

70 FLRA No. 1

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
ST. PETERSBURG REGIONAL BENEFIT OFFICE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1594
(Union)

0-AR-5168

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DECISION

October 12, 2016

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

I. Statement of the Case

Arbitrator Richard John Miller found that the Agency did not provide the Union with adequate office space and access to that office, as required by the parties' collective-bargaining agreement. As a remedy for that violation, he directed the Agency to cure certain deficiencies in the office space.

The Arbitrator also found that the Agency violated the agreement and refused to honor a memorandum of understanding (MOU) by denying certain Union officials access to Agency computer systems. As a remedy for that violation, he directed the Agency to issue the vice-president of the Union – a non-employee who had been separated from the Agency – a personal-identity-verification (PIV) card.

The Agency filed exceptions to the Arbitrator's award. Those exceptions present us with three substantive issues.

First, the Agency argues that the award fails to draw its essence from the parties' agreement. Because the Agency does not demonstrate that the Arbitrator's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement, we deny this exception.

Second, the Agency contends that the Arbitrator exceeded his authority by addressing issues that were not submitted to arbitration. Because the award is directly responsive to the issues as framed by the Arbitrator, we deny this exception.

Finally, the Agency alleges that the PIV-card remedy is contrary to law and government-wide regulations, specifically Homeland Security Presidential Directive 12 (HSPD-12), a memo from the Office of Personnel Management (OPM) providing credentialing standards for PIV cards (OPM Memo), and § 7106(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute).¹ Because the Arbitrator directed the Agency to issue a PIV card without regard to the credentialing standards in the OPM Memo – and there is no dispute that the standards in the OPM Memo are government-wide regulations, for purposes of our review – we set aside that remedy as contrary to government-wide regulations. As a result, we find it unnecessary to resolve the Agency's argument that the PIV-card remedy violates § 7106(a)(1) of the Statute. And as that was the Arbitrator's sole remedy for his finding of a computer-access violation – and we have left that finding of a violation undisturbed – we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an appropriate, alternative remedy, if any.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency had failed to provide the Union office space and access to that office space in accordance with the parties' agreement. The parties did not resolve the grievance, and they submitted it to arbitration. After submitting the matter to arbitration, but before an arbitration hearing, the Agency provided office space to the Union.

The parties did not stipulate to the issues, and the Arbitrator framed the issues as: (1) whether the Agency provided the Union with "office space and access" in compliance with the parties' agreement; and, (2) "[i]f not, what are the appropriate remedies?"²

Regarding the office space, the Arbitrator found, as relevant here, that the office space that the Agency provided to the Union was partially deficient. As a remedy, the Arbitrator directed the Agency to cure the deficiencies by, among other things, providing sound proofing and smaller furniture as well as demonstrating that the office is compliant with the Americans with Disabilities Act and Occupational Safety and Health Administration regulations.

¹ 5 U.S.C. § 7106(a)(1).

² Award at 2.

Next, the Arbitrator turned to the issue of the Agency's limitations on Union officials' physical access to the Union office, as well as the Agency's refusal to allow non-employee Union officials "computer access to any Agency software, programs[,] or technology."³

As relevant here, the Union argued that the Agency, in violation of the parties' agreement, refused to allow non-employee Union officials, including the Union's vice president, access to the office and Agency computer systems. As remedies, the Union requested that the Agency (1) provide office space in compliance with the parties' agreement and (2) grant PIV cards to non-employee Union officials.

The Agency argued that its restrictions of Union-official access were consistent with the agreement. The Agency also argued that it could not issue a PIV card to the Union vice president because the Agency believed he posed a security risk and that such a remedy impinged on its right to determine its internal-security practices.

Concerning technological access, the Arbitrator found that, "pursuant to [the parties' agreement], Union officials are authorized to access [Agency] systems."⁴ Further, the Arbitrator noted the MOU, which requires the Agency to provide Union officials with computer access to Agency data for "representational responsibilities" on Agency-owned computer equipment.⁵ The Arbitrator found that the Agency "ignored this MOU in [its] denial of access to [Agency] systems for Union officials,"⁶ and concluded that the Agency had "refused to honor the MOU."⁷

Regarding a remedy, the Arbitrator rejected, as unsupported, the Agency's argument that the Union vice president was a security risk. The Arbitrator found that, because the Union vice president "is not a security or safety risk to the [Agency], he would be eligible to obtain a PIV card."⁸ However, the Arbitrator denied the Union's request that "all Union officials, including those who are not current [Agency] employees, be granted a PIV card," because the record was insufficient to determine "whether those current or past Union officials are security risks."⁹

On the same day that he issued the award, the Arbitrator responded to an email from the Union's attorney seeking "clarification" of the award.¹⁰ In his email response, the Arbitrator stated that the Union vice president "shall be granted a PIV card since he is not a security risk as noted in my decision."¹¹

The Agency filed exceptions to the award, and the Union filed an opposition to those exceptions.

