67 FLRA No. 19

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3448
(Union)

and

SOCIAL SECURITY ADMINISTRATION
REGION V
(Agency)

0-AR-4864

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DECISION

December 13, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Arbitrator found that the grievant committed misconduct and that the Agency was justified under the parties' collective-bargaining agreement to suspend him. The central issue in this case is whether the award upholding the grievant's suspension is deficient because the Arbitrator improperly found that the grievant committed misconduct "on or about" August 31st rather than solely on that date. We deny the Union's nonfact and exceeds-authority exceptions – asserting that the Arbitrator improperly considered whether the grievant engaged in misconduct "on or about" a particular date – because the date upon which the grievant engaged in the alleged misconduct was disputed at arbitration, and the award is directly responsive to the issue as framed by the Arbitrator. Further, we deny the Union's exception – claiming that the award is contrary to 5 U.S.C. § 7503 and related regulations – because the Arbitrator based her award on the parties' agreement, not § 7503, and was not required to address the cited statutory and regulatory provisions.

II. Background and Arbitrator's Award

The Agency issued the grievant a three-day suspension for failing "to follow work procedures by posting wages of a claimant without proper verification" during a meeting concerning the grievant's workload on August 31st.[1] The Union filed a grievance contesting the grievant's suspension. In the absence of a stipulated issue, Arbitrator Margaret Nancy Johnson framed the following issue: "did the Agency have just and proper cause to impose a three[-]day suspension upon the grievant for conduct occurring on or about August 31[st], and[,] if not, to what remedy, if any[,] is the grievant entitled?"[2] The Arbitrator found that the grievant engaged in the misconduct with which he was charged "on or about" August 31st.[3] And the Arbitrator concluded that, under Article 23, Section 1 of the parties' agreement, which is set forth in the appendix to this decision, the Agency had just cause to suspend the grievant for three days.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union's exception claiming that the award is contrary to Agency regulations.

The Union maintains that the award is contrary to Agency regulations because the grievant's actions – posting a claimant's wages without receiving proper verification of those wages – were in accordance with an Agency policy statement updating the Agency's Program Operations Manual System (POMS).[4] According to the Union, the Agency's policy statement, which is set forth, in pertinent part, in the appendix to this decision, provides that, under certain circumstances, a claimant's statement will serve as verification of his or her wages.[5] The Agency contends, among other things, that the Authority should not consider the Union's claim because the Union did not argue before the Arbitrator that Agency regulations, such as POMS, excuse the grievant's conduct.[6]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[7] Nothing in the record demonstrates that the Union argued, before the Arbitrator, that the grievant's actions were in accordance with the Agency's policy statement. Because the Union's contention relates to whether the grievant's actions constituted misconduct, and the policy statement was in the record before the Arbitrator,[8] the Union could have,

[1] Award at 1 (citation omitted).
[2] *Id.* at 1-2.
[3] *Id.* at 5; *see also id.* at 4.
[4] Exceptions at 10-11.
[5] *Id.* at 10.
[6] Opp'n at 9.
[7] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also AFGE, Local 1546*, 65 FLRA 833, 833 (2011).
[8] Exceptions at 10.

and should have, presented this claim to the Arbitrator.[9] Consequently, we find that §§ 2425.4(c) and 2429.5 bar consideration of this exception.[10] Accordingly, we dismiss the Union's exception.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union asserts that the award is based on a nonfact.[11] In this regard, the Union contends that the Arbitrator improperly considered whether the grievant engaged in misconduct on a date other than August 31st because the parties only disputed whether the grievant engaged in misconduct during the meeting on that date.[12]

The Authority will not find that an award is based on a nonfact when the factual matter at issue was disputed at arbitration.[13] Here, the record demonstrates that the date upon which the grievant engaged in the alleged misconduct was disputed at arbitration. The Arbitrator resolved this dispute by finding that it was immaterial whether the grievant's misconduct occurred on August 31st or September 1st.[14] Therefore, we find that the Union has failed to demonstrate that the award is based on a nonfact.[15] Accordingly, we deny the Union's exception.

B. The Arbitrator did not exceed her authority.

The Union claims that the only issue before the Arbitrator was whether the grievant engaged in misconduct during the meeting on August 31st and that the Arbitrator exceeded her authority by considering whether the grievant committed misconduct "on or about" that date.[16]

Arbitrators exceed their authority when, among other things, they resolve an issue not submitted to arbitration.[17] Absent a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference.[18] In those circumstances, the Authority examines whether the award is directly responsive to the issue the arbitrator framed.[19]

As noted above, the parties did not stipulate to an issue,[20] and the Arbitrator framed the following issue: "did the Agency have just and proper cause to impose a three[-]day suspension upon the grievant for conduct occurring on or about August 31[st], and[,] if not, to what remedy, if any[,] is the grievant entitled?"[21] The Arbitrator found that the grievant engaged in the misconduct with which he was charged "on or about" August 31st.[22] The Authority, in a similar case, found that the arbitrator's determination – that the grievant's absence from work on a particular date was not authorized – did not exceed the arbitrator's authority because the arbitrator's framed issue encompassed the grievant's conduct on that date and/or another date.[23] In our view, the Arbitrator's conclusion similarly is directly responsive to the issue as she framed it.[24] Consequently, we conclude that the Union's exception provides no basis for finding that the award is deficient on the ground that the Arbitrator exceeded her authority.[25] Accordingly, we deny the Union's exception.

