

67 FLRA No. 22

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
WOMACK ARMY MEDICAL CENTER
FORT BRAGG, NORTH CAROLINA
(Agency)

0-AR-4839

DECISION

December 21, 2012

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Kathryn Durham 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 Union filed a grievance challenging the Agency's decision to suspend the grievant for three days for disorderly conduct. Award at 2-4. The Arbitrator sustained the grievance, in part, and reduced the grievant's penalty to a written reprimand. *Id.* at 2, 6-7.

For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance challenging the Agency's three-day suspension of the grievant. Award at 2-3. The Agency denied the grievance, and the parties submitted the matter to arbitration. *Id.* at 3. The parties stipulated to the following issue: "[W]hether the three-day suspension issued to [the g]rievant was for just cause and taken to promote the efficiency of the service." *Id.* at 2.

The incident underlying the suspension involved a discussion between the grievant, a licensed practical nurse at Womack Army Medical Center, and her supervisor, regarding the grievant's time-card entries. *Id.* After the counseling session, the grievant walked out of the supervisor's office and commented, "[T]his place!" or "[Y]ou people!" *Id.* The grievant re-entered the supervisor's office a few moments later, claimed that she was being treated unfairly, and said that she was planning to file a grievance. *Id.* The supervisor subsequently issued a notice of proposed suspension (notice) to the grievant, recommending a suspension of five days on the charge of disorderly conduct. *Id.* at 2-3.

The Agency reviewing official later re-evaluated the grievant's charge and determined that the grievant's conduct "fit [the Agency's] [t]able of [p]enalties item #7a—[d]iscourtesy, e.g. rude, unmannerly, impolite acts or remarks (non-discriminatory)." *Id.* at 3. The reviewing official also reduced the grievant's suspension to three days. *Id.*

The Arbitrator found that the charge of disorderly conduct, as specified in the notice, "[was] not an offense included in the Agency's [t]able of [p]enalties." *Id.* at 3, 5. In this connection, the Arbitrator found that the Agency failed to prove the charge of disorderly conduct at the hearing. *Id.* at 5. However, the Arbitrator found that the grievant's supervisors "looked to a different charge, [d]iscourtesy, in the [t]able of [p]enalties" in deciding to suspend the grievant for three days. *Id.* at 5. The Arbitrator found that the Agency proved the discourtesy charge. *Id.* at 4. Moreover, concluding that the Union presented no authority "indicat[ing] that an employee cannot be charged with an offense that is not recognized in the [t]able of [p]enalties," and finding that the notice "clearly stat[ed] the alleged conduct" upon which the Agency based the charge, the Arbitrator found that the Agency afforded the grievant appropriate due process. *Id.* at 5. But, after considering the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981) (*Douglas*), the Arbitrator mitigated the grievant's discipline to a written reprimand. *Id.* at 5-7.

III. Positions of the Parties**A. Union's Exceptions**

In its exceptions, the Union claims that the Arbitrator exceeded her authority by resolving an issue that was not submitted to arbitration. Exceptions at 2. Specifically, the Union argues that the Arbitrator erroneously considered the charge of discourtesy because the Agency did not charge the grievant with that offense. *Id.* at 1-2. On this same basis, the Union also argues that the award is based on a nonfact. *Id.* at 3. According to

the Union, the Arbitrator ordered the Agency to discipline the grievant for an offense “that simply did not exist in the record.” *Id.* Finally, the Union argues that the award is contrary to law because it “negat[es] the [grievant’s] due process right to know she is charged with discourtesy before she is punished for such a charge.” *Id.* at 4. Consequently, the Union asks that the Authority “reverse[]” the grievant’s written reprimand. *Id.*

B. Agency’s Opposition

The Agency argues that the Arbitrator properly exercised her authority in basing the award on a charge of discourtesy, because the Arbitrator addressed the stipulated issue, which the Agency argues includes “issues closely related to the issue giving rise to the grievance.” Opp’n at 2-3. Further, the Agency contends that the Union’s nonfact argument must fail because the charge was an issue disputed by the parties during arbitration, and because the argument challenges the Arbitrator’s legal conclusions. *Id.* at 3-4. Finally, the Agency asserts that the Union has not demonstrated that the grievant was denied due process. *Id.* at 4-6.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed her authority.

