71 FLRA No. 138

UNITED STATES
DEPARTMENT OF LABOR
OFFICE OF WORKMAN'S
COMPENSATION PROGRAMS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF FIELD LABOR LOCALS
COUNCIL 73
(Union)

0-AR-5511

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DECISION

April 29, 2020

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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 performance discipline case, we hold that the Arbitrator's consideration of a charge different from the one sustained by the Agency and stipulated to by the parties was clearly erroneous. We vacate this award.

The Agency charged the grievant with failure to follow instructions and suspended him for fourteen days. However, Arbitrator Gerard A. Fowler instead found that the Agency charged the grievant with insubordination. The Arbitrator determined that the Agency had failed to prove that the grievant was insubordinate and sustained the grievance.

We find that the Arbitrator's award is based on a nonfact. As a result, we grant the Agency's nonfact exception and set aside the award.

II. Background and Arbitrator's Award

The grievant works for the Agency as a claims examiner. One morning when the grievant was teleworking, his supervisor sent him an email stating "[p]lease work on returning phone calls [to claimants] today, especially those from last week."[1] The grievant responded immediately by email that he was "[o]n it!"[2] However, the grievant did not return the calls until the next day.

The Agency proposed a fourteen-day suspension because of the grievant's "Failure to Follow Instructions."[3] The grievant argued that he had simply "forgotten" to return the calls and did so the following day.[4] The grievant's supervisor did not find that explanation to be "credible."[5] The deciding official sustained the charge because the grievant had "ignored . . . repeated instructions to return the calls" and found the fourteen-day suspension was a reasonable penalty because of a prior reprimand and seven-day suspension for misconduct involving timekeeping.[6] The Union grieved the action and arbitration ensued.

In his award dated May 3, 2019, the Arbitrator framed the issue as "[w]as the [g]rievant disciplined for just cause? If not, what is the proper remedy?"[7] Although the parties stipulated that the Agency issued a notice of proposed suspension charging the grievant with "Failure to Follow Instructions" and that the deciding official issued a decision letter sustaining that charge,[8] the Arbitrator found that the Agency charged the grievant with "insubordination."[9] The Arbitrator then went on to describe the elements of an insubordination charge and found that the grievant had not been insubordinate because he was not given an opportunity to correct his "'purported' insubordinate behavior," never exhibited "hostility toward his supervisor," and "seemed genuine" in his testimony about becoming engrossed in other work.[10] The Arbitrator sustained the grievance in its entirety, awarded back pay, and directed the Agency to permanently remove the suspension from the grievant's personnel file.

The Agency filed exceptions to the award on May 31, 2019. The Union filed an opposition to the Agency's exceptions on July 15, 2019.[11]

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[1] Award at 3.
[2] *Id.*
[3] *Id.* at 3-4; *see also* Exceptions, Attach. 2, Notice of Proposed Suspension at 1-2.
[4] Award at 3.
[5] *Id.* at 4.
[6] *Id.* at 5.
[7] *Id.* at 1.
[8] Exceptions, Attach. 3, Joint Stipulations at 1.
[9] Award at 14.
[10] *Id.* at 15.
[11] The Union filed a motion for an extension of time until July 15, 2019 to file an opposition and the Authority's Office of Case Intake and Publication granted the Union's motion. Thus, the Union's opposition is timely.

III. Analysis and Conclusion: The Arbitrator's award is based on the nonfact that the charge at issue was insubordination.

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.[12]

The Agency argues that the Arbitrator based his award on the erroneous fact that the grievant had been charged with "insubordination" rather than "failure to follow instructions."[13] The Agency further argues that the evidence fully supports its "failure to follow instructions" charge.[14]

It is well-established that the elements of the charges of failure to follow instructions and insubordination are quite distinct.[15] Likewise, there is no dispute – and the parties stipulated – that the grievant was charged with the former, not the latter.[16]

Only the charges and specifications set out in an agency's notice of proposed discipline may be used to justify a charge.[17] To analyze a disciplinary case using the elements of a different charge, and to conclude that the Agency failed to prove that charge, constitutes a clear error regarding a central fact. Accordingly, we must vacate the award.[18]

IV. Decision

We grant the Agency's nonfact exception and set aside the award.

[12] *U.S. DHS, Citizenship & Immigration Servs., Dist. 18*, 71 FLRA 167, 167 (2019) (*DHS*) (Member DuBester dissenting) (citing *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010)).

[13] Exceptions Br. at 3-4.

[14] *Id.* at 6.

[15] *See, e.g., Archerda v. DOD*, 121 M.S.P.R. 314, 321-22 (2014) (noting that "[t]o prove a charge of failure to follow instructions, an agency must establish that: (1) the employee was given proper instructions, and (2) the employee failed to follow the instructions, without regard to whether the failure was intentional or unintentional"); *Parbs v. U.S. Postal Serv.*, 107 M.S.P.R. 559, 564 (2007) (stating that "[u]nlike a charge of insubordination, a charge of failure to follow instructions does not require proof that the failure was intentional") (citing *Hamilton v. U.S. Postal Serv.*, 71 M.S.P.R. 547, 555-57 (1996)).

[16] *See* Exceptions, Attach. 2, Notice of Proposed Suspension at 1-2; Exceptions, Attach. 3, Joint Stipulations at 1; *cf. AFGE, Local 1770*, 67 FLRA 93, 94 (2012) (denying a nonfact exception where the correct charge for the arbitrator to consider was *disputed at arbitration* and thus the arbitrator's finding on the issue could not be challenged as a nonfact); *Broad. Bd. of Governors*, 65 FLRA 830, 830-31 (2011) (considering a factual scenario where the agency charged failure to follow instructions but the record clearly established that the agency argued, before the arbitrator, that it had sufficient cause to suspend the grievant because the grievant *intentionally* failed to follow instructions and the arbitrator relied on *the agency's allegations of intentionality*).

[17] *See, e.g., Guerrero v. Dep't of VA.*, 105 M.S.P.R. 617, 620-21 (2007) (stating "[i]t has long been settled that only the charges and specifications set out in the agency's proposal notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply") (citing *Lachance v. MSPB*, 147 F.3d 1367, 1371 (Fed. Cir. 1998)); *Hawkins v. Smithsonian Inst.*, 73 M.S.P.R. 397, 401 (1997) (stating that "the Board cannot consider or sustain charges or specifications that are not included in the notice of proposed adverse action").

[18] The Agency also argues that the award is contrary to law and raises a "Matters not Previously Presented" exception. Exceptions Br. at 6. However, because we grant the Agency's nonfact exception, we find it unnecessary to address the Agency's remaining arguments. *See, e.g., DHS*, 71 FLRA at 168 n.10 (setting aside an arbitrator's award reducing a grievant's suspension and declining to address the agency's remaining arguments).

Member DuBester, concurring:

I agree with the Decision to grant the Agency's nonfact exception and set aside the award.