

63 FLRA No. 156

UNITED STATES DEPARTMENT
OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

0-AR-4175

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DECISION

July 15, 2009

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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 Calvin William Sharpe 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 grievance concerns whether the Agency had just cause to suspend the grievant for fourteen days for disrespectful conduct and for disrupting the workplace to the point that a staff meeting had to be ended prematurely. The Arbitrator concluded that the Agency did not have just cause to suspend the grievant and rescinded the discipline. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant, the local Union president, attended the Agency's Laundry Operations (Laundry) monthly staff meeting as a Union representative. Approximately eighteen bargaining unit employees attended the meeting. At the meeting, the Laundry General Foreman (the foreman) invited the grievant to provide information concerning the Agency's Emergency Employee Disaster Relief Fund for victims of Hurricane Katrina. *See* Award at 3, 11. The grievant advised the employees to donate by check so that their donations would be tax

deductible. *See id.* An employee expressed concern that the grievant's suggestion would allow "a tax write-off on the backs of [his] folks." *Id.* at 3-4. In response, the grievant stated that any tax deductions would come from the federal government, which had "left indigent African-Americans in New Orleans to die at the hands of Hurricane Katrina as contrasted with the government's reaction to Hurricane Ophelia in Nags Head populated by whites." *Id.* at 4. The foreman informed the grievant that the relief effort was not a race issue and requested that she discontinue the discussion. After the grievant insisted on finishing her point, the foreman instructed her to be quiet and to sit down. When the grievant refused, the foreman adjourned the staff meeting early. *Id.* The Agency subsequently suspended the grievant for fourteen days for disrespectful conduct and for disrupting the workplace to the point that a staff meeting had to be ended prematurely. *See* Exceptions, Agency Attach. 6 at 10, 14.

The Union filed a grievance, which was not resolved, and was submitted to arbitration. The Arbitrator framed the issues as: (1) whether the Agency's suspension of the grievant was for just cause, and, (2) if not, what is the appropriate remedy? Award at 2.

According to the Arbitrator, the parties agreed that the applicable standard for evaluating the grievant's rights was set forth in *Department of the Air Force, Grissom Air Force Base, Indiana*, 51 FLRA 7 (1995) (*Grissom*). *See id.* at 9. The Arbitrator stated that, under *Grissom*, in determining whether an employee has engaged in flagrant misconduct, the Authority balances the grievant's right to engage in protected activity, which permits leeway for impulsive behavior, against the Agency's right to maintain an orderly workplace, by considering: (1) the place and subject matter of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether the outburst was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct. *Id.* at 10 (citing *Grissom*, 51 FLRA at 12).

The Arbitrator found that the grievant's comments were in direct response to an employee's objection that tax deductions would come off the "backs of [his] people," and were designed to demonstrate that the grievant "did not intend to encourage opportunistic behavior at [h]e expense of African-American victims and to demonstrate her racial sensitivity." *Id.* at 14. In so finding, the Arbitrator rejected the Agency's assertions that the grievant's comments were an attempt to engage in "race-baiting" or to "play[] the race card." *Id.* at 14 n.2; 15 n.3. The Arbitrator also rejected the Agency's argument that the grievant created a "racially hostile envi-

ronment[.]” finding that the Agency’s claim was “overstated.” *Id.* at 14 n.2.

Specifically applying the *Grissom* factors, the Arbitrator found that the grievant’s comments were made at a staff meeting that she attended in her representational capacity. *See id.* at 14. The Arbitrator further found that the grievant was invited to speak by the foreman, and that her comments were precipitated by the comments of an employee at the meeting. The Arbitrator also determined that the grievant’s remarks “spontaneously evolved” from the employee’s comment. *See id.* at 14-15. In addition, the Arbitrator found that the grievant’s language was not intemperate, and that her insistence on completing her comments was provoked by the foreman’s behavior. *See id.* at 15. Upon balancing these factors, the Arbitrator concluded that the grievant’s comments did not constitute flagrant misconduct or otherwise “exceed the boundaries of protected activity.”¹ *Id.*

In reaching this conclusion, the Arbitrator specifically rejected the Agency’s assertion that the grievant “[t]ook charge of the meeting,” because the grievant was invited to speak by the foreman, her statement was in direct response to an employee’s concern, and a different supervisor might have allowed the grievant to finish her statement. *Id.* at 16. The Arbitrator also rejected the Agency’s argument that the grievant’s conduct, even if not flagrant misconduct, demonstrated “an ongoing pattern of disruptive misconduct . . . that removes the shield of statutory protection.” *Id.* In this regard, the Arbitrator rejected the Agency’s reliance on a 1997 suspension and a 2005 disciplinary action against the grievant. The Arbitrator found that the grievant’s three-day suspension in 1997 was too remote from the current case, and also cited the arbitrator’s conclusion in that case that the grievant’s conduct was “unrelated to the lawful pursuit of official union duties.” *Id.* at 17 (quoting 1997 arbitration award). In contrast, the Arbitrator found that the grievant’s conduct in the current case was related to the lawful pursuit of her Union duties. Further, the Arbitrator determined that even if the grievant’s 2005 discipline concerned unprotected conduct, the current case concerned protected conduct, and, as such, the two cases are “dissimilar.” *Id.* at 17 n.5.

