64 FLRA No. 204

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2382
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
PHOENIX, ARIZONA
(Agency)

0-AR-4419

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DECISION

July 30, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Sanford Jay Rosen filed by the Union 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 exceptions.

The Arbitrator granted the grievance in part, finding that the Agency had just cause to suspend the grievant for failing to provide adequate medical documentation to support his sick leave request, but did not have just cause to suspend him for returning late from a break. For the following reasons, we dismiss the Union's exceptions in part and deny the Union's remaining exceptions.

II. Background and Arbitrator's Award

The grievant, a housekeeping aide at an Agency facility, was issued a non-disciplinary letter of counseling for "sick leave abuse." Award at 2. Approximately two and a half months later, the grievant was issued a memorandum requiring him to provide medical documentation for future absences for which he claimed sick leave because, since the prior notification, he had used an additional twenty-four hours of sick leave. *Id.* The memorandum required the grievant to provide medical evidence for any absence of one hour or more no later than three work days after the absence. *Id.* The memorandum noted that, consistent with 5 C.F.R. § 630.403, such evidence "must contain specific reason [*sic*] for [the grievant's] incapacitation for [his] position[.]"[1] *Id.* Moreover, the memorandum stated that, to be administratively acceptable, such evidence "must clearly indicate how, at a minimum, [the grievant] w[as] physically unable to perform the essential function" of his position. *Id*. at 9.

Approximately two months after receiving this memorandum, the grievant was absent due to illness and did not provide "acceptable medical certification within [three] work days to substantiate this absence, as he had been instructed to do[.]" *Id.* at 2. Approximately twelve days after this absence, the grievant provided to the Agency a handwritten note from his doctor stating "excuse[d] from work for [Saturday and Sunday] due to illness." *Id.* at 4.

The grievant's second-level supervisor issued the grievant a proposed ten-day suspension based on his failure to submit acceptable medical evidence for this absence and his late return from a morning break. *Id.* at 2-3. The Union presented a grievance, which was unresolved and submitted to arbitration. *Id.* at 1-2.

The Arbitrator framed the issue as: "Whether the [ten]-day suspension imposed on [g]rievant was for just cause, and if not, what should be the remedy?" *Id.* at 1.

The Arbitrator determined that, even assuming that the grievant's medical note was timely, the note failed to meet the valid requirements set forth in the memorandum. *Id.* at 15. The Arbitrator found that the Agency had provided "ample evidence" to substantiate its concerns that the grievant had abused sick leave and that, as a result, the Agency "appropriately required some explanation in any doctors' [sic] note that the [g]rievant could not perform his job due to illness." *Id.* The Arbitrator further noted that this requirement did not require the

1. 5 C.F.R. § 630.403(a) provides, in relevant part:

> An agency may also require a medical certificate or other administratively acceptable evidence as to the reason for an absence for any of the purposes described in § 630.401(a) for an absence in excess of 3 workdays, or for a lesser period when the agency determines it is necessary.

disclosure of confidential medical information. *Id.* The Arbitrator determined that the Agency had failed, however, to present sufficient evidence of tardiness with respect to the grievant's return from his morning break; accordingly, he overturned this charge. *Id.*

The Arbitrator concluded that the Agency had shown sufficient just cause for imposing discipline for the inadequate doctor's note, but had not shown sufficient just cause for imposing a suspension for the grievant's alleged fifteen minute late return from his morning break. *Id.* Therefore, the Arbitrator mitigated the grievant's suspension from ten days to five days and ordered that the grievant be made whole for the difference. *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the Arbitrator's award is contrary to 5 U.S.C. § 7503(b) and fails to draw its essence from Article 13, § 8 of the parties' agreement. Exceptions at 2-4. According to the Union, 5 U.S.C. § 7503(b) and Article 13, § 8 of the parties' agreement require that federal employees who are to be suspended without pay be given advance notice of the specific reasons for the proposed suspension. *Id.* at 2. The Union asserts that, because the Agency charged the grievant with failing to provide *a* medical notice for his absence, not failing to provide an *adequate* note, the grievant was not provided such notice. *Id.* at 2-4.

The Union also alleges that the Arbitrator's finding -- that the doctor's note provided by the grievant was inadequate because it failed to explain that the grievant could not perform his job due to illness -- is based on a nonfact. *Id.* at 4-5. The Union alleges that the Arbitrator improperly found that the doctor's note failed to contain "some explanation that [the g]rievant could not perform his job due to illness." *Id.* at 4. The Union asserts that, because the note provided by the grievant stated that the grievant should be "excuse[d] from work . . . due to illness," the note "support[s] the proposition" that the grievant could not perform his work due to illness. *Id.* at 5.

