70 FLRA No. 118

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1594
(Union)

0-AR-5168
(70 FLRA 1 (2016))

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DECISION

May 16, 2018

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

I. Statement of the Case

Arbitrator Richard John Miller issued an award (first award) in *Department of VA, St. Petersburg Regional Benefit Office* (*VA I*)[1] finding that the Agency did not provide the Union with adequate office space and access to that office and, thereby, violated the parties' collective-bargaining agreement and a memorandum of understanding (MOU). As relevant here, the Arbitrator ordered the Agency, as part of the remedy, to grant a Union vice president a personal-identity-verification (PIV) card.

The Agency filed exceptions to the first award. The Authority granted one of the Agency's exceptions, vacated the remedy of granting the Union vice president a PIV card, and remanded the award to the parties for resubmission to the Arbitrator, absent settlement, for an appropriate remedy, if any.

On remand, the Arbitrator issued a second award (remand award) and ordered the Agency to allow the Union vice president to undergo the PIV-credentialing process as outlined in VA Handbook 0735 and, upon the successful completion of the credentialing process, to grant him either a PIV card or a non-PIV card.

The Agency filed exceptions to the Arbitrator's remand award. Those exceptions present us with one primary issue.

The Agency alleges that the award is contrary to Homeland Security Presidential Directive 12 (HSPD-12) and an Office of Personnel Management (OPM) memo dated July 31, 2008 (OPM Memo) because the decision "to sponsor and authorize an individual to undergo" the PIV-credentialing process "is solely within the [a]uthority of the Agency."[2] We find that the OPM Memo grants the Agency the discretion and the authority alone to determine what is a security risk that warrants not submitting an individual to the PIV-credentialing process. Because the remand award usurped that discretion, we agree with the Agency and vacate that award.

II. Background and Arbitrator's Award

A. The First Award and *VA I*

Because *VA I* discusses the facts in detail, we will only briefly address relevant facts here.

The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to provide the Union with office space and access to that office space. The grievance went to arbitration. Among other issues, the Arbitrator addressed 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] The Arbitrator found that the Agency had violated the parties' agreement as well as an MOU and, as a remedy, ordered the Agency to grant the Union vice president – who had been removed from federal service – a PIV card.

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

In *VA I*, the Authority found that the first award was contrary to the government-wide rules and regulations found in HSPD-12 and the OPM Memo. Specifically, the Authority found that the award was contrary to these regulations because "the Arbitrator determined that the Union vice president 'shall be granted a PIV card,' without regard to the[] credentialing standards" found in HSPD-12 and the OPM Memo.[4] The Authority remanded the case to the

[1] 70 FLRA 1 (2016) (Member Pizzella concurring in part and dissenting in part).

[2] Exceptions at 5.

[3] First Award at 26-27.

[4] *VA I*, 70 FLRA at 4.

parties for resubmission to the Arbitrator, absent settlement, "to formulate an appropriate, alternate remedy, if any."[5]

B. The Remand Award

On remand, the parties resubmitted the issue to the Arbitrator to address an appropriate, alternate remedy. At the second arbitration proceeding, the Union requested as a remedy that the Arbitrator order the Agency to allow the Union vice president to undergo the PIV-credentialing process.

The Agency argued at arbitration that the Arbitrator could not dictate how the Agency administers its obligations under HSPD-12 and that "any award by an arbitrator that would instruct the Agency to do anything in regards to its[] PIV policy would run contrary to government-wide regulations"[6] and its management rights under § 7106 of the Federal Service Labor-Management Relations Statute (Statute).[7] The Agency also presented testimony by the Agency official in charge of the credentialing process. This official stated that he would not sponsor—and would not allow any employees to sponsor—the Union vice president for the credentialing process. Specifically, the official testified that he based this decision on, among other things: (1) an administrative law judge's finding that the Union vice president fabricated testimony before the Merit Systems Protection Board, and (2) reports that the Union vice president – who, as noted above, had been removed from federal service – was frequently seen in areas designated only for employees. This witness also discussed inappropriate emails that the Union vice president had sent to Agency management.

