exceptions under §§ 2425.4(c) and 2429.5 where nothing in the record indicated that excepting party raised its arguments at arbitration, despite being able to do so).