68 FLRA No. 18

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 918
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
NATIONAL PROTECTION
AND PROGRAMS DIRECTORATE
FEDERAL PROTECTIVE SERVICE
(Agency)

0-AR-4910

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DECISION

December 3, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Agency suspended the grievant for three days for failure to submit a report to his supervisor by the date it was due. Arbitrator Leroy D. Clark denied the grievance and declined to cancel the grievant's three-day suspension. There are three questions before us.

The first question is whether the award is contrary to law because the Arbitrator did not apply the required legal standards for sustaining a disciplinary action. Because the case law upon which the Union relies does not establish such standards, the answer is no.

The second question is whether the Arbitrator exceeded his authority by failing to address "efficiency-of-the-service" and "just-cause" issues. Because the award is directly responsive to the issue in dispute, as the Arbitrator characterized it, the answer is no.

The third question is whether the award fails to draw its essence from the parties' agreement. The Union's principal argument is that the Arbitrator improperly failed to discuss whether the discipline was for just cause. Because the award represents a plausible interpretation of, and is consistent with, the just-cause provision of the parties' agreement, and because the Union's other essence claims lack merit, the answer is no.

II. Background and Arbitrator's Award

The grievant is an inspector with the Federal Protective Service. Among the grievant's duties is the preparation of facility security assessment (FSA) reports. When the grievant failed to submit an assigned FSA report to his supervisor by the date it was due, the Agency suspended him for three days. The Union filed a grievance. The grievance was not resolved, and the parties submitted it to arbitration.

The parties did not stipulate an issue for the Arbitrator to resolve, and the Arbitrator did not expressly frame one. Instead, the Arbitrator characterized the dispute as a "challenge [to the three-day] suspension imposed on the grievant, for failure to complete work assigned to him, by [his] supervisor . . . by the required date."[1]

Before the Arbitrator, the Union claimed that the grievant's supervisor had agreed "not to impose any penalty" if the grievant submitted the report by a certain date.[2] The Union also claimed that the supervisor's denial of any such agreement was biased and inaccurate. But the Arbitrator credited the supervisor's "express[] deni[al]" of the Union's claim, finding it "honest and straight forward [sic]."[3]

Next, the Arbitrator considered the Union's contention that the grievant was not disciplined in the same manner as other employees who also submitted late FSA reports. The Arbitrator rejected the Union's contention, crediting the Agency's assertions that the grievant had a history of filing late FSA reports and that no other employee had submitted a late report that year. In addition, the Arbitrator took into account the length of the grievant's suspension, noting that the grievant had only been suspended for three days, even though the maximum available penalty was a fourteen-day suspension. Accordingly, the Arbitrator declined to cancel the grievant's three-day suspension.

III. Analysis and Conclusions

A. The award is not contrary to law.

The Union claims that the award is contrary to law because the Arbitrator did not apply the required legal standards for sustaining a disciplinary action.[4] Relying on *Douglas v. Veterans Administration* (*Douglas*)[5] and *U.S. Department of the Air Force, Davis-Monthan Air Force Base, Tucson, Arizona*

[1] Award at 2.
[2] *Id.* at 3.
[3] *Id.*
[4] Exceptions at 7-10.
[5] 5 M.S.P.R. 280 (1981).

(*Davis-Monthan*),[6] the Union argues that for an arbitrator to sustain a disciplinary action, the agency must prove, by a preponderance of the evidence, that: (1) there is a nexus between the charged misconduct and the efficiency of the service; and (2) the disciplinary action is reasonable.[7] Moreover, the Union argues, the grievant was treated unreasonably because other employees who engaged in the same conduct were not disciplined.[8] But, the Union asserts, the Arbitrator erred by failing to make factual findings or provide any legal analysis applying these standards when the Arbitrator upheld the grievant's suspension.[9]

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.[10] 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.[11] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[12]

The Union's reliance on *Douglas* is misplaced. Arbitrators are not required to consider the *Douglas* factors in cases involving suspensions of fourteen days or less.[13] As this case involves a three-day suspension, the Arbitrator was not required to apply the *Douglas* factors, and the Union's exception provides no basis for finding the award contrary to law on this ground.[14]

Additionally, *Davis-Monthan*, on which the Union also relies, is inapposite. As pertinent here, *Davis-Monthan* involved an essence, not a contrary-to-law exception. In *Davis-Monthan*, the arbitrator reduced the grievant's suspension, finding that the agency did not treat the grievant in a "fair and equitable manner," as required by the parties' agreement, when it disciplined the grievant differently than another employee for similar misconduct.[15] Before the Authority, the agency argued that the award failed to draw its essence from the parties' agreement – not that the award was contrary to law.[16] The Authority upheld the award, finding that the arbitrator's mitigation of the discipline imposed by the agency represented a plausible interpretation of the parties' agreement.[17] Because *Davis-Monthan* does not deal with contrary-to-law matters, the Union's contrary-to-law exception based on *Davis-Monthan* does not demonstrate that the award is deficient on that ground.

Accordingly, we find that the Union does not demonstrate that the award is contrary to law, and we deny this exception.

