70 FLRA No. 115

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3254
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
GRISSOM AIR RESERVE BASE, INDIANA
(Agency)

0-AR-5324

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DECISION

May 9, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

The Agency issued an employee (the grievant) a letter of counseling (counseling letter) for circumventing her chain of command and for multiple instances of being rude in conversations with headquarters personnel. To support the action, the Agency attached confidential employee responses to a financial-management survey that the Agency had administered. Subsequently, the Agency rescinded the counseling letter and reissued it without the confidential survey responses. Arbitrator Norman R. Harlan issued an award finding that the Agency did not violate the parties' collective-bargaining agreement by issuing the counseling letter. There are five substantive questions before us.

The first question is whether the Arbitrator exceeded his authority by resolving whether the Agency violated the agreement by issuing the counseling letter instead of resolving whether the Agency misused confidential survey responses. In the absence of a stipulated issue, the Arbitrator resolved the issue that he framed, and he addressed the survey-response issue to the extent necessary to resolve the framed issue. Accordingly, the Arbitrator did not exceed his authority.

The second question is whether the Arbitrator denied the Union a fair hearing. We deny the exception because the Union fails to demonstrate that: the Arbitrator refused to hear or consider pertinent evidence, the Arbitrator conducted the proceeding in a manner that prejudiced the Union, or extraordinary circumstances excused the Union's failure to object to certain conduct at the hearing.

The third question is whether the award is based on a nonfact because the Arbitrator allegedly incorrectly framed the issue. We deny the exception because the Arbitrator's framing of the issue does not constitute a factual finding.

The fourth question is whether the award fails to draw its essence from the parties' agreement. It does not, because the Union does not establish that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement.

The fifth question is whether the award is contrary to an Agency regulation – Air Force Instruction (AFI) 38-501. We deny the exception because the Arbitrator framed and resolved only whether the Agency violated the agreement, and the Union offers no support for its claim that AFI 38-501 is incorporated into the agreement.

II. Background and Arbitrator's Award

On May 15, 2017, the Agency issued the grievant the counseling letter for certain actions. As support, the Agency attached to the letter: an organizational chart, copies of emails that the grievant had sent, and confidential employee responses to a financial-management survey that the Agency had administered.

On May 30, 2017, the grievant filed a grievance alleging that the Agency violated the agreement by attributing certain confidential survey responses to the grievant, sharing those responses with management, and using those responses to support a disciplinary action against her – specifically, the counseling letter. On May 31, 2017, the Agency rescinded the counseling letter and reissued it. The reissued counseling letter no longer included the survey responses as supporting documentation.

The parties submitted the grievance to arbitration. At arbitration, the Union argued that the Agency's use of the survey responses in connection with the counseling letter violated Articles 3 and 10 of the agreement. Article 3 concerns employees' rights. In particular, Article 3.6 states that "[a]ll employees have the right to be treated with dignity and respect and no employee shall have to tolerate harassment (including sexual harassment), abusive language,

intimidation, or discrimination."[1] Article 10 concerns disciplinary and adverse actions, and defines disciplinary actions as: an oral admonishment confirmed in writing, a written reprimand, or a suspension of fourteen days or less.[2] The Union also claimed that the Agency's use of the survey responses was inconsistent with AFI 38-501, which concerns maintaining the confidentiality of such responses.

The parties did not agree to a stipulated issue at the arbitration hearing, so the Arbitrator framed the issue as: "Did the Agency violate the [parties' agreement] . . . when it issued [the] . . . [c]ounseling [letter] to [the grievant on] May 31, 2017?"[3]

The Arbitrator found, as relevant here, that the counseling letter was not a disciplinary action within the meaning of Article 10. He stated that the grievant apparently recognized as much because, in the grievance, she did not request removal of the letter from her record. He also found no evidence that the Agency failed to treat the grievant with dignity or respect or otherwise violated Article 3. He noted that the Agency had reissued the counseling letter without the confidential survey responses. And he found that there were "numerous complaints" about the grievant that served as the basis of the counseling letter, independent of the survey responses.[4] Accordingly, the Arbitrator found that the Union failed to demonstrate that the Agency violated the agreement. Consequently, the Arbitrator stated that, under the agreement, the Union was responsible for paying the arbitration costs.

