67 FLRA No. 106

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

and

UNITED STATES
DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS
(Agency)

0-AR-4950

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DECISION

April 30, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Arbitrator Salvatore J. Arrigo denied a grievance that the Union filed on behalf of an employee (the grievant) regarding his five-day disciplinary suspension. There are two substantive questions before us.

The first question is whether the award is contrary to law because the Arbitrator violated the grievant's constitutional right to due process. Because there are no constitutionally required due-process protections that an arbitrator must observe in conducting post-suspension arbitration proceedings, the answer is no.

The second question is whether the award is contrary to law because the Arbitrator incorrectly assigned the burden of proof to the grievant. As the Arbitrator did not assign the burden of proof to the grievant, the Union's exception misunderstands the award, and the answer is no.

II. Background and Arbitrator's Award

The Agency investigated a workplace dispute involving the grievant, and concluded that the grievant demonstrated "a pervasive pattern of inappropriate behavior."[1] Accordingly, the Agency issued a "Notice of Proposed [Five]-Day Suspension" (notice) to the grievant.[2] The notice included various memoranda, emails, and affidavits documenting allegations made by the grievant's coworkers, and it informed the grievant of his right to reply. The Union filed a response denying the allegations in the notice, but the grievant did not separately reply, even when the Agency granted the grievant multiple extensions of the reply period.[3]

The Agency proceeded to issue a "Decision on Proposed [Five]-Day Suspension," suspending the grievant for five days for "[i]nappropriate [b]ehavior" and "[f]ailure to [f]ollow [s]upervisory [i]nstruction."[4] The Union filed a grievance alleging that the suspension was not for "just cause" and was untimely.[5] The parties then submitted the grievance to expedited arbitration.

In his award, the Arbitrator discussed the two charges underlying the suspension. Regarding the charge of "[i]nappropriate [b]ehavior,"[6] the Arbitrator found that there were "numerous . . . statements . . . in the record for which there [was] no direct denial by the grievant as to their truth,"[7] and that the incidents referenced in these statements were "sufficient . . . to support the charge."[8]

Regarding the charge of "[f]ailure to [f]ollow [s]upervisory [i]nstructions," the Arbitrator found that the charge was based on a single allegation, and that "[t]he record contain[ed] no denial or explanation by the grievant of the facts as stated in the charge."[9] Accordingly, the Arbitrator found that the record supported the charge.

In making these findings, the Arbitrator noted the Union's claims that the statements that the Agency relied on "lacked credibility," and that "the grievant was not interviewed about the allegations."[10] The Arbitrator found that the statements that the Agency relied on "were

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[1] Award at 2 (quoting Exceptions, Attach. 2, "Notice of Proposed [Five]-Day Suspension" (Notice) at 1) (internal quotation marks omitted).
[2] *Id.* (internal quotation marks omitted).
[3] *Id.* at 2-3; Exceptions, Attach. 3, Decision on Proposed Five-Day Suspension (Suspension Decision) at 1.
[4] Suspension Decision at 1 (emphasis omitted).
[5] Award at 3.
[6] *Id.* at 5.
[7] *Id.* at 4.
[8] *Id.* at 5.
[9] *Id.*
[10] *Id.*

presented to the grievant for his inspection when the . . . notice . . . issued[,] and he was notified in that notice, and later, that he could make a reply."[11] The Arbitrator further found that, "[a]lthough the *Union* challenged the credibility of the [coworkers] who gave statements" in its response to the notice, "the record contain[ed] no direct denial or explanation by [the *grievant*] regarding the matters relied on" by the Agency in deciding to suspend the grievant.[12]

Based on the foregoing, the Arbitrator found that the suspension was for "just cause as will promote the efficiency of the service."[13] He also found "no support in the record that the suspension was motivated by the grievant's Union activity or was defective because of timeliness."[14] Accordingly, he denied the grievance.

The Union filed exceptions to the Arbitrator's award, and the Agency filed an opposition to the Union's exceptions.

