

73 FLRA No. 124

UNITED STATES
DEPARTMENT OF STATE
PASSPORT SERVICES
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1998
(Union)

0-AR-5862

DECISION

September 1, 2023

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

I. Statement of the Case

The Agency conceded that it violated a settlement agreement and the parties' collective-bargaining agreement by failing to timely remove a letter of reprimand (reprimand) from an employee's (the grievant's) electronic official personnel file (eOPF). To remedy the violation, Arbitrator Gary A. Anderson directed the Agency to pay the grievant \$2000 and establish a monitoring system to verify that the Agency timely removes reprimands from employees' eOPFs.

The Agency filed exceptions to the award, arguing that the monetary remedy violates the doctrine of sovereign immunity and the monitoring remedy does not draw its essence from the parties' agreement and exceeds the Arbitrator's authority. We grant the sovereign-immunity exception, finding there is no statutory basis for the monetary remedy, which we set aside. We deny the essence exception to the monitoring system. However, we find that this remedy exceeded the Arbitrator's authority, because it was not limited to the grievant, and we modify the remedy as specified below.

II. Background and Arbitrator's Award

The Agency placed a reprimand in the grievant's eOPF. Under Article 24, § 3(h) of the parties' agreement (Article 24), the reprimand would "[n]ormally . . . be retained for one year"¹ – here, until June 5, 2021.² Two months before that date, on April 6, the Agency agreed to remove the reprimand within the next two pay periods as part of a settlement agreement for a related grievance. On April 13, the Agency instructed the office responsible for eOPFs to remove the reprimand from the grievant's file. However, when the grievant returned from parental leave in July, he discovered that the Agency had not removed the reprimand from his eOPF. On July 22, the Union notified the Agency. The Agency responded a few hours later, both acknowledging that it had failed to timely remove the reprimand and confirming that the reprimand was no longer in the grievant's eOPF.

Seeking a remedy for the Agency's failure to timely remove the reprimand, the Union filed a step-one grievance. In its response, the Agency rejected the Union's requested remedies but stated that the Agency would "diligently monitor the timelines" of reprimand removals.³ In a step-two grievance, the Union requested additional remedies, which the Agency also rejected. Ultimately, the grievance proceeded to arbitration, where the parties stipulated the following issue: "What is the appropriate remedy for the Agency's untimely removal of discipline in violation of a signed settlement agreement and the [parties' agreement]?"⁴

The Union argued that the Agency should make the grievant whole for the alleged contract violations and provide the remedies listed in both steps of the grievance. For the grievant, these included an apology; removal of reference to the reprimand from the grievant's 2020 performance review; and time-off awards. The Union also requested the Agency's "adhere[nce] to time frames for removal of disciplinary actions" from eOPFs;⁵ "admonish[ment]" of Agency officials;⁶ and official time and various time-off awards for Union representatives and members. The Agency argued that any awarded remedies "should be proportionate and relevant to the violation."⁷

In evaluating the issue, the Arbitrator found the grievant "suffered a minimal amount of harm" because the Agency "remedied" the violation very shortly after the grievant became aware that the reprimand was still in his eOPF.⁸ The Arbitrator further noted that the Agency did not "have a history or pattern of failing to timely remove

¹ Award at 12 (quoting Collective-Bargaining Agreement Art. 24, § 3(h)).

² Unless otherwise noted, all dates are in 2021.

³ See Opp'n, Attach. 4, Step-One Resp. (Step-One Resp.) at 3.

⁴ Award at 2.

⁵ *Id.* at 9.

⁶ *Id.* at 11.

⁷ *Id.* at 6.

⁸ *Id.* at 10.

discipline” from eOPFs⁹ and “acted in good faith” by timely initiating the reprimand-removal process in April.¹⁰ In addition, due to the Agency’s “immediate steps” to remove the reprimand “[w]hen the mistake was brought to [its] attention” in July, the Arbitrator determined that a “major part of the remedy” had “already been carried out.”¹¹ For these reasons, the Arbitrator rejected most of the Union’s requested remedies as unnecessary, “inappropriate,” “disproportionate,” or “beyond [his] authority.”¹² However, noting that the grievant “did not receive what he and the Union bargained for” in the settlement agreement, the Arbitrator directed the Agency to pay the grievant \$2000.¹³ Further, the Arbitrator directed the Agency to set up a system to monitor the removal of reprimands from eOPFs to “ensure that errors and failures do not occur in the future.”¹⁴

The Agency filed exceptions to the award on February 2, 2023, and the Union filed its opposition on March 6, 2023.

