

63 FLRA No. 158

UNITED STATES DEPARTMENT
OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL JOINT COUNCIL
OF FOOD INSPECTION LOCALS
(Union)

0-AR-4155

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DECISION

July 16, 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 exceptions to an award of Arbitrator Claude Dawson Ames filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator found that the Agency lacked just cause to suspend the grievant for being absent without leave (AWOL) because the grievant met the medical certification requirements of the Family and Medical Leave Act (FMLA). For the reasons discussed below, we find that the Arbitrator's award is deficient and set it aside.

II. Background and Arbitrator's Award

From late June to early October 2004, the grievant was absent from work for large periods of time due to an illness.¹ During this time, the grievant and/or his domestic partner intermittently telephoned the agency to report his absence and, over the course of his absence, the grievant submitted medical certificates excusing him from work from July 5 through August 2 and from August 10 to October 11. Award at 11. The medical

forms contained the treating physician's name, contact information and signature; the dates of the grievant's medical visits; the dates that the grievant was unable to work; the date the grievant could return to work; and a statement that the grievant was unable to work due to a "medical illness." *Id.* at 10. The grievant also submitted two requests for leave without pay (LWOP) for July 11 to October 11. *Id.* at 11.

Following the grievant's return to work in October, his supervisor notified him verbally and in writing that his requests for LWOP would not be approved unless he provided medical documentation that included a diagnosis of his illness. The grievant did not provide additional medical information. *Id.* at 11-12. Subsequently, the Agency suspended the grievant for one pay period for being AWOL and failing to provide acceptable medical documentation for his absences. The Agency charged that neither the grievant nor his domestic partner had called to report absences on June 30 and July 1 and that there was no proof that the grievant requested leave for the periods of August 17 through 23 and August 30 through September 3. Also, according to the Agency, the documentation provided by the grievant was insufficient and that the grievant refused to supplement it with acceptable documentation. *Id.* at 12-13.

A grievance was filed alleging that the Agency violated the parties' agreement when it disciplined him and denied LWOP request under the FMLA. The grievance was not resolved and was submitted to arbitration, where the parties stipulated to the following issues: (1) whether the Union's grievance should be dismissed for untimeliness; and, if not, (2) whether the Agency had just cause to issue a notice of suspension to the grievant. Award at 3.

Initially, the Arbitrator found that the grievance was "timely" and arbitrable. *Id.* at 15. As to the merits, the Arbitrator found that the Agency lacked just cause to suspend the grievant and that it abused its discretion in denying his leave requests. The Arbitrator acknowledged the parties' stipulation that the grievant's medical certificates were not sufficient for "advanced sick leave" under Article 14 § 5 of the parties' agreement.² However, the Arbitrator found that the Agency had not established that the grievant requested this type of leave. *Id.* at 18.

According to the Arbitrator, the medical evidence presented by the grievant was sufficient for the Agency to grant LWOP under the FMLA. *Id.* at 18-19. He found that the grievant had established a serious, ongoing medical condition that often prevented him from calling personally to report his absence. *Id.* at 18. The

1. Unless otherwise noted, all subsequent dates refer to 2004.

Arbitrator stated that the FMLA permitted the grievant's domestic partner to notify the Agency of the grievant's health condition when he was unable to do so himself. Given the unforeseeability of the grievant's need for leave, the Arbitrator found that the grievant and his domestic partner were also permitted to notify the Agency "within a reasonable period of time" of his intent to use FMLA leave. *Id.* at 19.

The Arbitrator further found that the medical evidence, including a July 25, 2005 letter from the grievant's physician, attested to the grievant's ongoing medical treatment for his "serious health condition."³ *Id.* at 20. He stated that, when viewed "in its totality and under the circumstances described[,]," this evidence "substantially complie[d]" with the FMLA requirements. *Id.* at 20. The Arbitrator found that the grievant acted in good faith when attempting to comply with the Agency's request for a diagnosis and that the Agency failed to seek clarification from the grievant's physician about any inadequacy of the medical evidence. The Arbitrator awarded the grievant the wages and benefits he lost during his suspension, and directed the Agency to remove the suspension and AWOL status from his file, and the change of his AWOL status to LWOP.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the Arbitrator's finding that the grievance is arbitrable fails to draw its essence from the parties' agreement. In this regard, it maintains that the Arbitrator's interpretation of the parties' agreement is implausible. Exceptions at 4.

The Agency contends that the award is contrary to the FMLA regulations on three separate grounds. First, the Agency argues that the Arbitrator erroneously found that the grievant's medical documentation was sufficient for purposes of FMLA. *Id.* at 6-7. In this regard, the Agency asserts that the documentation provided by the grievant did not meet the requirements, detailed in 5

C.F.R. § 630.1207, for certification of a serious health condition.⁴ *Id.* According to the Agency, the grievant's medical certificates stated only that he had a "medical illness," and did not provide information about when his serious medical condition began, what it was, which of his essential job duties he could not perform, and other appropriate medical facts. *Id.* at 7.