III. Preliminary Matters

A. We will not consider the Union's supplemental submissions.

After filing its opposition to the Agency's exceptions, the Union filed a clarification of its opposition and a reply to the Agency's response to a show-cause order that the Authority's Office of Case Intake and Publication (CIP) issued. However, the Union did not request leave to file these supplemental submissions. Section 2429.26(a) of the Authority's Regulations states, in pertinent part, that the "Authority . . . may in [its] discretion grant leave to file other documents as [it] deem[s] appropriate."¹² When parties have not requested leave to file supplemental submissions, the Authority has not considered those submissions.¹³ Accordingly, because the Union has not requested leave under § 2429.26(a) to file these submissions, we will not consider them.

B. The issue of granting the vice president a PIV card is not moot.

The Authority will dismiss an exception as moot when the parties no longer have a legally cognizable interest in the dispute.¹⁴ Here, the Agency argues, in part, that the award is contrary to law and regulation because the Arbitrator ordered the Agency to issue the Union vice president a PIV card.¹⁵ In its opposition, the Union states that the Union vice president "has successfully obtained a PIV card as a volunteer[] for a[n Agency] facility in Orlando, Florida."¹⁶ CIP issued an order directing the Agency to show cause why these exceptions should not be dismissed as moot.¹⁷ The

³ *Id.* at 26-27.

⁴ *Id.* at 25; *see also id.* at 3 (quoting agreement provisions regarding access to Union office space), 4 (quoting agreement provisions regarding Union access to Agency equipment and technology).

⁵ *Id.* at 33 (quoting MOU); *see also id.* at 25.

⁶ *Id.* at 25.

⁷ *Id.* at 33.

⁸ *Id.* at 34.

⁹ *Id.*

¹⁰ Opp'n, Ex. 4 (Supp. Award) at 1.

¹¹ *Id.*

¹² 5 C.F.R. § 2429.26(a).

¹³ *U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 535 n.1 (2010).

¹⁴ *U.S. Dep't of VA, VA Long Beach Healthcare Sys., Long Beach, Cal.*, 63 FLRA 332, 334 (2009) (citing *AFGE, Local 171, Council of Prison Locals 33*, 61 FLRA 661, 663 (2006)).

¹⁵ Exceptions at 4-8.

¹⁶ Opp'n at 13 n.2.

¹⁷ Show Cause Order at 2.

Agency submitted a response stating that the Union vice president “does not currently have a valid working PIV card.”¹⁸ The Agency also included an affidavit from an Agency employee who maintains information on all PIV cards issued by the Agency, as well as documentation in support of that affidavit. This employee stated that the Union vice president “did not obtain a PIV card as a volunteer for a[n Agency] facility in Orlando, Florida.”¹⁹ Based on the Agency’s response and attached affidavit,²⁰ we conclude that the matter of issuing a PIV card to the Union vice president is not moot.

- C. Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar some of the Agency’s arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the Arbitrator.²¹

In its exceptions, the Agency argues that the awarded remedy is contrary to Executive Order 13,467, a memorandum from the Office of Management and Budget, and Federal Information Processing Standards Publication 201-2.²² Additionally, the Agency argues that the awarded remedy is contrary to the Agency-wide regulations found in VA Directive 0710 and VA Directive and Handbook 6500.²³ Specifically, the Agency argues that granting the Union vice president a PIV card is contrary to these government-wide and Agency-wide regulations.²⁴ However, the Agency did not raise any of these arguments before the Arbitrator. Because the Union requested the PIV-card remedy at arbitration,²⁵ the Agency could have raised these arguments before the Arbitrator. Because the Agency did not do so, we will not consider them now,²⁶ and we dismiss these exceptions.

IV. Analysis and Conclusions

- A. The award does not fail to draw its essence from the parties’ agreement.

