63 FLRA No. 185

UNITED STATES DEPARTMENT OF AGRICULTURE
FARM SERVICE AGENCY
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 3354
(Union)

0-AR-4352

DECISION

August 14, 2009

Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Mark W. Suardi filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authorityís Regulations. The Union filed an opposition to the Agencyís exception.

The Arbitrator sustained a grievance challenging the grievantís four-day suspension. For the reasons discussed below, we deny the Agencyís exception.

II. Background and Arbitratorís Award

While at work, the grievant opened two e-mail messages sent by a coworker and viewed the sexually explicit images that were attached. The grievant and his coworker were each issued four-day suspensions for violating the Agencyís e-mail usage policy, IRM-306 § 4C. [1] Award at 2, 5. The Union challenged the grievantís four-day suspension and the Agencyís administration of the disciplinary process. *Id.* at 4. The issue was unresolved and the parties submitted the matter to arbitration.

At arbitration, the parties stipulated to the following issue: Did the Agency violate the partiesí agreement when the grievant was suspended for four days? If so, what should the remedy be? *Id.* The Arbitrator initially found that the Agencyís e-mail policy was reasonable, and that employees had been properly trained regarding its requirements. The Arbitrator then focused his inquiry on the issues of whether the grievant "truly ran afoul of the rule" and whether the discipline was fair and equitable, as required by the partiesí agreement. [2] *Id.* at 7.

The Arbitrator found, and it was undisputed that, the grievant "viewed" the sexually explicit material attached to the e-mail messages sent by his coworker. *Id.* The Arbitrator found, however, that the grievant did not know the content of the attachments when he opened them and was angry and offended to have received them. *Id.* at 3, 8. The Arbitrator stated that the evidence established that the grievant viewed the images for only seconds, did not download them to his computer, and did not transmit them electronically to anyone else. [3] *Id.* at 7-8. The Arbitrator found that the grievant twice told the coworker who sent the messages to stop sending them. *Id.* at 8. The Arbitrator determined that the coworkerís compilation and transmission of the images were "a good deal more serious than the [g]rievantís unwitting receipt of them." *Id.*

Although the Arbitrator accepted the Agencyís argument that the grievant should have reported the first e-mail he received, he found that the grievant was not a "willing participant" in the violation of the e-mail policy and that he took steps to stop the coworker from sending inappropriate messages. *Id.* at 9. The Arbitrator found that these mitigating circumstances "militate[d] against the discipline imposed." *Id.* He concluded that the grievantís discipline was "not in accord with the fair and

1. IRM-306 § 4C states, in relevant part: "Employees are expected to conduct themselves professionally in the workplace and to refrain from using . . . e-mail systems for activities that are inappropriate. Misuse or inappropriate personal use includes . . . creating, downloading, viewing, storing, copying, or transmitting sexually explicit or sexually oriented materials . . . ." Exception, Exhibit 2 at 6.

2. Article 16.1.B of the partiesí agreement provides, in relevant part: "The Employer agrees to effect disciplinary actions fairly and equitably, and only where there is just and sufficient cause. The parties agree to the principle of like penalty for like offense." Opposition, Attachment at 96. Article 16.1.C provides, in relevant part: "Management will treat Employees fairly and equitably regarding the determination of appropriate discipline." *Id.*

3. The Arbitrator noted that some federal courts have found that "purposeful downloading or saving is required before an image is truly in a computer usersí possession." Award at 8 (citing *United States v. Luken*, 515 F. Supp. 2d 1020 (D.S.D. 2007), *affid*, 560 F.3d 741 (8th Cir. 2009), *U.S. v. Stulock*, 308 F.3d 922 (8th Cir. 2002), and *United States v. Kuchinski*, 469 F.3d 853 (9th Cir. 2006).

equitable standard set forth in the [partiesí a]greement." *Id.* at 10. The Arbitrator ordered that the four-day suspension be set aside and expunged from the grievantís record. *Id.*

III. Positions of the Parties

A. Agency Exception

The Agency alleges that the award is contrary to its Telecommunications and Internet Services and Use Regulation, USDA DR 3300-001, and § 4C of the Agencyís Internet and Electronic Mail Policy, IRM-306, because it does not allow the grievant to be held accountable for viewing sexually explicit images on his computer while at work. Exception at 2.

