

**63 FLRA No. 190**

SOCIAL SECURITY ADMINISTRATION  
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES  
LOCAL 2369  
(Union)

0-AR-4174

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DECISION

August 14, 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 an exception to an award of Arbitrator Thomas M. Phelan 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 exception.

The grievance challenged the grievant's 3-day suspension for processing a name change for a relative and for improper access of computer records. The Arbitrator sustained the grievance with respect to one of the two charges made by the Agency and mitigated the suspension to counseling and an oral warning. For the reasons that follow, we deny the Agency's exceptions.

**II. Background and Arbitrator's Award**

The Agency maintains confidential information on members of the public in electronic form. Under the Agency's policy to safeguard and control access to such information, employees may not access records of family members. The grievant, a customer service representative, inadvertently processed her stepdaughter's name change and, in doing so, obtained a computer query containing the stepdaughter's confidential information. The grievant reported the incident to her supervisor. These actions led to two disciplinary charges, one for improperly obtaining a computer query containing confidential information of a family member and the other for improperly processing the name change of a

family member. Award at 4. The Agency sustained the charges and suspended the grievant for three days.

The Union filed a grievance and when it was not resolved, it was submitted to arbitration. The Arbitrator stated the issue as follows: "Was the three day suspension imposed on [the grievant] for just cause? If not, what shall be the remedy?" *Id.* at 9.

The Arbitrator first considered whether there was just cause under Article 23<sup>1</sup> of the parties' agreement for the charges against the grievant. He dismissed the charge concerning the computer query containing her stepdaughter's confidential information finding that a computer query is normally part of the procedure for processing a name change. Therefore, he concluded that it should not be considered a separate violation. *See id.* at 11. He further found that it was this charge that the Agency considered most important in deciding to impose the 3-day suspension. *See id.* Consequently, the Arbitrator found no just cause for the 3-day suspension. *See id.* The Arbitrator did, however, sustain the charge that the grievant improperly processed the name change for a relative. *See id.* at 12. The Arbitrator found that this was a "serious" violation, "which generally merits disciplinary action." *Id.* Specifically, the Arbitrator explained that, normally, the appropriate discipline for this charge is a 2-day suspension. However, considering mitigating circumstances such as the grievant's lack of intention to commit the offense, the fact that she immediately informed her supervisor of the incident, and her 14 years of service without prior disciplinary or performance problems, the Arbitrator found

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1. Article 23 of the parties' collective bargaining agreement provides, in relevant part:

The parties agree that the objective of discipline is to correct and improve employee behavior so as to promote the efficiency of the service. The parties agree to the concept of progressive discipline which is designed primarily to correct and improve employee behavior. A common pattern of progressive discipline is reprimand, short term suspension, long term suspension and removal. Any of these steps may be bypassed where management determines by the severe nature of the behavior that a lesser form of discipline would not be appropriate.

The parties further agree that normally, discipline should be preceded by counseling and assistance including oral warnings which are informal in nature and not recorded. Counseling and warnings will be conducted privately and in such a manner so as to avoid embarrassment to the employee. Bargaining unit employees will be subject to disciplinary or adverse action only for just cause.

Award at 9-10.

no just cause to impose a 2-day suspension. *See id.* at 14.

Based on the foregoing, the Arbitrator ordered the Agency to rescind the suspension and substitute it with counseling and an oral warning. He also ordered that the grievant be made whole for lost earnings and benefits. *See id.* at 15.

### III. Positions of the Parties

#### A. Agency's Exception

The Agency contends that the award fails to draw its essence from the parties' agreement. The Agency asserts that, under Article 23, management may bypass progressive discipline and impose a more severe penalty when the severe nature of the employee's behavior warrants such discipline. *See* Exception at 4. The Agency asserts that the Arbitrator's interpretation of the parties' agreement ordering the Agency to rescind the 3-day suspension, despite the seriousness of the offense, manifests a blatant disregard for

Article 23. *See id.* at 5. In this regard, having concluded that the violation was "serious," the Agency asserts that the Arbitrator was required to sustain the 3-day suspension. In support of these claims, the Agency cites *Soc. Sec. Admin., St. Paul, Minn.*, 61 FLRA 92 (2005) (Member Pope dissenting) (*SSA, St. Paul*) and *Soc. Sec. Admin., Lansing, Mich.* 58 FLRA 93 (2002) (then-Member Pope dissenting) (*SSA, Lansing*) *recons. denied*, 58 FLRA 181 (2002). The Agency also asserts that, while an oral warning is mentioned in Article 23, "such warning is not a disciplinary action" and is "not appropriate when the [A]rbitrator found a serious violation of the Agency rules." *Id.* at 4. The Agency requests that the award be set aside.

#### B. Union's Opposition

The Union asserts that the Arbitrator correctly interpreted Article 23 of the parties' agreement and fashioned a remedy consistent with what the Agency has done in the past, under similar circumstances. The Union also argues that a 3-day suspension was "clearly incorrect" because the Agency does not dispute the Arbitrator's finding that it only proved one of the two charges that "justified the three day suspension." Opposition at 7. Finally, the Union argues that, even if the Authority finds that the Arbitrator disregarded Article 23 with respect to the charge he found to be correct, the penalty would have to be reevaluated.

