71 FLRA No. 45

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 2499
(Union)

0-AR-5329

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DECISION

July 24, 2019

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

I. Statement of the Case

Arbitrator Richard N. Block issued an award finding that the Agency violated the parties' agreement by requiring an employee (the grievant) to undergo medical examinations without a Union representative present. As a remedy, the Arbitrator ordered the Agency to establish procedures to inform bargaining-unit employees (employees) and independent medical examiners (the physicians) of an employee's right, under the parties' agreement, to have a Union representative present during Agency-mandated medical examinations. There are three questions before the Authority.

The first question is whether the award is contrary to law or public policy. To support both these claims, the Agency argues that the award improperly requires the Agency to exercise control over the non-employee physicians. Because the award does not require the Agency to exercise control over the physicians, the answer is no.

The second question is whether the award is based on a nonfact. The Agency claims that the Arbitrator erroneously found that the Agency promulgated the medical guidelines that it provides to the physicians. Because the Agency has not demonstrated that, but for this factual error, the Arbitrator would have reached a different result, the answer is no.

The third question is whether the Arbitrator exceeded his authority by improperly awarding a remedy to non-grievants. To the extent that the award applies to individuals other than the grievant, the answer is yes. Accordingly, we modify the award to clarify that it applies only to the grievant.

II. Background and Award

The grievant is a border patrol agent stationed in Gibraltar, Michigan (the Gibraltar station). He also serves as the Union's president.

On February 7, 2014,[1] the grievant filed a worker's compensation claim against the Agency, citing psychological and physical injuries resulting from "[h]arassment and disparate treatment by [his] immediate supervisor."[2] The claim included a doctor's letter stating that "the grievant was unable to work and that he was totally disabled."[3] The grievant began a leave of absence using sick and annual leave.

Three months later, the grievant returned to work at the Gibraltar station. Shortly after returning to work, the grievant informally requested a temporary reassignment to a different unit because "the Gibraltar station was a trigger for [his medical] symptoms."[4] The Agency granted the grievant a temporary sixty-day reassignment. In August, the grievant formally requested a transfer. To support his request, the grievant provided his doctor's diagnosis, but not his medical records. The Agency extended the grievant's reassignment for thirty days while it considered his request.

In September, the Agency determined that it needed more information to respond to the grievant's transfer request. Specifically, the Agency determined that the grievant's diagnosis as "totally disabled"[5] raised concerns about the grievant's "capacity to perform the full range of duties of [his] position in a safe and effective manner."[6] As a result, the Agency ordered the grievant to undergo a fitness-for-duty examination process "to determine if there are physical or mental health issues that may be affecting [the grievant's] job performance."[7] As part of this process, the Agency ordered the grievant to submit to physical and psychiatric

[1] All dates are in 2014 unless otherwise indicated.
[2] Award at 13.
[3] *Id.*
[4] *Id.* at 16.
[5] *Id.* at 22.
[6] *Id.*
[7] *Id.* at 21.

examinations through a third party contractor, Comprehensive Health Services (CHS). CHS, in turn, subcontracts medical examinations to independent physicians.

As relevant here, the dispute in this case arose when the grievant was not permitted to have a Union representative present at two medical examinations conducted by non-employee physicians on behalf of the Agency.

Before attending the two medical examinations, the grievant asked a Union representative "to accompany him because he feared that the [examinations] could result in disciplinary action."[8] It is undisputed that, under Article 19, Section B of the parties' agreement (Art. 19(B)), a Union representative is allowed to be present at fitness-for-duty examinations upon an employee's request.[9] Further, Art. 19(B) states, in relevant part, that "[e]mployees will be advised of their right to have a Union representative any time allowed, or not prohibited, by O[ffice of] P[ersonnel] M[anagement] procedures."[10]

During the physical examination, medical technicians allowed the Union representative to observe and film the beginning of the examination. Once the physician entered the examination room, he expressed concerns about filming the examination and the Union representative's presence. The physician stopped the examination and then called CHS for guidance. At the same time, the grievant called and emailed Agency representatives about the situation, but did not receive a response. After speaking with CHS, the physician informed the grievant that the examination would not proceed with the Union representative present. The grievant then asked the Union representative to leave, and the physician completed the examination.

