

70 FLRA No. 30

NATIONAL NURSES UNITED
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JESSE BROWN VA MEDICAL CENTER
HINES, ILLINOIS
(Agency)

0-AR-5214

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DECISION

January 31, 2017

Before the Authority: Patrick Pizzella, Acting Chairman,
and Ernest DuBester, Member

I. Statement of the Case

The Agency suspended the grievant for fourteen days for falsifying veterans' medical records. The Union filed a grievance challenging the suspension. Arbitrator Aaron S. Wolff found that the Agency had just cause to suspend the grievant, and denied the grievance. We must decide three substantive questions.

The first question is whether the award is based on a nonfact. Because the claimed nonfact concerns the Arbitrator's evaluation of the evidence and the parties disputed the claimed nonfact before the Arbitrator, the answer is no.

The second question is whether the Arbitrator failed to conduct a fair hearing. Because the Union fails to demonstrate that the Arbitrator refused to hear or consider pertinent and material evidence, or conducted the proceeding in a manner that so prejudiced the Union as to affect the fairness of the proceeding as a whole, the answer is no.

The third question is whether the award fails to draw its essence from the parties' collective-bargaining agreement (CBA). Because the Union does not establish that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

II. Background and Arbitrator's Award

The grievant is a registered nurse who works with the Agency's Homeless Program. Part of the grievant's job is to go into the community to identify homeless veterans and offer them services available through the Agency. This includes gathering information from homeless veterans and entering the information into the Agency's database.

After a co-worker claimed that the grievant falsified an entry, the Agency decided to review records the grievant had updated for the past five years. The Agency found ten records that appeared false because the records reported meetings with veterans that never occurred. These records included, for example, a record in which the grievant reported a face-to-face meeting with a veteran who, the Agency confirmed, had died three years before the alleged meeting. The Agency considered removing the grievant, but ultimately decided to suspend the grievant for fourteen days – for falsifying veterans' medical records.

The Union filed a grievance challenging the suspension, and invoked arbitration when the parties could not resolve the matter. At arbitration, the parties stipulated to the following issue: "Was the discipline issued in this case for just cause, and if not, what was the appropriate remedy?"¹

The Arbitrator concluded that the Agency had just cause to suspend the grievant. Although the Arbitrator noted that "other reasons could be stated" for denying the grievance, he based his conclusion "sole[ly]" on "the grievant's own testimonial admissions."² The Arbitrator found that the grievant "testified that his dispute with the Agency was over the degree of discipline imposed on him," and that the grievant "believed that he should have been 'counseled' instead of receiving [the] suspension."³ Interpreting the grievant's reference to "counseling" as an "admi[ssion] that some discipline was proper," and as an "admi[ssion] of wrongdoing [and] that the entries he made . . . were false," the Arbitrator found just cause for the suspension and denied the grievance.⁴

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

¹ Exceptions, Attach. 3, Tr. at 5.

² Award at 13.

³ *Id.*

⁴ *Id.*

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact.⁵ To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.⁶ However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.⁷ Further, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, provides no basis for finding that an award is based on a nonfact.⁸

The Union argues that the Arbitrator erred by concluding that the grievant admitted wrongdoing, based on the grievant's testimony that the Agency should have counseled, rather than suspended, him.⁹ According to the Union, the grievant did not admit to wrongdoing because "counseling" under the parties' agreement does not constitute discipline.¹⁰

The Union's nonfact exception lacks merit because it challenges the Arbitrator's evaluation of the evidence, and moreover, the parties disputed whether the grievant committed wrongdoing before the Arbitrator.¹¹ Further, to the extent that the Union contends that the award is inconsistent with the parties' agreement, such a claim does not raise a nonfact exception.¹²

Accordingly, we deny the Union's nonfact exception.

B. The Arbitrator did not deny the Union a fair hearing.

The Union argues that the Arbitrator denied it a fair hearing.¹³ The Authority will find an award 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 he or she conducted the proceedings in a manner that so prejudiced a party as to affect the fairness of the proceeding as a whole.¹⁴

The Union argues that the Arbitrator denied the Union a fair hearing for two reasons. First, referring to a stipulation between the parties that the veteran witnesses were contacted by phone, not in person, the Union claims that "the Arbitrator prevented the full stipulation from being entered into the record."¹⁵ Second, the Union claims that the grievant "was denied . . . a fair hearing" "[b]ecause the [U]nion did not have access to the . . . veteran interviewees during the arbitration hearing or in the employer's investigation process."¹⁶

Neither of the Union's claims has merit. As to the Union's full-stipulation claim, the record reflects that the Arbitrator made the stipulation part of the record.¹⁷ Specifically, the Arbitrator stated during the hearing that "[t]he stipulation was that the contacts that were made to the [i]nvestigator [by the veteran witnesses were] not personally done. [They were] by phone."¹⁸ The Union's representative replied: "By phone, correct."¹⁹ After a brief colloquy, the Arbitrator further stated: "[w]e got the stipulation anyway. Anything else?" to which the Union's representative replied: "For now, no."²⁰ Thus, the record does not support the Union's full-stipulation claim, and we reject it.