The Union further contends that the award fails to draw its essence from Article 32, § 7 and Article 32, § 5(B) of the parties' agreement. *Id.* at 5-6. Article 32, § 7 provides that "employees will not be required to reveal the nature of the illness as a condition for approval of sick leave." *Id.* According to the Union, requiring the grievant to provide an explanation that he "'could not perform his job' necessarily requires disclosure of the employee's medical condition, particularly since the Arbitrator found the doctor's phrase 'due to illness' inadequate." *Id.* at 5. Article 32, § 5(B) provides that employees who are suspected of abusing sick leave "'may be required to furnish a medical certification for each such sick leave application.'"[2] *Id.* The Union asserts that the award manifestly disregards the language of this provision because the award upheld the grievant's suspension for failing to provide a medical certificate, even though he had provided a medical certificate and the adequacy of the note was not questioned until arbitration. *Id.* at 5-6.

Finally, the Union argues that the award is contrary to 5 C.F.R. § 630.201, which defines the term "medical certificate."[3] *Id.* at 6. According to the Union, an agency "cannot declare a medical certificate to be inadequate if it meets the definition of a 'medical certificate' in [the Office of Personnel Management's] regulations." *Id.* The Union contends that, because the grievant's note satisfied this definition, the Arbitrator's award upholding the grievant's suspension "on the basis that the *Agency* considered [the note] inadequate is contrary to law." *Id.*

B. Agency's Opposition

The Agency asserts that the award draws its essence from the parties' agreement. Opposition at 3-5. The Agency contends that it clearly identified for the grievant: (1) the medical evidence that he was required to provide for future requests for sick leave; (2) the charges that it asserted against him; and (3) the specifications underlying those charges. *Id.* Accordingly, the Agency contends that the Union has

2. The Union mistakenly cites this provision as Article 32, § 5(B). The quoted language is actually from Article 32, § 5(C)(2). *See* Exceptions Attach. at 38.

3. The Union mistakenly refers to this provision as 5 C.F.R. § 430.201. Exceptions at 6. 5 C.F.R. § 630.201 provides:

> Medical certificate means a written statement signed by a registered practicing physician or other practitioner certifying to the incapacitation, examination, or treatment, or to the period of disability while the patient was receiving professional treatment.

failed to show that the award fails to draw it essence from the parties' agreement. *Id.* at 5.

Further, the Agency contends that the Union's argument that the award is based on a nonfact is insufficient because the Union fails to identify a clearly erroneous central fact underlying the award, but for which a different result would have been reached by the Arbitrator. *Id.* at 6. According to the Agency, the Union is challenging the Arbitrator's conclusion that the medical evidence was insufficient, not a fact underlying the award. *Id.*

Finally, the Agency contends that the award is not contrary to law. According to the Agency, 5 C.F.R. § 630.403 permits an Agency to require medical evidence beyond that specified in 5 C.F.R. § 630.201. *Id.* at 7. The Agency asserts that, under Authority case law, an Agency has broad discretion in determining what medical evidence is administratively acceptable. *Id.* (citing *U.S. Dep't of the Air Force, Robins Air Force Base, Warner Robins, Ga.*, 41 FLRA 635, 638 (1991) (citation omitted) (*U.S. Dep't of the Air Force*)). The Agency contends that the requirement in the memorandum that the grievant's medical evidence "clearly indicate how, at a minimum, [he] was physically unable to perform the essential functions" of his position is inherently reasonable. *Id.* at 7-8. Further, the Agency maintains that, contrary to the Union's argument, this requirement does not require the grievant to disclose the nature of his illness. *Id.* at 8.

IV. Preliminary Issue

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues or evidence that could have been, but were "not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5. The Union asserts that, because the Agency charged the grievant with failing to provide *a* medical note for his absence, not failing to provide an *adequate* note, the grievant was not provided the notice required under 5 U.S.C. § 7503(b) or Article 13, § 8 of the parties' agreement. Exceptions at 2. The Union also asserts that the award manifestly disregards Article 32, § 5(B) of the parties' agreement because the award upheld the grievant's suspension for failing to provide a medical certificate, even though the grievant had provided this document to the Agency. *Id.* at 6.