The Arbitrator first found that neither the Union vice president's classification as a visitor nor the fact that the Union vice president had a PIV card for the Agency's medical center in Orlando allowed the Union vice president to have the access required by the parties' agreement and various MOUs. The Arbitrator then described the credentialing process set forth in VA Handbook 0735. As an initial step, the Agency appoints a sponsor to initiate a credentialing request for an affiliate. VA Handbook 0735 also defines "[a]ffiliate[s]" as "[i]ndividuals who require logical access to VA [i]nformation systems and/or physical access to VA facilities to perform their jobs," including "Union officials."[8] The Arbitrator concluded that the Union vice president is an affiliate for credentialing purposes.

After reviewing Agency regulations, government-wide regulations, and the parties' MOUs, the Arbitrator then determined that "the credentialing procedure . . . has no provision for the Agency to refuse to appoint a sponsor"[9] and that an MOU concerning access for Union officials "does not give the Agency discretion to refuse to sponsor a Union official unless specific credentialing standards are met by the Agency."[10] The Arbitrator also found that the Union president "could serve" as the Union vice president's sponsor.[11] Finally, the Arbitrator found unpersuasive the Agency official's contention that the decision was based on security concerns. Specifically, the Arbitrator found that the Agency official's "allegations . . . do not comply with the 'reasonable basis to believe' standard established"[12] in the OPM Memo.[13] The Arbitrator concluded that this testimony "demonstrat[ed] anti-[u]nion bias."[14]

As a remedy, the Arbitrator ordered the Agency to allow the Union vice president "to undergo the PIV[-]credentialing process as stated in VA Handbook 0735 [and] . . . in the exact same way accorded to other [a]ffiliates."[15] He also ordered the Agency to grant the Union vice president a PIV card if the Union vice president successfully completed the credentialing process "in the same way as another [a]ffiliate granted a PIV card," or in the alternative, to grant him a non-PIV card in accordance with VA Handbook 0735. The Arbitrator concluded that "it is expected that if he is treated like other non-employee [a]ffiliates in the credentialing process, he will successfully complete the credentialing process for a PIV or [n]on-PIV card."[16]

The Agency filed exceptions to the remand award; the Union filed an opposition.

[5] *Id.* at 5.
[6] Award at 9.
[7] 5 U.S.C. § 7106(a)(1).
[8] Award at 10 (quoting VA Handbook 0735).
[9] *Id.* at 11.
[10] *Id.* at 12.
[11] *Id.*
[12] *Id.* at 16,
[13] Agency's Exceptions, Attach. 5, OPM Memo at 2-3; *see also id.* at 2 n.5 ("A reasonable basis to believe occurs when a disinterested observer, with knowledge of the same facts and circumstances, would reasonably reach" a conclusion that a PIV card should be denied for certain specified reasons.).
[14] Award at 16.
[15] *Id.* at 18.
[16] *Id.*

III. Analysis and Conclusions: The remand award is contrary to the OPM Memo.

The Agency contends[17] that the award is contrary to HSPD-12 and the OPM memo.[18] These exceptions allege that the award is contrary to law. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception 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 this assessment, the Authority defers to the arbitrator's underlying factual findings.[21]

The Agency argues that the award is contrary to government-wide regulations because "the PIV[-]credentialing process includes any decision to sponsor and authorize an individual to undergo a check. That decision is solely within the [a]uthority of the Agency."[22] The Agency continues that the "authority . . . to [decide] who gets to go through the process is the essence of HSPD-12"[23] and that, under the OPM Memo, "[t]he Agency has the right to control who[m] they want sponsored and who[m] they do not."[24]

In *VA I*, the Authority struck the remedy at issue – an order that the Agency issue the vice president a PIV card – because the Arbitrator issued that remedy without regard to the credentialing standards set forth in government-wide regulations.[25] With respect to the remedy now before us, we find that the Arbitrator again reached legal conclusions that are contrary to government-wide regulation – specifically, the OPM Memo.