III. Preliminary Matters

A. We deny the Union’s request to dismiss the exceptions.

The Union argues that the Authority should dismiss the exceptions, “at least in part,” because the Agency “fail[ed] to comply with the instructions to properly fill out the Authority[-]provided form.”¹⁵ The Authority’s Regulations require that parties include a table of contents with all filed documents exceeding ten double-spaced pages in length, unless the document is filed using the Authority eFiling system’s fillable forms.¹⁶

The Union asserts that the Agency’s exceptions form does not meet this requirement, because it is more than ten pages long and lacking a table of contents.¹⁷ As the form was not eFiled, and contains no table of contents, we find that it does not comply with Authority Regulations. However, the Authority has declined to

dismiss filings on the basis of minor deficiencies where the deficiencies did not harm the opposing party or impede its ability to respond.¹⁸ The Union does not allege any harm arising from the improper formatting, and the Union filed a timely and thoroughly argued opposition brief. Thus, we find the formatting deficiencies did not affect the Union’s ability to understand and respond to the Agency’s exceptions,¹⁹ and we deny this request.

B. Sections 2425.4(c) and 2429.5 of the Authority’s Regulations do not bar the Agency’s exceptions.

The Agency argues that the monetary remedy violates the doctrine of sovereign immunity²⁰ and the monitoring remedy does not draw its essence from the parties’ agreement²¹ and exceeds the Arbitrator’s authority.²² Because the Agency did not raise these arguments below, the Union requests that the Authority dismiss them.²³ Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority generally will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.²⁴

The Agency asserts that it could not have known to raise its sovereign-immunity argument at arbitration because the Union did not request any “monetary damages.”²⁵ More importantly, the Authority has held §§ 2425.4(c) and 2429.5 do not bar “a claim of federal sovereign immunity,” which an agency can raise “at any time.”²⁶ Therefore, we find it unnecessary to determine whether the Agency should have raised sovereign immunity below, and we consider this argument.²⁷

The Agency also claims that the awarded monitoring system is “beyond anything the [A]gency would have known to argue against.”²⁸ The Union counters that the Agency should have known that the

⁹ *Id.* at 9-10.

¹⁰ *Id.* at 7-8.

¹¹ *Id.* at 12-13.

¹² *Id.* at 9-11.

¹³ *Id.* at 13.

¹⁴ *Id.*

¹⁵ *Opp’n* at 5.

¹⁶ 5 C.F.R. § 2429.29.

¹⁷ *Opp’n* at 5.

¹⁸ *AFGE, Loc. 2338*, 72 FLRA 743, 744 (2022).

¹⁹ *See NTEU*, 69 FLRA 614, 616 (2016) (where union did not consent to email service, declining to dismiss agency exceptions served by email where union timely filed opposition and did “not allege that it suffered any harm”).

²⁰ Exceptions at 10.

²¹ *Id.* at 9.

²² *Id.*

²³ *Opp’n* at 14-15, 19-20.

²⁴ *NTEU, Chapter 149*, 73 FLRA 133, 134 (citing 5 C.F.R. §§ 2425.4(c), 2429.5).

²⁵ Exceptions at 11 (asserting that there was “no reason to believe the [A]rbitrator would fashion such a remedy” because “monetary damages [were not] raised by the Union on behalf of the grievant”).

²⁶ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Beaumont, Tex.*, 70 FLRA 477, 478 (2018) (*BOP*) (Member DuBester dissenting on other grounds) (quoting *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 962 (2015)); *see also SSA, Off. of Disability Adjudication & Rev., Region 1*, 65 FLRA 334, 337 (2010).

²⁷ *See BOP*, 70 FLRA at 478 (finding it “unnecessary . . . to determine whether the [sovereign-immunity] argument was raised below”).

²⁸ Exceptions at 10.

Arbitrator could direct such a remedy²⁹ because the Agency's first grievance response stated that the Agency would "diligently monitor the timelines" for reprimand removals.³⁰ However, the Union did not request the creation of a monitoring system in either step of the grievance or at arbitration.³¹ Therefore, the Agency "could not have known to raise its objections" to this remedy at arbitration.³² For these reasons, we find the Authority's Regulations do not bar the Agency's exceptions to this remedy, and we consider those exceptions.

IV. Analysis and Conclusions

A. The award violates the doctrine of sovereign immunity.

The Agency argues that the \$2000 remedy violates the doctrine of sovereign immunity.³³ Under that doctrine, the United States is immune from suit except as it consents to be sued.³⁴ Sovereign immunity can be waived by statute, but a waiver will be found only if "unequivocally expressed in statutory text."³⁵ Accordingly, the Authority has found that when an arbitrator directs an agency to pay monetary damages to an employee, there must be statutory support for such a remedy.³⁶ The Authority has also held that an award of backpay under the Back Pay Act (the Act)³⁷ is authorized only when an arbitrator finds that an employee suffered a loss of pay due to an unjustified and unwarranted personnel action.³⁸