1. In reaching this conclusion, the Arbitrator stated that there were “questions” about the “reliability” of the eighteen bargaining unit employees who witnessed the incident and that the foreman and the grievant provided “a better basis for factual determination and the inference to be drawn from them.” Award at 12 n.1.

Based on the foregoing, the Arbitrator concluded that the Agency did not have just cause to suspend the grievant and rescinded the fourteen-day suspension.²

III. Positions of the Parties

A. Agency’s Exceptions

The Agency argues that the award is contrary to law because the Arbitrator based his award on *Grissom* rather than on *Department of Defense, Defense Mapping Agency, Aerospace Center, St. Louis, Missouri*, 17 FLRA 71 (1985) (*Defense Mapping*). Although the Agency concedes that both decisions use the same four factors to evaluate whether an employee has engaged in flagrant misconduct, it contends that *Defense Mapping* holds that an employee receives less “leeway” if their conduct occurs at a “formal discussion” instead of during “negotiations[.]” Exceptions at 3. In addition, the Agency asserts that the award is contrary to law because the Arbitrator “erred in applying the law regarding union representatives disrupting a formal discussion.” *Id.* In this regard, the Agency argues that Authority precedent establishes that the grievant was prohibited from “tak[ing] charge . . . or disrupt[ing] the meeting.” *Id.* (citations omitted).

The Agency also argues that the award is based on several nonfacts. In this regard, the Agency claims that the Arbitrator incorrectly stated that the parties had agreed that *Grissom* was the appropriate legal standard to be applied. The Agency further asserts that the Arbitrator improperly ignored witness testimony when he relied on the testimony of the foreman and the grievant and questioned the reliability of the remaining witnesses. *See id.* at 4-5. In addition, the Agency contends that the Arbitrator quoted and relied on the 1997 arbitration award concerning the grievant’s suspension, even though it was not introduced into evidence. *See id.* at 5. The Agency also argues that there is “no factual basis for distinguishing” between discipline related to union representation and discipline unrelated to union representation for purposes of determining whether the grievant had engaged in a pattern of misconduct. *Id.* at 5. Finally, the Agency contends that the Arbitrator’s award ignores the grievant’s 2005 five-day suspension.³ *See id.*

The Agency further asserts that the award fails to draw its essence from Article 16, §§ 1 and 8 of the par-

2. The Arbitrator also denied the Union’s claim that the suspension was in retaliation against the grievant for her protected Union activities. *See Award* at 18. As the Union does not except to this finding, we do not address it further.

ties' agreement, which prohibits racial discrimination in the work place.⁴ In this regard, the Agency argues that the Arbitrator's conclusion that the grievant's comments demonstrated her "racial sensitivity" is a "clear departure" from the zero-tolerance policy against racial discrimination in the agreement. *Id.* at 6.

B. Union's Opposition

The Union contends that the award is not contrary to law because the standards in *Grissom* and *Defense Mapping* are the same. *See* Opposition at 4. The Union also asserts that the Agency's argument that case law prohibited the grievant from disrupting the staff meeting ignores the fact that the Arbitrator specifically found that she did not. *Id.*

The Union further disputes the Agency's claim that the award is based on nonfacts. In this regard, the Union repeats its argument that *Grissom* and *Defense Mapping* use the same standard. *See id.* at 5. The Union also argues that the Arbitrator's decision to rely primarily on the testimony of the grievant and the foreman is not a nonfact, but a credibility determination that the Arbitrator was permitted to make. *See id.* Further, the Union rejects the Agency's assertion that the 1997 arbitration award was not put into the record, asserting that the Agency relied on the award, the award is public, and the Authority has "published [a] decision on the matter." *Id.* at 6 (citing *AFGE, Local 2145*, 55 FLRA 366 (1999) (*AFGE, Local 2145*)).

3. Although the Agency frames all of these arguments as nonfact exceptions, as discussed below in Section IV.D., we construe the arguments that the Arbitrator relied on an arbitration award not in evidence and ignored the grievant's 2005 suspension as claims that the Arbitrator denied the Agency a fair hearing.