III. Preliminary Matters

A. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some Union arguments, but not others.

The Union argues that the Arbitrator erred by failing to address whether the suspension violated the grievant's rights as a whistleblower under 5 U.S.C. § 2302(b)(9)(A).[15] The Union also argues that the Arbitrator erred by failing to "explain why [the] Agency's actions should not be scrutinized within the legal context of the . . . protection against retaliation for [U]nion activity" set forth in Article 47, Section 6(c) of the parties' agreement.[16] Further, the Union contends that "[t]he Arbitrator's decision . . . ignored the basic tenets of due process required in a disciplinary action against [a] federal employee" such as the grievant.[17] In this connection, the Union claims that the Arbitrator "erred by failing to recognize the grievant's [constitutionally protected] property interest in his government position,"[18] and did not address what process was due the grievant, which the Union claims is "spelled out in the parties' . . . agreement."[19] The Union also contends that the Arbitrator violated the grievant's due-process rights by addressing certain incidents that "were not listed in the specification of charges in the letter of proposed suspension."[20] Moreover, the Union asserts that the Arbitrator misallocated the burden of proof in his award.[21]

The Agency argues that the Union is making arguments that it should have made, but did not make, at arbitration.[22] Specifically, the Agency asserts that the Union is making "new due[-]process arguments, whistleblowing defenses," and arguments regarding the "misallocation of the burden of proof."[23]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[24] However, where it is not clear that a party could have raised its claims before the arbitrator, the Authority has considered those claims.[25]

The Union could have argued, before the Arbitrator, that the grievant's suspension violated 5 U.S.C. § 2302(b)(9)(A) and Article 47, Section 6(c) of the parties' agreement. But nothing in the record indicates that the Union made these arguments before the Arbitrator. Therefore, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union from making these arguments, and we dismiss the portions of the exceptions that raise these arguments.[26]

As noted above, the Union also makes several constitutional-due-process arguments. In considering exceptions alleging denials of due process, the Authority has distinguished between an agency's pre-decisional actions in the disciplinary process and an arbitrator's conduct during a post-suspension arbitration proceeding.[27] To the extent that the Union's due-process claims challenge the Agency's actions in connection with the grievant's suspension, the Union could have raised these claims before the Arbitrator. But nothing in the record indicates that the Union did so. As a result,

[11] *Id.*
[12] *Id.* at 6 (emphasis added).
[13] *Id.*
[14] *Id.* at 5.
[15] Exceptions at 4.
[16] *Id.*
[17] *Id.* at 1.
[18] *Id.*
[19] *Id.* at 2.
[20] *Id.*
[21] *Id.* at 4.
[22] Opp'n at 12.
[23] *Id.*
[24] 5 C.F.R. §§ 2425.4(c) & 2429.5; *see, e.g.*, *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012) (*Local 3448*).
[25] *SSA, Louisville, Ky.*, 65 FLRA 787, 789 (2011) (*SSA*).
[26] *See, e.g., Local 3448*, 67 FLRA at 73-74.
[27] *Compare SSA, Balt., Md.*, 64 FLRA 516, 518 (2010) (constitutional-due-process claim challenging agency's pre-decisional actions must show that employee was denied notice of the charges, an explanation of the agency's evidence, or an opportunity to reply in order to establish award deficient), *with NTEU, Chapter 45*, 52 FLRA 1458, 1465-66 (1997) (*Chapter 45*) (arbitrator's conduct of post-suspension hearing "cannot be held to violate the grievant's right to constitutional due process because there is no constitutional requirement for any post-suspension proceeding at all, let alone for the procedures that an arbitrator must follow in the hearing").

