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United States Department of Housing and Urban Development (Agency) and American Federation of Government Employees, National Council of HUD Locals 222 (Union)

66 FLRA No. 160
66 FLRA 867

UNITED STATES

DEPARTMENT OF HOUSING

AND URBAN DEVELOPMENT

(Agency)

and

AMERICAN FEDERATION

OF GOVERNMENT EMPLOYEES

NATIONAL COUNCIL OF HUD LOCALS 222

(Union)

0-AR-4586

(65 FLRA 433 (2011))

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ORDER DISMISSING EXCEPTIONS

August 8, 2012

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Before the Authority: Carol Waller Pope, Chairman, and

Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Andrée Y. McKissick filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

In a prior decision, the Authority reviewed exceptions to a merits award by the Arbitrator. *See U.S. Dep't of Hous. & Urban Dev.*, 65 FLRA 433 (2011) (*HUD*). In *HUD*, the Authority set aside the Arbitrator's chosen remedy and remanded the merits award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy. *See id.* at 436. In the remedial award on remand – the award at issue here – the Arbitrator provided four alternative remedies, and she directed the Agency to stop advertising positions in a manner that violates the parties' collective-bargaining agreement (CBA).

For the following reasons, we dismiss the Agency's exceptions.

II. Background and Arbitrator's Awards

A. Merits Award and *HUD*

In the merits award, the Arbitrator found that the manner in which the Agency advertised and filled certain positions violated the CBA. *HUD*, 65 FLRA at 434 (citations omitted). The Arbitrator found, for example, that the Agency structured external and internal vacancy announcements differently so that the internal announcements – i.e., those advertising vacancies to existing agency employees – required a "constructive demotion" to a lower General Schedule (GS) grade level in order to obtain greater promotion potential. *See* Opp'n to Exceptions to Remedial Award, Attach., Ex. B (Merits Award), at 14-15. As a remedy, the Arbitrator directed "'an organizational upgrade of affected

positions by upgrading the journeyman level for all the subject positions to [the] [GS, Grade 13 (GS-13)] level retroactively[.]'" *HUD*, 65 FLRA at 434 (first and third alterations in original) (quoting Merits Award at 16). The Agency filed exceptions to the merits award and argued that the Arbitrator's chosen remedy was deficient. *See id.* at 434-35.

In its opposition to the exceptions to the merits award, the Union argued that if the Authority set aside the Arbitrator's chosen remedy, then the Authority should remand the merits award because valid, alternative remedies existed. *See* Opp'n to Exceptions to Merits Award, at 17. According to the Union, valid remedies included: (1) retroactively promoting all affected bargaining-unit employees into currently existing career-ladder positions with GS-13 promotion potential, *id.* at 16; (2) retroactively selecting affected bargaining-unit employees for one of the vacant career-ladder positions advertised with GS-13 promotion potential, *see id.* at 11; (3) providing each grievant with one priority consideration and re-running selections for all vacancies with GS-13 promotion potential that the Agency filled in violation of the CBA, *id.* at 17; and (4) "retroactively plac[ing] all affected [bargaining-unit employees] into an unclassified position description identical to those of the externally hired . . . employees" and "order[ing] the Agency to classify and . . . grade those" position descriptions, *id.*

As mentioned earlier, the Authority in *HUD* set aside the Arbitrator's chosen remedy and remanded the merits award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy. *See HUD*, 65 FLRA at 436.

B. Remedial Award

On remand from *HUD*, when the parties could not reach a settlement on an appropriate remedy, *see* Remedial Award at 2, the Union requested that the Arbitrator exercise her authority to award alternative relief, *see* Opp'n to Exceptions to Remedial Award, at 3-4. In its request, the Union asserted, among other things, that the Agency continued to advertise positions in a manner that violated the CBA.[1] Thereafter, the Arbitrator

directed both parties to submit proposed alternative remedies.[2] The Union submitted its remedial proposals.[3] However, the Agency neither submitted any remedial proposals to the Arbitrator, nor responded to the Union's proposals.[4]

After "read[ing] and review[ing] all prior submissions of the parties," Remedial Award at 2, the Arbitrator found four alternative remedies appropriate, *see id.* at 2-4. Specifically, as relevant here, she found that appropriate remedies included: (1) retroactively, permanently promoting all affected bargaining-unit employees into currently existing career-ladder positions with GS-13 promotion potential, *id.* at 2-3; (2) retroactively selecting affected employees to fill vacant career-ladder positions for which they applied, *id.* at 3; (3) affording one priority consideration to each grievant and re-running selections for all vacancies that the Agency filled in violation of the CBA, *id.* at 3-4; and (4) "placing all affected [bargaining-unit employees] into an unclassified position description identical to those of the newly-hired . . . GS-13 employees" and ordering "the Agency to classify and grade those" position descriptions, *id.* at 4. The Arbitrator numbered those remedies from one to four in order of priority, *see id.* at 2-4, and she directed the Agency to implement the highest-priority remedy that was not "found to be inconsistent with law or otherwise [un]available," *id.* at 5. In addition, the Arbitrator directed the Agency to "stop advertising positions in a way that requires current employees" to accept a "constructive demotion" in order to "secure greater promotion potential." *Id.* at 4 (citing Merits Award at 13-14).