4. Article 16, "Employee Rights," provides, in pertinent part:

Section 1 – General

In an atmosphere of mutual respect, all employees shall be treated fairly and equitably and without discrimination in regard to their . . . race Employees will also be afforded proper regard for and protection of their privacy and constitutional rights. It is therefore agreed that Management will endeavor to establish working conditions which will be conducive to enhancing and improving employee morale and efficiency.

....

Section 8 – Dignity and Self Respect In Working Conditions

Employees, individually and collectively, have the right to expect, and to pursue, conditions of employment which promote and sustain human dignity and self-respect.

Exceptions, Attach., J. Ex. 1 at 41-42.

Finally, the Union challenges the Agency's assertion that the award fails to draw its essence from the parties' agreement because the Agency never charged the grievant with racial discrimination or made this contractual argument to the Arbitrator. *See id.* Further, the Union asserts that the Agency's exception is contrary to the Arbitrator's factual conclusions that the grievant did not play the race card or engage in race-baiting, and that her comments were meant to demonstrate her racial sensitivity. *Id.* at 6-7.

IV. Analysis and Conclusions

A. The award is not contrary to law.

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 arbitrator's legal conclusions are consistent with the applicable standard of law. *See United States 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. *See id.*

Section 7102 of the Statute guarantees employees the right to form, join, or assist any labor organization, or to refrain from such activity, without fear of penalty or reprisal. 5 U.S.C. § 7102; *AFGE, Nat'l Border Patrol Council*, 44 FLRA 1395, 1402 (1992). Consistent with § 7102, however, an agency has the right to discipline an employee who is engaged in otherwise protected activity for remarks or actions that: (1) constitute flagrant misconduct, or (2) otherwise exceed the bounds of protected activity. *See United States Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis Monthan Air Force Base, Tucson, Ariz.*, 58 FLRA 636, 636 (2003) (*Davis Monthan*). The Authority has clarified that "flagrant misconduct" is "illustrative of," but not the only type of, action that could justify removal from the protection of § 7102 of the Statute. *Id.* (quoting *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 202 (D.C. Cir. 2002) (*Air Force*)).

As stated by the Arbitrator, in *Grissom*, the Authority outlined four factors to be considered in determining whether an employee has engaged in flagrant misconduct: (1) the place and subject matter of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether the outburst was in

any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct. *Grissom*, 51 FLRA at 12 (citing *Defense Mapping*, 17 FLRA at 80-81). These factors need not be cited or applied in any particular way in determining whether conduct exceeds the bounds of the Statute's protection. *Id.*

The Agency claims that the Arbitrator erred when he applied the legal standard from *Grissom* rather than from *Defense Mapping*.⁵ Contrary to the Agency's arguments, *Defense Mapping* and *Grissom* do not suggest two different standards.

The Agency also argues that the Arbitrator did not consider the "law regarding union representatives disrupting a formal discussion[.]" See Exceptions, at 3. Specifically, the Agency incorrectly argues that Authority precedent establishes that a Union representative may not "take charge of the proceedings or disrupt [a] meeting." *Id.* Even assuming that these cases establish such a rule, the Arbitrator concluded that the grievant did not take charge of or otherwise disrupt the meeting. See Award at 16. The Agency has not challenged this finding. Therefore, we find that the Agency has not demonstrated that the award is contrary to law.

B. The award is not based on nonfacts.

To establish that an award is based on a nonfact, a party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *United States Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). However, the Author-

ity will not find an award deficient as based on a nonfact on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration. See *id.* at 594. A challenge to the weight accorded testimony does not provide a basis for finding an award deficient. *AFGE, Local 376*, 62 FLRA 138, 141 (2007) (*AFGE, Local 376*).

Even assuming the Arbitrator incorrectly stated that the Agency agreed that *Grissom* was the correct legal standard, the Agency has not established that the standards for flagrant misconduct in *Grissom* and *Defense Mapping* are different. Therefore, the Agency has not demonstrated that, but for this factual error, the Arbitrator would have reached a different result. See *Bremerton Metal Trades Council*, 62 FLRA 391, 393-94 (2008) (where none of alleged nonfacts were central to arbitrator's determination, union failed to show that arbitrator would have reached a different result). The Agency also argues that the Arbitrator erred by crediting the grievant's and the foreman's testimony. The Agency's argument challenges the weight the Arbitrator accorded those witnesses' testimony and, consistent with Authority precedent, does not demonstrate that the award is based on a nonfact. See *AFGE, Local 376*, 62 FLRA at 141 (denying nonfact exception alleging that arbitrator erred by relying on certain witness testimony). Further, the Agency's argument that discipline cannot be distinguished based on whether or not it is related to protected activity challenges a matter that was disputed below, and therefore provides no basis for overturning the award. See *id.* Accordingly, we deny these exceptions.