The OPM Memo provides, initially, six reasons for a PIV card to not be issued to an individual.[26] After this list, the Memo continues:

> Many departments and agencies work with individuals who do not require a suitability determination or a security clearance. In such cases, agencies have the flexibility to apply supplemental credentialing standards in addition to the six basic standards above. The supplemental standards are intended to ensure that the grant of a PIV card to an individual does not create an unacceptable risk. . . . These standards may be applied based on the risk associated with the position or work on the contract.[27]

The OPM Memo then lists seven more standards available to agencies so that "[a] department or agency may consider denying or revoking a PIV card to an individual based on one of these supplemental credentialing standards."[28]

Thus, the OPM Memo provides to departments and agencies, already charged with providing PIV cards themselves, the discretion and the authority alone to determine who presents security risks and, therefore, should not even have *access* to the PIV-credentialing

[17] The Agency also argues that the awarded remedy is contrary to Executive Order 13,467, Office of Management and Budget Memo M-11-11, Federal Information Processing Standards Publication 201-2, and that the awarded remedy is contrary to the Agency-wide regulations found in VA Directive 0710 and VA Directive and Handbook 6500. *See* Exceptions at 4-5, 8-9, 11. Because the Agency could have raised these arguments before the Arbitrator, but did not do so, we will not consider them now. *See* 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288-89 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012). As well, the Union requests that we consider certain arguments by the Agency that were not raised before the Arbitrator because the Agency "will use these arguments to refuse to follow the order, and refuse to appoint a sponsor" for the Union vice president. *See* Opp'n at 15. However, under the Authority's Regulations, the Authority will not issue advisory opinions, such as an opinion as to matters that might occur in the future. *See* 5 C.F.R. § 2429.10; *SSA, Office of Disability Adjudication & Review, Region 1*, 65 FLRA 334, 336 (2010) (*citing AFGE, Local 1864*, 45 FLRA 691, 694-95 (1992)). Accordingly, we will not consider various submitted evidence and arguments put forth by the Union in fear that the Agency will not comply with the award. *See* Opp'n at 28, 37, 42, 44; *id.* at 33 ("retaliation" (citing 5 U.S.C. § 7116(a)(2))); *id.* at 35 ("due process"). *NASA, Goddard Space Flight Center, Greenbelt, Md.*, 62 FLRA 348, 349 (2008).

[18] Exceptions at 5-6 (alleging that the remand award is contrary to *VA I*); *id.* at 7-8 (alleging that the remand award is contrary to HSPD-12); *id.* at 9 (alleging that the award is contrary to the OPM Memo).

[19] *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)).

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

[21] *Id.*

[22] Exceptions at 5 (arguing that the award is contrary to *VA I*); *see also id.* at 7 ("That authority as to who gets to go through the process is the essence of HSPD-12."); *id.* at 9 (arguing that under the OPM memo "[t]he Agency has the right to control who they want sponsored and who they do not").

[23] *Id.* at 7.

[24] *Id.* at 9.

[25] 70 FLRA at 4-5.

[26] Agency's Exceptions, Attach. 5, OPM Memo at 2.

[27] *Id.* (citations omitted).

[28] *Id.* at 3.

process.[29] We cannot reconcile this discretion and authority with the Arbitrator's sweeping determinations that led to his conclusions and remedy in the remand award.[30] The Arbitrator concluded that the security concerns, testified to by the Agency official in charge of credentialing, were "not for any security reasons" and so, he ordered that the Union vice president be provided with a sponsor and put through the credentialing process "like other non-employee [a]ffiliates."[31] While we acknowledge the well-established discretion that our own case law has provided to arbitrators to fashion remedies for violations, our review of the OPM Memo does not allow us to go so far as to permit an arbitrator to require an agency to activate the PIV-credentialing process. To hold otherwise would run counter to the very premise underlying that process itself – specifically, that agencies alone have the discretion and the authority to determine which individuals pose security risks that warrant not submitting them to the process.[32] And so, we find the remand award contrary to law and we set it aside.[33]

Because we vacate the remand award on this basis, there is no need to address the Agency's remaining exceptions.[34]

IV. Decision

We dismiss, in part, and grant, in part, the Agency's exceptions; and we vacate the remand award.

[29] *See NASA v. Nelson*, 562 U.S.134, 148 (2011) (agency conducts challenged background checks, in accordance with HSPD-12, in its capacity "as proprietor" and manager of its "internal operation" and case law has recognized that the Government has a much freer hand in dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large); *U.S. Dep't of Air Force v. FLRA*, 648 F.3d 841, 847-48 (D.C. Cir. 2011) (Authority should defer to agency's interpretation of statute it is charged to administer).