Second, the Agency asserts that the Arbitrator found, contrary to 5 C.F.R. § 630.1203(b), that the grievant's domestic partner could provide retroactive notification of the grievant's health status. *Id.* The Agency notes that this regulation provides that FMLA leave may be invoked retroactively only if both the employee and his or her personal representative are incapacitated or incapable of invoking the leave during the entire period of the absence. *Id.* According to the Agency, there is no evidence that the grievant was incapacitated during the entire period of his absence from work. *Id.* at 7-8.

Third, the Agency claims that the Arbitrator found, contrary to 5 C.F.R. § 630.1206, that the grievant was entitled to invoke FMLA "within a reasonable time" because his health condition was not foreseeable. *Id.* at 8. The Agency argues that the grievant was required to provide notice thirty days prior to taking leave because he had previously been diagnosed and was undergoing planned medical treatment. *Id.*

The Agency also argues that the award is contrary to public policy because the Arbitrator ignored the privacy requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).⁵ *Id.* at 5. The Agency argues that, under HIPAA, it could not have contacted the grievant's private physician to obtain more information about his medical condition without first obtaining the grievant's written consent. *Id.* In this connection, the Agency also argues that the award is based on a nonfact because the Arbitrator's finding that the Agency could have obtained additional medical information from the grievant's physician without permission is clearly erroneous under HIPAA's privacy regulations.

B. Union's Opposition

The Union argues that the Arbitrator's award draws its essence from the parties' agreement and is not

2. Article 14 § 5 states, in part:

Normally employees will not be required to furnish a medical certificate . . . to substantiate a request for sick leave if their absence is for three (3) consecutive days or less. When a medical certificate is necessary it shall include a written statement signed by a registered practicing physician or other practitioner certifying to the incapacitation, examination, or treatment, and the period of disability or incapacitation, and legibly show the doctor's name and address.

Award at 4.

3. This letter, written after the Agency issued its final decision, is not in the record.

4. The text of the FMLA's relevant implementing regulations is set forth in the attached Appendix.

5. The Agency did not cite to any specific provisions of the HIPAA privacy regulations, found at 45 C.F.R. § 164.500, *et seq.*

contrary to law. Further, the Union asserts that the Agency's public policy argument misinterprets HIPAA's limitations and misconstrues the Arbitrator's findings. Opposition at 3-4. In this regard, the Union claims that the HIPAA regulations allow disclosure of medical information for purposes of judicial and administrative proceedings. *Id.* at 4. The Union also contends that the Arbitrator did not state that the Agency should have asked the grievant's physician for a diagnosis or medical records, only that it made no attempt to seek clarification of the medical documents presented on behalf of the grievant. *Id.* Finally, with respect to the Agency's nonfact exception, the Union contends that the Arbitrator did not base his award solely on the finding that the Agency did not seek clarification of the medical evidence. *Id.* at 4-5.

IV. Analysis and Conclusions

A. The procedural arbitrability determination is not deficient.

The Authority generally will not find that an arbitrator's ruling on the procedural arbitrability of a grievance is deficient on grounds that directly challenge the procedural arbitrability ruling itself. *United States Dep't of Def. Educ. Activity*, 60 FLRA 254, 255-56 (2004) (*DDEA*); *AFGE, Local 3882*, 59 FLRA 469, 470 (2003). Grounds for challenging procedural arbitrability rulings include a showing that there was bias on the part of the arbitrator, that the arbitrator exceeded his or her authority, or that the ruling was contrary to law. *DDEA*, 60 FLRA at 255-56.

The Agency argues that the Arbitrator's ruling, finding that the grievance was procedurally arbitrable, fails to draw its essence from the parties' agreement. This exception directly challenges the Arbitrator's ruling that the Union's grievance was procedurally arbitrable. *See DDEA*, 60 FLRA at 256. Further, the Agency does not except to the Arbitrator's ruling on any grounds that do not directly challenge the ruling itself. *See id.* Accordingly, as this exception provides no basis for finding that the procedural arbitrability determination is deficient, we deny the Agency's exception.