C. The award is not contrary to law or regulation.

The Union asserts that the Arbitrator misapplied 5 U.S.C. § 7503, which "makes clear that employees may be disciplined for [fourteen] days or less for such cause as will promote the efficiency of the service."[26] According to the Union, regulations implementing § 7503 also provide that the Agency has the burden of establishing that discipline promotes the efficiency of the service.[27] Additionally, the Union claims that the Agency failed to provide evidence that the grievant engaged in the misconduct with which he was charged.[28]

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[9] *See AFGE, Local 2612*, 55 FLRA 483, 486 (1999).
[10] *See U.S. Dep't of the Treasury, IRS*, 57 FLRA 444, 448 (2001); *AFGE, Local 1151*, 54 FLRA 20, 25 (1998).
[11] Exceptions at 8-9.
[12] *Id.* at 8.
[13] *E.g., NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009).
[14] *See* Award at 4-5.
[15] *See AFGE, Local 376*, 62 FLRA 138, 141 (2007); *U.S. DOD, Hale Koa Hotel*, 55 FLRA 651, 652 (1999).
[16] Exceptions at 10.
[17] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[18] *E.g., AFGE, Local 522*, 66 FLRA 560, 562 (2012) (*Local 522*); *U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).
[19] *E.g., Local 522*, 66 FLRA at 562.
[20] *See* Exceptions at 4; Opp'n at 2.
[21] Award at 1-2.
[22] *See, e.g., id.* at 5.
[23] *See NAGE, Local R12-44*, 54 FLRA 70, 74 (1998).
[24] *See id.*; *see also AFGE, Local 1637*, 49 FLRA 125, 130-31 (1994).
[25] *See AFGE, AFL-CIO, Local 1923*, 58 FLRA 376, 377 (2003).
[26] Exceptions at 11.
[27] *Id.*
[28] *Id.*

The Authority has found that where an arbitrator resolves a purely contractual issue, he or she is not required to apply statutory standards.[29] Moreover, the Authority has concluded that, in this situation, the alleged misapplication of statutory standards does not provide a basis for finding the award deficient.[30] As relevant here, the Authority has held that, when the issue resolved by an arbitrator is whether there was just cause for a grievant's suspension under a collective-bargaining agreement, the arbitrator is not required to apply § 7503.[31]

Here, the Arbitrator found that the Agency had just cause to suspend the grievant for three days under Article 23, Section 1 of the parties' agreement.[32] The Arbitrator never cited, and did not decide whether the Agency's actions violated, § 7503 and related regulations. Consequently, because the Arbitrator here resolved a purely contractual issue, we find that she was not required to apply statutory standards, namely § 7503 and related regulations.[33] Accordingly, we deny the Union's exception.[34]

V. Decision

We dismiss the Union's exceptions in part and deny the Union's exceptions in part.

[29] *E.g.*, *U.S. Dep't of Transp., FAA, Miami, Fla.*, 66 FLRA 876, 878 (2012) (*FAA*).
[30] *E.g.*, *id.*
[31] *See AFGE, Local 2018*, 65 FLRA 849, 851 (2011) (*Local 2018*).
[32] *See, e.g.*, Award at 7.
[33] *See FAA*, 66 FLRA at 878; *Local 2018*, 65 FLRA at 851.
[34] *See Local 2018*, 65 FLRA at 851.

APPENDIX

Article 23, Section 1 of the parties' agreement states:

> The parties agree that the objective of discipline is to correct and improve employee behavior so as to promote the efficiency of the service. The parties agree to the concept of progressive discipline which is designed primarily to correct and improve employee behavior. A common pattern of progressive discipline is reprimand, short term suspension, long term suspension and removal. Any of these steps may be bypassed where management determines by the severe nature of the behavior that a lesser form of discipline would not be appropriate.
>
> The parties further agree that normally discipline should be preceded by counseling and assistance including oral warnings which are informal in nature and not recorded. Counseling and warnings will be conducted privately and in such a manner so as to avoid embarrassment to the employee. Bargaining unit employees will be subject to disciplinary or adverse action only for just cause.[35]

The policy statement states, in pertinent part:

> As a result of continuing efforts to simplify and streamline Supplemental Security Income (SSI) policies and procedures, the procedures for developing evidence of wages and termination of wages have changed.
>
> Whenever original pay slips or verification from an SSA-approved wage verification company, e.g., the Work Number, is not available, verify wages using secondary evidence such as photocopied pay slips, Interstate Benefits Inquiry (IBIQ), the National Directory of New Hires (NDNH), SSA Access to State Records Online (SASRO), SSA's Master Earnings File (MEF), W-2's, or Federal or State tax forms. Contact employers for evidence

[35] Award at 2.

> of wages or termination of wages only for periods requiring development where other primary and secondary evidence are not available.
>
> Obtaining the individual's signed statement as evidence of wages or termination of wages when primary and secondary evidence are unavailable is no longer required. Instead, the individual's statement will serve as verification.[36]

[36] Exceptions, Attach. 11, Daily PolicyNet Instructions Postings for May 5, 2009 at 1-2.