

**71 FLRA No. 27**

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
CITIZENSHIP AND IMMIGRATION SERVICES  
DISTRICT 18  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1944  
(Union)

0-AR-5370

DECISION

May 24, 2019

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

**I. Statement of the Case**

Arbitrator Dennis J. Smith reduced the grievant's fourteen-day suspension to a one-day suspension. As relevant here, he found that the Agency erroneously viewed the grievant's misconduct as her second disciplinary offense when, in his view, the misconduct was her first offense.

Because the Arbitrator's mitigation of the suspension was based on the nonfact that the grievant's misconduct here was her first offense, we set aside the award and reinstate the fourteen-day suspension.

**II. Background**

The grievant is an Immigration Services Officer responsible for interviewing applicants for immigration benefits. In November 2016, the Agency issued the grievant a fourteen-day suspension based on a single charge of improper conduct, with four underlying incidents of misconduct cited to support that charge. As to the underlying incidents, the Agency alleged that in January and April 2016, the grievant made rude and disruptive comments in the presence of Agency customers.

The Union filed a grievance challenging the fourteen-day suspension, and the matter went to arbitration. At arbitration, the parties stipulated the issue as: "Was there just cause to suspend the grievant . . . for [fourteen] calendar days? If not, what is the remedy?"<sup>1</sup>

The Arbitrator found that the Agency proved the improper-conduct charge based on two of the alleged incidents of rude or disruptive comments, but he found that the Agency failed to prove the other two incidents. Further, when considering the severity of the fourteen-day suspension, the Arbitrator found that the Agency had improperly taken into account, and considered as a first offense, previous misconduct for which the grievant received a letter of reprimand. Instead, the Arbitrator found that the improper-conduct charge was the grievant's first offense. Consequently, the Arbitrator consulted the Agency's progressive-discipline regulation, Management Directive 256-002, to determine an appropriate penalty for a first offense. Under that regulation's Table of Penalties, the Arbitrator found that the improper-conduct charge warranted only a one-day suspension.

On April 19, 2018, the Agency filed exceptions to the award.<sup>2</sup>

**III. Analysis and Conclusion: The award is based on the nonfact that the current misconduct was the grievant's first offense.**

The Agency argues that the award is based on the nonfact that the improper-conduct charge was the grievant's first disciplinary offense.<sup>3</sup> To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>4</sup>

We agree with the Agency that the award is based on the clearly erroneous factual finding that the

<sup>1</sup> Award at 3.

<sup>2</sup> The Union filed exceptions to the award on April 21, 2018—three days after the thirty-day-filing deadline. The Authority's Office of Case Intake and Publication directed the Union to show cause why its exceptions should not be dismissed as untimely filed. The Union filed a timely response to the show-cause order, admitted that its filing was untimely, and asked that the thirty-day filing requirement be tolled. However, because tolling was not warranted, and because there is no provision in the Authority's Regulations that allows the time limit to file exceptions to be extended or waived, the Authority dismissed the Union's untimely exceptions. See Order Dismissing Exceptions at 2; see also 5 C.F.R. § 2425.2(b).

<sup>3</sup> Exceptions Br. at 2.

<sup>4</sup> *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010).

improper-conduct charge was a first offense.<sup>5</sup> As the Arbitrator recognized, the grievant received a previous letter of reprimand.<sup>6</sup> Therefore, the grievant's misconduct sanctioned by that prior letter of reprimand, not the current misconduct, was the grievant's first offense. Further, the Arbitrator's erroneous factual finding was central to his award because it led him to consult the Table of Penalties section for first offenses, rather than second offenses.<sup>7</sup> Thus, we grant the Agency's nonfact exception.

In sum, the improper-conduct charge at issue here is the grievant's *second* offense. Under the Table of Penalties, which the Arbitrator found was the appropriate basis for determining the severity of corrective action here, a second offense warrants a suspension from six to fourteen days.<sup>8</sup> Because the Agency imposed a fourteen-day suspension, the severity of that penalty is consistent with the Table of Penalties, and we find no basis for modifying that penalty.<sup>9</sup> Therefore, we set aside the award and reinstate the fourteen-day suspension.<sup>10</sup>

#### IV. Decision

We grant the Agency's nonfact exception set aside the award, and reinstate the grievant's fourteen-day suspension.

