

70 FLRA No. 41

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2302
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY HUMAN RESOURCES COMMAND
(Agency)

0-AR-5256

—
DECISION

April 19, 2017

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

I. Statement of the Case

Arbitrator Russell L. Weaver issued an award finding that the Agency neither discriminated against the grievant nor created a hostile work environment in violation of the parties' collective-bargaining agreement or Title VII of the Civil Rights Act of 1964 (Title VII),¹ though he found two incidents of alleged improper behavior were substantiated. The Arbitrator partially sustained and partially denied the Union's grievance but awarded no damages. The Union filed three substantive exceptions.

First, the Union alleges that the award is contrary to law because the Arbitrator discounted facts. Because this exception challenges the Arbitrator's evaluation of evidence and determinations of the weight to be accorded such evidence, it does not establish that the award is contrary to law, and we deny this exception.

Second, the Union contends that the Arbitrator based the award on a nonfact. Because this exception also challenges the Arbitrator's evaluation of the evidence — and disagreements with an arbitrator's evaluation of evidence provide no basis for finding that an award is based on a nonfact — we deny this exception.

Finally, the Union alleges, in effect, that the Arbitrator was biased and denied the Union a fair hearing because the Arbitrator had a conflict of interest; that is, that the Arbitrator and an Agency supervisor's wife are both professors at the same university. Because the Union does not support this assertion, we deny this exception.

II. Background and Arbitrator's Award

The grievant alleged that various supervisors discriminated against her because of her race, age, and sex as well as her engagement in protected activity, and created a hostile work environment. The grievant filed two grievances encompassing these complaints. The parties were unable to resolve them and submitted these combined grievances to arbitration.

At arbitration, the Union alleged that the Agency supervisors violated the parties' agreement and Title VII by discriminating against the grievant on the basis of age, sex, and race as well as for exercising her protected right to submit complaints. The Union asserted that the Agency discriminated in three incidents. In the first, the Union contended that a supervisor — in order to discriminate against the grievant and as retaliation against the grievant for speaking to a supervisor and supporting a coworker in filing a discrimination claim — yelled at the grievant. In the second incident, the Union claimed that a second supervisor discriminated against the grievant, ordering the grievant to move some weighty boxes without assistance. The Union also claimed that the supervisor, through other actions, discriminated against the grievant and retaliated against her for filing a grievance concerning the first incident. Finally, the Union alleged that the supervisor from the first incident and a third supervisor, through a pattern of behavior, created a hostile work environment because of the grievant's age, race, and sex, and in retaliation for her exercise of protected rights. The Union also alleged that one of the supervisors gave preferential treatment to military personnel and employees who were formerly in the military. The Union concluded that, through these incidents, the Agency violated the parties' agreement as well as Title VII.

The Agency countered that it violated neither the parties' agreement nor Title VII. As to the first incident of alleged discrimination, the Agency admitted that the supervisor spoke to the grievant "in an authoritative voice," but argued that the supervisor apologized to the grievant within a few minutes of the incident.² The Agency denied that the supervisor's actions were motivated by the grievant's age, race, or sex, or in retaliation for participation in protected activities.

¹ 42 U.S.C. § 2000e.

² Award at 17.

As to the second incident, the Agency denied that the supervisor in question ordered the grievant to move the weighty boxes by herself, but asserted that the supervisor told the grievant not to move any boxes until a certain point when, if the grievant requested it, the supervisor would have provided assistance. The Agency also denied that any of the supervisor's actions were motivated by discrimination against the grievant's age, race, or sex, or retaliation for participation in protected activities. As to the final incident, the Agency denied that the two supervisors in question created a hostile work environment or otherwise discriminated against the grievant.

Regarding the first incident, the Arbitrator considered the evidence, including a report from an investigation done by the Agency (the Richmond investigation), and found that the supervisor acted improperly, but that "there is no evidence suggesting that [the supervisor] discriminated against [the g]rievant because of her national origin, ethnic background, sex[,] or age, and the Union did not offer sufficient evidence suggesting that [the supervisor] discriminated against [the g]rievant because of her protected activities."³

As to the second incident, the Arbitrator considered conflicting evidence as to what events took place, but ultimately found that "the Union offered no proof suggesting that [the supervisor] had discriminatory intent"⁴ and that "[t]he Union did not offer any direct evidence that [the supervisor] engaged in discrimination or retaliated" against the grievant.⁵

Finally, the Arbitrator considered the evidence surrounding the final incident, including a second Agency investigation, and found that one supervisor showed favoritism to uniformed personnel or former military personnel, but determined that no supervisor discriminated against the grievant based on her age, sex, or race, or in retaliation for her participation in protected activities in violation of the parties' agreement or Title VII.

In conclusion, the Arbitrator found (1) that the supervisor in the first incident acted improperly, but not in a discriminatory manner, and (2) that the supervisor in the third incident favored uniformed and former military personnel, but did not act on the basis of the grievant's age, sex, or race, or in retaliation for her participation in protected activities.

³ *Id.* at 23.

⁴ *Id.* at 31.

⁵ *Id.* at 33.

As a remedy, the Arbitrator found that the proper remedy for the first incident was the apology by that supervisor given minutes after the incident. The Arbitrator also directed the supervisor from the third incident "to avoid improper discrimination between former military personnel and civilian personnel"⁶ and recommended that the Agency further investigate the matter. The Arbitrator denied the Union's request for damages.