The Union's second fair-hearing claim – based on lack of access to veteran witnesses – also lacks merit. Although the Union claims that the Arbitrator denied it a fair hearing because the Union "did not have access to" certain witnesses during the arbitration hearing or during the Agency's investigation of the grievant's alleged conduct,²¹ the Union does not assert that the *Arbitrator* refused to hear or consider evidence, or otherwise conducted the proceeding in a manner that so prejudiced the Union as to affect the fairness of the proceeding as a

⁵ Exceptions at 10-12.

⁶ *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).

⁷ *Id.*

⁸ *E.g., U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015) (Member Pizzella dissenting) (citing *AFGE, Local 2382*, 66 FLRA 664, 668 (2012)).

⁹ Exceptions at 11.

¹⁰ *Id.*

¹¹ *Compare* Award at 11 ("The Agency . . . contends that [the] grievant falsified records") *with id.* at 13 (The Union alleges "[t]he [i]nvestigation [d]id [n]ot . . . [p]rove [t]hat [t]he [g]rievant [w]as [g]uilty as [c]harged").

¹² See *NLRB*, 50 FLRA 88, 92 (1995) (interpretation of parties' agreement cannot be challenged as nonfact).

¹³ Exceptions at 7.

¹⁴ *AFGE, Local 2152*, 69 FLRA 149, 152 (2015) (citing *AFGE, Local 1668*, 50 FLRA 124, 126 (1995)).

¹⁵ Exceptions at 9.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Tr. at 4.

¹⁹ *Id.*

²⁰ *Id.* at 5.

²¹ *Id.*

whole. Specifically, the Union does not identify any witnesses that the Arbitrator refused to allow to testify or the Union to cross-examine. Thus, the Union's lack-of-access claim also does not demonstrate that the Arbitrator denied the Union a fair hearing.²²

Accordingly, we deny the Union's fair-hearing exception.

- C. The award does not fail to draw its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from the parties' agreement.²³ In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the same deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.²⁴ 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 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.²⁵ 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."²⁶ And the Authority has denied essence exceptions where the arbitrator's award does not conflict with the plain wording of the parties' agreement.²⁷

The Union contends that the award fails to draw its essence from the parties' agreement because the Arbitrator did not find that the Agency violated the parties' agreement when the Agency conducted the investigation that led to the grievant's suspension.²⁸ Specifically, the Union alleges that the Agency violated: Article 6, Section 1.F (Article 6.1.F) and Article 31, Section 5.A.3 (Article 31.5.A.3) because the Union had no "access to question, cross-examine, or verify" the veteran witnesses that the Agency interviewed during the investigation, and because "the evidence used against [the grievant] in the disciplinary process was

unsubstantiated hearsay"; and Article 31, Section 1.E (Article 31.1.E) because the Agency failed to consider certain extenuating circumstances in assessing discipline.²⁹

In relevant part, Article 6.1.F provides that "disciplinary . . . actions will be impartial, taken with due process, not based on gossip or unsubstantiated rumors."³⁰ Article 31.5.A.3 provides that "[m]aterial which cannot be disclosed to the [Registered Nurse] or to the [Union] may not be used to support a disciplinary action."³¹ Article 31.1.E provides that "the deciding official should consider any extenuating or mitigating circumstances and/or contributing factors surrounding the offense."³²

The Union's claims do not demonstrate that the award fails to draw its essence from the parties' agreement. The Arbitrator did not discuss or interpret Article 6.1.F, Article 31.5.A.3, or Article 31.1.E. Therefore, the Union is not challenging the Arbitrator's interpretation of these provisions.

Moreover, the Union fails to demonstrate that the award is in manifest disregard of the cited contract terms. Specifically, the Union does not claim that the Arbitrator's dispositive finding – that the Agency had just cause to suspend the grievant based solely on the grievant's testimonial admission of wrongdoing³³ – conflicts with any of the CBA provisions on which the Union relies.

Accordingly, because the Union does not establish that the Arbitrator's interpretation of the CBA is irrational, unfounded, implausible, or in manifest disregard of the CBA, we deny the Union's essence exception.

IV. Decision

We deny the Union's exceptions.

²² *NTEU*, 66 FLRA 835, 837 (2012).

²³ Exceptions at 12.

²⁴ 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

²⁵ *U.S. DOD, Def. Contract Audit Agency, Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*DOL*)).

²⁶ *Id.* (quoting *DOL*, 34 FLRA at 576).

²⁷ *AFGE, Local 1336*, 68 FLRA 704, 708 (2015).

²⁸ Exceptions at 13-14.

²⁹ *Id.*

³⁰ Opp'n, Attach. D, CBA at 12.

³¹ *Id.* at 100.

³² *Id.* at 98.

³³ Award at 13.