The Arbitrator directed the Agency to pay the grievant \$2000 "because [the grievant] did not receive what he and the Union bargained for."³⁹ The Agency contends that this monetary remedy violates sovereign immunity because it "is not in any way related to [the Act] or any other law or regulation."⁴⁰ The Union disagrees, arguing that the \$2000 award is valid under the Act because it remedies the Agency's violation of the settlement agreement and the parties' agreement.⁴¹ However, the Arbitrator did not reference the Act or find that the Agency's violation resulted in lost pay or benefits.⁴² Thus, the monetary remedy is not authorized by the Act.⁴³

Further, the Union's claim that the Agency "waive[d]"⁴⁴ sovereign immunity by agreeing to let the Arbitrator determine a remedy is misplaced: only Congress can waive sovereign immunity.⁴⁵ As neither the Arbitrator nor the Union asserts any other basis for the award, we find that the \$2000 remedy lacks statutory support. Accordingly, we find that this monetary remedy violates sovereign immunity and we set it aside.⁴⁶

B. The Agency does not establish that the monitoring remedy fails to draw its essence from the parties' agreement.

The Agency argues that the monitoring remedy fails to draw its essence from the parties' agreement.⁴⁷ The Authority will find an award deficient on this ground when the excepting party establishes the award: (1) cannot in

²⁹ Opp'n at 14-15.

³⁰ See Step-One Resp. at 3.

³¹ See, Opp'n, Attach. 3, Step-One Grievance (Step-One Grievance) at 3 (listing requested remedies); Opp'n, Attach. 5, Step-Two Grievance (Step-Two Grievance) at 4-5 (same); Opp'n, Attach. 12, Union Arb. Br. (Union Br.) at 15 (requesting make-whole remedy along with remedies listed in step-one and step-two grievances). The Union argues that it listed "procedures for timely removals of discipline actions" as a discussion topic in a request to resolve the grievance with alternative dispute resolution. Opp'n at 13. However, as noted, the Union did not renew this request with the Arbitrator or even remark upon it. See Union Br. at 15.

³² See *U.S. DOD, Educ. Activity*, 60 FLRA 254, 257 n.3 (2004) (finding exception was not barred by § 2429.5 where arbitrator "prematurely addressed the issue of attorney fees" and the agency "could not have known to raise its objections" at arbitration); see also *U.S. Dep't of the Treasury, IRS*, 68 FLRA 329, 331 (2015) ("The Authority applies §§ 2425.4(c) and 2429.5 to bar challenges to a remedy if the remedy was requested by one of the parties and not objected to by the other." (emphasis added)); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 66 FLRA 388, 391 (2011) (considering exceeded-authority exception to remedy not requested by union).

³³ Exceptions at 10.

³⁴ *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1170 (2020) (*FSA*) (Member DuBester concurring).

³⁵ *Id.* (quoting *U.S. Dep't of HHS, Food & Drug Admin.*, 60 FLRA 250, 252 (2004)).

³⁶ *Id.*

³⁷ 5 U.S.C. § 5596.

³⁸ See *U.S. Dep't of VA, Consol. Mail Outpatient Pharmacy, Leavenworth, Kan.*, 72 FLRA 455, 456-57 (2021) (*VA Leavenworth*) (Chairman DuBester concurring).

³⁹ Award at 13.

⁴⁰ Exceptions at 10.

⁴¹ Opp'n at 17.

⁴² See *id.* at 12-13 (discussing rationale for remedies).

⁴³ See *VA Leavenworth*, 72 FLRA at 457 (finding backpay remedy contrary to the Act where the arbitrator "did not find, and the record [did] not establish, that the [unjustified or unwarranted personnel action] resulted in a loss of pay to the grievants").

⁴⁴ Opp'n at 17-18.

⁴⁵ See *U.S. Dep't of Transp., FAA*, 65 FLRA 325, 328 (2010) (holding that "officers of the United States possess no power through their actions to waive" sovereign immunity absent "some express provision [of] Congress" (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947))).

⁴⁶ As we set aside the monetary portion of the remedy, we do not consider the Agency's essence and exceeded-authority exceptions to that remedy. See Exceptions at 9-10; *U.S. DHS, U.S. CBP*, 65 FLRA 160, 164 n.5 (2010) (declining to consider exceeded-authority exception to backpay remedy that was set aside as contrary to the Act).

⁴⁷ Exceptions at 9.

any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.⁴⁸

The Agency contends that Article 24 sets the timeframes for removal of reprimands from employee eOPFs and makes “no mention” of a monitoring system.⁴⁹ Thus, according to the Agency, monitoring goes “beyond what is required by the [parties’ agreement].”⁵⁰ However, the Authority has held that an arbitrator has wide discretion to fashion an appropriate remedy.⁵¹ Further, the Agency fails to explain how a remedy that enforces the requirements of Article 24 is irrational, unfounded, implausible, or in manifest disregard of the parties’ agreement.⁵² Therefore, we deny the essence exception as to the monitoring remedy.