[30] We note that the dissent takes an extraordinarily broad view of the restrictions that collective-bargaining may place on, and takes a disproportionally narrow view of an Agency's right to determine, who may access an Agency's facilities. We take seriously the increasingly frequent scoldings that the Authority has received from the courts for its failure to give due consideration to the discretion and responsibilities held by other agencies when they interpret other statutes not our own. *See U.S. Dep't of Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F.3d 957, 961 (D.C. Cir. 2016) (noting the court "cannot imagine that Congress intended to empower a civilian agency like the Federal Labor Relations Authority to second-guess the military's judgment about non-military access to commissaries and exchanges); *U.S. Dep't of Navy v. FLRA* 665 F.3d 1339, 1348 (D.C. Cir. 2012); *AFGE, AFL-CIO, Local 32*, 29 FLRA 380, 417 (1987) (Concurring and Dissenting Opinion of Member Frazier) ("precious little deference"). Without a doubt, the Authority has long recognized, and still does today, the prerogative and necessity of federal unions to select their own officials and the importance of assuring access between federal unions and the bargaining unit employees they represent. With that said, the Authority has never held (and may not hold) that any particular union official can unilaterally demand entry into controlled-access agency facilities, or the manner in which the agency will exercise its right to determine who is entitled to access credentials, without any regard to OPM's or another agency's national security-based edicts. We do not consider national security requirements to be equal to the use of a telephone or access to scheduling systems, examples upon which the dissent relies. Simply put, there is sound public policy behind the discretion which agencies are given in making security determinations and that policy and those rights cannot be compromised by a collective-bargaining provision.

[31] Award at 18.

[32] *See Gargiulo v. DHS*, 727 F.3d 1181, 1184-85 (Fed. Cir. 2013) (citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (holding that no one has a "right" to a security clearance which requires an affirmative act of discretion on the part of the granting official)); *see also U.S. Nuclear Regulatory Comm'n*, 65 FLRA 79, 83 (2010) (noting Authority has held that under *Egan* neither arbitrators nor the Authority generally may review the merits of security-clearance determinations); *U.S. Info. Agency*, 32 FLRA 739, 745 (1988) (arbitrator may not review the merits of the agency's security-clearance determination).

[33] *See DHS, CBP*, 67 FLRA 107, 110 (2013); *see also U.S. DOJ, BOP, Metro. Det. Ctr., Guaynabo San Juan, P.R.*, 66 FLRA 81, 88 (2011) (as grievants do not perform service abroad they do not qualify for home leave under 5 C.F.R. §§ 630.601, 630.605(a) and because there is no basis for finding that the Agency can provide home leave to employees who do not qualify for it under 5 C.F.R. §§ 630.601, 630.605(a), parties' agreement cannot provide a basis for the Arbitrator's award of home leave); *Nat'l Ass'n of Air Traffic Specialists, NAGE- SEIU*, 61 FLRA 558, 559 (2006) (Authority has held that arbitrators have broad discretion in fashioning appropriate remedies, and an arbitrator is not required to provide a remedy for every violation of a collective bargaining agreement).

[34] Exceptions at 6, 14-16 (arguing that the award exceeds the Arbitrator's authority, fails to draw its essence from the parties' agreement and is contrary to § 7106(a)(1) of the Statute).

Member DuBester, dissenting:

Contrary to the majority, I would uphold the Arbitrator's findings and conclusion that the Agency improperly refused to allow the grievant, a Union official, access to the Agency's PIV credentialing process. The Agency's action constitutes a repudiation of the Agency's responsibilities under the parties' collective-bargaining agreement, the parties' memoranda of understanding (MOUs), HSPD-12, an Office of Personnel Management memo (OPM memo), and the Agency's handbook dealing with the PIV process.[1] In addition, the Agency's actions are contrary to Authority precedent granting union officials access to agency systems vital to their union representational responsibilities.[2] As the Arbitrator found, the Union official's request to undergo the credentialing process is "based on the bona fide need for a relationship between the [Union official] and the [Agency]."[3]