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

III. Preliminary Matters

A. Sections 2425.4 and 2429.5 of the Authority's Regulations bar some of the Union's arguments and exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority "will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator."⁷

In its exceptions, the Union contends that the award is contrary to law and violates the parties' agreement because of the "omission of . . . facts."⁸ The only factual omission the Union identifies is that the Richmond investigation allegedly "omitted key witness testimony."⁹ The Union further contends that the Arbitrator's decision would have been different if "key witness testimony had been obtained [and] introduced into the decision[-]making process."¹⁰ However, the Union did not call these witnesses to testify at the arbitration, and we will not consider their testimony now.¹¹ Additionally, we deny, as unsupported,¹² the Union's exceptions that rely solely on this argument.¹³

Additionally, the Union argues that the award violates the WPEA.¹⁴ The record does not demonstrate

⁶ *Id.* at 63.

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

⁸ Exceptions Br. at 1.

⁹ *Id.* at 2.

¹⁰ *Id.*

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

¹² 5 C.F.R. § 2425.6(e)(1); *AFGE, Local 1938*, 66 FLRA 741, 743 (2012) ("Under § 2425.6(e)(1), an exception that fails to support a properly raised ground is subject to denial.").

¹³ Exceptions Br. at 1 ("[T]he omission of these facts are in total contradiction of public policy in that it violates the [parties' agreement,] Title VII[,] and [the WPEA].").

¹⁴ *Id.*

that the Union raised the issue of the WPEA before the Arbitrator. While the issue of retaliation was before the Arbitrator, it was only in the context of a violation of the parties' agreement, not in the context of a violation of the WPEA. As such, the Union could have raised the issue of the WPEA before the Arbitrator, but did not do so. Consequently, we dismiss this exception.¹⁵

Finally, the Union now argues that, by violating the parties' agreement, Title VII, and the WPEA, the award is contrary to public policy.¹⁶ Although the Union argued violations of the parties' agreement and Title VII, the record does not demonstrate that the Union argued at arbitration that the Agency violated public policy. As such, because the Union could have raised this issue before the Arbitrator, but did not do so, we will not consider it now. We dismiss this public-policy exception as well.¹⁷

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Union argues that the award is contrary to law.¹⁸ 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*.¹⁹ 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.²⁰ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that those findings are nonfacts.²¹

The Union alleges that the award is contrary to law because the Arbitrator "discounted facts surrounding his own findings that" a supervisor created a hostile work environment "by discriminating in favor of uniformed personnel or former military personnel[] over civilian employees."²² Specifically, the Union alleges that the award is contrary to Title VII.²³ This exception challenges the Arbitrator's evaluation of the evidence and conclusion that the hostile-environment claim was

"simply not borne out by the facts."²⁴ However, arguments that challenge an arbitrator's evaluation of evidence and determinations of the weight to be accorded such evidence do not establish that an award is contrary to law.²⁵ Consequently, we deny this exception.

B. The award is not based on a nonfact.

The Union argues that the Arbitrator based his award on nonfacts. 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.²⁶ 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.²⁷ 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.²⁸

Specifically, the Union contends that the Arbitrator based his award on a nonfact because "[t]he award relied on a flawed and bias[ed] investigation that did not interview two key witnesses."²⁹ However, this nonfact exception challenges the Arbitrator's evaluation of the evidence; specifically, evidence disclosed by the investigation. Because a disagreement with an arbitrator's evaluation of evidence provides no basis for finding that an award is based on a nonfact, we deny this exception.

C. The Union does not demonstrate that the Arbitrator was biased or that he denied the Union a fair hearing.

The Union claims that "there could have been a possible conflict of interest, as [the Arbitrator] and [a supervisor]'s wife . . . are both professors" at the same university.³⁰ To the extent that the Union intended this sentence to be an exception on bias grounds, we deny it because the Union does not support this claim — beyond the above, quoted assertion — as required by § 2425.6(e)(1) of the Authority's Regulations.³¹ To the

¹⁵ See 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288-89; *Local 3448*, 67 FLRA at 73-74.

¹⁶ Exceptions Br. at 1-2 (The award is "in total contradiction of public policy in that it violates" the parties' agreement, Title VII, and the WPEA.).

¹⁷ See 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288-89; *Local 3448*, 67 FLRA at 73-74.

¹⁸ Exceptions Form at 7.

¹⁹ *NTEU*, Chapter 24, 50 FLRA 330, 332 (1995).

²⁰ *E.g.*, *GSA*, 70 FLRA 14, 15 (2016).

²¹ *E.g.*, *AFGE*, *Nat'l Council 118*, 70 FLRA 63, 67 (2016).

²² Exceptions Br. at 1.

²³ *Id.*

²⁴ Award at 39.

²⁵ *U.S. DOL*, 70 FLRA 27, 30 (2016) (citing *U.S. DHS*, *U.S. CBP*, 65 FLRA 356, 362 (2010)).

²⁶ *NFFE*, *Local 1984*, 56 FLRA 38, 41 (2000).

²⁷ *Id.*

²⁸ *E.g.*, *U.S. Dep't of the Air Force*, *Whiteman Air Force Base*, *Mo.*, 68 FLRA 969, 971 (2015) (then-Member Pizzella dissenting) (citing *AFGE*, *Local 2382*, 66 FLRA 664, 668 (2012)).

²⁹ Exceptions Form at 9.

³⁰ Exceptions Br. at 3.

³¹ *E.g.*, *U.S. Dep't of the Army*, *White Sands Missile Range*, *White Sands Missile Range*, *N.M.*, 67 FLRA 619, 625 (2014) (citing *U.S. DHS*, *U.S. CBP*, 66 FLRA 904, 908 (2012)).

extent the Union intended this same sentence to be an exception on fair hearing grounds, it is likewise unsupported, and so, denied.³² Consequently, we deny this exception.

IV. Decision

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

³² *E.g.*, *AFGE Local 1698*, 70 FLRA 96, 99 (2016); *see also AFGE Local 2883*, 69 FLRA 561, 561 n.12 (2016).