§§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union from making these claims, and we dismiss the portions of the exceptions that raise these claims.[28]

However, to the extent that the Union's due-process claims challenge the Arbitrator's conduct during the arbitration, as first brought to the Union's attention by the Arbitrator's award, it is not clear that the Union could have known to raise those claims until after the award issued. The same is true of its claims regarding the Arbitrator's alleged misapplication of the burden of proof in the award. Accordingly, we address those claims in section IV. below.[29]

B. Certain exceptions do not raise grounds recognized in § 2425.6(e) of the Authority's Regulations.

Section 2425.6 of the Authority's Regulations specifically enumerates the grounds that the Authority currently recognizes for reviewing arbitration awards.[30] In addition, the Regulations provide that if exceptions argue that an award is deficient based on private-sector grounds not currently recognized by the Authority, then the excepting party "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions."[31]

Further, § 2425.6(e)(1) of the Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support" the grounds listed in § 2425.6(a)-(c), or "otherwise fails to demonstrate a legally recognized basis for setting aside the award."[32] Thus, an exception that does not raise a recognized ground is subject to dismissal under the Regulations.[33]

The Union argues that the Arbitrator relied upon evidence that was "not germane to the proposed suspension,"[34] and that he "ignored" or "failed to address" evidence and arguments that the Union offered.[35] These arguments do not raise grounds currently recognized by the Authority for reviewing awards.[36] And the Union does not cite legal authority to support any ground not currently recognized by the Authority. Accordingly, we dismiss these exceptions.[37]

IV. Analysis and Conclusions: The award is not contrary to law.

The Union argues that the award is contrary to law. When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[38] In conducting de novo review, the Authority defers to the arbitrator's underlying factual findings.[39] Exceptions based on misunderstandings of an arbitrator's award do not demonstrate that the award is contrary to law.[40]

A. The Arbitrator did not violate the grievant's constitutional right to due process.

As discussed above, the Union argues that the Arbitrator violated the grievant's constitutional-due-process rights.[41] For example, the Union claims that the Arbitrator failed "to recognize the grievant's [constitutionally protected] property interest in his government position,"[42] and violated the grievant's due-process rights by addressing certain incidents that "were not listed in the specification of charges in the letter of proposed suspension."[43]

In considering exceptions alleging denials of due process, the Authority has distinguished the constitutionally required protections that apply to an agency's pre-decisional actions in the disciplinary process from the protections that apply to an arbitrator's conduct during a post-suspension arbitration proceeding.[44] While recognizing that constitutional protections exist for the interests the Union cites, such as the grievant's property interest in his government employment, the Authority has held that such protections only apply in a pre-decisional context. In contrast, the Authority has held that federal employees who are suspended for fourteen days or less do not have a constitutional right to particular post-suspension

[28] *See, e.g., Local 3448*, 67 FLRA at 73-74.
[29] *See, e.g., SSA*, 65 FLRA at 789.
[30] *See* 5 C.F.R. § 2425.6(a)-(b).
[31] *Id.* § 2425.6(c).
[32] *Id.* § 2425.6(e).
[33] *See, e.g., AFGE, Local 1858*, 66 FLRA 942, 943 (2012) (*Local 1858*); *AFGE, Local 738*, 65 FLRA 931, 932 (2011) (*Local 738*).
[34] Exceptions at 2-3.
[35] *Id.* at 1; *see also id.* at 2, 3-6.
[36] *See* 5 C.F.R. § 2425.6(a)-(b).
[37] *See, e.g., Local 1858*, 66 FLRA at 943; *Local 738*, 65 FLRA at 932.
[38] *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)).
[39] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[40] *E.g., AFGE, Local 2382*, 66 FLRA 664, 667 (2012) (*Local 2382*).
[41] *See* Exceptions at 1-2.
[42] *Id.* at 1.
[43] *Id.* at 2.
[44] *See, e.g., AFGE, Local 1770*, 67 FLRA 372, 374 (2014); *U.S. Dep't of VA, Nat'l Mem'l Cemetery of the Pac.,* 45 FLRA 1164, 1174-80 1992)..

due-process protections that arbitrators must observe in conducting arbitration proceedings.[45] Consistent with these principles, we reject the Union's arguments that the Arbitrator violated the grievant's constitutional-due-process rights.