The Agency's own handbook makes clear that the grievant should have access to the Agency's credentialing process. The handbook states that the credentialing process applies to "individuals who require logical access to [Agency] [i]nformation sytems and/or physical access to [Agency] facilities to perform their jobs . . . . Examples include . . . [u]nion [o]fficials."[4] As the Arbitrator found, the Agency's refusal to allow the grievant access to the credentialing process is contrary to the handbook's provisions.[5]

Further, as the Arbitrator also found, the Agency's refusal is contrary to the parties' MOU relating to the handbook. This MOU "does not give the Agency the discretion to refuse to [give access to the credentialing process to] a [u]nion official unless specific credentialing standards are met by the Agency."[6] Those credentialing standards are set forth in the OPM memo. The Arbitrator found that the Agency did not meet those standards.[7] Consequently, the Agency's refusal to allow the grievant access to the credentialing process is also contrary to the parties' MOU.

Moreover, as the OPM memo makes clear, "[t]he PIV credentialing process does not interfere with . . . agency discretion to make suitability or national security (security clearance) determinations."[8] As the Arbitrator found, "[i]f the individual's background investigation uncovers facts fitting into one of the [OPM memo's standards], the agency has discretion to deny the card" as part of the credentialing process.[9] But these considerations should not affect an individual's access to the process, before any determinations are made.[10]

The reasons provided by the Agency for its refusal to give the grievant access are based on the grievant's performance of his representational responsibilities, and not for any security reasons. Rather than being "convincing evidence" supporting denying access, those reasons demonstrate anti-union bias.[11] As the Arbitrator found, the Agency official's allegations concerning why the grievant was denied access do not comply with the "reasonable basis to believe" standard established in the OPM memo.[12] I agree with that finding.

In sum, the Agency's actions denying the grievant access to the credentialing process, and the Agency's rationale for taking those actions, do not comply with law, applicable regulations and other

[1] Award at 11, 16-17.

[2] *See, e.g.*, *AFGE, AFL-CIO, Local 3748*, 11 FLRA 122 (1983) (finding that proposed access to agency's telecommunication system for representational purposes directly related to conditions of employment and within duty to bargain under the Statute); *AFGE, AFL-CIO, Council of Marine Corps Locals, Council 240*, 35 FLRA 108 (1990) (same); *see also U.S. Dep't of VA, St. Petersburg Reg'l Benefit Office*, 70 FLRA 1, 5 (2016) (finding that agency violated parties' agreement and MOUs when it refused union official access to agency computer system); *United Am. Nurses D.C. Nurses Ass'n & United Am. Nurses Local 203*, 64 FLRA 879, 881-83 (2010) (finding negotiable proposal granting union access to agency's scheduling system); *SSA*, 65 FLRA 523, 525-27 (2011) (finding that agency violated parties' agreement by terminating union president's access to aspects of agency computer system when he retired).

[3] Award at 7.

[4] *Id.* at 10 (quoting VA Handbook 0735).

[5] *Id.* at 11.

[6] *Id.* at 12.

[7] *Id.* at 16.

[8] *See id.* at 14.

[9] *Id.*

[10] Like the majority, I take seriously national security requirements and an agency's right to determine who may access agency facilities. Majority at 6 n.30. But contrary to the majority's decision, I do not consider that right to include the discretion to ignore government-wide and agency directives addressing access issues, as the Agency did in this case. Nor do I consider that right to include the discretion to ignore other legal requirements to which the Agency is subject, such as the requirement that the Agency not base decisions on anti-union bias. Finally, and in any event, I note, contrary to the majority's misunderstanding of this case, that what is at issue is not the Union official's access *to the Agency's facilities*. The only issue is the Union official's access *to the Agency's PIV credentialing process*, which will provide data giving the Agency an objective, factual basis for granting or denying the Union official access to Agency facilities. The award, and the scope of this dissent, is no broader.

[11] Award at 16.

[12] *Id.*

guidance, or Authority precedent. Barring special circumstances not present in this case, union officials are entitled to access to agency systems and facilities vital to their union representational responsibilities. Because the majority's decision undercuts the important reasons for that access, I dissent.