71 FLRA No. 25

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL 121
(Union)

and

UNITED STATES GOVERNMENT PUBLISHING OFFICE
(Agency)

0-AR-5401

DECISION

May 22, 2019

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, a bargaining-unit employee was suspended for fourteen days for lack of candor to an Inspector General (IG) investigator about his knowledge of, and providing supplies to, another employee who constructed a grill for his personal use out of Agency materials. Arbitrator M. David Vaughn reduced the suspension to seven days. We uphold the award.

II. Background and Arbitrator's Award

The grievant is a sheet-metal mechanic, one of several in the fabrication department. In January 2015, the Agency's IG received an anonymous tip that someone had constructed a grill or a smoker for personal use out of Agency materials. In July 2015, the IG issued an investigative report which identified the mechanic who had constructed the grill. In the course of the investigation, the grievant was interviewed and denied knowing about the other mechanic's actions, even though he supplied him with the high-temperature paint used on the grill. The mechanic who constructed the grill was suspended for seven days for his actions; the grievant was suspended for fourteen days for lack of candor, misuse of government property, and failure to follow applicable rules, laws, regulations, or policies in the performance of duties. The Union grieved and the dispute was arbitrated.

The parties stipulated to the following issues: "Did the Agency prove the charges against [the g]rievant by a preponderance of the evidence? Was the penalty of a 14-day suspension reasonable? Did the Agency violate the [p]arties' [agreement] by unduly delaying implementation of corrective action against [the g]rievant?"[1]

In the award, the Arbitrator found that the Agency had proved the three charges by a preponderance of the evidence. However, the Arbitrator found that the penalty was excessive because the mechanic who had actually constructed the grill only received a seven-day suspension and the grievant's actions were not "aggravated."[2] As a remedy, the Arbitrator reduced the grievant's suspension to seven days.

The Union filed exceptions on August 9, 2018, and the Agency filed an opposition on September 10, 2018.

III. Analysis and Conclusions

A. The award is not contrary to law.

In its exceptions, the Union argues that the award is contrary to law[3] because it "fail[s] to rescind the suspension due to a violation of the grievant's due process rights."[4] Specifically, the Union argues that the Agency unlawfully considered the grievant's denial of wrongdoing as an "aggravating factor" in deciding to suspend him for fourteen days because the Agency did not notify the grievant of this aggravating factor in the proposal letter.[5]

[1] Award at 2.
[2] *Id.* at 38.
[3] When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo. In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the appealing party establishes that those findings are nonfacts. *E.g.*, *U.S. Dep't of State, Bureau of Consular Affairs, Passport Servs. Directorate*, 70 FLRA 918, 919 (2018).
[4] Exceptions at 4, citing to the U.S. Const. amend. V; *see also id.* at 5 (incorporating by reference the due-process arguments raised in the grievant's post-hearing brief).
[5] Exceptions, Attach. 1 (Closing Brief) at 9-10 (quoting *Smith v. Dep't of Navy*, 62 M.S.P.R. 616, 621 (1994) ("[I]t is inappropriate to consider an [employee's] denial of misconduct as an aggravating factor in determining the maximum reasonable penalty.").

This argument is unavailing because it is well established that the substantive standards of the Merit Systems Protection Board (MSPB) are not binding on arbitrators when they consider actions that cannot be appealed to the MSPB, such as the personnel action here - a fourteen-day suspension.[6] Therefore, the numerous MSPB cases, and those cases appealed from the MSPB to the U.S. Court of Appeals for the Federal Circuit, cited by the Union are not dispositive.[7]

Further, the Union's argument is premised on a misinterpretation of the award.[8] The Arbitrator noted the disparity between the grievant's and the mechanic's suspensions, stated that such a disparity could only be supported if the grievant's misconduct was "more aggravated"[9] and concluded that the grievant's misconduct was *not* "aggravated."[10] Accordingly, the Arbitrator reduced the grievant's suspension to the length of the mechanic's suspension—effectively reversing any allegedly improper consideration of the denial as an aggravating factor. The Arbitrator did not rescind the suspension entirely because he found that the Agency proved the charges by a preponderance of the evidence.[11]

Because MSPB caselaw is not dispositive and the Arbitrator already remedied the challenged Agency conduct by reducing the length of the grievant's suspension, we deny this exception.[12]

B. The Arbitrator did not exceed his authority.

The Union also argues that the Arbitrator exceeded his authority[13] by not resolving one of the parties' stipulated issues—whether the Agency violated the parties' agreement by unduly delaying implementation of corrective action against the grievant.[14]