The Agency alleges that the award fails to draw its essence from the parties’ agreement.²⁷ When an exception alleges that an award fails to draw its essence from the agreement, the Authority reviews the arbitrator’s interpretation of the agreement. In reviewing an arbitrator’s interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.²⁸ Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties’ 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.²⁹ The Authority and the courts defer to arbitrators in this context “because it is the arbitrator’s construction of the agreement for which the parties have bargained.”³⁰

The Agency argues that the parties’ agreement “specifies the [Agency] information system[s] will be accessible at all Union offices[,] but falls short of guaranteeing access to any one specific person.”³¹ Although presenting its interpretation of the parties’ agreement, the Agency does not explain how the Arbitrator’s interpretation of the agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement.³² Consequently, the Agency has failed to demonstrate that the award fails to draw its essence from the parties’ agreement, and we deny this exception.

¹⁸ Agency’s Resp. to Show Cause Order at 1.

¹⁹ *Id.*, Ex. 2 at 2.

²⁰ *AFGE, Local 2145*, 67 FLRA 141, 142 (2013) (considering affidavit submitted in response to show cause order); *Haw. Fed. Emps. Metal Trades Council*, 57 FLRA 450, 452 (2001) (same).

²¹ 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014) (*DOL*); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012) (*Local 3448*).

²² Exceptions at 6.

²³ *Id.* at 8-9.

²⁴ *See id.* at 4-9.

²⁵ Award at 11.

²⁶ 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288-89; *Local 3448*, 67 FLRA at 73-74.

²⁷ Exceptions at 12-13.

²⁸ 5 U.S.C. § 7122(a)(2); *Independent Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1003 (2015) (*IUPEDJ*); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

²⁹ *IUPEDJ*, 68 FLRA at 1003; *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*) (citations omitted).

³⁰ *IUPEDJ*, 68 FLRA at 1003; *OSHA*, 34 FLRA at 576.

³¹ Exceptions at 13.

³² *U.S. Dep’t of the Treasury, IRS*, 63 FLRA 616, 618 (2009); *U.S. Dep’t of the Air Force, Griffiss Air Force Base, Rome, N.Y.*, 39 FLRA 889, 895 (1991).

B. The Arbitrator did not exceed his authority.

The Agency contends that the Arbitrator exceeded his authority.³³ Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.³⁴ In the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference.³⁵

The Agency argues that the Arbitrator exceeded his authority by “impermissibly expand[ing] the arbitration beyond the grievance by deciding whether the Union vice president was entitled to physical and logical access to [Agency] facilities and information systems.”³⁶ The Agency also argues that the Arbitrator improperly issued an award concerning the furniture, sound proofing, and regulatory compliance of the Union office.³⁷ The Agency notes that, at the time the Union filed the grievance, “the Union vice president was a[n Agency] employee, held a PIV [card], and had physical and logical access to [Agency] facilities and information systems”³⁸ and that “[p]rior to the completion of arbitration, the [Agency] provided an office to the Union, which should have made the arbitration moot.”³⁹

However, the parties did not stipulate to the issues, and the Arbitrator framed the issues before him to include whether the Agency had provided the Union “office space and access” in compliance with the parties’ agreement.⁴⁰ In addressing that issue, the Arbitrator found that the Agency improperly denied the Union vice president physical and technological access to Agency facilities and that various aspects of the Union office the Agency provided were not in compliance with the parties’ agreement.⁴¹ Therefore, the award is directly responsive to the issues as framed by the Arbitrator, and we deny this exception.⁴²

C. The PIV-card remedy is contrary to government-wide regulations, and we remand for an appropriate, alternative remedy, if any.

The Agency alleges that the award is contrary to law and government-wide regulations.⁴³ When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception de novo.⁴⁴ 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.⁴⁵ In making this assessment, the Authority defers to the arbitrator’s underlying factual findings.⁴⁶

The Agency argues that the award is contrary to government-wide rules and regulations found in HSPD-12 and the OPM Memo.⁴⁷ In particular, the Agency contends that HSPD-12 and the OPM Memo mandate adherence to “credentialing standards” that “require . . . that the individual undergo an appropriate background investigation, be fingerprinted, and present two acceptable forms of identity source documents” before receiving a PIV card.⁴⁸

HSPD-12 announced a policy for “establishing a mandatory, [g]overnment-wide standard for secure and reliable forms of identification issued by the [f]ederal [g]overnment to its employees.”⁴⁹ Under the authority granted in HSPD-12, OPM released credentialing standards for issuing PIV cards. There is no dispute that these standards constitute government-wide regulations, for purposes of our review. As part of these standards, agencies must “initiate a background investigation . . . and ensure the [Federal Bureau of Investigation] fingerprint check is completed before issuing an identity credential.”⁵⁰

In this case, the Arbitrator determined that the Union vice president “shall be granted a PIV card,” without regard to these credentialing standards.⁵¹ Accordingly, the Arbitrator’s remedy of granting the Union vice president a PIV card is contrary to government-wide regulations, and we set aside that

³³ Exceptions at 13-14.

