

## **Exercise #1 – Failure to raise: 5 C.F.R. §§ 2425.4(c) & 2429.5**

**The Agency posted a vacancy. Both the selectee and the grievant applied. The Union filed a grievance after the Agency chose the selectee.**

**The Arbitrator found that Article 13 of the parties' agreement applied. Article 13 provides that the Agency will fill vacancies from among qualified employees, based on seniority. Finding that the grievant was qualified and most senior, the Arbitrator concluded that the Agency violated the parties' agreement by not selecting the grievant, and he directed the Agency to place the grievant in the position.**

**The Agency then filed exceptions to the award. The Agency argued that the award was contrary to its right to make selections for appointments under § 7106(a)(2)(C) of the Statute. In this regard, the Agency claimed that it had argued at arbitration that the provisions of Article 13 were contrary to § 7106. But there was nothing in the record that showed that the Agency argued at arbitration, or in its pre- and post-hearing briefs, that the provisions of Article 13 were contrary to § 7106. Instead, the only reference to § 7106 concerned the interpretation of a previous memorandum of understanding.**

**The Agency also argued that the grievance was not substantively arbitrable because § 7121(c)(4) of the Statute excludes from the negotiated grievance procedure grievances concerning, among others, any appointment.**

**Can the agency argue on exceptions that the award violates its management right to select appointees?**

**Teaching point:** No, the Agency cannot raise that argument. In *U.S. Department of Veterans Affairs, James N. Quillen VA Medical Center, Mountain Home, Tennessee*, 69 FLRA 144, 145 (2015) (Member Pizzella dissenting), the Authority addressed an agency claim on exceptions that Article 13 was contrary to § 7106. Noting the agency's concession that it was aware at arbitration that Article 13 was at issue, but finding that the agency had not made its § 7106 managements-right argument to the arbitrator, the Authority held that the agency was barred from raising this argument for the first time on exceptions.

**Is the grievance substantively arbitrable?**

**Teaching point:** Yes. *See id.* at 145. Substantive arbitrability involves questions as to whether a dispute's subject matter is arbitrable. *See Overseas Private Investment Corp.*, 68 FLRA 982, 984-85 (2015) (Member Pizzella dissenting).

The Authority has long held that § 7121(c)(4) applies only to *initial* appointments to the federal service. *U.S. Dep't of Agric., Rural Dev. Centralized Servicing Ctr., St. Louis, Mo.*, 57 FLRA 166, 168 (2001). That is not the case here: the grievant and the other applicants were already federal employees. So, because § 7121(c)(4) applies only to initial appointments to the federal service, the grievance was substantively arbitrable. *See id.*

**What if the grievant were an employee appointed on a part-time basis, who had asked for more hours, but was denied them, and, subsequently, the Agency appointed another temporary, part-time employee? The Union files a grievance based on the grievant having been denied the additional hours. Would the grievance be substantively arbitrable, or would § 7121(c)(4) bar the grievance?**

**Teaching point:** Yes, the grievance is **substantively arbitrable**. The Authority has found that such a grievance was substantively arbitrable, and that the matter concerned only indirectly the appointment of the temporary employee. Because the grievance challenged the agency's denial of the grievant's request for additional hours, the grievance did not directly challenge the appointment of the other employee. Additionally, the requested remedy – backpay – in no way concerned that appointment. *AFGE, Local 2654*, 27 FLRA 143, 144 (1987).

## **Exercise #2 –Back Pay Act/Sovereign Immunity**

**The Agency suspended an employee-awards program for fiscal year (FY) 2013 due to sequestration. The Union filed a grievance alleging that the Agency had violated the parties' agreement, regulation, and law. The Arbitrator found that the Agency had not violated the parties' agreement, law, or regulation, because its hands were tied by sequestration. Nonetheless, the Arbitrator ordered that the Agency give backpay, in the form of quality step increases, to employees who would have received monetary awards in the absence of sequestration, as well as to those who were given outstanding performance appraisals in FY 2013.**

**The Agency filed exceptions to the award, arguing that the award was contrary to both the Back Pay Act (BPA) and the doctrine of sovereign immunity because the Arbitrator did not find that the Agency had violated either the parties' agreement or any statutory provision.**

**As a preliminary matter, the Union argued that the Authority should dismiss the Agency's sovereign-immunity argument under §§ 2425.4(c) and 2429.5 of the Authority's Regulations because the Agency had not raised it to the Arbitrator below.**

**Would you dismiss the Agency's exception?**

**Teaching Point:** No, the Agency's sovereign-immunity argument should not be dismissed. Although the Agency failed to raise its sovereign-immunity argument before the Arbitrator, the issue of sovereign immunity may be raised *at any time* to the Authority, regardless of whether it was raised to the Arbitrator. Therefore, the Authority rejected the Union's argument and allowed the Agency's exception to proceed. *U.S. DOJ, Fed. BOP, Fed. Corr. Complex – Allenwood, White Deer, Pa.*, 68 FLRA 841, 842 (2015) (*BOP Allenwood*) (Chairman Pope concurring).

**Turning to the merits of the Agency's argument, would you uphold the Arbitrator's decision to award backpay in the form of quality step increases?**

**Teaching Point:** No. An award of backpay is authorized under the BPA *only* when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action directly resulted in the withdrawal or reduction of an employee's pay, allowances, or differentials. The first requirement can be satisfied by a finding of a violation of applicable law, regulation, or the parties' agreement.

Here, the Arbitrator specifically found that the Agency did not violate the parties' agreement, law, or regulation. The Arbitrator also did not find that any law other than the BPA waived sovereign immunity in this case. Accordingly, the Authority found that the award was contrary to the BPA and set it aside. *BOP Allenwood*, 68 FLRA at 843.