64 FLRA No. 60

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
LOS ANGELES FIELD OFFICE
LOS ANGELES, CALIFORNIA
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1450
(Union)

0-AR-4274

DECISION

January 4, 2010

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 Sylvia Marks-Barnett 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.

As relevant here, the Arbitrator found that a letter of reprimand issued to the grievant violated Article 16, Section 16.01 (the just-cause provision) of the parties' agreement and § 7116(a)(1) and (2) of the Statute. [1] For the reasons that follow, we deny the Agency's exceptions.

1. Article 16, Section 16.01 provides, in pertinent part: "Employees shall be subject to disciplinary action only for just and sufficient cause." Award at 3. Section 7116(a) of the Statute provides, in pertinent part, that it is an unfair labor practice (ULP) for an agency: "(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute];" and "(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]" As there is no exception to the Arbitrator's finding that the Agency did not violate the Whistleblower Protection Act, we do not address it further.

II. Background and Arbitrator's Award

The grievant's supervisor (the supervisor) reprimanded the grievant for "inappropriate conduct[,]" specifically: (1) sending an e-mail to the field office director's (the director's) cousins and to the director's husband's ex-wife "without any subject or message, but with a smiley face;" and (2) taking a picture, "through a glass panel[,]" of another employee who was sitting in the director's office. Award at 10. The grievant, who is the Union president, filed an institutional "Grievance of the Parties regarding Official Reprimand of Union President[.]" Opp'n, Attachment 4.

When the grievance was unresolved, it was submitted to arbitration. At arbitration, the parties agreed that one issue was "whether [m]anagement was justified in issuing discipline to [the] [g]rievant . . . and, if not, what is the appropriate remedy." Award at 2. The second issue, which was "raised by the Union" and "left to the framing of the Arbitrator," was "whether [m]anagement's conduct in issuing discipline to [the] grievant . . . constituted [a ULP] and, if so, what is the appropriate remedy." *Id.*

The Arbitrator found that, with certain exceptions not relevant here, the just-cause provision of the parties' agreement requires that an employee have notice "of what kind of conduct will lead to discipline[,]" and that "[t]here cannot be a violation of a rule unless the employee knows what the rule is." *Id.* at 10. The Arbitrator determined that there is no rule prohibiting the grievant's actions, and that the grievant was never informed of any such rule. *See id.* at 11. In fact, the Arbitrator found that the evidence showed that: the director also used smiley faces in her e-mails and had instructed the grievant to do the same; photographs were taken in the office frequently; and the director had a "minimal" expectation of privacy because she had an "uncovered, glass panel" through which the grievant took the photo. *Id.*

The Arbitrator noted the supervisor's testimony that, in determining the appropriate level of discipline, the supervisor had consulted the Agency handbook regarding adverse actions (the handbook) and had determined that the grievant's actions most closely fit within "rude, boisterous or disruptive conduct," which, according to the handbook's table of penalties (the table), permits discipline ranging from a reprimand to a five-day suspension. *Id.* at 10. The Arbitrator also noted the supervisor's testimony that he had relied on "context[,]" including alleged evidence of animosity between the grievant and other managers, "to fill in the blanks of 'inappropriate conduct.'" *Id.* at 11-12. The Arbitrator

then stated: "It may very well be that when one considers the context, the offensive conduct of the [g]rievant can be characterized as inappropriate[,] [b]ut, without notice for the [g]rievant, she was unable to discern what conduct, in what context, it was that she was to avoid." *Id.* at 12. Further, the Arbitrator found that a particular individual had told the supervisor that the grievant had engaged in "inappropriate conduct, that [this individual] was the one who came up with that term," and that the supervisor "relied on [this individual] to come up with the terms." *Id.* at 11. The Arbitrator concluded that the grievant's reprimand was "'designer discipline', something created just for [the g]rievant." *Id.*

In addition, the Arbitrator determined that the just-cause provision requires that an employee "be given the chance to tell his side of the story[,]" and that the Agency's investigation into the incidents was "fatally flawed[]" because the supervisor did not interview the grievant "to obtain her version of the 'context'" and identify other potential witnesses to interview. *Id.* at 12. Accordingly, the Arbitrator concluded that the reprimand was not for just cause and, thus, violated the agreement. *See id.*

Further, the Arbitrator determined that when the grievant took the photo, it was protected activity under the Statute because it was part of her Union activities and was not "flagrantly offensive[.]" *Id.* at 15. Specifically, the Arbitrator found that the grievant had been gathering evidence as part of an investigation into whether Union documents and mail were being stolen, whether "Union conversations were being overheard," and whether the director "was engaging several of the bargaining unit employees to give [the director] insider information for the purpose of defeating" the grievant's election as Union president "and later for the purpose of undermining her effectiveness[.]" *Id.* at 14.