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<sup>5</sup> See Exceptions, Attach. 5, (Mgmt. Directive No. 256-000) at 2, 10 (noting that a letter of reprimand is a formal disciplinary action).

<sup>6</sup> Award at 21.

<sup>7</sup> *Id.*

<sup>8</sup> Mgmt. Directive No. 256-000 at 18.

<sup>9</sup> We note that our deference to the Agency here is consistent with that of the Merit Systems Protection Board. See *Lachance v. Devall*, 178 F.3d 1246, 1258 (Fed. Cir. 1999) ("We have never opined, however, that upon doing so the Board may substitute its will for the agency's by stepping beyond independent justification—a power essentially coextensive with independent review—into the realm of independent management. We have instead repeatedly emphasized the agency's exclusive domain in disciplining its employees"); *Parker v. U.S. Postal Serv.*, 819 F.2d 1113, 1116 (Fed. Cir. 1987) ("It is well established that the determination of the proper disciplinary action to be taken to promote the efficiency of the service is a matter peculiarly and necessarily within the discretion of the agency."); *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 300-01 (1981) ("Management of the federal workforce and maintenance of discipline among its members is not the Board's function. Any margin of discretion available to the Board in reviewing penalties must be exercised with appropriate deference to the primary discretion which has been entrusted to agency management, not to the Board. Our role in this area, as in others, is principally to assure that managerial discretion has been legitimately invoked and properly exercised.").

<sup>10</sup> The Agency also argues that the award fails to draw its essence from Article 46 of the parties' agreement, and violates management's right to discipline employees. Exceptions Br. at 6-9; see Exceptions, Attach. 2, at 169-70. Because we grant the Agency's nonfact exception, we find it unnecessary to address the Agency's remaining arguments. *E.g.*, *AFGE, Local 2145*, 69 FLRA 7, 9 (2015).

**Member DuBester, dissenting:**

I agree with the majority that the sustained charges are the grievant's second offense under the Agency's Table of Penalties.<sup>1</sup> However, I disagree with the majority's decision to set aside the Arbitrator's award and to uphold the Agency's initial fourteen-day suspension.

Under the Table of Penalties, a second offense warrants a suspension from six to fourteen days. And, the Agency suspended the grievant for fourteen days based on *four different* specifications of improper conduct covering a three-month span.<sup>2</sup>

But, the Arbitrator sustained only two of the four specifications – a finding the Agency does not challenge.<sup>3</sup> Moreover, the two specifications the Arbitrator rejected were also the most serious because they allegedly involved direct communications with customers.<sup>4</sup> In fact, the Agency's own Deciding Official assigned each charge with a specific suspension: ten-days total for the two specifications involving *customers*, and only four-days total for the two specifications involving *coworkers*.<sup>5</sup> Because the Arbitrator only sustained the lesser charges involving coworkers, it is not reasonable that the Agency's original fourteen-day suspension be reimposed.<sup>6</sup>

Given that the Agency does not challenge the Arbitrator's findings on each specification, perhaps a

better alternative is to remand the "conclusion" findings portion of the award to the parties for resubmission to the Arbitrator, absent settlement, to determine the appropriate remedy consistent with this decision.

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<sup>1</sup> Majority at 3.

<sup>2</sup> Award at 5-6.

<sup>3</sup> *Id.* at 23.

<sup>4</sup> *Compare id.* at 16, 19 ("the Agency HAS NOT PROVEN . . . its charge of Improper Conduct under Specification #1" that the grievant called a customer a liar and "the Agency HAS NOT PROVEN . . . its charge that the grievant behaved in a discourteous manner toward a customer when she 'allegedly' scolded the customer for being late, under Specification 2"), *with id.* at 20-21 ("the Agency HAS PROVEN . . . its charge that the grievant did make . . . inappropriate comments to fellow officers in the presence of a customer under Specification 3" and "the Agency HAS PROVEN . . . its charge that the grievant behaved in a disruptive manner with coworkers.").

<sup>5</sup> *Id.* at 21-22.

<sup>6</sup> The majority's reference to MSPB precedent is misplaced. Given the unique attributes of our Statute, including the requirement that every collective-bargaining agreement have a negotiated-grievance procedure – attributes that have nothing to do with the MSPB – I fail to see how consistency with MSPB precedent has anything to do with this case.