On October 23, 2017, the Union filed exceptions to the Arbitrator's award, and on November 28, 2017, the Agency filed an opposition to the Agency's exceptions.[5]

III. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Union argues that the Arbitrator exceeded his authority.[6] As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration or resolve an issue not submitted to arbitration.[7] Where the parties fail to stipulate the issue, arbitrators may formulate the issue based on the subject matter before them, and the formulation is accorded substantial deference.[8] In such circumstances, the Authority examines whether the award is directly responsive to the issue that the arbitrator framed.[9]

The Union contends that the Arbitrator failed to resolve the issue of the impropriety of the Agency's

[1] Award at 6.
[2] *Id.* at 7.
[3] *Id.* at 10.
[4] *Id.* at 21.

[5] In its opposition, the Agency claims that the Union's exceptions are deficient under § 2425.4(a)(2)-(3) of the Authority's Regulations and asks the Authority to dismiss them because, according to the Agency, the Union failed to include with its exceptions specific references to the record, legible copies of referenced documents, or a record of the arbitration hearing. Opp'n at 3-4. Under § 2425.4(a)(2)-(3), an exception must "set[] forth[] in full" all arguments "in support of" its exceptions, including "specific references to the record . . . and any other relevant documentation," as well as "[l]egible copies of any documents" that "the Authority cannot easily access." 5 C.F.R. § 2425.4(a). Because the Union provides adequate information for the Authority to address its exceptions, we deny the Agency's request. *See, e.g., AFGE, Local 1367*, 67 FLRA 378, 378-79 (2014). The Agency also asks the Authority to strike the Union's post-hearing brief from the record because the Union did not provide the Agency with a copy of the brief when the Union filed the brief *with the Arbitrator*. Opp'n at 4. Section 2429.27(a) of the Authority's Regulations requires that parties serve a complete copy of any documents filed *with the Authority* on all counsel of record or other designated representatives. 5 C.F.R. § 2429.27(a). The Agency does not assert that the Union failed to serve it with a complete copy of its exceptions and its attachments in the proceedings *before the Authority*. Therefore, the Agency's argument provides no basis for finding the Union's exceptions deficient, and we deny the request. *See U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 57 FLRA 417, 420 (2001).
[6] Exceptions at 13-14.
[7] *U.S. DOJ, Fed. BOP, Metro. Det. Ctr. Guaynabo, P.R.*, 68 FLRA 960, 966 (2015) (*Guaynabo*); *SSA, Office of Disability Adjudication & Review, Springfield, Mass.*, 68 FLRA 803, 806 (2015).
[8] *E.g., Guaynabo*, 68 FLRA at 966; *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 887, 891 (2000).
[9] *Guaynabo*, 68 FLRA at 966 (citing *AFGE, Local 522*, 66 FLRA 560, 562 (2012) (*AFGE*)).

"release/use of a confidential and anonymous survey" and instead resolved whether the Agency violated the agreement by issuing the counseling letter.[10] The grievance itself alleges that the Agency violated Articles 3 and 10 of the agreement by attributing certain confidential survey responses to the grievant, sharing those responses with management, and *using those responses to issue the counseling letter*.[11] When the parties failed to stipulate the issue, the Arbitrator framed the issue as whether the Agency violated the parties' agreement when it issued the counseling letter.[12] The Arbitrator found that the Agency did not violate the agreement because the counseling letter was not a disciplinary action within the meaning of Article 10 and there was no evidence that the Agency violated Article 3. Thus, the Arbitrator's finding is directly responsive to the issue that he framed. Further, the Arbitrator addressed the survey-response issue to the extent necessary to resolve the framed issue. Thus, the Union's exception does not demonstrate that the Arbitrator exceeded his authority, and we deny it.[13]