In this regard, the Agency states that the grievant admitted to viewing sexually explicit images. *Id.* at 1. The Agency argues that this behavior violated USDA DR 3300-001, which prohibits employees from viewing sexually explicit materials or using telecommunications in a way that would reflect adversely on the department or the Agency. *Id.* at 2. The Agency also argues that IRM-306 § 4C identifies viewing sexually explicit or sexually oriented materials as inappropriate. *Id.* In addition, the Agency states that the Union stipulated that the penalty for inappropriate use of government equipment ranges from a letter of reprimand to removal and that the grievant knew about the Agencyís e-mail policies. *Id.* at 1.

B. Union Opposition

The Union asserts that the Arbitratorís award is properly based on his interpretation of the partiesí agreement. Opposition at 1-2. In response to the Agencyís exception, the Union argues that the Agency did not raise USDA DR 3300-001 before the Arbitrator. The Union further notes that the copy of this regulation submitted by the Agency does not include Appendix F, which addresses e-mail. *Id.* at 2. The Union contends that, in any case, the award is not contrary to USDA DR 3300-001 because that regulation does not specify the penalties that may be imposed for violations of the regulation. *Id.* at 2. The Union also argues that IRM-306 defers to the partiesí agreement "[w]here contract language already addresses these policies and procedures[.]" *Id.* The Union contends that this applies to the section of IRM-306 dealing with disciplinary actions. [4] *Id.*

IV. Preliminary Issue

Under § 2429.5 of the Authorityís Regulations, the Authority will not consider an issue that could have been, but was not, presented to the arbitrator. *See, e.g., United States Depít of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003). Consistent with the Unionís assertion, there is no evidence in the award or the record that that the Agency argued a violation of USDA RD 3300-001 before the Arbitrator. The record indicates that the grievant was charged with a violation of IRM-306 § 4C, Award at 2, and that the Arbitrator evaluated the grievantís actions on that basis. As USDA RD 3300-001 also addresses employee usage of email, the Agency could have presented it to the Arbitrator, but did not. *See United States Depít of Transp., Fed. Aviation Admin.*, 61 FLRA 54, 56 (2005). Accordingly, pursuant to 5 C.F.R. § 2429.5, we dismiss the portion of the Agencyís exception claiming a violation of USDA RD 3300-001.

V. Analysis and Conclusions

Section 7122(a)(1) of the Statute provides that an arbitration award will be found deficient if it conflicts with any law, rule, or regulation. For purposes of § 7122(a)(1), "regulation" includes governing agency regulations. *See NFFE, Local 2030*, 53 FLRA 1136, 1141 (1998). As the Agencyís exception challenges the awardís consistency with IRM-306 -- an Agency regulation -- we review the exception and the award *de novo. See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitratorís legal conclusions are consistent with the applicable standard of law. *See United States Depít of Def., Depíts of the Army and the Air Force, Ala. Natíl Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitratorís underlying factual findings. *See id.*

The Agency argues that the Arbitratorís award is contrary to IRM-306 § 4C, because it does not allow the grievant to be held accountable for viewing sexually explicit images at work. However, the Agency fails to explain how the Arbitratorís award violates IRM-306 § 4C. A review of IRM-306 establishes that it merely sets forth the types of behavior that are inappropriate and does not provide procedures for determining when violations have occurred or set forth specific penalties for inappropriate behavior. As the Agencyís exception

4. IRM-306 § 6A provides, in relevant part: "Any person who willfully or knowingly violates or fails to comply with the provisions of appropriate Federal laws and USDA and [Agency] regulations will be subject to appropriate disciplinary actions, such as suspension or dismissal." Exception, Exhibit 2 at 11.

does not fully explain or provide authority for its argument that the Arbitratorís award violates IRM-306 § 4C, we find that the Agency has not established that the Arbitratorís award is deficient as contrary to regulation.

VI. Decision

The Agencyís exception is denied.