*Id.*

### IV. Analysis and Conclusions

The Authority's role when addressing exceptions claiming that an arbitrator's award does not draw its essence from the parties' agreement has been narrowly defined by Congress. *See* S. Rep. No. 95-1272, 95th Cong., 2d Sess. 153 (1978). Consistent with this narrow definition, the Authority has consistently reviewed arbitral awards under the deferential standards adopted by the Federal courts. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998) (*AFGE*); *OSHA, United States Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). 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. *See OSHA*, 34 FLRA at 575. The above standard and the private sector cases from which it is derived make it clear that an arbitrator's award will not be found to fail to draw its essence from the agreement merely because a party believes that the arbitrator misinterpreted the agreement. *See OSHA*, 34 FLRA at 575-76. The Authority and the courts defer to arbitrators interpretation of the collective bargaining agreement "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576; *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (*Misco*) (as long as an arbitrator is even arguably construing the collective bargaining agreement, that a court is convinced that the arbitrator committed serious error does not suffice to find the award deficient).

At issue here, is the interpretation and application of Article 23 of the parties' agreement, which sets forth the types of discipline that the Agency may impose with respect to employees in the bargaining unit. Article 23 also defines actions that the Agency can take short of discipline, such as counseling and oral warnings. *See Award* at 9-10.

The Agency claims that the award fails to draw its essence from the agreement because the Arbitrator's mitigation of the penalty to counseling and oral warning, despite having found a serious offense, manifests a blatant disregard for Article 23 of the parties' agreement. In support of its argument, the Agency cites *SSA, Lansing*, 58 FLRA 93, and *SSA, St. Paul*, 61 FLRA 92, two cases in which arbitration awards were found defi-

cient on essence grounds because the arbitrators did not administer disciplinary action consistent with the parties' agreements. *See SSA, Lansing*, 58 FLRA at 95 (Member Pope dissenting) (award failed to represent a plausible interpretation of the agreement because, even though the arbitrator found that the agency had just cause to discipline the grievants, he did not administer any form of disciplinary action provided under the parties' agreement); *see also SSA, St. Paul*, 61 FLRA at 94 (Member Pope dissenting) (award exhibited a manifest disregard for the agreement where it imposed the least serious form of discipline possible under the parties' agreement in the case of a serious infraction and the agreement allowed management to bypass its progressive discipline policy in favor of more stringent discipline in cases of serious infractions).

Here, the Arbitrator found that there was no just cause for the grievant's suspension and that, given the circumstances of this case, no discipline was warranted. *See Award* at 14. The Arbitrator's conclusion -- that the grievant's suspension be vacated and that the grievant receive counseling and oral warning -- constitutes his interpretation and application of Article 23 of parties' agreement, and reflects his conclusion that this was an offense for which no discipline was warranted. Given the Arbitrator's factual findings that the offense -- though technically serious -- was inadvertent and was reported by the offender herself as soon as she realized her mistake, we cannot say this was an unreasonable conclusion. Unlike the awards which the Authority has found deficient because they failed to draw their essence from the collective bargaining agreement, the Agency fails to establish that the Arbitrator's interpretation of Article 23 conflicts with express provisions of the agreement. *See United States Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (award deficient because arbitrator's interpretation of agreement was incompatible with its plain wording); *United States Dep't of the Air Force, Hill Air Force Base, Utah*, 39 FLRA 103, 108 (1991) (award deficient because arbitrator's reliance on collective bargaining agreement could not in any rational way be derived from that agreement and manifestly disregarded its terms). In this connection, we note that, as counseling and oral warning are within the scope of Article 23, the Arbitrator's remedy does not deviate from the confines of the parties' agreement. Consequently, the Agency has not shown that the Arbitrator's award cannot in any rational way be derived from the agreement; 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; does

not represent a plausible interpretation of the agreement; or evidences a manifest disregard of the agreement. *See OSHA*, 34 FLRA at 575.

The Agency's reliance on *SSA, St. Paul* and *SSA, Lansing* is misplaced. In each of those cases, the arbitrator found that some form of discipline was warranted (and the majority and then-Member Pope disagreed as to whether that particular form of discipline was permitted by Article 23 of the parties' agreement). Here, in contrast, by directing that the proper Agency response to the grievant's technical violation should have been counseling and oral warning, the Arbitrator found that no discipline -- as expressly defined by Article 23 of the parties' agreement -- was warranted. While Article 23 sets forth (and limits) the types of discipline that are available when discipline is warranted, nothing in Article 23 precludes an Arbitrator from finding that no discipline is warranted in certain circumstances.<sup>2</sup> Accordingly, we deny the exception.

## V. Decision

The Agency's exception is denied.

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2. Chairman Pope agrees that the Authority's decisions in *SSA, St. Paul* and *SSA, Lansing* are distinguishable based on the fact that, in those cases, the arbitrators found that some form of discipline was warranted. However, for reasons set forth in her dissenting opinions in those cases, Chairman Pope affirms that, in her view, both cases were wrongly decided. *See SSA, St. Paul*, 61 FLRA at 96; *SSA, Lansing*, 58 FLRA at 97. *See also United States Dep't of Homeland Security, Customs and Border Prot.*, 63 FLRA 495, 500 n.7 (2009); *Soc. Sec. Admin., Huntington Park District Office, Huntington Park, CA.*, 63 FLRA 391, 392 n.1 (2009); *United States Dep't of the Air Force, Davis-Monthan AFB, Tucson, AZ.*, 63 FLRA 241, 244 n.4 (2009).