

71 FLRA No. 139

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY
RICHMOND, VIRGINIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1992
(Union)

0-AR-5166
(70 FLRA 313 (2017))
(69 FLRA 567 (2016))

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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 Abbott concurring)

I. Statement of the Case

In this case, we recognize that an arbitrator has the remedial discretion to determine an appropriate reduction in compensatory damages where an employee’s actions unnecessarily prolong the interactive process for determining a reasonable accommodation.

Arbitrator Steven F. O’Beirne found that the Agency violated the Rehabilitation Act and the parties’ collective-bargaining agreement by denying a reasonable accommodation to the grievant. As a remedy, the Arbitrator directed the Agency to grant the grievant a reasonable-accommodation telework schedule, and to pay him \$30,000 in compensatory damages for the harm that he suffered due to the Agency’s violation of the Rehabilitation Act.

The Agency asserts that the award of compensatory damages is contrary to law because the Arbitrator allegedly failed to account for the grievant’s partial responsibility for the delays in the interactive process. But because the Arbitrator did adjust the amount of damages to hold the grievant accountable, the Agency’s assertion reflects a misunderstanding of the award, and we reject it.

II. Background and Arbitrator’s Award

Due to the grievant’s prior military service, he suffers from post-traumatic stress disorder (PTSD), and both parties recognize that he is an individual with a disability. The grievant’s previous duty station was Richmond, Virginia, where he worked as a property disposal specialist, assisting customers with inventorying, moving, and discarding property. In April 2014, the Agency directed the grievant to move to a duty station in Quantico, Virginia, due to an asserted need to provide onsite customer service there.

The grievant requested a reasonable accommodation under the Rehabilitation Act, asking not to be physically moved to Quantico because, according to his physician, working on a military base would exacerbate his PTSD. The Agency maintained that it needed the grievant onsite at Quantico full-time to reduce property-processing mistakes, so the Agency denied his request. The grievant appealed the denial, but in the midst of that appeal, he asked to withdraw his request.

Minutes after withdrawing his first request, the grievant filed a second reasonable-accommodation request. In the second request, the grievant included updated documentation from his physician and proposed that he be allowed to work at Quantico for two nonconsecutive days per week and telework during the remaining weekdays. The Agency denied the request, at which point the Union filed a grievance on the grievant’s behalf.

The parties arbitrated the grievance in two previous proceedings, most of the details of which are not pertinent here. Exceptions were filed to the awards in those previous proceedings, and, based on those exceptions, the Authority twice remanded the matter to the parties. The Authority directed that, if the parties resubmitted the matter to arbitration on remand, then the arbitrator should address:

- (1) whether the grievant is a qualified individual who could perform the essential functions of the position in question, with or without a reasonable accommodation; and (2) if so, whether the grievant was discriminated against because of his disability; that is, whether the Agency failed to reasonably accommodate a qualified individual with a known disability or whether the Agency demonstrate[d] that the requested accommodation

would impose an undue hardship on the Agency.¹

The parties submitted the dispute to the Arbitrator, who reviewed the record from the previous proceedings and received additional briefs from the parties.²

The Arbitrator found that, after the Agency denied the grievant's reasonable-accommodation requests, the grievant moved to Quantico in January 2015. At Quantico, the Agency initially assigned the grievant to work near "an area of the base where the military detonated explosives."³ After the grievant complained about the nearby explosive detonations aggravating his PTSD, the Agency moved him to an office elsewhere on the base. However, a security reclassification rendered the grievant ineligible to work in that space, so "he has been working out of his car and only visits Quantico when a customer requests to meet."⁴ Since March 2017, the grievant has been teleworking three days a week and splits his remaining days between Quantico and two other worksites, "directing his own work and scheduling his own appointments for those site visits."⁵

Addressing the issues that the Authority identified when remanding the previous awards, the Arbitrator first found that the grievant was a "'qualified individual' under law, contract[,] and Agency policy, capable of performing the essential functions of his position"⁶ "with a reasonable accommodation of some sort."⁷ In support, the Arbitrator cited the grievant's successful performance in his position for approximately eight years. Second, the Arbitrator found that the Agency did not establish undue hardship to justify its actions.

Regarding the process that led the Agency to deny the grievant a reasonable accommodation, the Arbitrator found that the grievants' higher-level supervisors did not know what his job entailed or how a move would affect his PTSD, and they did not inquire about either of those matters before denying his accommodation requests. The Arbitrator found that, although there were approximately eighty other property disposal specialists in the same region as the grievant, the

Agency never considered transferring someone else to Quantico.