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

The Union argues that the Arbitrator failed to conduct a fair hearing in four respects, discussed separately below.[14] The Authority will find that an arbitrator failed to conduct 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.[15] In addition, the Authority has held that, absent extraordinary circumstances, issues involving an arbitrator's conduct at the hearing should be raised at the hearing and, if they are not, then the Authority will not consider them for the first time on exceptions.[16]

First, the Union argues that the Arbitrator incorrectly framed the issue at arbitration as involving the counseling letter instead of the "illegal use of a confidential and anonymous survey."[17] The Union has not shown that the arbitrator refused to hear or consider pertinent and material evidence in framing the issue, or that the Arbitrator framed the issue in a manner that so prejudiced the Union as to affect the fairness of the proceeding as a whole. As such, the Union has not demonstrated that the Arbitrator denied the Union a fair hearing in this respect.[18]

Second, the Union argues that the Agency's representative contacted the Arbitrator's wife and had a discussion with her about the medication that the Arbitrator was required to take at the hearing.[19] The Union does not explain how this alleged communication deprived the Union of a fair hearing. Moreover, the Union concedes that it did not object to the discussion at arbitration and the Union does not claim that extraordinary circumstances excused its failure to object at arbitration. Accordingly, the Union's fair-hearing argument on this point does not establish that the award is deficient, and we reject it.[20]

Third, the Union contends that, before the hearing, the Arbitrator allegedly improperly ordered the parties to send him the agreement and certain exhibits, and relied on those documents to conclude that he could not grant the Union's requested remedy of disciplining the grievant's supervisor.[21] Once again the Union does not claim that, at arbitration, it objected to the Arbitrator's pre-hearing order or his statement concerning the remedy. Nor does the Union claim that extraordinary circumstances excused its failure to object. As the Arbitrator found that the Agency did not violate the agreement and so, the Union was not entitled to any remedy, the Arbitrator's statement concerning his *authority* to grant the requested remedy is unnecessary to the disposition of his decision. Therefore, it constitutes dictum.[22] For these reasons, this argument provides no basis for finding that the Arbitrator denied the Union a fair hearing.[23]

Finally, the Union argues that the Arbitrator refused to allow the Union to pursue questioning concerning whether the Agency violated Article 12.12.1.3 of the agreement.[24] However, no record

[10] Exceptions at 14.
[11] Award at 1-2.
[12] *Id.* at 10.
[13] *See, e.g.*, *Guaynabo*, 68 FLRA at 966-67; *AFGE, Local 1235*, 66 FLRA 624, 625 (2012); *AFGE*, 66 FLRA at 562.
[14] Exceptions at 9-10.
[15] *E.g., Nat'l Nurses United*, 70 FLRA 166, 167 (2017) (*Nurses*); *Pension Benefit Guar. Corp.*, 68 FLRA 916, 922 (2015) (*Pension*) (citing *AFGE, Local 1668*, 50 FLRA 124, 126 (1995)).
[16] *U.S. DHS, U.S. CBP*, 66 FLRA 409, 411 (2011) (*DHS*) (citing *Bremerton Metal Trades Council*, 59 FLRA 583, 588 (2004) (*Bremerton*)).
[17] Exceptions at 9.
[18] *See AFGE, Council of Prison Locals, Local 3828*, 66 FLRA 504, 505 (2012).
[19] Exceptions at 9.
[20] *See DHS*, 66 FLRA at 411; *Bremerton*, 59 FLRA at 588.
[21] Exceptions at 9-10.
[22] *See* Award at 20-21 (declining to award the requested remedy because "there [was] no violation of the [agreement] here").
[23] *See, e.g., AFGE, Local 3911*, 69 FLRA 233, 235 (2016) (exception challenging arbitrator statement unnecessary to disposition of decision did not provide basis for Authority to find award deficient); *AFGE, Council of Prison Locals 33, Local 3690*, 69 FLRA 127, 131 (2015) (*Local 3690*) (same).
[24] Exceptions at 9.

evidence supports the Union's claim that the Arbitrator refused to allow questioning concerning an alleged violation of this Article. Moreover, arbitrators have considerable latitude in conducting arbitration hearings.[25] As the Union has not shown that the Arbitrator's conduct at the hearing was improper or that it prejudiced the Union, we reject the Union's argument.