C. The Arbitrator exceeded his authority.

The Agency argues that the Arbitrator exceeded his authority by directing the Agency to create an eOPF-monitoring system.⁵³ As relevant here, arbitrators exceed their authority when they award relief to those not encompassed within the grievance.⁵⁴ If a grievance is limited to a particular grievant, then the remedy must be similarly limited.⁵⁵

The Arbitrator directed the Agency to establish a system to monitor the removal of reprimands from employees’ eOPFs to “ensure that errors and failures do not occur in the future.”⁵⁶ The Agency argues that this remedy is not properly “limited,” because it goes “beyond any remedy that could be established for the grievant.”⁵⁷ Although arbitrators have broad discretion to fashion appropriate remedies, they do not have authority to extend a remedy to employees not encompassed by the grievance.⁵⁸ Here, both the grievance and the stipulated arbitration issue concerned the Agency’s failure to timely remove a reprimand from the *grievant’s* eOPF.⁵⁹ Additionally, the Arbitrator explicitly found that the Agency did not have “a history or pattern of failing to timely remove discipline from . . . eOPF[s]” generally.⁶⁰ Thus, by directing the Agency to monitor eOPFs for employees other than the grievant, the Arbitrator exceeded his authority.⁶¹ Therefore, we grant the exceeded-authority exception, in part, and clarify that the monitoring remedy does not apply to other employees.⁶²

V. Decision

We grant the sovereign-immunity exception and, in part, the exceeded-authority exception, and we deny the essence exception. Accordingly, we set aside the monetary remedy and modify the monitoring remedy as specified.

⁴⁸ *AFGE, Loc. 2092*, 73 FLRA 596, 597 (2023).

⁴⁹ Exceptions at 9.

⁵⁰ *Id.*

⁵¹ *U.S. Dep’t of VA, Boise Veterans Admin. Med. Ctr.*, 72 FLRA 124, 129 (2021) (Member Abbott concurring; Chairman DuBester dissenting in part on other grounds) (finding arbitrator had discretion to direct agency to review safety procedures and meet legal obligations for safe work environment).

⁵² *See id.* (denying essence exception where challenged remedy did not conflict with requirements of parties’ agreement); *U.S. DOD, Def. Cont. Mgmt. Agency*, 59 FLRA 396, 404 (2003) (Member Pope dissenting in part on other grounds) (denying essence exception challenging bargaining remedy that comported with terms of parties’ agreement).

⁵³ Exceptions at 9.

⁵⁴ *U.S. DHS, U.S. CBP*, 69 FLRA 244, 246 (2016) (*DHS*).

⁵⁵ *Id.*

⁵⁶ Award at 13.

⁵⁷ Exceptions at 9.

⁵⁸ *See U.S. DHS, U.S. CBP*, 62 FLRA 59, 62 (2007) (*CBP*) (finding arbitrator exceeded his authority by directing the agency to provide dues-withholding statements to *all* employees rather than only those included in the grievance over erroneous termination of dues withholding); *see also DHS*, 69 FLRA at 246-47 (finding arbitrator exceeded his authority by directing agency to approve future leave requests for employees “similarly situated” to grievants).

⁵⁹ *See* Award at 1 (stating that the “parties do not dispute” that the Agency’s violation concerned the failure “to timely remove the [reprimand] from [the grievant’s] eOPF”); *see also id.* at 2 (limiting issue to Agency’s violation of a settlement agreement with the grievant); Step-One Grievance at 1-2 (stating that the grievance was filed “on behalf of” the grievant and arose when the grievant discovered that the reprimand had not been removed from his eOPF); Step-Two Grievance at 1-2 (same).

⁶⁰ Award at 9-10; *see also id.* at 8 (“It is noted that the Agency does not have a history of such violations.”); *id.* at 9 (finding that the Agency “did not act in bad faith” and timely requested removal of the reprimand).

⁶¹ *See U.S. Dep’t of Transp., FAA*, 71 FLRA 694, 696-97 (2020) (*FAA*) (Member Abbott concurring in relevant part and dissenting on other grounds) (finding arbitrator exceeded authority by directing agency to notify union of “all types of substance or alcohol testing” when grievance concerned only one kind of testing); *DHS*, 69 FLRA at 246-47; *CBP*, 62 FLRA at 62; *cf. U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 861-62 (2012) (Chairman Pope dissenting in part on other grounds) (finding arbitrator did not exceed authority where bargaining remedy was “directly responsive” to stipulated issue and arbitrator found “pattern” of agency violations).

⁶² *See FAA*, 71 FLRA at 697 (modifying remedy that exceeded arbitrator’s authority); *DHS*, 69 FLRA at 247 (modifying award to clarify that the remedy applied only to the grievants); *CBP*, 62 FLRA at 62 (modifying award to apply only to employees included in the grievance).