66 FLRA No. 173

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1858
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE INFORMATION SYSTEMS AGENCY
REDSTONE ARSENAL, ALABAMA
(Agency)

0-AR-4847

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DECISION

August 31, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Union filed an exception to an award of Arbitrator William C. Serda under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exception.[*]

The Arbitrator found that the relevant provision of the parties' agreement was void and unenforceable and, thus, denied the Union's grievance. For the reasons set forth below, we dismiss the exception.

II. Background and Arbitrator's Award

The issue before the Arbitrator was: "Is . . . Article 17, [S]ection 3g, of the [parties' agreement] an enforceable provision . . . ? And, when determined, what shall the consequences be?" Award at 3. Article 17, Section 3g of the parties' agreement provides that "Union officials, elected or appointed, will have top seniority for shift preferences." *Id.* at 2.

According to the Arbitrator, superseniority provisions, such as Article 17, Section 3g of the parties' agreement, have been justified only when they are necessary to preserve the presence of Union representation on each shift. *Id.* at 18. The Arbitrator determined that superseniority provisions have been found lawful in the "lay-off and recall circumstances" and "presumably unlawful in all other circumstances; including shift, location, route, etc. bidding situations." *Id.* Therefore, according to the Arbitrator, language providing for automatic and absolute superseniority "would be invalid and un-enforceable, on its face." *Id.* at 19. The Arbitrator denied the grievance because he found Article 17, Section 3g to be invalid, unlawful, and unenforceable. *Id.* at 20. In this regard, the Arbitrator concluded that the Union provided no compelling justification that superseniority was necessary, *id.*, and the Agency provided "tangible and convincing evidence" that it had an operational need not to apply the superseniority provision, *id.* at 21.

III. Positions of the Parties

A. Union's Exception

The Union argues that the Arbitrator "violated the [parties' a]greement" in finding Article 17, Section 3g to be invalid, unlawful, and unenforceable. Exception at 1. According to the Union, "[t]he [a]greement takes precedence over all the reasons the [A]rbitrator used in justifying his decision." *Id.* at 2. The Union also contends that the Arbitrator did not state that Article 17, Section 3g violated a law, rule, or regulation. *Id.*

B. Agency's Opposition

The Agency first argues that the Union's exception is untimely. Opp'n at 3. The Agency claims that the Union received the award on May 11, 2012, and its exception was filed on June 12, 2012, more than thirty days later. *Id.* at 3-4.

The Agency also contends that the Union does not raise a "legally recognized basis for setting aside the award" in accordance with § 2425.6(e) of the Authority's Regulations. *Id.* at 4. According to the Agency, the Union simply argued that the parties' agreement "takes precedence over all the reasons the [A]rbitrator used in justifying his decision." *Id.* (internal quotation mark omitted).

Finally, the Agency asserts that the award is not contrary to law because the Authority consistently has found that superseniority clauses violate § 7106(a)(2)(A) of the Statute except in layoff or recall situations, which are not at issue here. *Id.* at 4-7 (citing *POPA*, 41 FLRA

[*] The Union also filed a supplemental submission in response to the Agency's opposition. However, as the Union did not request permission to file a supplemental submission under 5 C.F.R. § 2429.26, we do not consider it. *See AFGE, Local 3627*, 66 FLRA 207, 207 n.1 (2011).

795 (1991); *Fed. Union of Scientists & Eng'rs, NAGE, Local R1-144*, 23 FLRA 804 (1986); *AFGE, Local 2612, AFL-CIO*, 19 FLRA 1012 (1985)).

IV. Preliminary Matter: The exception is timely.

The Agency contends that the Union's exception is untimely. Opp'n at 3-4. Section 7122(b) of the Statute requires that exceptions be filed within thirty days from the date of service of the award. 5 U.S.C. § 7122. The Authority presumes, absent evidence to the contrary, that an award was served by mail on the date of the award. *IFPTE, Local 77, Prof'l & Scientists Org.*, 65 FLRA 185, 188 (2010) (*Local 77*). Under the Authority's Regulations, the thirty-day period for filing exceptions begins to run the day after the award's date of service. *See* 5 C.F.R. § 2425.2(b). Section 2429.22 of the Authority's Regulations provides that five days be added if the award is served by mail or commercial delivery. 5 C.F.R. § 2429.22.

Although the Agency argues that the exception is untimely because it was filed more than thirty days after the Union received the award, the Authority's Regulations calculate timeliness based on the date the award was served, rather than on the date it was received. *See U.S. Dep't of Veterans Affairs, VA Md. Healthcare Sys.*, 65 FLRA 619, 619 n.1 (2011). There is no evidence in the record regarding when the award was served, or the method of service. Accordingly, the award is considered to have been served by mail on May 9, 2012, the date of the award. *See Local 77*, 65 FLRA at 188. Counting thirty days beginning on May 10 in accordance with § 2425.2(b), the due date for filing exceptions was June 8, 2012. Because the Authority presumes that the award was served by mail, this time period is extended by five days, resulting in a due date of June 13, 2012. The Union's exception was filed with the Authority on June 12, 2012. Therefore, we find that the exception was timely filed. *See U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 730, 731 (2011) (finding that the exceptions were timely after presuming that the date of the award was the date of service).

V. Analysis and Conclusion: The exception does not raise a ground recognized in § 2425.6(e) of the Authority's Regulations.

The Authority's Regulations specifically enumerate the grounds that the Authority currently recognizes for reviewing awards. *See* 5 C.F.R. § 2425.6(a)-(b). 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." 5 C.F.R. § 2425.6(c).

Further, § 2425.6(e)(1) of the Regulations provides that an exception "may be subject to dismissal or denial if: [t]he excepting party fails to raise and support" the grounds listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award." 5 C.F.R. § 2425.6(e)(1). Thus, an exception that does not raise a recognized ground is subject to dismissal under the Regulations. *AFGE, Local 1738*, 65 FLRA 975, 975 (2011) (Member Beck concurring in the result); *AFGE, Local 738*, 65 FLRA 931, 932 (2011) (*Local 738*); *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting in part).

The Union contends that the Arbitrator "violated the [parties' a]greement" in finding that Article 17, Section 3g was invalid, unlawful and unenforceable, Exception at 1, because "[t]he [a]greement takes precedence over all the reasons the [A]rbitrator used in justifying his decision," *id.* at 2. The Union also asserts that the Arbitrator did not state that Article 17, Section 3g violated a law, rule, or regulation. *Id.* These arguments do not constitute grounds currently recognized by the Authority for reviewing awards. *See* 5 C.F.R. § 2425.6(a)-(b). Because the Union does not raise a recognized ground or cite legal authority to support a ground not currently recognized by the Authority, we dismiss the exception. *See Local 738*, 65 FLRA at 932.

VI. Decision

The exception is dismissed.