B. The award is not contrary to the Family and Medical Leave Act.

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 *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 arbitra-

tor's legal conclusions are consistent with the applicable standard of law. *See United States Dep't of Def., Dep't 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.*

Title II of the FMLA, which covers most federal civil service employees, entitles an employee to twelve workweeks of leave where, among other circumstances, the employee suffers a "serious health condition that makes the employee unable to perform the functions of the employee's position." 5 U.S.C. § 6382(a)(1)(D); *see also Bremerton Metal Trades Council*, 62 FLRA 391, 393 (2008) (*Bremerton*). Under the FMLA, agencies may require that a request for leave for a serious medical condition be supported by a written medical certification from the employee's health care provider. 5 U.S.C. § 6383(a). As relevant here, the required certification will be sufficient if it states:

- (1) the date on which the serious health condition commenced;
- (2) the probable duration of the condition;
- (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; [and]
- (4) . . . (B) . . . a statement that the employee is unable to perform the functions of the position of the employee[.]

5 U.S.C. § 6383(b); *see also* 5 C.F.R. § 630.1207(b)(1)-(3), (5). The implementing regulations for Title II of the FMLA state that, if an employee does not produce proper certification in a timely manner, then the agency may treat the employee as AWOL. 5 C.F.R. § 630.1207(i)(1); *see AFGE, Local 2006*, 54 FLRA 110, 115-17 (1998) (employee who failed to report unscheduled absences in a timely manner and to submit corroborating documentation not covered by FMLA); *see also AFGE, Local 2328*, 62 FLRA 63, 65 (2007) (finding of AWOL appropriate where employee failed to enter request for all types of leave, including FMLA leave, into the computer system and to submit appropriate documentation); *Dias v. Dep't of Veterans Affairs*, 102 M.S.P.R. 53, 55-56, 58 (2006) (sustaining finding of AWOL where employee failed to provide requested medical documentation in a timely manner).

In the absence of Authority precedent addressing the requirement governing the content of FMLA medical certification, the Authority looks to the Merit Systems Protection Board (MSPB) for guidance. *See*

Bremerton, 62 FLRA at 393 (Authority citing MSPB precedent as guidance on FMLA issue). When interpreting FMLA certification requirements, the MSPB has held that a report describing the history and progress of an employee's condition, including when and how he became incapacitated, how he was treated, and the duration of the incapacity, was sufficient to meet the FMLA requirements. *Ellshoff v. Dep't of the Interior*, 76 M.S.P.R. 54, 77 (1997). By contrast, the MSPB has found that a physician's note, which stated only that the employee's "condition rendered him unable to work" for one month did not comply with the medical certification requirements of the FMLA because it did not provide "the date that the . . . serious health condition commenced, its probable duration, and appropriate facts regarding [the] condition, incapacitation, examination, or treatment." *Burge v. Dep't of the Air Force*, 82 M.S.P.R. 75, 85-86 (1999) (internal citations omitted).

In the instant case, the Arbitrator found that the medical certification forms submitted by the grievant contained the physician's name, contact information and signature; the dates of the grievant's medical visits; the dates that the grievant was unable to work; the date he could return to work; and a statement that he was unable to work due to a "medical illness." Award at 10. The Arbitrator stated that this information "substantially complie[d]" with the requirements for FMLA. *Id.* at 20. He found that, in conjunction with the grievant's applications for leave, these certifications established that the grievant had a serious health condition that prevented him from performing his normal job duties, that he was treated for this condition, and that he was incapacitated for the period specified. *Id.* at 18-19.

After considering the entire record, we find that the grievant's medical certifications are inadequate under the FMLA because they give no "appropriate medical facts . . . regarding the serious health condition" and no "statement that the employee is unable to perform the functions of the position." 5 U.S.C. § 6383(b)(3) and (4)(B); 5 C.F.R. § 630.1207(b)(3) and (5). In this regard, the FMLA regulations provide that "appropriate medical facts" include "a general statement as to the incapacitation, examination, or treatment that may be required." 5 C.F.R. § 630.1207(b)(3). The regulations also require that the statement regarding an employee's ability to perform essential job functions be based on written information from the agency or a discussion with the employee about these job functions. 5 C.F.R. § 630.1207(b)(5).

The grievant's medical certifications were insufficient because they stated only that the grievant was

unable to work due to a "medical illness." Although, under the FMLA, the grievant was not required to provide a diagnosis, he was required to provide medical documentation with sufficient medical facts to explain the nature of his incapacity and the reasons he was disabled from performing his essential job functions. Because the grievant's medical documentation did not supply this information, the Arbitrator erred in finding that the grievant's medical certifications substantially complied with the minimum requirements of the FMLA statute. *See Burge*, 82 M.S.P.R. at 85 (a physician's note stating that the employee's "condition" rendered him "unable to work" for one month was not sufficient under the FMLA).