In sum, we deny the Union's fair-hearing exceptions.

C. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact because the Arbitrator incorrectly framed the issue as involving the counseling letter instead of the survey-response issue.[26] To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[27] A challenge that fails to identify clearly erroneous *factual* findings does not demonstrate that an award is based on a nonfact.[28] Here, the Arbitrator's framing of the issue does not constitute a *factual* finding. Therefore, the Union's claim provides no basis for finding that the award is based on a nonfact, and we deny the exception.[29]

D. The award draws its essence from the agreement.

The Union argues that the award fails to draw its essence from the agreement for two reasons, which we discuss separately below.[30] In reviewing an arbitrator's award interpreting a collective-bargaining agreement, the Authority will find that the award fails to draw its essence from the agreement when the excepting 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.[31]

First, the Union argues that the award fails to draw its essence from Article 3.6,[32] which states, in pertinent part, that "[a]ll employees have the right to be treated with dignity and respect."[33] Specifically, the Union claims that the Agency failed to treat the grievant with dignity by allegedly attributing certain confidential survey responses to her and attaching those responses as support for the counseling letter. The Arbitrator found that the Agency reissued the counseling letter, which did not include the confidential survey responses as support, and that other evidence supported the letter, independent of the survey responses. Accordingly, the Arbitrator concluded that the Union failed to demonstrate that the Agency's actions violated Article 3. The Union cites nothing in the agreement that defines the terms "dignity" or "respect" or otherwise conflicts with the Arbitrator's interpretation. Therefore, the Union's argument provides no basis for finding that the Arbitrator's conclusion is irrational, unfounded, implausible, or in manifest disregard of the agreement, and we deny the exception.[34]

Second, the Union argues that the award fails to draw its essence from Article 12.12.1.3 because the Arbitrator would not allow the Union to pursue questioning related to whether the Agency violated that article.[35] Article 12.12.1.3 provides that the Wing Commander will meet with a grievant and/or his or her representative before responding to a grievance if the grievant is assigned to an organization that reports directly to the Wing Commander. We have already found that the Arbitrator did not deny the Union a fair hearing by refusing to allow questioning concerning an alleged violation of Article 12.12.1.3. And the Union does not otherwise provide an argument as to why the Arbitrator's interpretation of the agreement conflicts with Article 12.12.1.3. Therefore, the Union's argument provides no basis for finding that the Arbitrator's interpretation of the agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement, and we deny this exception.[36]

[25] *Pension*, 68 FLRA at 922; *AFGE, Local 3979, Council of Prisons Locals*, 61 FLRA 810, 814 (2006).
[26] Exceptions at 11.
[27] *AFGE, Council of Prison Locals #33, Local 0922*, 69 FLRA 351, 353 (2016).
[28] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 201 (2016).
[29] *See id.* (party's nonfact claims challenging arbitrator's failure to apply the doctrine of collateral estoppel and award liquidated damages were not challenging factual findings and, thus, provided no basis for finding the award was based on nonfacts); *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015) (arbitrator's interpretation of the parties' agreement did not constitute a factual finding and, as such, could not be challenged as a nonfact).
[30] Exceptions at 12-13.
[31] *SSA*, 70 FLRA 227, 229 (2017).
[32] Exceptions at 12-13.
[33] Award at 6.
[34] *Nurses*, 70 FLRA at 168.
[35] Exceptions at 13.
[36] *Nurses*, 70 FLRA at 168.