In addition, the Agency conceded that the grievant's duties did not actually change after he was moved. That concession undermined the Agency's earlier insistence that the grievant could not perform his duties at Quantico while remaining stationed in Richmond, or while working onsite at Quantico for two nonconsecutive days per week and teleworking during the remaining weekdays. Thus, the Arbitrator found that the "only discernable reason to explain the Agency's failure to provide [the g]rievant with a reasonable accommodation is that it made no effort to do so."⁸

The Arbitrator concluded that the Agency never "made a good[-]faith effort to engage [the g]rievant in the interactive process" to determine a reasonable accommodation,⁹ and the Agency's "failure to engage in the interactive process was the reason [that the g]rievant was not granted an accommodation."¹⁰ In addition, the Arbitrator rejected the "Agency's argument that it was [the g]rievant who failed to participate in the interactive process," finding that the grievant was "ready, willing[,] and able to participate."¹¹ The Arbitrator found that the Agency's actions exacerbated the grievant's condition, and he was entitled to compensatory damages for that harm.

In assessing damages, the Arbitrator took "into account that [the g]rievant unnecessarily confused the process when he decided to withdraw his initial accommodation request,"¹² and, consequently, the grievant bore "some responsibility for the breakdown of the process."¹³ But even considering that factor, the Arbitrator determined that, "for the mental distress [that the grievant] suffered from the time he first requested a reasonable accommodation in May 2014 [until] the date the Agency granted him an accommodation in May 2017," the Agency must pay the grievant \$30,000 in compensatory damages.¹⁴ The Arbitrator also directed the Agency to continue allowing the grievant to telework as a reasonable accommodation.

The Agency filed an exception to the award on October 31, 2018, and the Union filed an opposition to the exception on November 30, 2018.

¹ *AFGE, Local 1992*, 70 FLRA 313, 314 (2017) (*AFGE II*) (quoting *AFGE, Local 1992*, 69 FLRA 567, 569 (2016) (*AFGE I*) (Member Pizzella concurring)).

² The Arbitrator who issued the award currently before us is not the same arbitrator who issued the awards in the previous proceedings.

³ Award at 8.

⁴ *Id.* at 19.

⁵ *Id.* at 20.

⁶ *Id.* at 35.

⁷ *Id.* at 38.

⁸ *Id.* at 43.

⁹ *Id.* at 39.

¹⁰ *Id.* at 43.

¹¹ *Id.*

¹² *Id.* at 47.

¹³ *Id.* at 48; *see also id.* at 49 ("I take into account [the g]rievant's role in impeding the process by withdrawing his initial request and submitting a new request . . .").

¹⁴ *Id.* at 46.

III. Analysis and Conclusion: The compensatory-damages award is consistent with the Rehabilitation Act.

Under the Rehabilitation Act,¹⁵ “[f]ailing to make a good[-]faith effort to accommodate a [qualified, disabled employee] exposes an agency to liability for compensatory damages.”¹⁶ Further, where an agency’s failure to engage in the interactive process results in the denial of a reasonable accommodation, the agency is liable for the failed process that led to the denial of the accommodation.¹⁷ And even when an employee’s actions contribute to delays in the interactive process, an agency remains liable if its actions are “more to blame for the breakdown of the interactive process” than the employee’s actions.¹⁸

The Agency argues that the award is contrary to the Rehabilitation Act for two reasons. First, the Agency contends that the Arbitrator awarded compensatory damages without addressing the responsibility of the grievant for the breakdown of the interactive process.¹⁹ However, the Arbitrator expressly acknowledged that the grievant’s withdrawal of his first reasonable-accommodation request “unnecessarily confused the process.”²⁰ Nevertheless, the Arbitrator found that, overall, the grievant was “ready, willing[,] and able to participate” in the interactive process,²¹ and the Agency failed to make a

good-faith effort to participate in that process.²² Thus, the argument that the Arbitrator failed to address the grievant’s responsibility is based on a misunderstanding of the award that provides no basis for finding the award contrary to law.²³

Second, the Agency asserts that the amount of the Arbitrator’s compensatory-damages award fails to account for the “substantial period of time when [the grievant] bore responsibility for the breakdown of the interactive process.”²⁴ Initially, it is worth noting that the Arbitrator did not find that the grievant’s actions delayed the interactive process for a “substantial period of time.”²⁵ Further, the Arbitrator found that the Agency’s “failure to engage in the interactive process was the reason [that the g]rievant was not granted an accommodation,”²⁶ thereby establishing that the Agency bore most of the blame for the breakdown in the interactive process.²⁷ Moreover, in calculating an appropriate damages amount, the Arbitrator repeatedly stated that he considered the grievant’s actions in arriving at an appropriate sum.²⁸ Thus, the Agency’s argument to the contrary rests on a

¹⁵ Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794. When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Dep’t of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law. *U.S. DOD, Dep’ts of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

¹⁶ *Blount v. Napolitano*, EEOC Doc. 0720070010, 2009 WL 3700690, at *7 (2009) (*Blount*).

¹⁷ See *id.* at *7-8; see also *Spurling v. C & M Fine Pack, Inc.*, 739 F.3d 1055, 1062 (7th Cir. 2014) (“[W]hile an employer’s failure to engage in the interactive process alone is not an independent basis for liability, it is actionable ‘if it prevents identification of an appropriate accommodation for a qualified individual.’” (quoting *Basden v. Prof’l Transp., Inc.*, 714 F.3d 1034, 1039 (7th Cir. 2013))); *Sid E. v. Esper*, EEOC Doc. 0120172812, 2019 WL 1397585, at *4 (2019) (finding that employee was entitled to compensation for agency’s “failing to engage in the interactive process,” where that failure resulted in denying reasonable accommodations for multiple sclerosis).