The Union claims that the Arbitrator exceeded her authority by resolving an issue that was not submitted to arbitration. Exceptions at 2. Specifically, the Union claims that the Arbitrator erred in considering the charge of discourtesy because the Agency did not charge the grievant with that offense. *Id.*

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. See *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). Arbitrators do not exceed their authority when the award is directly responsive to the stipulated issue. *AFGE, Local 1235*, 66 FLRA 624, 625 (2012).

Here, the Arbitrator resolved the issue submitted by the parties—whether the grievant’s three-day suspension was for just cause and taken to promote the efficiency of the service. Award at 2. In resolving the issue, the Arbitrator evaluated the grievant’s undisputed conduct and found that the Agency proved the grievant’s conduct amounted to an offense for which the Agency could impose discipline—namely, discourtesy. *Id.* at 5. After a thorough review of the *Douglas* factors, the Arbitrator went on to find that a three-day suspension for that conduct was not for just cause, and reduced the

penalty to a written reprimand. *Id.* at 5-7. The award’s consideration of just cause, and the award’s remedy, are directly responsive to the stipulated issue.

Moreover, the Arbitrator expressly found that although the Agency charged the grievant with disorderly conduct in the notice, the Agency “looked to a different charge, [d]iscourtesy, in the [t]able of [p]enalties” in deciding to suspend the grievant for three days. Award at 3, 5. Thus, both charges were related to the issue giving rise to the grievance and the Arbitrator properly considered both charges in addressing the issue as stipulated by the parties. See, e.g., *NFFE, Local 858*, 63 FLRA 227, 229-30 (2009); *SSA, Balt., Md.*, 57 FLRA 181, 183 (2001) (arbitrators do not exceed their authority by resolving issues closely related to the issue giving rise to the grievance); *NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996) (arbitrators do not exceed their authority by addressing an issue that is necessary to decide a stipulated issue). Consequently, we deny the Union’s exceeds-authority exception.

B. The award is not based on a nonfact.

Next, the Union argues that the award is based on a nonfact because the Arbitrator grounded her award on an offense—discourtesy—“that simply did not exist in the record.” Exceptions at 3.

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. *NFFE, Local 1984*, 56 FLRA 38, 41 (2000). 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. *AFGE, Local 2382*, 66 FLRA 664, 668 (2012).

The record reflects that the Union disputed at arbitration whether disorderly conduct or discourtesy was the correct charge for the Arbitrator to consider. The Union argued in this connection that the grievant’s suspension should be set aside “because the charge specified in the [n]otice . . . was [d]isorderly [c]onduct, which is not the same charge that was assessed by the [reviewing] [o]fficial.” Award at 4. Assuming without deciding that this is a factual matter, the Arbitrator’s resolution of this issue—concluding that discourtesy was the proper basis for the grievant’s discipline—determined a factual matter disputed at arbitration that cannot now be challenged as a nonfact. See *AFGE, Local 2382*, 66 FLRA at 668. Accordingly, we deny the Union’s nonfact exception.

C. The award is not contrary to law.

Finally, the Union argues that the award is contrary to law because it violates the grievant's due process rights. Exceptions at 3-4. Specifically, the Union asserts that the award "negat[es] the [grievant's] due process right to know she is charged with discourtesy before she is punished for such a charge." *Id.* at 4.

When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions and the award de novo. *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. *U.S. Dep't of Def., Dep'ts of the Army & 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. *Id.*

As for the Union's claim that the grievant's due process right was violated because she did not know what she was charged with, we find that the claim lacks merit. The Arbitrator found that the notice specified the conduct with which the grievant was charged. Award at 5. The Arbitrator found that the notice's "specifications clearly state the alleged conduct underlying the disciplinary event, whether it be termed disrespectful, discourteous, or disorderly." *Id.* Consequently, finding that the grievant was fully aware of the conduct with which she was charged, the Arbitrator rejected the Union's due process claim. The Union does not challenge the Arbitrator's findings as nonfacts. Accordingly, we find that the Union's due-process exception is unsupported.

Moreover, the Merit Systems Protection Board (MSPB) cases cited by the Union did not bind the Arbitrator, and cannot provide a basis for finding her award deficient, because the issue before her involved a suspension of fourteen days or less. *See, e.g., U.S. DOJ, Exec. Office for Immigration Review*, 66 FLRA 221, 224 (2011) (an arbitrator's failure to apply the same substantive standards as the MSPB in cases involving suspensions of fourteen days or less will not establish that an award is deficient).

Accordingly, we find that the Union has not demonstrated that the award is contrary to law and deny the exception.

V. Decision

We deny the Union's exceptions.