During the psychiatric examination, the physician allowed the Union representative to observe the examination for almost an hour until the physician realized that the grievant was recording the examination. The physician stopped the examination, and, after a break, told the grievant that he would not continue the examination with the Union representative present or while the grievant recorded the examination. The grievant stopped recording, and asked the Union representative to leave. The physician then completed the examination.

The Union filed two separate grievances alleging, as relevant here, that the Agency violated the parties' agreement by not permitting the grievant to have a Union representative present at the medical examinations. The parties were unable to resolve the grievances, and proceeded to arbitration.

At arbitration, the parties agreed to allow the Arbitrator to frame the relevant issue.[11] The Arbitrator framed the issue as: "Was the collective bargaining agreement violated when the grievant . . . was required to complete the two [medical] examinations without a Union representative present as he requested? If so, what shall the remedy be?"[12]

The Arbitrator found that the Agency violated Art. 19(B) "when the grievant was required to complete the two [examinations] without a Union representative present as he requested."[13] As a remedy, the Arbitrator ordered the Agency to establish temporary procedures for (1) "informing bargaining[-]unit employees who are directed to undergo a fitness-for-duty examination of their right to request that a Union representative be present at the . . . examination" and (2) "informing [the physicians] who perform fitness-for-duty examinations of this right."[14] The Arbitrator also ordered the Agency to bargain with the Union over establishing permanent procedures to implement the remedy.

Explaining the rationale for the award's remedy, the Arbitrator notes that he was "aware that [the] award may require that the Agency inform the [physicians] that [the] presence of a Union representative may be required if the [employee] makes such a request."[15] He also stated that he was "aware . . . that the Agency has no authority to order the [physicians] to conduct the examination with a Union representative in the room."[16] However, the Arbitrator found that the Agency provides physicians with "detailed written standards" when they conduct examinations "on behalf of the Agency."[17] He noted that "[t]hese guidelines permit a translator, immediate family members, and a chaperone of the appropriate gender to be present during the [examination]."[18] As such, the Arbitrator found that "there is no reason in the record why the standards could not be amended to include the presence of a Union representative requested by [an employee] in accordance with the [parties'] agreement."[19]

[8] *Id.* at 22; *see id.* at 24.
[9] *Id.* at 40.
[10] *Id.* at 6.
[11] Exceptions, Attach. 1, Tr. pt. 1 (Tr. pt. 1) at 5.
[12] Award at 4.
[13] *Id.* at 57.
[14] *Id.* at 58.
[15] *Id.* at 57.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

On December 1, 2017, the Agency filed exceptions to the award. On January 12, 2018, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion

A. The Agency's contrary-to-law exception, and related public-policy exception, lack merit.

The Agency claims that the award is contrary to law and public policy.[20] To support these claims, the Agency argues that the award "requires the Agency to exercise control over [third parties]" – the physicians – "who are outside of the bargaining relationship."[21] The Agency further argues that by requiring the Agency to control the physicians, the award contravenes the public policy against the "lay practice of medicine."[22]

The Agency misconstrues the award. The Agency premises its arguments on the claim that the Arbitrator ordered the Agency to instruct the physicians "that [they] *must* permit a non-patient third party in [the] examination room while [the physicians] conduct[] medical examination[s]."[23] But the award imposes no such requirement. Rather, the Arbitrator expressly recognized that "the Agency has no authority to order the [physicians] to conduct . . . examination[s] with a Union representative in the room."[24]

In other words, the award only requires that the Agency "inform" and "advise" physicians of an employee's right to have a Union representative present at the examination pursuant to Art. 19(B).[25] And, the Agency concedes that "the Agency could be required to *request* of a [physician] that an employee be permitted to have a union representative present" at an examination.[26]

Accordingly, we deny the Agency's contrary-to-law and public policy exceptions.