³⁴ *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

³⁵ *U.S. Dep’t of the Army, Corps of Eng’rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).

³⁶ Exceptions at 13.

³⁷ *Id.* at 14.

³⁸ *Id.* at 13.

³⁹ *Id.* at 14.

⁴⁰ Award at 2.

⁴¹ *See id.* at 35.

⁴² *U.S. DOJ, Fed. BOP*, 68 FLRA 728, 731 (2015).

⁴³ Exceptions at 4-8.

⁴⁴ *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)).

⁴⁵ *U.S. DOD, Dep’ts of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

⁴⁶ *Id.*

⁴⁷ Exceptions at 5-7.

⁴⁸ *Id.* at 8.

⁴⁹ HSPD-12 at 1.

⁵⁰ OPM Memo at 3.

⁵¹ Supp. Award at 1.

remedy. As a result, there is no need to address the Agency's argument that this remedy is also contrary to § 7106(a)(1) of the Statute.⁵²

Where, as here, the Authority sets aside an entire remedy, but leaves an arbitrator's finding of an underlying violation undisturbed, the Authority remands the award for determination of an appropriate, alternative remedy, if any.⁵³ As we have left undisturbed the Arbitrator's finding of a computer-access violation, but have set aside the entire remedy with respect to that violation, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an appropriate, alternative remedy, if any.

In remanding, we note our disagreement with our colleague's statements that "the Arbitrator found only *one violation*."⁵⁴ The Arbitrator did indeed state that the "only" issue before him involved whether the "office space and access" provided by the Agency complied with the parties' agreement.⁵⁵ But, addressing both office-space and access issues, the Arbitrator found *both* office-space and access violations. Specifically, as noted previously, in addition to finding that the Agency violated the agreement because of deficiencies in the office space it provided, the Arbitrator also expressly found that: "pursuant to [the parties' agreement], Union officials are authorized to access [Agency] systems";⁵⁶ the MOU requires the Agency to provide Union officials with computer access to Agency data for "representational responsibilities" on Agency-owned computer equipment;⁵⁷ the Agency "ignored this MOU in [its] denial of access to [Agency] systems for Union officials";⁵⁸ and the Agency "refused to honor the MOU[']s" computer-access requirements.⁵⁹ Given these findings, and unlike our colleague, we find that the most reasonable reading of the award is that the Arbitrator

found two separate violations – one regarding office space, and another regarding computer access.

V. Decision

We: dismiss, in part; deny, in part; and grant, in part, the Agency's exceptions. We set aside the remedy ordering the Agency to issue a PIV card to the Union vice president, and remand that portion of the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an appropriate, alternative remedy, if any.

⁵² Exceptions at 5 (arguing that PIV-card remedy "impermissibly intruded upon the exclusive right of the [Agency] to determine its internal security practices [under] . . . § 7106(a)(1)").

⁵³ *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 860 (2012) (Chairman Pope dissenting in part); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 88 (2011) (citations omitted); *U.S. DOJ, Fed. BOP, Mgmt. & Specialty Training Ctr., Aurora, Colo.*, 56 FLRA 943, 946 (2000) (remanding for determination of an appropriate remedy, "if any").

⁵⁴ Separate Opinion at 11.

⁵⁵ Award at 13, 15.

⁵⁶ *Id.* at 25 (emphasis added); *see also id.* at 3 (quoting agreement provisions regarding access to Union office space), 4 (quoting agreement provisions regarding Union access to Agency equipment and technology).

⁵⁷ *Id.* at 33 (quoting MOU); *see also id.* at 25.

⁵⁸ *Id.* at 25 (emphasis added).

⁵⁹ *Id.* at 33.