B. The Arbitrator did not incorrectly allocate the burden of proof.

The Union argues that the Arbitrator erred, as a matter of law, by "plac[ing] the burden of proof on the [U]nion, requiring it to establish that the grievant did not engage in misconduct."[46] In this regard, the Union cites the Arbitrator's statements that "the record contain[ed] no direct denial or explanation by [the grievant] regarding the matters relied on" by the Agency in deciding to suspend the grievant.[47]

Although the Arbitrator noted the grievant's failure to *address* the Agency's allegations, the Arbitrator did not reassign the burden of proof by requiring the grievant to *disprove* the allegations. So the Union's exception is based on a misinterpretation of the award. As such, the exception provides no basis for finding the award deficient.[48]

V. Decision

We dismiss the Union's exceptions, in part, and deny them, in part.

[45] *Local 3911*, 66 FLRA at 61; *Chapter 45*, 52 FLRA at 1465.
[46] Exceptions at 4.
[47] Award at 6.
[48] *See, e.g.*, *Local 2382*, 66 FLRA at 667.

Member Pizzella, concurring:

I agree with my colleagues to dismiss the Union's exceptions in part and to deny the others in part.

The filing of a frivolous grievance unwisely consumes federal resources: time, money, and human capital; serves to undermine "the effective conduct of [the government's] business;[1] and completely fails to take into account the resulting costs to the taxpayers, who fund the Agency's operations and pay for the significant costs of Union official time to process a grievance.

The grievant was charged with engaging in "a pervasive pattern of inappropriate behavior"[2] that spanned a period of months whereby he demonstrated a "hostile attitude" towards contractor employees that could be described (in my opinion) as bullying.[3] At arbitration, the Union could muster only unsupported defenses that the charges were "untimely . . . unsubstantiated . . . hearsay" and challenged the credibility of the numerous statements provided[4] that corroborated the charges and each other.[5.]

As I noted in my concurring opinion in *AFGE, Local 218*,[6] it is inexplicable to me that the Union would pursue such a matter to arbitration while the grievant did not even bother to file any response to the Agency's charges and after the Agency "extended" the reply period for the grievant.[7] It is unlikely that Congress envisioned that such futile endeavors by a union official would "contribute[] to the effective conduct of [the government's] business"[8] or facilitate the "amicable settlement[] of disputes."[9]

These circumstances, quite simply, do not promote "the effective conduct of public business"[10] or

[1] *NTEU, Chapter 32*, 67 FLRA 174, 177 (2014) (*Chapter 32*) (Concurring Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1)(B) (internal quotation marks omitted).
[2] Award at 2.
[3] Included in the charges against the grievant were incidents wherein he berated a contractor for "transferring a telephone call to him"; called contractors "butt boys" and "butt buddies"; and claimed that "[g]uys don't last long if they aren't on my side" and that "people don't stay here long if they play for the wrong team." *Id*. at 4.
[4] *Id*. at 3.
[5.] *Id.* at 6.
[6] 67 FLRA 218, 220 (2014) (Concurring Opinion of Member Pizzella).
[7] Award at 3
[8] 5 U.S.C. § 7101(a)(1)(B).
[9] *Id.* § 7101(a)(1)(C); *see also U.S. DHS, CBP*, 67 FLRA 107, 112 (2013) (*CBP*) (Concurring Opinion of Member Pizzella).
[10] *Chapter 32*, 67 FLRA at 177 (citing *CBP*, 67 FLRA at 112 (Concurring Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1)(B) (internal quotation marks omitted))).

foster "work practices [that] facilitate and improve . . . the efficient accomplishment of the operations of the Government."[11]

Thank you.

[11] *Id.* at 177 (citing *CBP*, 67 FLRA at 112 (Concurring Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1) (internal quotation marks omitted))).