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator exceeded her authority by awarding multiple, alternative remedies rather than a single remedy. *See* Exceptions to Remedial Award at 1-2, 6. The Agency further asserts that the alternative remedies must be set aside because they are, in various respects: (1) contrary to regulation, *id.* at 3-4; (2) incomplete

so as to make implementation impossible, *id.* at 4-5; (3) contrary to management's rights, *id.* at 5-6; and (4) based on a nonfact, *id.* at 6.

B. Union's Opposition

The Union asserts that, after the parties' settlement discussions ended "unsuccessful[ly]," the Agency "ceased its involvement in this case." Opp'n to Exceptions to Remedial Award, at 3. In that regard, the Union states that because the Agency "failed to provide any type of response to the Arbitrator or Union concerning the Arbitrator's deadline for submission[s] . . . [and did not] reply to the Union's" remedial proposals, all of the arguments in the exceptions are being raised for the "first time." *Id.* In addition, the Union asserts that the exceptions do not establish that the remedial award is deficient. *See id.* at 3-14.

IV. Analysis and Conclusions

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority does not consider issues or arguments in exceptions that could have been, but were not, presented to the arbitrator.[5] *See, e.g.*, *U.S. Dep't of Transp., FAA*, 64 FLRA 387, 389 (2010) (*FAA*). Where a party makes an argument for the first time on exceptions that it could have, and should have, made before the arbitrator, the Authority applies §§ 2425.4(c) and 2429.5 to bar the argument. *See, e.g.*, *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 66 FLRA 335, 337-38 (2011) (*Homeland*), *mot. for recons. denied*, 66 FLRA 634 (2012); *see also USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 57 FLRA 4, 5 (2001) (Chairman Cabaniss concurring).

On remand from *HUD*, the Union submitted to the Arbitrator proposed alternative remedies. *See* Opp'n to Exceptions to Remedial Award, at 3; *see generally id.*, Attach., Ex. A. It also asserted that the Agency was continuing to advertise positions in a manner that violated the CBA.[6] The Agency made no submission. Upon consideration of "all prior submissions of the parties," Remedial Award at 2, the Arbitrator awarded four alternative remedies,

see id. at 2-4, and also directed the Agency to "stop advertising positions" in a way that requires employees to accept a "constructive demotion" to obtain higher promotion potential, *id.* at 4. The Agency does not claim – and nothing in the record indicates – that any of the remedies that the Arbitrator awarded on remand differ from those that the Union proposed. In these circumstances, the Agency could have, and should have, presented to the Arbitrator the challenges to the remedies that it now presents in its exceptions. *See* 5 C.F.R. §§ 2425.4(c), 2429.5; *Homeland*, 66 FLRA at 337-38. As the Agency did not do so, §§ 2425.4(c) and 2429.5 bar consideration of the exceptions. *See FAA*, 64 FLRA at 389. Therefore, we dismiss the Agency's exceptions.

V. Order

The Agency's exceptions are dismissed.

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[1] *See* Opp'n to Exceptions to Remedial Award, Attach., Ex. A, Letter from Union Rep. to Arbitrator, with Carbon Copy to Agency (July 28, 2011) (proposing timeline for parties' submissions to Arbitrator on "recommendations for alternative remedies"; asserting that Agency continued advertising and filling positions "in the exact" manner that the Arbitrator previously "found to be a violation" of the CBA).

[2] *See* Opp'n to Exceptions to Remedial Award, at 3; *id.*, Attach., Ex. A, E-mail from Arbitrator to Union and Agency Reps. (Sept. 8, 2011, 4:36 PM) (indicating Arbitrator's acceptance of Union's proposed timeline for submissions).

[3] *See* Opp'n to Exceptions to Remedial Award, Attach., Ex. A, E-mail from Arbitrator to Union Counsel, with Carbon Copy to Agency Rep. (Sept. 21, 2011, 1:58 PM) (Arbitrator's acknowledgement of Union's submission of proposed remedies).

[4] *See* Opp'n to Exceptions to Remedial Award, Attach., Ex. A, E-mail from Union Counsel to Arbitrator, with Carbon Copy to Agency Rep. (Sept. 25, 2011, 3:22 AM) (indicating that Agency declined to submit remedial proposals of its own and requesting that Arbitrator adopt Union's proposals); Opp'n to Exceptions to Remedial Award, Attach., Ex. A, E-mail from Union Counsel to Arbitrator, with Carbon Copy to Agency Rep. (Dec. 5, 2011, 3:50 PM) (setting forth post-remand

timeline of actions involving – and correspondence among – Arbitrator, Union, and Agency; and indicating that Agency declined to file "any [r]esponse or [o]pposition to the Union's [s]ubmission on [r]emedy").

[5] Section 2425.4(c) provides that exceptions may not rely on any "evidence [or] arguments . . . that could have been, but were not, presented to the arbitrator." Section 2429.5 provides that the "Authority will not consider any evidence [or] . . . arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator."

[6] *See* Opp'n to Exceptions to Remedial Award, Attach., Ex. A, Letter from Union Rep. to Arbitrator, with Carbon Copy to Agency (July 28, 2011), at 1.