

71 FLRA No. 124

UNITED STATES
SMALL BUSINESS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 288
(Union)

0-AR-5502

DECISION

April 2, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, the Agency suspended the grievant for multiple instances of disrespectful behavior in the workplace. As relevant here, Arbitrator Carol A. Vendrillo reduced the suspension from fourteen days to five days after finding that the Agency, in determining an appropriate penalty, unfairly relied on past discipline that, in her view, involved procedural errors and was unproven.

Because we find that the Arbitrator’s award is based on a nonfact and that she exceeded her authority by resolving issues not before her, and not necessary to decide the issue submitted to arbitration, we set aside the penalty portion of her award.

II. Background and Arbitrator’s Award

The grievant worked for the Agency for seven years as a senior loan specialist. In 2017, the grievant was suspended for fourteen days for four instances of improper conduct. The charges included yelling and pointing his finger at his supervisor and sending disrespectful emails to a co-worker.

The deciding official found merit to three of the charges. In determining the appropriate penalty, the

deciding official considered the grievant’s prior five-day suspension that occurred in 2016 and that, similar to these charges, also involved disrespectful and unprofessional conduct. The official concluded that a fourteen-day suspension was warranted as a second offense under the Agency’s Table of Recommended Penalties.¹ The Union grieved the action and arbitration ensued.

The Arbitrator framed the issue as “[d]id the Agency have just and sufficient cause to impose a 14-day suspension on [the grievant] for disrespectful behavior in the workplace?”² She determined that the grievant had engaged in the three instances of misconduct, but that the grievant’s actions were not “serious,”³ and also that she would give “little weight” to the prior discipline from 2016 because the grievant “was never given the opportunity to have [those charges] reviewed on the merits.”⁴ Accordingly, she concluded that “[g]iven the absence of any proven instances of prior misconduct during his seven-year tenure as a federal employee, a five-day suspension is the appropriate penalty consistent with Agency guidelines.”⁵

The Agency filed exceptions to the award on April 29, 2019. The Union filed an opposition to the Agency’s exceptions on May 29, 2019.

III. Analysis and Conclusions

A. The Arbitrator’s award is based on a nonfact.

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.⁶

¹ Award at 8.

² *Id.* at 2.

³ *Id.* at 15.

⁴ *Id.*

⁵ *Id.* at 16.

⁶ *SSA, Office of Hearing Operations*, 71 FLRA 177, 178 (2019) (citing *U.S. DOD, Def. Logistics Agency, Disposition Servs., Battle Creek, Mich.*, 70 FLRA 949, 950 (2018)).

The Agency argues that the Arbitrator's award is based on a nonfact—that “the [g]rievant was never given the opportunity to have [the 2016 suspension] reviewed on the merits.”⁷ Contrary to the Arbitrator's finding, the documentary evidence here indicates that the grievant was given an opportunity to have the 2016 suspension reviewed. The grievant was notified in the 2016 disciplinary letter of his “right to file a grievance under . . . the SBA's standard operation procedures [(SOP)]” and to whom “any questions” should be directed.⁸ According to the Union, an “appeal” was filed but was dismissed because it was filed on the wrong date.⁹ Although the Union asserted a vague “variance” in filing dates between the SOP and unspecified “regulations,” the record is silent as to whether the grievant challenged that determination in order to have the merits of the “appeal” heard. Moreover, there is a vast difference between having the *opportunity* to have a grievance heard on the merits and having that grievance dismissed as untimely filed. Thus, the Arbitrator's determination that “the [g]rievant was never given the opportunity to have [the grievance] reviewed on the merits” is clearly erroneous.¹⁰

Furthermore, the Agency asserts, and we agree, that but for this clear error, and the Arbitrator's subsequent conclusion that the Agency failed to “prove” the facts underlying the 2016 suspension, the Arbitrator would have upheld the suspension.¹¹ Here, the Arbitrator reduced the grievant's 2017 suspension from fourteen days to five days. She clearly mitigated the Agency's penalty based on this error because she expressly concluded that “[g]iven the absence of any proven instances of prior misconduct . . . a five-day suspension is the appropriate penalty.”¹² Therefore, we find that but for the error that the grievant was never given an opportunity to have his 2016 suspension reviewed on the merits, the grievant's 2017 fourteen-day suspension would have been upheld.