In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective-bargaining agreement.[15]

The Arbitrator referenced the issue in his award several times. He stated: (1) the issue;[16] (2) Article VIII, § 4 of the parties' agreement that "[c]orrective actions should be initiated by a[n Agency] official within a reasonable period of time after knowledge of the alleged infraction or circumstances;"[17] (3) the Union's contention that the discipline was "not timely;"[18] (4) the Step 3 Hearing Officer's explanation for the delay due to the complaint being made to the IG's office, which is independent of management and which spent several months investigating the matter before presenting its findings to management, and that the Union was not harmed because it knew of the inquiry from the outset;[19] (5) the Union's argument that the Agency's assertion that the delay was "not unusually long"[20] and therefore not untimely, was "facially untenable;"[21] and (6) the Agency's contention that it did not violate the parties' agreement by delaying corrective action against the grievant.[22]

In his analysis, the Arbitrator found the "[g]rievant's conduct *properly* subjected him to discipline."[23] By finding the grievant to have been *properly* subjected to discipline, the Arbitrator effectively found that the Agency did not violate the parties'

[6] *AFGE Nat'l Border Patrol Council, Local 2455*, 69 FLRA 171, 173 (2016) (Member Pizzella concurring) (noting arbitrators are only required to apply substantive standards of MSPB when reviewing actions arising under 5 USC §§ 4303 and 7512); *U.S. DOJ, Exec. Office of Immigration Review*, 66 FLRA 221, 224 (2011)) (arbitrator's failure to apply the same substantive standards as the MSPB in cases involving suspension of fourteen days or less will not establish that an award is deficient).

[7] *Gose v. USPS*, 451 F.3d 831, 834-35 (Fed. Cir. 2006); *Von Muller v. Dep't of Energy*, 101 MSPR 91 (Feb. 13, 2006).

[8] *SSA*, 71 FLRA 57, 58 (2019) (*SSA*) (Member DuBester concurring); *AFGE, Local 1101*, 70 FLRA 644, 648 (2018) (*Local 1101*) (Member DuBester concurring) (citing *AFGE, Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010)); *AFGE, Local 1441*, 70 FLRA 161, 163 (2017) (citing *AFGE, Local 1415*, 69 FLRA 386, 390 (2016); *U.S. DHS, U.S. CBP*, 66 FLRA 838, 844 (2012)).

[9] Award at 37.

[10] *Id.* at 38.

[11] *Id.* at 36 ("Acceptance of that evidence as establishing what happened directly contradicts [g]rievant's denials of knowledge of the grill and its construction and establishes his guilt of the Charges and Specifications."), 37 ("it was not plausible that [g]rievant was unaware of the fabrication of the grill prior to the time he reported it").

[12] *SSA*, 71 FLRA at 58; *Local 1101*, 70 FLRA at 648.

[13] An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration or resolves an issue not submitted to arbitration. *AFGE, Local 12*, 70 FLRA 582, 583 (2018) (*Local 12*) (citing *U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996)).

[14] Exceptions at 6-7.

[15] *AFGE, Council of Prison Locals, Council 33*, 70 FLRA 191, 193 (2017) (*Council 33*) (citing *Fraternal Order of Police, Lodge 12*, 68 FLRA 616, 618 (2015); *U.S. Dep't of the Interior, Bureau of Reclamation, Great Plains Region, Colo./Wyo. Area Office*, 68 FLRA 992, 994 (2015)).

[16] Award at 2.

[17] *Id.* at 4.

[18] *Id.* at 21.

[19] *Id.* at 22.

[20] *Id.* at 29 (citing Tr. at 204).

[21] *Id.*

[22] *Id.* at 24.

[23] *Id.* at 37 (emphasis added).

agreement as to the timing of the personnel action.[24] Thus, the award responds to the parties' stipulated issues,[25] and we deny the Union's exception.[26]

IV. Order

We deny the Union's exceptions.

[24] *See also id.* at 34 ("The testimony of Agency witnesses was credible on its face" referring to testimony on the merits of the charge); Tr. at 204-11 (Agency testimony that a "reasonable period of time" was based on "circumstances and resources").
[25] *Local 12*, 70 FLRA at 583 (citing *AFGE, Nat'l Border Patrol Council, Local 2724*, 65 FLRA 933, 935 (2011)).
[26] *Council 33*, 70 FLRA at 193.

Member DuBester, concurring:

I agree with the decision to uphold the Arbitrator's award reducing the suspension from fourteen to seven days. Accordingly, I concur with the decision to deny the Union's exceptions.