¹⁸ *EEOC v. Ford Motor Co.*, 782 F.3d 753, 780 (6th Cir. 2015) (en banc).

¹⁹ Exception at 2, 10.

²⁰ Award at 47.

²¹ *Id.* at 43.

²² *Id.* at 39; see also *Blount*, 2009 WL 3700690, at *7 (“Failing to make a good[-]faith effort to accommodate a [qualified, disabled employee] exposes an agency to liability for compensatory damages.”).

²³ *U.S. DHS, CBP*, 68 FLRA 157, 162 (2015) (*CBP*) (citing *SPORT Air Traffic Controllers Org.*, 66 FLRA 552, 554 (2012)) (arguments that reflect a misunderstanding of an award do not show that award is contrary to law).

²⁴ Exception at 15.

²⁵ *Id.*

²⁶ Award at 43.

²⁷ *EEOC*, 782 F.3d at 780 (even where employee’s actions delayed the interactive process, the employee is entitled to compensatory damages if the employer’s actions were “more to blame for the breakdown of the interactive process”).

²⁸ Award at 47, 49. The Agency also argues that the Arbitrator could not award damages for the emotional harm that the grievant suffered from May 2014 through May 2017, see Award at 46, because, according to the Agency, “the [g]rievant suffered no actual harm before moving to Quantico” in January 2015. Exception at 14. But the Agency’s failure to engage in the interactive process began in May 2014, and the grievant was entitled to receive damages for the harm from that failure, which resulted in the denial of a reasonable accommodation. *Spurling*, 739 F.3d at 1061-62 (holding that, where an employer fails to engage in an interactive process and denies reasonable accommodation, the employer is liable from the time that the “employee begins the accommodation process” (emphasis added)); *Blount*, 2009 WL 3700690, at *2-3, *6-8 (finding agency liable for failing to engage in interactive process and denying reasonable accommodation; and determining that liability began in July 2004, when employee first requested accommodation, even though employee did not enter into disability retirement, due to his inability to work without accommodation, until December 2004).

misunderstanding and fails to establish that the award is contrary to law.²⁹

Accordingly, we deny the Agency's exception.

IV. Decision

We deny the Agency's exception.

²⁹ *CBP*, 68 FLRA at 162.

Member Abbott, concurring:

I recently reminded my colleagues that the Authority's decisions must be clear, concise, and easily understood by the federal labor-management relations community.¹ While I agree that the Agency has failed to establish that the award is contrary to law, I believe that the majority unfairly mischaracterizes the excepting party's argument.

Former Member Pizzella often intoned the wisdom of Confucius to note that "[t]he beginning of wisdom is to call things by their proper names."² Here, the majority unfairly concludes that the Agency "misunderstand[s]" the portion of the award that addresses compensatory damages but then fails to explain *how* and *why* the Agency's argument *does not* establish that that aspect of the award is contrary to law. Authority members do not have the ability to read minds. Even if we did, whether or not a party understands or misunderstands an award does not establish that the award is or is not contrary to law.

I have no idea whether the Agency understands or does not understand the award and frankly whether they did or did not is quite irrelevant.³ One thing is clear and is dispositive to our determination – the Agency simply is wrong that the Arbitrator did not consider the grievant's partial responsibility for "the breakdown of the [interactive] process."⁴ The award makes clear that the Arbitrator considered the grievant's actions but concluded that the Agency bore most of the blame. Thus, the Agency has not established that the award is contrary to law.⁵

We serve the federal labor-management relations community more effectively when we explain our rationale rather than when we attempt to read the minds of parties and engage in irrelevant analysis.

¹ See *AFGE, Local 2338*, 71 FLRA 723, 725 (2020) (Concurring Opinion of Member Abbott) (citing *NTEU*, 70 FLRA 701, 701 n.4 (2018)).

² *AFGE, Local 2058*, 68 FLRA 676, 688 (2015) (Dissenting Opinion of Member Pizzella).

³ I recognize that the Authority has on many occasions based the rejection of arguments on this meaningless conclusion. The fact that it has been used so frequently in the past does not justify continuing its use.

⁴ Award at 48.

⁵ *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, Red River, Texarkana, Tex.*, 67 FLRA 609, 613 (2014) (noting that the excepting party bears the burden of establishing that an award is deficient); *AFGE, Local 1815*, 60 FLRA 788, 788 (2005) (finding that exceptions are subject to denial when the excepting party fails to demonstrate that the award is contrary to law); *NAGE, Local R12-33*, 51 FLRA 541, 544 (1995) ("A party contending before the Authority that an award is deficient because it is contrary to an agency rule or regulation bears the burden of demonstrating that the award is inconsistent with the plain wording of the regulation or is otherwise impermissible.").