The Arbitrator's award is based on a nonfact and we grant the Agency's exception.

B. The Arbitrator exceeded her authority by addressing issues not necessary to decide the issue submitted to arbitration.

The Agency argues that the Arbitrator exceeded her authority¹³ by considering the “legitimacy” of the grievant's 2016 five-day suspension¹⁴ for similar misconduct.¹⁵

The issue submitted to the Arbitrator was whether the Agency had just and sufficient cause to impose the fourteen-day suspension for the three charges of misconduct *in 2017*.¹⁶ The grievant and his attorney did not raise any issue about the 2016 suspension in either the grievant's response to the proposed 14-day suspension, even though the proposing official noted his consideration of the prior suspension,¹⁷ or in the grievance itself.¹⁸ Arbitrators are not free to simply resurrect, and assume jurisdiction over, a prior grievance and its merits¹⁹ as the Arbitrator did here. Therefore, by reaching back to 2016 in order to effectively reverse the Agency's prior disciplinary action, the Arbitrator resolved an issue not submitted to arbitration.

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. *IBEW, Local 121*, 71 FLRA 161, 162 n.13 (2019) (Member DuBester concurring) (citing *AFGE, Local 12*, 70 FLRA 582, 583 (2018)).

¹⁴ The Authority has held that arbitrators do not exceed their authority by addressing an issue that is necessary to decide issues submitted to arbitration or by addressing an issue that necessarily arises from an issue submitted to arbitration. *U.S. Dep't of the Treasury, IRS, Office of Chief Counsel*, 70 FLRA 783, 784 n.15 (2018) (*IRS*) (Member DuBester dissenting) (citing *NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996); *Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 519 (1986)); *see also U.S. DOL*, 62 FLRA 153, 155 (2007) (stating that “an [a]rbitrator is permitted to address matters in the stipulated issue relating to issues to be addressed by another arbitrator where those matters are integrally related to the stipulated issue”) (citing *Gen. Serv. Admin.*, 47 FLRA 1326, 1331 (1993)).

¹⁵ Exceptions Br. at 10.

¹⁶ Award at 2.

¹⁷ Exceptions, Attach. at 447-49, Grievant's Resp. to Proposed Suspension at 1-3.

¹⁸ Exceptions, Attach. at 550-51, Grievance Form, Appendix B at 1-2.

¹⁹ *See U.S. Dep't of VA, N.Y. Reg'l Office, N.Y.C., N.Y.*, 60 FLRA 17, 19 (2004) (Member Pope dissenting in part) (arbitrator determining whether reprimand was for just cause exceeded his authority by addressing validity of 2 ½ year old settlement agreement concerning prior discipline); *see also U.S. Small Bus. Admin.*, 70 FLRA 885, 887 (2018) (Member DuBester dissenting).

⁷ Exceptions Br. at 15 (quoting Award at 15).

⁸ Exceptions, Attach. at 504, August 25, 2016 Letter of Suspension at 7.

⁹ Exceptions, Attach. at 417-18, Hr'g Tr., Vol. II at 146-47.

¹⁰ Award at 15.

¹¹ Exceptions Br. at 13; *see also* Award at 16.

¹² Award at 16.

Even if we were to agree with the Union that *Bolling v. Department of the Air Force*²⁰ applied to the circumstances of this case (which we do not),²¹ the Union did not meet its burden to challenge the merits of the 2016 discipline before this Arbitrator and the Arbitrator failed to make required findings. Specifically, the Union failed to provide documentation of the prior action, of the appeal, or of the Agency's purported dismissal,²² and the Arbitrator failed to "determin[e] whether [the prior] action [was] *clearly erroneous*."²³

Accordingly, we grant the Agency's exceeds-authority exception and set aside the penalty portion of the award.²⁴

IV. Decision

We find that the Arbitrator's award is based on a nonfact and we grant the Agency's exception. We also grant the Agency's exceeds-authority exception and set aside the penalty portion of the award.