B. The Arbitrator did not exceed his authority.

The Union contends that the Arbitrator exceeded his authority because he failed to resolve two issues. One issue is whether there was a nexus "between the alleged misconduct and the efficiency of [the] service."[18] The other issue is whether the three-day suspension was for just cause.[19]

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.[20] In the absence of a stipulation concerning the issue to be resolved at arbitration, arbitrators are accorded great deference in their formulation, or their characterization, of the issue.[21]

Here, the parties did not stipulate, and the Arbitrator did not frame, the issue to be resolved. But the Arbitrator characterized the purpose of the arbitration as a challenge to the grievant's three-day suspension.[22] Based on the evidence before him, the Arbitrator decided not to cancel the grievant's three-day suspension.[23] In doing so, the Arbitrator rejected the Union's arguments challenging the suspension, and credited the Agency's evidence. Because the award is directly responsive to the issue in dispute, as the Arbitrator characterized it, the Union's exception does not provide any basis for finding that the Arbitrator exceeded his authority.[24] Accordingly, we deny this exception.

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[6] 63 FLRA 241, 243-44 (2009).
[7] Exceptions at 8.
[8] *Id.*
[9] *Id*.
[10] *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)).
[11] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[12] *Id*.
[13] *AFGE, Local 522*, 66 FLRA 560, 563 (2012).
[14] *Id*.
[15] *Davis-Monthan*, 63 FLRA at 241-42 (internal quotation marks omitted).
[16] *Id*. at 242.
[17] *Id*. at 244.
[18] Exceptions at 10.
[19] *Id*. at 11.
[20] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[21] *U.S. Dep't of VA, VA Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 72 (2009) (*VA, Louisville*) (arbitrator established issue for resolution by characterizing nature of dispute).
[22] Award at 2-3.
[23] *Id.* at 3-4.
[24] *VA, Louisville*, 64 FLRA at 72-73; *see also, e.g., AFGE, Local 1741*, 61 FLRA 118, 120 (2005) (finding award directly responsive to the issue as framed by the arbitrator).

C. The award draws its essence from the parties' agreement.

The Union claims that the Arbitrator's failure to "analyze 'just cause' in any way," establishes that the award fails to draw its essence from the parties' agreement, "which requires . . . 'just cause' for even a [three]-day suspension."[25] In further support, the Union argues that the Arbitrator erred by failing to find various facts that allegedly demonstrate that there was no just cause for the grievant's suspension. The Union also faults the Arbitrator for failing to mention the *Douglas* factors.[26]

When 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. [27] 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."[28] 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.[29] Applying these standards to the instant case, the Union does not establish that the award fails to draw its essence from the parties' agreement.

Regarding the Union's claim that the Arbitrator failed to "analyze 'just cause' in any way,"[30] the record is unclear as to whether the Union specifically argued before the Arbitrator that the grievant's suspension lacked "just cause" under the parties' agreement. But assuming, without deciding, that the Union raised a contractual just-cause issue before the Arbitrator, the Union's essence exception still fails to demonstrate that the award is deficient.

Read in context, the award is reasonably interpreted as including findings responsive to and consistent with the just-cause contract provision of Article 39 of the parties' agreement, which the Union cites, and which is quoted in relevant part below. The Arbitrator noted specifically the Union's argument "that the imposition of a [three-]day penalty was *inappropriate*."[31] The Arbitrator's consideration of the Union's "appropriateness" issue is consistent with the just-cause contract provision's requirement that "suspensions . . . will be taken only for *appropriate cause*."[32] Therefore, contrary to the Union's claim, the award's failure to mention the term "just cause" does not demonstrate that the award fails to draw its essence from the parties' agreement.

Also unavailing is the Union's additional essence claim that the Arbitrator erred by failing to find various facts that allegedly demonstrate that there was no just cause for the grievant's suspension. The Union argues, in particular, that the Arbitrator erroneously failed to find that "other employees who engage[d] in the same infractions [as the grievant were] not disciplined in the same manner."[33]

To the extent that the Union is disagreeing with the Arbitrator's factual findings, such disagreement does not demonstrate that an award fails to draw its essence from the agreement.[34] Therefore, this essence claim also does not demonstrate that the award is deficient.

Finally, the Union's reliance on the Arbitrator's failure to mention the *Douglas* factors to support the Union's essence exception is misplaced. Application of a just-cause contract provision does not require an arbitrator to apply the *Douglas* factors.[35] Therefore, this essence claim also does not demonstrate that the award is deficient.

Accordingly, because the Union fails to establish that the Arbitrator's award reflects an interpretation of the agreement that is irrational, unfounded, implausible, or in manifest disregard of the agreement, we deny the Union's essence exception.

IV. Decision

We deny the Union's exceptions.

[25] Exceptions at 13; *see also id*. at 11.
[26] *Id.* at 13; *see also id*. at 11.
[27] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[28] *U.S. DOL* (*OSHA*), 34 FLRA 573, 576 (1990).
[29] *Id*. at 575.
[30] Exceptions at 13.
[31] Award at 2 (emphasis added).
[32] Exceptions, Ex. 4 at 2.
[33] *Id.* at 11.
[34] *SSA*, 66 FLRA 6, 9 (2011) (citing *AFGE, Local 12*, 61 FLRA 507, 509 (2006)).
[35] *See AFGE, Council of Prison Locals, Local 1612*, 40 FLRA 498, 503 (1991) (rejecting union's essence exception and finding that arbitrator not required to consider *Douglas* factors when determining whether agency had just cause under parties' agreement to suspend grievant for fourteen days).