Moreover, the Arbitrator determined that the grievant's protected activity "was a, if not 'the', motivating factor in the issuance of the discipline." *Id.* at 15. In so finding, she determined that the director was not a credible witness, that there was "a great deal of evidence of anti-union animus at the workplace[,]" and that the director had engaged in various behaviors that had attempted to "set the groundwork for a disciplinary action against" the grievant. *Id.* at 15-17. In the latter connection, the Arbitrator found that, "even if [the director] did not sign the official reprimand, her fingerprints are all over it[,]" and "[w]hile there was no evidence that [the director] was involved in determining the quantum of discipline that [the g]rievant was to receive," the director "tried to have [the g]rievant disciplined." *Id.* at 18. The Arbitrator further found that the grievant's Union activities "were a motivating factor for the conduct that [the director] engaged in for this purpose." *Id.*

Finally, the Arbitrator found that, given the Agency's failure to establish just cause for the discipline, it also failed to establish a legitimate justification therefor. *See id.* at 18-19. The Arbitrator concluded that disciplining the grievant for taking the photo constituted a ULP, and she directed, as relevant here, that the Agency post a notice to employees at its Region IX Office and all of that region's field offices. *See id.* at 19-20.

III. Positions of the Parties

A. Agency Exceptions

The Agency argues that the award fails to draw its essence from the parties' agreement. *See* Exceptions at 3 (citing *U.S. DOJ, INS, Del Rio Border Patrol Sector, Tex.,* 45 FLRA 926 (1992) (*INS Del Rio*)). In this connection, the Agency asserts that the handbook expressly states that the table "does not cover every possible offense", that "an offense not listed . . . does not mean a penalty cannot be imposed", and that "a reasonable penalty can be determined by comparison with those listed." Exceptions at 4. According to the Agency, the supervisor determined that the grievant's misconduct was similar to "rude, boisterous or disruptive behavior[,]" which is a listed offense. *Id.* at 4. In addition, the Agency asserts that the Arbitrator found the reprimand inappropriate despite his findings that it "may very well be" that the grievant's "offensive conduct . . . can be characterized as inappropriate[.]" *Id.* at 4. Further, the Agency contends that the Arbitrator erred by finding that the supervisor was "contractually obligated to hear the [g]rievant out[,]" as the parties' agreement imposes such a requirement in connection with only proposed suspensions, not proposed reprimands. *Id.* at 5.

The Agency also argues that the Arbitrator's finding of a ULP is based on a nonfact, specifically the finding that the director participated in the decision to issue the reprimand. *See id.* at 6. The Agency asserts that the Arbitrator acknowledged that the director had no actual participation in the supervisor's decision to issue the reprimand, quoting her findings that "there is no evidence that [the director] was involved in determining the quantum of discipline[,]" but that [the director] tried to have [g]rievant disciplined." *Id.* at 7 (quoting Award at 18).

Finally, the Agency contends that the Arbitrator exceeded her authority by ordering the posting of a

notice. *See* Exceptions at 7. Specifically, the Agency contends that the grievance in this case was limited to one specific grievant, but the order to post a notice in all of the Region IX field offices afforded relief to employees other than the grievant, including employees represented by a different union. *See id.* at 8. For support, the Agency cites *U.S. EPA Region 2,* 59 FLRA 520 (2003) (*EPA Region 2*) (then-Member Pope dissenting in pertinent part), and *U.S. EPA*, 57 FLRA 648 (2001) (*EPA*).

B. Union Opposition

The Union argues that the award draws its essence from the parties' agreement because it is based on the just-cause provision, and the Arbitrator's factual findings demonstrate that the Agency lacked just cause. *See* Opp'n at 4-9. The Union also argues that the award is not based on a nonfact, as the issue of whether the director was involved in the reprimand was disputed before the Arbitrator, and the credited record evidence supports the Arbitrator's finding that the director was involved. *See id.* at 9-11.

In addition, the Union contends that the Arbitrator did not exceed her authority by ordering the notice posting. *See id.* at 11. In this regard, the Union asserts that the Authority decisions cited by the Agency are distinguishable because those decisions "are not union animus cases but involve individual grievances regarding denial of promotion based on national origin, gender, and/or age." *Id.* According to the Union, the Arbitrator expressly framed one of the issues as involving a ULP, and in resolving that issue, she stated that "the grievance was filed by the Union, alleging harm to a union officer acting in her union capacity." *Id.* at 13. Further, the Union contends that the ordered posting expressly pertains to interference with "*Union protected activities*" and "is proper to redress a harm done upon [the Union]." *Id.* (emphasis in Opp'n). As such, the Union asserts that pertinent Authority precedent supports the remedy. *See id.* at 11 (citing *GSA,* 53 FLRA 925, 933 (1997) and *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis Monthan Air Force Base, Tucson, Ariz.*, 58 FLRA 636 (2003) (*Air Force*)). Finally, the Union contends that there is no basis for reversing the remedy merely because the ordered posting includes one office where unit employees are located also employs individuals who are represented by a different union. *See* Opp'n at 12.