In coming to his decision, the Arbitrator relied, in part, on the July 25, 2005 letter from the grievant's physician, the contents of which are not in the record. Even without considering the contents of that letter, it would not provide a valid basis for FMLA leave because it was not timely submitted. The FMLA regulations require that an employee provide adequate medical information within 15 days of an agency request or, if that is not practicable, within 30 days. 5 C.F.R. § 630.1207(h). The regulations further state that, if an employee does not provide the requested documentation after the leave has commenced, then the agency may charge the employee with AWOL. 5 C.F.R. § 630.1207(i)(1). Here, the physician's letter was not provided until nearly nine months after the Agency notified the grievant that his medical certification was not adequate. Award at 11. Therefore, the physician's letter, was untimely under the regulations and was not a valid basis for finding that the grievant had established his entitlement to leave under the FMLA. *See Dias*, 102 M.S.P.R. at 57-58 (reversing administrative law judge's finding that agency had abused its discretion in denying FMLA where employee did not meet time limits under FMLA regulations).

Based on the foregoing, we find that the Arbitrator's award is deficient because it is contrary to the medical certification requirements of Title II of the FMLA.⁶

V. Decision

The award is contrary to 5 U.S.C. § 6383 and 5 C.F.R. § 630.1207 and is set aside.⁷

6. Although the issue before the Arbitrator was whether there was "just cause" under the parties' agreement for the grievant's suspension, resolving that necessitated the Arbitrator's interpretation and application of the FMLA and its regulations. Thus, by misapplying the FMLA regulations, the Arbitrator arrived at an award that is deficient under the Statute.

APPENDIX

5 C.F.R. § 630.1203 Leave entitlement.

(a) An employee shall be entitled to a total of 12 administrative workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

....

(4) A serious health condition . . . that makes the employee unable to perform any one or more of the essential functions of his or her position.

(b) An employee may not retroactively invoke his or her entitlement to family and medical leave. However, if an employee and his or her personal representative are physically or mentally incapable of invoking the employee's entitlement to FMLA leave *during the entire period* in which the employee is absent from work . . . the employee may retroactively invoke his or her entitlement to FMLA leave within 2 workdays after returning to work. In such cases, the incapacity of the employee must be documented by a written medical certification from a health care provider. In addition, the employee must provide documentation . . . explaining the inability of his or her personal representative to contact the agency . . . during the entire period in which the employee was absent from work for an FMLA-qualifying purpose. . . .

5 C.F.R. § 630.1206 Notice of leave.

(a) If leave . . . is foreseeable based on . . . planned medical treatment, the employee shall provide notice to the agency of his or her intention to take leave not less than 30 calendar days before the date the leave is to begin....

....

(c) If the need for leave is not foreseeable . . . the employee shall provide notice within a reasonable period of time If necessary, notice may be given by an employee's personal representative If the need for leave is not foreseeable and the employee is unable . . . to provide notice of his or her need for leave, the leave may not be delayed or denied.

....

7. In light of this decision, we do not address the Agency's remaining exceptions.

(f) An agency may require that a request for leave under § 630.1203(a)(1) and (2) be supported by evidence that is administratively acceptable to the agency.

5 C.F.R. § 630.1207 Medical certification.

(a) An agency may require that a request for leave ...be supported by written medical certification issued by the health care provider of the employee

....

(b) The written medical certification shall include:

(1) The date the serious health condition commenced;

(2) The probable duration of the serious health condition or specify that the serious health condition is a chronic or continuing condition with an unknown duration and whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity;

(3) The appropriate medical facts within the knowledge of the health care provider regarding the serious health condition, including a general statement as to the incapacitation, examination, or treatment that may be required by a health care provider;

....

(5) ... [A] statement that the employee is unable to perform one or more of the essential functions of his or her position or requires medical treatment for a serious health condition, based on written information provided by the agency on the essential functions of the employee's position or . . . discussion with the employee about the essential functions of his or her position

(c) The information on the medical certification shall relate only to the serious health condition for which the current need for family and medical leave exists. The agency may not require any personal or confidential information in the written medical certification other than that required by paragraph (b) of this section. If an employee submits a completed medical certification form signed by the health care provider, the agency may not request new information from the health care provider. However, a health care provider representing the agency . . . may contact the health care provider . . . for purposes of clarifying the medical certification.

.....

(h) An employee must provide the written medical certification required by paragraph[] (a) ... no later than 15 calendar days after the date the agency requests such medical certification. If it is not practicable . . . to provide the requested medical certification no later than 15 calendar days after the date requested by the agency despite the employee's diligent, good faith efforts, the employee must provide the medical certification within a reasonable period of time ...but no later than 30 calendar days after the date the agency requests such medical certification.

(i) If, after the leave has commenced, the employee fails to provide the requested medical certification, the agency may:

(1) Charge the employee as absent without leave (AWOL); or

(2) Allow the employee to request that the provisional leave be charged as leave without pay or charged to the employee's annual and/or sick leave account, as appropriate.