B. The award is not based on a nonfact, but for which the Arbitrator would have reached a different result.

The Agency claims that the award is based on a nonfact.[27] 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.[28]

The Agency argues that the Arbitrator based his award on the erroneous finding that the Agency "promulgated" the Independent Medical Examiner Standards that it gives to the physicians who conduct Agency-ordered medical examinations.[29] The Agency claims in support that these standards are written by the American Medical Association (AMA) and the World Psychiatric Association (WPA).[30] But the Agency does not demonstrate that, but for this alleged factual error, the Arbitrator would have reached a different result.

First, the Agency argues that but for this error, "[t]he Arbitrator [w]ould [n]ot [h]ave [c]oncluded that the Agency [h]as [c]ontrol over" the non-employee physicians.[31] However, as discussed above, the Arbitrator does not find that the Agency controls the physicians. As such, this argument lacks merit.

Second, the Agency argues that but for this error, the Arbitrator would not have found that the Agency violated the parties' agreement.[32] However, the source of these standards has no connection with the Arbitrator's finding that the grievant was denied a Union representative at the medical examinations, or his conclusion that the Agency violated Art. 19(B).[33] As such, the Agency has not demonstrated that "but for" this factual error, the Arbitrator would have reached a different result.

Accordingly, we deny the Agency's nonfact exception.

C. The Arbitrator exceeded his authority to the extent that the award applies to individuals other than the grievant.

The Agency claims that "[t]he Arbitrator exceeded his authority by fashioning an award that improperly extends a remedy to non-grievants."[34] An

[20] Exceptions Br. at 24-29.
[21] *Id.* at 13.
[22] *Id.* at 27.
[23] *Id.* at 24-26.
[24] Award at 57.
[25] *Id.* at 57-58.
[26] Exceptions Br. at 26 (citing *Library of Cong. v. FLRA*, 699 F.2d 1280, 1290 (D.C. Cir. 1983)).
[27] *Id.* at 14.
[28] *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 172-73 (2015) (Member Pizzella dissenting); *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[29] Exceptions Br. at 18. The Agency does not dispute the Arbitrator's finding that the Agency provides these standards to the physicians or that these guidelines "permit a translator, immediate family members, and a chaperone of the appropriate gender to be present during" medical examinations. Award at 57.
[30] Exceptions Br. at 15.
[31] *Id.* at 16.
[32] *Id.* at 18-19.
[33] Award at 57.
[34] Exceptions Br. at 20.

arbitrator exceeds his or her authority when, as relevant here, he or she awards relief to persons who are not encompassed within the grievance.[35] In this regard, if the grievance is limited to a particular grievant, then the remedy must be similarly limited.[36]

In this case, the Union filed two grievances only on behalf of the grievant.[37] The parties did not agree to a stipulated issue and, instead, agreed to allow the Arbitrator to frame the issue.[38] The Arbitrator framed the issue as whether the Agency violated the parties' agreement by "requir[ing the grievant] to complete the two [medical] examinations without a Union representative present," and "if so[,] what shall the remedy be?"[39] The Arbitrator resolved this issue by finding that the Agency violated Art. 19(B) "when the grievant was required to complete the two [medical examinations] without a Union representative present as he requested."[40]

The Arbitrator exceeded his authority. The grievances concerned only the grievant,[41] and the Arbitrator framed the issue concerning only the grievant.[42] Thus, the Arbitrator "was authorized to award relief to the grievant only."[43] The Arbitrator's remedy directing the Agency to establish procedures to notify all bargaining-unit employees and third-party physicians of employees' Art. 19(B) right does not limit its application to the grievant. To the extent that the award applies to individuals other than the grievant, the award exceeds the Arbitrator's authority.