In sum, we deny the Union's essence exceptions.[37]

E. The award is not contrary to an Agency regulation.

The Union argues that the award is contrary to an Agency regulation – specifically, AFI 38-501.[38] The Union quotes a portion of that regulation that states, as relevant here, that employees will "not communicate, either verbally or in writing, information that could reasonably allow identification of individual survey respondents to any individual or agency, either within or outside the Air Force."[39] The Union contends that the Agency violated AFI 38-501 by allegedly releasing the grievant's confidential survey responses.[40] In addition, the Union claims that it "informed the [A]rbitrator that all [AFIs] are an extension of the [parties' agreement]."[41] Therefore, according to the Union, because AFIs are incorporated into the agreement, the Arbitrator's finding that the Agency did not violate the agreement conflicts with AFI 38-501.[42]

The Authority will find an award deficient if it is inconsistent with a governing agency regulation.[43] In reviewing arbitration awards for consistency with agency regulations, the Authority normally reviews the questions of law raised by the award and the exception de novo.[44] But when a collective-bargaining agreement incorporates the agency regulation at issue, the matter becomes one of contract interpretation because the agreement, not the regulation, governs the matter in dispute.[45] In such circumstances, the Authority applies an essence analysis to assess the excepting party's claim.[46]

The Arbitrator did not interpret or find a violation of AFI 38-501. Instead, he framed and resolved only whether the Agency violated the agreement. Because the Union offers no support for its claim that AFI 38-501 is incorporated into the agreement, we deny the exception.

IV. Decision

We dismiss,[47] in part, and deny, in part, the Union's exceptions.

[37] The Union also claims that the award fails to draw its essence from Article 2.3 of the agreement because, when quoting the wording of Article 2.3 in his award, the Arbitrator mistakenly omitted the term "[e]xcluded" from the provision's description of employees that are excluded from the bargaining unit. Exceptions at 13. Beyond this claim, the Union provides no support for finding that the award fails to draw its essence from the agreement in this regard. Accordingly, we deny this exception as unsupported. 5 C.F.R. § 2425.6(e)(1) (the Authority will deny an exception that "fails to . . . support" a recognized ground for review); *see, e.g.*, *AFGE, Local 2959*, 70 FLRA 309, 311-12 (2017); *Local 3690*, 69 FLRA at 131; *AFGE, Local 1858*, 67 FLRA 327, 328 (2014).

[38] Exceptions at 5.

[39] *Id.*

[40] *Id.* at 5-6.

[41] *Id.* at 6.

[42] *Id.* ("a violation of AFI 38-501 was a violation of the [parties' agreement]").

[43] *U.S. Dep't of the Air Force, Joint Base Elmendorf-Richardson*, 69 FLRA 541, 546 (2016).

[44] *U.S. Dep't of Transp., FAA*, 64 FLRA 513, 514 (2010).

[45] *See, e.g.*, *U.S. Dep't of the Navy, Naval Air Station, Pensacola, Fla.*, 65 FLRA 1004, 1008 (2011) (citing *AFGE, Council of Prison Locals 33*, 59 FLRA 381, 382 (2003)).

[46] *Id.*

[47] In the "additional information" section of its exceptions form, the Union raises two claims. Exceptions at 15-16. First, the Union asserts that, prior to the hearing, the Agency rescinded its request for an arbitrability ruling. According to the Union, the Agency is therefore the "losing party" under the agreement and the Arbitrator erred in ordering the Union to pay the arbitration costs. *Id.* at 16. Second, in response to the Arbitrator's statement that the grievant did not request removal of the counseling letter from her record because she apparently recognized that the letter was not a disciplinary action, the Union asserts that it did not request such action because it is seeking that remedy in a different grievance. *Id.* Because these arguments neither raise a recognized ground for review listed in § 2425.6(a)-(c) of the Authority's Regulations nor otherwise demonstrate a legally recognized basis for setting aside the award, we dismiss them. *E.g.*, *AFGE, Local 12*, 69 FLRA 162, 162-63 (2016); *AFGE, Local 1858*, 68 FLRA 845, 845 (2015); *see also* 5 C.F.R. § 2425.6(e)(1).