There is no evidence in the award or the record that the Union ever argued below that: (1) the charges against the grievant were not specific enough under 5 U.S.C. § 7503(b); (2) the grievant was charged in a manner inconsistent with Article 13, § 8 of the parties' agreement; or (3) the grievant complied with Article 32, § 5(B) of the parties' agreement by providing a medical certificate for his absence. Because such arguments could, and should, have been made to the Arbitrator, we find that consideration of these claims is barred by § 2429.5 of the Authority's Regulations. *See, e.g., AFGE, Council of Prison Locals 33, Locals 1007 & 3957*, 64 FLRA 288, 290 (2009) (Authority declined to consider union's exception that the award failed to draw its essence from Article 4 of the parties' agreement where the union raised only Articles 3, 7 and 32 before the arbitrator); *AFGE, Local 2608*, 63 FLRA 486, 488 (2009) (Authority did not consider argument that award failed to draw its essence from Article 25 of the parties' agreement where such agreement had not been raised before the arbitrator); *U.S. Dep't of the Treasury, Internal Revenue Serv., Kan. City Field Compliance Serv.*, 60 FLRA 401, 403 (2004) (Authority did not consider the agency's contrary to law claim where the agency could have, but did not, raise the claim below).

V. Analysis and Conclusions

A. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.* In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA 88, 92 (1995).

The Union alleges that the Arbitrator improperly found that the medical note that the grievant provided failed to contain "some explanation that [the g]rievant could not perform his job due to illness." Exceptions at 4-5. This fact was disputed at arbitration. *See* Award at 10, 13, 15. Consequently, the Union's claim provides no basis for finding that the award is deficient. *See U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993) (award not deficient based on a nonfact where excepting party challenges

a factual matter that the parties disputed at arbitration).

Accordingly, we deny this exception.

B. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. 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 arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Union argues that the award is contrary to 5 C.F.R. § 630.201, which defines the term "medical certificate." Exceptions at 6. According to the Union, "[t]he Agency cannot declare a medical certificate to be inadequate if it meets the definition of a 'medical certificate'" set forth in the regulation. *Id.* The Union contends that, because the grievant's note satisfied this definition, the Arbitrator's award upholding the grievant's suspension "on the basis that the Agency considered [the note] inadequate" is contrary to law. *Id.*

The Union fails to note that, under 5 C.F.R. § 630.403(a), an agency may require a "medical certificate or *other administratively acceptable evidence* as to the reason for an absence . . . in excess of [three] work days, or for a lesser period when the agency determines it is necessary" (emphasis added). Moreover, an agency has broad discretion under this provision regarding what documentation constitutes administratively acceptable evidence of incapacitation; such discretion is subject only to the rule of reasonableness. *See U.S. Dep't of the Air Force*, 41 FLRA at 638 (citing *Miller v. Bond*, 641 F.2d 997, 1003 (D.C. Cir. 1981)).

Here, the Agency determined that, because of the grievant's abuse of sick leave, the grievant would be required to provide "administratively acceptable evidence" for future requests for sick leave for any absence of one hour or more. The grievant was instructed, in writing, that such administratively acceptable evidence, among other things, "must clearly indicate how, at a minimum, [he was] physically unable to perform the essential function" of his position. Award at 9. Thus, we find that the Arbitrator's holding -- that the grievant's note was inadequate because it failed to meet the "administratively acceptable evidence" standard set forth in the Agency's memorandum to the grievant -- is not contrary to law.

Accordingly, we deny this exception.

C. The award does not fail to draw its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in 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 collective bargaining 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. *See United States Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Union contends that the award fails to draw its essence from Article 32, § 7 of the parties' agreement, which provides that "employees will not be required to reveal the nature of the illness as a condition for approval of sick leave." Exceptions at 5. According to the Union, requiring the grievant to provide an explanation that he "'could not perform his job' necessarily requires disclosure of the employee's medical condition." *Id.* at 5.

We reject the Union's contention. Requiring the grievant to explain *how* he is physically unable to perform an essential function of his position does not require him to reveal *why* he is unable to perform such function. For example, if the grievant had a back injury, he would not be required to reveal this condition; rather, he only would be required to state that, because of a medical condition, he is unable to

lift more than five pounds. Thus, we find that the Union's exception does not establish that the Arbitrator's interpretation of the parties' agreement is unfounded in reason, does not represent a plausible interpretation of the agreement, cannot be derived from the agreement, or evidences a manifest disregard of the agreement.

Accordingly, we find that the award does not fail to draw its essence from the parties' agreement and deny this exception.

VI. Decision

The Union's exceptions are dismissed in part and the remaining exceptions are denied.