Accordingly, we grant the Agency's exceeds-authority exception, and modify the award to clarify that the award applies only to the grievant.[44]

IV. Decision

We deny the Agency's contrary-to-law, public-policy, and nonfact exceptions. We sustain the portion of the award finding that the Agency violated Art. 19(B) in regard to the grievant.[45] We grant the Agency's exceeds-authority exception, and set aside the portion of the award wherein the Arbitrator directs the Agency first to establish temporary procedures and then to bargain with the Union over permanent procedures for: (1) "informing bargaining[-]unit employees who are directed to undergo a fitness-for-duty examination of their right to request that a Union representative be present at the . . . examination" and (2) "informing [the physicians] who perform fitness-for-duty examinations of this right."[46]

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[35] *U.S. DOD*, *Army & Airforce Exch. Serv.*, 51 FLRA 1371, 1378 (1996).

[36] *U.S. Dep't of the Army, U.S. Corps of Eng'rs, Nw. Div.*, 65 FLRA 131, 133 (2010) (*Army*) (citing *U.S. Dep't of Energy, Oak Ridge Office, Tenn.*, 64 FLRA 535, 538 (2010)).

[37] Award at 26; Exceptions, Attach. 3, Joint. Ex. (Joint Ex.) at 1, 33.

[38] Tr. pt. 1 at 5; Opp'n at 11 (The Agency incorrectly asserts that the parties stipulated the issues at arbitration, and the Union challenges this assertion in its opposition.).

[39] Award at 4.

[40] *Id.* at 57.

[41] Joint. Ex. at 1, 33.

[42] Award at 4.

[43] *Army*, 65 FLRA at 133.

[44] *Id.* at 134.

[45] Award at 57.

[46] *Id.* at 58. Chairman Kiko notes, for purposes of clarifying the Agency's compliance obligations, that the Authority's decision sets aside *all* awarded remedies for the violation of Art. 19(B).

Member Abbott, concurring

In this decision drafted for the Authority by my colleague, I agree with the conclusions that the Agency's contrary-to-law and nonfact exceptions are properly denied and also that the Arbitrator exceeded his authority by extending the remedy to employees other than the grievant. I write separately, however, to highlight several important takeaways that demand this result.

First, parties do not "encourage[] the amicable settlement[] of disputes" when they proffer arguments that run counter to arguments they make before an arbitrator or in filings with us.[1] Here, the Agency argues that the award is contrary to law and public policy because it requires the Agency to instruct examining physicians that they must permit Union representatives. In its exceptions, however, the Agency inexplicably concedes that Article 19(B) could be interpreted to require it to "request" that a physician permit the employee's union representative to be present[2] which alone effectively counters the Agency's contrary to law and public policy arguments.

Second, all factual errors are not equal. Some clearly change the outcome of a case; others do not. The former are nonfacts and may be challenged before the Authority; the latter are simply mistakes. Without a doubt, the Arbitrator erred in his factual finding that the "Agency . . . established detailed written standards for IMEs and PEs."[3] That finding, however, had nothing whatsoever to do with the gravamen of the grievance – whether the Agency violated Article 19(B). The Arbitrator concluded that the Agency violated Article 19(B) and, as noted above, the Agency conceded this point making the argument futile and pointless.

The Agency should have read the Arbitrator's decision much more carefully and double-checked to make sure that its arguments were not inconsistent with the concessions it made. With a more focused perspective, the Agency may have had an easier time convincing the Union that the award went too far and may have obviated the need for exceptions, and our involvement, altogether.

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[1] 5 U.S.C. § 7101(a)(1)(C); *see also U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 70 FLRA 924, 929 n.56 (2018) (Member DuBester concurring, in part, and dissenting, in part).

[2] Exceptions Br. at 26.

[3] Award at 57.