²⁰ 9 M.S.P.R. 335 (1981) (*Bolling*).

²¹ Under *Bolling*, merits review occurs only if the employee was *not* notified of the action, the action is *not* a matter of record (i.e. in the employee's Electronic Official Personnel Folder (EOPF)), and if the employee was *not* permitted to dispute the charges before a higher level of authority. *Rhee v. Dep't of the Treasury*, 117 M.S.P.R. 640, 654 (2012) (*Rhee*); *Bolling*, 9 M.S.P.R. at 338-40. Under the circumstances of this case, the record includes documentation that the grievant was notified of the 2016 discipline and that the prior suspension is noted in his EOPF and, as discussed above, was given the opportunity to challenge the suspension. Where, as here, the criteria for merits review are not met, the "challenged prior disciplinary action[] will receive only a limited review." *Bolling*, 9 M.S.P.R. at 340.

²² *Bolling*, 9 M.S.P.R. at 338 ("[I]f the employee takes issue with the merits of the past action, the documentary record of the past action—i.e., the written notification of the action and any supporting documentation; the employee's reply, if any; and the record of any agency administrative proceeding held in connection with the action—will be reviewed to determine the validity of that action as one of the reasons for the current action.").

²³ *Rhee*, 117 M.S.P.R. at 654 (emphasis added); *Bolling*, 9 M.S.P.R. at 340.

²⁴ The Agency also argues that the award fails to draw its essence from the parties' agreement. Exceptions Br. at 12-13. However, because we grant the Agency's nonfact and exceeds-authority exceptions, we find it unnecessary to address the Agency's remaining arguments. See, e.g., *U.S. DHS, Citizenship & Immigration Servs., Dist. 18*, 71 FLRA 167, 168 n.10 (2019) (Member DuBester dissenting) (setting aside an arbitrator's award reducing a grievant's suspension and declining to address the agency's remaining arguments).

Member DuBester, dissenting:

I disagree with the majority's decision that the Arbitrator exceeded her authority and that the award is based on nonfacts. Because the Arbitrator properly analyzed the reasonableness of the grievant's discipline using the factors set forth in *Douglas v. Veterans Administration (Douglas)*,¹ I would deny these exceptions.

The majority concludes that the Arbitrator exceeded her authority because she "assume[d] jurisdiction over" and "effectively reverse[d]" the grievant's 2016 suspension.² But this does not accurately reflect the Arbitrator's decision. Rather, the Arbitrator considered the grievant's prior discipline in the context of applying the twelve factors identified in *Douglas* that are properly considered by deciding officials to evaluate whether a particular disciplinary action should be mitigated.³

¹ 5 M.S.P.R. 280, 305 (1981).

² Majority at 4.

³ *Douglas*, 5 M.S.P.R. at 305. The *Douglas* factors include:

- (1) The nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities;
- (2) The employee's job level and type of employment, including supervisory or fiduciary role;
- (3) *Any past disciplinary record*;
- (4) The past work record, including length of service, performance, ability to get along with fellow employees, and dependability;
- (5) The effect of the reasons for action on the employee's ability to perform satisfactorily and on supervisors' confidence;
- (6) Consistency of the penalty with those imposed on other employees for the same or similar offenses;
- (7) Consistency of the penalty with any applicable agency table of penalties;
- (8) The notoriety of the offense or its impact on the agency's reputation;
- (9) The clarity with which the employee was on notice of any rules violated in committing the offense or had been warned about the conduct in question;
- (10) Any potential for rehabilitation;
- (11) Mitigating circumstances surrounding the offense; and
- (12) The adequacy and efficacy of alternative sanctions to deter such conduct in the future by the employee or others. *Id.* at 305-06 (emphasis added).

