

72 FLRA No. 119

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
OFFICE OF INFORMATION & TECHNOLOGY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 17
(Union)

0-AR-5692

January 13, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and James T. Abbott, Members
(Chairman DuBester concurring)

Decision by Member Abbott for the Authority

I. Statement of the Case

Following a two-month absence from work, and after the grievant's sick leave ran out, the Agency charged the grievant as absent without leave (AWOL) and, as a result, imposed a three-day suspension. The Union, on behalf of the grievant, grieved the suspension. Arbitrator Charles Feigenbaum mitigated the suspension to a written reprimand. The Agency filed an exception arguing that the award is contrary to Executive Order (EO) 13,839.¹ Because the Agency could have, but failed to, present this argument to the Arbitrator, we dismiss the Agency's exception in accordance with §§ 2425.4(c) and 2429.5 of the Authority's Regulations.²

II. Background and Arbitrator's Award

The grievant has been employed at the Agency for over 18 years with no prior history of disciplinary action. When her son fell ill, she requested sick leave until further notice and told the Agency that she would

¹ Promoting Accountability and Streamlining Removal Procedures Consistent With Merit System Principles, Exec. Order No. 13,839, 83 Fed. Reg. 25,343, 25,344 (May 25, 2018) ("Supervisors and deciding officials should not be required to use progressive discipline. The penalty for an instance of misconduct should be tailored to the facts and circumstances.").

² 5 C.F.R. §§ 2425.4(c), 2429.5.

provide an update the following week. However, the grievant remained absent from work for over two months and failed to communicate with the Agency during this time.

The Agency attempted to contact the grievant several times during her prolonged absence regarding an update.³ After multiple failed attempts, the Agency eventually issued the grievant a three-day suspension for AWOL.⁴ The Union grieved the suspension and the grievance was submitted to arbitration. The Arbitrator defined the issue as: "Was the Agency's three-day suspension of the [g]rievant . . . for just and sufficient cause? If not, what shall be the remedy?"⁵

Ultimately, the Arbitrator rescinded the suspension and replaced it with a written reprimand. In reaching this conclusion, the Arbitrator primarily relied upon the parties' commitment to using progressive discipline in Article 14, Section 5⁶ of their collective-bargaining agreement (CBA). Based on the language of the CBA, the Arbitrator determined that "a suspension, which stays on [the grievant's] personnel record forever, and which means loss of pay, is in excess of what is needed for correction and improvement."⁷ The Arbitrator acknowledged that while the grievant's infraction was serious and warranted discipline, the unfortunate reasons surrounding her absence and her prior positive employment record supported a penalty of lesser severity than a three-day suspension.

The Agency filed an exception to the award on December 30, 2020, and the Union filed an opposition to the exception on January 29, 2021.

III. Analysis and Conclusions: We dismiss the Agency's contrary-to-law exception under 5 C.F.R. §§ 2425.4(c) and 2429.5.

The Agency argues that the award is contrary to law because the Arbitrator's reliance on Article 14, Section 5⁸ of the parties' CBA conflicts with Section 2(b)

³ The Agency also informed the grievant that she was exhausting her sick leave, hindering the efficiency of the work place, was at risk of being marked as AWOL, and could subsequently face discipline.

⁴ The Agency initially proposed a six-day suspension, but reduced it to three days after the Union grieved it.

⁵ Award at 2.

⁶ CBA Art. 14, § 5 states, "The parties also agree to the concept of progressive discipline, which is discipline designed primarily to correct and improve employee behavior, rather than punish." Exceptions, Attach. 3 at 51.

⁷ Award at 29-30.

⁸ Exceptions, Attach. 3 at 51.

of EO 13,839.⁹ In its opposition, the Union argues that the Agency is “foreclosed from arguing that the [a]ward is contrary to EO 13,839 because it did not raise this issue during arbitration.”¹⁰

Under the Authority’s Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.¹¹ Nothing in the record indicates that the Agency raised the argument that the EO supersedes the CBA before the Arbitrator.

Because the Authority will not consider arguments that could have been, but were not, presented to the Arbitrator, we dismiss the Agency’s exception under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations.¹²

IV. Decision

We dismiss the Agency’s exception.

⁹ Section 2(b) of Executive Order 13,839 states, “Supervisors and deciding officials should not be required to use progressive discipline. The penalty for an instance of misconduct should be tailored to the facts and circumstances.” May 25, 2018. This EO was rescinded on January 22, 2021.

¹⁰ Opp’n Br. at 3.

¹¹ 5 C.F.R. §§ 2425.4(c), 2429.5.

¹² Member Abbott is troubled by the Arbitrator’s decision to mitigate the three-day suspension to a written reprimand despite the Agency’s consideration of the grievant’s extended unexcused absence, its multiple attempts to contact the grievant, the seriousness of the grievant’s circumstance, its need to hold the grievant accountable to ensure fair and consistent discipline among all employees, and the suspension falling within the Agency’s Table of Penalties. Member Abbott has written separately on multiple occasions expressing concern about arbitrators substituting their opinions, masking as arbitral review, of the penalty determinations made by agency deciding officials in disciplinary cases. *See AFGE, Loc. 987*, 72 FLRA 565, 566 (2021) (Concurring Opinion of Member Abbott); *SSA*, 71 FLRA 798, 803 (2020) (Dissenting Opinion of Member Abbott); *U.S. DOD, Def. Logistics Agency, Distrib. Warner Robins, Warner Robins AFB, Ga.*, 71 FLRA 1029, 1032 (2020) (Dissenting Opinion of Member Abbott); *U.S. DOL, Off. of Workers’ Comp.*, 72 FLRA 489, 493 (2021) (Concurring Opinion of Member Abbott) (*DOL*). Within these opinions, Member Abbott has cautioned arbitrators from fashioning penalties they deem appropriate while disregarding the agency’s judgement even where the agency has demonstrated misconduct and imposed a penalty that is within the realm of reasonableness. In addition, he has emphasized that so long as relevant factors are considered and the penalty is reasonable and within the table of penalties, arbitrators “should be constrained to the same extent that [the Merit Systems Protection Board] constrains itself in both the application of the *Douglas* factors and the level of deference accorded to [a]gency deciding officials.” *DOL*, 72 FLRA at 493. Despite these concerns, we are constrained by the fact that the Agency did not bring forth an argument on these grounds.

Chairman DuBester, concurring:

I agree with the Decision to dismiss the Agency's exception.