

71 FLRA No. 161

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

0-AR-5518

DECISION

June 23, 2020

Before the Authority: Collen Duffy Kiko, Chairman, and
Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

Arbitrator Steve Bourne issued an award denying the Union's grievance alleging that the Agency discriminated against the grievant and suspended him without just and sufficient cause. The Union filed an exception on the ground that the award is contrary to law because it did not find that the Agency discriminated against the grievant. Because the award is consistent with law governing reasonable-accommodation requests, we deny the Union's exception.

II. Background and Arbitrator's Award

In May 2017, the grievant submitted a request under the Family and Medical Leave Act (FMLA) to use intermittent leave to manage his diagnosed mental health condition. The Agency determined that the request was incomplete because it did not include verification of his condition. The grievant then completed his request on August 3, 2017, after his doctor submitted his portion of the paperwork. The Agency granted the grievant's request on October 4, 2017, effective July 26, 2017 through July 25, 2018.

Meanwhile, on July 21, 2017, the grievant engaged in inappropriate conduct toward a fellow employee (the incident). He subsequently recognized that his actions were inappropriate, and attempted to

apologize for his behavior. The Agency investigated the incident, determined that the grievant's actions were below the standard of behavior expected from Agency employees, and proposed a fourteen-day suspension.

The Union filed a grievance challenging the suspension. At the third step of the grievance procedure, the Agency denied the grievance, but mitigated the suspension to three days. The Union then invoked arbitration.

At arbitration, the parties stipulated that the issues were whether: (1) the grievant was suspended for just and sufficient cause and (2) the Agency discriminated against the grievant.

Article 14, Section 1 of the parties' collective-bargaining agreement states that "[n]o bargaining unit employees will be subject to disciplinary action except for just and sufficient cause."¹ The Arbitrator determined that the Agency had just cause to suspend the grievant. He found that the Agency conducted a thorough and fair investigation of the incident and that the grievant admitted that his behavior was unacceptable.

Further, the Arbitrator noted that the "Union readily admitted [g]rievant's behavior was unacceptable, but seeks a modification of the penalty imposed on the [g]rievant, citing the Agency's failure to provide reasonable accommodation to [g]rievant and charging the Agency with discrimination against [g]rievant based upon his disability."² However, the Arbitrator found that the suspension was not discriminatory because the disciplinary action was based on the grievant's unacceptable behavior, not his medical condition. He also found that the grievant's unacceptable behavior "cannot be excused on th[e] ground[]" that he had requested a reasonable accommodation.³ And the Arbitrator rejected the Union's argument that the suspension was improper because the Agency had failed to timely provide the grievant with a reasonable accommodation.

On this point, the Arbitrator noted that the grievant contributed to the Agency's delay in processing his reasonable-accommodation request by not providing documentation that the Agency needed to evaluate his request before the incident occurred. Additionally, the Arbitrator found that the Agency's need for a physician's statement was reasonable and, that once the grievant submitted all of the required documentation, the Agency approved his request in a timely manner.

¹ Award at 2.

² *Id.* at 10.

³ *Id.* at 9.

On June 26, 2019, the Union filed exceptions to the award, and on July 22, 2019, the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusion: The Arbitrator's award is not contrary to law.

The Union argues that the Arbitrator's award is contrary to the Rehabilitation Act (the Act).⁴ In particular, the Union argues that the Agency knew of the grievant's need for an accommodation before it suspended him, and therefore, the suspension was discriminatory.⁵ When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.⁶ 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.⁷ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.⁸

As relevant here,⁹ an agency commits unlawful discrimination under the Act by failing to reasonably accommodate a qualified individual with a known disability unless the agency demonstrates that the requested accommodation would impose an undue hardship on the agency.¹⁰ However, the Act sets forth a process for requesting reasonable accommodations and responding to those requests.¹¹

⁴ Exceptions Br. at 3.

⁵ *Id.* at 4.

⁶ *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).

⁷ See *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

⁸ See *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).

⁹ Although the initial inquiry in a discrimination case usually focuses on whether the complainant has established a prima facie case, following this order of analysis is unnecessary when the agency has articulated legitimate, nondiscriminatory reasons for its actions. *Rowland v. U.S. Postal Serv.*, EEOC Doc. 01A43211, 2004 WL 1646883, at *1 (2004) (citing *Washington v. Dep't of the Navy*, EEOC Doc. 03900056, 1990 WL 1110998, at *2 (1990)). In such cases, the inquiry shifts from whether the complainant has established a prima facie case to whether he has demonstrated by a preponderance of the evidence that the agency's reasons for its actions merely were a pretext for discrimination. *Id.*; see also *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-17 (1983).

¹⁰ *AFGE, Local 1992*, 69 FLRA 567, 568 (2016) (Member Pizzella concurring) (citing *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 64 FLRA 39, 49 (2009) (*IRS*)).

¹¹ *Id.*

Specifically, a qualified individual's request for a reasonable accommodation triggers an "interactive process" during which the employer must act in good faith to assist the employee in determining the appropriate accommodation.¹² As part of this process, "both employee and employer must 'exchange essential information'" related to the request.¹³ And while neither party "can delay or obstruct the process,"¹⁴ employers are entitled to "gather sufficient information from the applicant and qualified experts as needed to determine what accommodations are necessary."¹⁵

The Union argues that the Arbitrator erred by finding that the Agency met its obligations under the Act to accommodate the grievant. On this point, the Union contends that, by the time the grievant engaged in the incident for which he was suspended, the Agency "kn[e]w . . . that an accommodation was warranted."¹⁶ It argues that the Agency therefore discriminated against the grievant when it failed to grant the requested accommodation before the incident occurred.

The Union has failed to demonstrate that the award should be vacated on these grounds. The Arbitrator found that the Agency could not have provided the requested accommodation sooner because required documents were not submitted until after the incident.¹⁷ Moreover, the Union does not dispute that the grievant's failure to include a physician's statement verifying his medical condition with his initial FMLA request was a contributing factor to the request being delayed.¹⁸ Because the record shows that the Agency participated in the interactive process, acted in good faith, and otherwise met its obligations under this process, the Arbitrator did not err by rejecting the Union's discrimination claim.

IV. Decision

We deny the Union's contrary-to-law exception.

¹² *Id.*

¹³ *Carroll v. Dep't of the Navy*, 321 F. Supp. 2d 58, 69 (D.D.C. 2004) (*Carroll*) (quoting *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114-15 (9th Cir. 2000) (*Barnett*)).

¹⁴ *Id.* (quoting *Barnett*, 228 F.3d at 1114-15); accord *Complainant v. Dep't of Commerce (Bureau of the Census)*, EEOC Doc. 0120112930, 2015 WL 1399390, at *5 (2015) ("An employer should respond expeditiously to a request for reasonable accommodation.").

¹⁵ *Carroll*, 321 F. Supp. 2d at 69 (quoting *Barnett*, 228 F.3d at 1115 n.6) (internal quotation marks omitted); see also *IRS*, 64 FLRA at 50 (where the disability and/or need for accommodation is not obvious, the employer may ask for information and documentation about the employee's functional limitations).

¹⁶ Exceptions Br. at 4.

¹⁷ Award at 11.

¹⁸ *Id.*