IV. Analysis and Conclusions

A. Essence

The Agency asserts that the award fails to draw its essence from the parties' agreement. To establish that an award is deficient because it fails to draw its essence from the collective bargaining agreement, the excepting party must show 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 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 U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

To support its essence claim, the Agency cites *INS Del Rio*, 45 FLRA 926, in which the Authority held that an arbitrator exceeded his authority by setting aside discipline while effectively finding that the agency had just cause to impose that discipline. *See id.* at 932. Here, as the Arbitrator found that the Agency lacked just cause to discipline the grievant, *INS Del Rio* is inapposite.

The Agency also argues that the handbook does not cover every possible offense, that the supervisor found that the grievant's conduct was "rude, boisterous or disruptive behavior" within the meaning of the handbook, and that the Arbitrator expressly found that it "may very well be" that the grievant's "offensive conduct . . . can be characterized as inappropriate." Exceptions at 4. However, the Arbitrator found that: the grievant was charged with "inappropriate conduct[,]" Award at 8; there was no rule prohibiting the grievant's actions, *id*. at 10; and, as the grievant was not on notice that she could be disciplined for those actions, the reprimand was not for just cause within the meaning of the parties' agreement, *id.* at 11-12. The Agency's arguments do not undercut these findings or demonstrate that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement.

Finally, with regard to the Agency's contention that the agreement requires the Agency to "hear . . . out" an employee only in certain circumstances that do not apply here, Exceptions at 5, the Arbitrator found that the parties' just-cause provision required the Agency to do so in this case. *See* Award at 12. The Agency provides no basis for finding that this interpretation of the just-cause provision is irrational, unfounded, implausible, or in manifest disregard of the agreement.

For the foregoing reasons, the Agency provides no basis for finding that the award fails to draw its essence from the parties' agreement, and we deny the Agency's essence exceptions.

B. Nonfact

The Agency argues that the Arbitrator's finding that the director participated in the decision to issue the reprimand is a nonfact. To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See U.S. Dep't of the Air Force, Lowry AFB, Denver, Colo.*, 48 FLRA 589, 593 (1993). The Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties had disputed before the arbitrator. *Id.* at 594 (citing *Nat'l Post Office Mailhandlers v. U.S. Postal Serv.*, 751 F.2d 834, 843 (6th Cir. 1985).

The factual matter of whether the director was involved in the decision to reprimand the grievant was disputed before the Arbitrator. *See* Award at 18 ("At the hearing, [the director] stated that she had no involvement in the decision to discipline.") As this matter was disputed before the Arbitrator, the Agency's exception provides no basis for finding that the award is based on a nonfact, and we deny the exception.

C. Exceeded Authority

The Agency argues that the Arbitrator exceeded her authority because the notice-posting remedy grants relief to persons who are not encompassed by the grievance. An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed by the grievance. *See U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996).

The Authority has upheld arbitral awards requiring a notice posting in cases where the Agency engaged in conduct that violated the Statute. *See GSA,* 53 FLRA 925, 933. The Authority also routinely requires a notice posting in ULP cases, including those involving alleged unlawful retaliation. *See, e.g., Air Force,* 58 FLRA 636, 637. As the Arbitrator found that the Agency's discipline of the grievant constituted a ULP in violation of the Statute, this precedent supports the Arbitrator's granting of a notice-posting remedy.

The two Authority decisions cited by the Agency are distinguishable. *EPA*, 57 FLRA 648, involved an "employee grievance" filed "on behalf of the employee" regarding the employee's performance appraisal. *Id.* at 649 & n.2. *EPA Region 2*, 59 FLRA 520, involved an individual employee's grievance alleging that the agency failed to promote her on the basis of national origin, gender, and/or age, and a subsequently added allegation that the agency took various actions against the grievant in reprisal against her for filing that grievance. *See id.* at 520. Although the reprisal issue in *EPA Region 2* involved agency "prohibitions concerning reprisal against employees for exercising rights under the Statute[,]" *id.*, neither that case nor *EPA* involved framed issues concerning, and arbitral findings of, ULPs. In addition, *EPA* and *EPA Region 2* involved issues regarding individual employees and either their personal interests or actions that they took while acting in their individual capacities. By contrast, the grievance in the instant case is an institutional "Grievance of the Parties" concerning alleged reprisal for actions taken by the grievant in her capacity as a Union representative. Opp'n at 12 (citing Opp'n, Attachment 4 (Grievance of the Parties regarding Official Reprimand of Union President). As such, *EPA Region 2* and *EPA* are distinguishable from this case and provide no basis for finding that the Arbitrator exceeded her authority by ordering a posting.

For the foregoing reasons, the Agency does not demonstrate that the Arbitrator exceeded her authority in this regard, and we deny the exception.

V. Decision

The exceptions are denied.