C. The Arbitrator did not fail to conduct a fair hearing.

We construe the Agency's assertions that the Arbitrator did not consider the grievant's 2005 discipline and relied on and quoted an arbitration award that was not introduced into evidence as claims that the Arbitrator failed to conduct a fair hearing. An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. See *AFGE, Local 1668*, 50 FLRA 124, 126 (1995).

The Agency argues that, in determining whether the grievant had engaged in a pattern of misconduct, the Arbitrator ignored the grievant's 2005 five-day suspension. However, the Arbitrator specifically found that the grievant's 2005 suspension was "dissimilar to the

5. Member Beck notes that the Statute contains no indication that Congress intended to protect employee misconduct of any kind. In this regard, § 7102 of the Statute, as relevant, states that each "employee shall have the right to form, join, or assist any labor organization . . . freely[,] and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." Although Congress intended to "protect[]" employees when they "form, join, or assist any labor organization," 5 U.S.C. § 7102, this language contains no indication that Congress intended to enact a law that "prohibits employers from seeking to maintain civility in the workplace." *Air Force*, 294 F.3d at 201 (citation omitted). In accordance with this view, court and Authority precedent establishes that the concept of "uninhibited and robust debate" in labor/management relations does not "sanction every kind of insult or disparagement." *Veterans Admin., Wash., D.C.*, 26 FLRA 114, 116 n.4 (1987), *aff'd sub nom. AFGE, AFL-CIO, Local 2031 v. FLRA*, 878 F.2d 460, 463 (D.C. Cir. 1989).

Careful scrutiny of the Arbitrator's findings reveals that what he effectively found is that, regardless of whether the grievant was acting in a representational capacity, she simply did not engage in behavior that could properly be characterized as misconduct.

[g]rievant's protected conduct in the instant case." Award at 17 n.5. The Arbitrator considered the very evidence that the Agency claims he ignored, and, as such, the Agency has not demonstrated that he refused to hear or consider pertinent and material evidence so as to deprive it of a fair hearing. *See NATCA*, 62 FLRA 469, 470 (2008) (denying union's fair hearing exception based upon the arbitrator's alleged failure to consider evidence that he actually considered).

Similarly, the Arbitrator's quotation of, and reliance on, the 1997 arbitration award does not provide a basis for overturning the award. The Arbitrator quoted a portion of the 1997 award stating that the grievant's discipline was "unrelated to the lawful pursuit of official [U]nion duties[.]" Award at 16-17. This quote is in the Authority's decision upholding the 1997 award, *see AFGE, Local 2145*, 55 FLRA at 366 (quoting arbitrator's award at 19), which the Agency cited in its post-hearing brief to the Arbitrator. *See Exceptions, Attach., Agency's Closing Brief at 7.* The Agency has not claimed that the Arbitrator relied on any other portion of the 1997 award. Therefore, the Agency had an opportunity to respond to the evidence that the Arbitrator cited in his award. Accordingly, the Agency has failed to demonstrate that the Arbitrator's actions in conducting the proceeding so prejudiced the Agency as to affect the fairness of the proceeding, and we deny the exception. *Cf. United States Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 360, 363 (2008) (granting agency's fair hearing exception where arbitrator failed to provide agency with an opportunity to respond to evidence he relied on in his award).

D. The Arbitrator did not exceed his authority.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator failed to find that the grievant's comments violated Article 16, §§ 1 and 8, which prohibits racial discrimination in the work place. As the Arbitrator did not interpret or apply Article 16, §§ 1 and 8, we construe the Agency's argument as a claim that the Arbitrator exceeded his authority by failing to resolve an issue submitted to arbitration. *See AFGE, Local 2142*, 58 FLRA 692, 694 (2003) (*AFGE, Local 2142*). As relevant here, arbitrators exceed their authority by failing to resolve an issue submitted to arbitration. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. *See United States Dep't of the Navy, Naval Sea Logistics Ctr., Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688 (2002).

Here, the parties did not stipulate to the issues to be resolved, and the Arbitrator framed the issues as whether the Agency's suspension of the grievant was for just cause, and, if not, what the appropriate remedy should be. *See Award at 2.* Although the Agency argued in its post-hearing brief that the grievant's comments violated Article 16 of the parties' agreement, the Agency has not demonstrated that the Arbitrator was required to have addressed the issue or that, by failing to do so, the Arbitrator failed to resolve an issue that was submitted to arbitration. *See AFGE, Local 2142*, 58 FLRA at 694 (arbitrator did not exceed his authority where his findings were directly responsive to the issue that he framed). Accordingly, we deny the exception.

V. Decision

The Agency's exceptions are denied.