Member Pizzella, concurring, in part, and dissenting, in part:

I wholeheartedly agree with my colleagues that arbitrators do not have the authority to determine how a federal Agency administers its obligations under Homeland Security Presidential Directive 12: Policy for a Common Identification Standard for Federal Employees and Contractors (HSPD-12).

After September 11, 2001, the Department of Homeland Security (DHS) recognized that there was a “[w]ide variation[] in the quality and security of forms of identification used to gain access to secure . . . facilities” throughout the federal government.¹ This situation presented a myriad of security risks to federal agencies and to those agencies’ properties and resources (e.g., information technology systems). Therefore, in an effort “to . . . eliminate[]” those “variations,” the President and Congress directed DHS to create a “mandatory[-g]overnment-wide standard” to “enhance security . . . [and] reduce identity fraud.”² Against this backdrop, DHS issued HSPD-12 as a government-wide regulation.

As a key component of HSPD-12, security credentials (e.g., personal-identity-verification (PIV) cards) may be “issued only by providers [generally a federal agency such as here the Department of Veterans Affairs] whose reliability has been established by an official accreditation process.”³

The Union – AFGE, Local 1594 – filed a grievance complaining about the office space and access it was given by the Veterans Affairs’ (VA) benefits office in St. Petersburg, Florida. As part of the grievance, the Union complained that the VA would not give the Union’s vice president, who *was not a VA employee* (nor employed by the federal government, or a federal contractor, in any capacity whatsoever) a PIV card. Possessing a PIV card is no small matter. Whoever possesses a PIV card has twenty-four hour access into the VA’s facility and its computer systems.⁴

When the matter went to arbitration, the Arbitrator determined that the VA violated Article 51 of the parties’ agreement by the “*office space and access* offered by the Agency.”⁵ The Arbitrator provided several remedies for that violation – sound proofing the Union’s office, hiding exposed cables, providing smaller furniture, and making the office Americans-with-Disabilities-Act and Occupational-Safety-and-Health-Administration compliant⁶ – including an order to the VA to issue a PIV card to AFGE’s vice president who was not an employee of the VA or the federal government.

As I noted above, my colleagues and I agree that this portion of the Arbitrator’s remedy goes too far because it is contrary to HSPD-12, a government-wide regulation. Unfortunately, our agreement ends there.

Even though AFGE alleged only *one violation* and the Arbitrator found only *one violation*, the majority relies on a *single* word – “systems”⁷ – from the Arbitrator’s thirty-five (35) page award to erroneously conclude that the Arbitrator’s remedy concerning the PIV card was actually based on an obscure *second* violation that was not apparent either to AFGE, the VA, or the Arbitrator. In other words, the majority concludes that even though the Arbitrator *may not* order the VA *to issue* a PIV card, the Arbitrator *may* find that the VA violated Article 51 *by not issuing* a PIV card.

I disagree on both accounts. Clearly, there was *one* issue, not *two*. According to the Arbitrator, his “determination [was] *simply a remedy*,”⁸ and he had the “contractual authority to render a remedy as to whom and when Union officials can occupy the Union office since *pursuant to Article 51*, Union officials are authorized to access VA *systems*.”⁹

Furthermore, if the Arbitrator *was not permitted* to order the VA *to issue* a PIV card, it stands to reason that the Arbitrator *would have no authority* to find that the VA violated Article 51 *by not issuing* a PIV card.

Contrary to the majority’s unexplained focus on the word “systems,” when the wording of the grievance, the defined issue, and the entirety of the award are read in context together, it is unmistakably clear that the PIV-card remedy was but one facet of a multi-faceted remedy designed to remedy the *one issue* before the Arbitrator – whether or not the Agency violated Article 51.

¹ HSPD-12 § 1.

² *Id.*

³ *Id.* at § 3(d).

⁴ Award at 10-11, 32.

⁵ *Id.* at 13 (emphasis added).

⁶ *Id.* at 35.

⁷ Majority at 8 (quoting Award at 25).

⁸ Award at 24 (emphasis added).

⁹ *Id.* at 25 (emphases added).

Thus, this is not a case where “the Authority [has set] aside an *entire remedy*” which would require a remand “for determination of an appropriate, alternative remedy.”¹⁰ In reality, our decision permits all but one facet – the one which is contrary to HSPD-12 – of the Arbitrator’s multi-faceted remedy to stand.

There is no need, nor justification, to remand.

Thank you.

¹⁰ Majority at 8 (emphasis added).