Applying these factors – one of which considers the employee's "*past disciplinary record*"⁴ – the Arbitrator acknowledged the 2016 discipline, but afforded it "little weight" because the grievant "was misinformed about the policy for challenging that disciplinary action" and was therefore "never given the opportunity to have it reviewed on the merits."⁵ And she found that other *Douglas* factors weighed against finding that the Agency's chosen penalty was appropriate.⁶

In concluding that the Arbitrator exceeded her authority, the majority omits any mention of the Arbitrator's reliance on the *Douglas* factors in considering the prior discipline. This is significant because, as the Arbitrator notes⁷ – and the majority acknowledges⁸ – the Agency itself relied on the grievant's prior suspension – a *Douglas* factor – to support the grievant's discipline.⁹ Given the issue before the Arbitrator – namely, whether the Agency had "just and sufficient cause to impose a [fourteen]-day suspension on [the grievant] for disrespectful behavior in the workplace"¹⁰ – I would conclude that the Arbitrator did not exceed her authority by considering the prior discipline in deciding to reduce the grievant's suspension.¹¹

I also disagree with the majority's conclusion that the award is based on a nonfact.¹² The majority premises this conclusion upon its finding that, but for the Arbitrator's finding that the grievant was unable to obtain review of her prior discipline, she would have upheld the fourteen-day suspension.¹³ But this finding is not solely dispositive of the Arbitrator's decision to mitigate the suspension, which was based upon several of the *Douglas* factors.

For instance, even though the Arbitrator afforded "little weight" to the prior suspension, she nevertheless considered the range of discipline that would be consistent with a second offense from the Agency's

⁴ *Id.* at 305 (emphasis added).

⁵ Award at 15.

⁶ *Id.* at 14-15 (relying on the first and seventh *Douglas* factors).

⁷ *Id.* at 15 ("The [prior] five-day suspension . . . weighed heavily on [the deciding official's] decision" to issue the grievant a fourteen-day suspension.).

⁸ Majority at 4.

⁹ Exceptions, Attach. at 190, Hr'g Tr., Vol. I at 190.

¹⁰ Award at 2.

¹¹ See *AFGE, Local 1770*, 67 FLRA 93, 94 (2012) (holding that arbitrator did not exceed her authority when she evaluated employee's discipline under the *Douglas* factors and mitigated the discipline accordingly).

¹² Majority at 2-3.

¹³ *Id.* at 3.

“Table of Recommended Penalties.”¹⁴ She also considered the nature and seriousness of the grievant’s actions, and found that they “were not serious offenses.”¹⁵ Given these findings, and applying the standard governing nonfact exceptions, I would deny the Agency’s nonfact exception.¹⁶

Accordingly, I dissent from the majority’s decision to grant the Agency’s exceeds-authority and nonfact exceptions and I would consider the Agency’s remaining exception.

¹⁴ Exceptions, Attach. at 463, App. C, Table of Recommended Penalties at 28 (As relevant here, “First Offense” requires “reprimand” and “Subsequent Offenses” require “[five]-day suspension to removal.”).

¹⁵ Award at 16. The Arbitrator found that “Specification 1” was not a “serious offense” and that the grievant “did not use profanity or threaten physical violence,” and the grievant’s supervisor “appears not to have considered it a serious matter.” *Id.* at 14. The Arbitrator found that “Specifications 2 and 3” were similarly “not serious offenses” and the grievant “did not use profanity,” “he was not being insubordinate,” “he followed [his reviewer’s] instructions,” and “criticism of his co-worker was not conveyed through name-calling and was softened by sarcasm.” *Id.* at 14-15.

¹⁶ *U.S. DHS, U.S. CBP*, 69 FLRA 1, 5-6 (2015) (finding nonfact claim fails where arbitrator’s discussion of one *Douglas* factor among findings on several factors not dispositive of arbitrator’s determination of reasonableness of employee’s discipline).