71 FLRA No. 173

UNITED STATES
DEPARTMENT OF THE AIR FORCE
MARCH AIR RESERVE BASE, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3854
(Union)

0-AR-5584

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DECISION

August 6, 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 case, Arbitrator Sara Adler found that the Agency violated the parties' collective-bargaining agreement (CBA) when it suspended the grievant for five days following charges of harassing behavior and failure to follow leave procedures. The Agency excepted on a ground not recognized for review and several other grounds, including that the Arbitrator exceeded her authority, that the award is ambiguous and contradictory, that it fails to draw its essence from the parties' agreement, and that it is based on several nonfacts.

For the reasons discussed below, we find that the Agency has either failed to support its argument or failed to otherwise establish that the award is deficient, and we deny all of the Agency's exceptions.

II. Background

The grievant worked as a firefighter at the March Air Reserve Base Fire Department. At some point, "perhaps beginning in 2017," the Agency began a command-directed investigation into issues at the fire department relating to possible bullying and conflicts between employees.[1] The grievant was interviewed as part of the investigation along with several other members of the department.

The grievant was also a union steward. On December 6, 2018, in a separate and unrelated matter, the grievant left the fire station to conduct Union business without getting permission from his immediate supervisor or entering his official time on his timecard.

On March 13, 2019, the Agency proposed a suspension based on two incidents of conduct unbecoming a federal employee; specifically, harassing, intimidating, or disruptive behavior and failure to follow proper procedures.[2] The first specification alleged that sometime between October 2018 and January 2019, the grievant told employees at the fire department not to speak to another certain employee, in an attempt to intimidate or isolate that employee.[3] The second specification alleged that the grievant failed to follow proper leave procedures by not recording his use of official time on his timecard when he left the fire station on December 6, 2018. The Agency ultimately imposed a five-day suspension. The Union grieved the discipline and the matter proceeded to arbitration.

At arbitration, the stipulated issues were "[d]id the Agency's five-day suspension of [the grievant] comply with the requirements of the [parties' CBA]" and "[i]f not, what shall be the remedy?"[4] With regard to the first charge, the Arbitrator found "several procedural irregularities" in violation of Article 31 of the parties' CBA,[5] the most serious being that the grievant was only given a copy of the investigation report with all names but his own redacted, which made a "mockery" of his right to respond and appeared to be "without any basis in law, rule[,] or regulation."[6] In addition, the Arbitrator also found that the first charge was based entirely on hearsay evidence and that "the only testimony even remotely close to direct evidence" was the grievant's statement that he only repeated to fellow employees what his supervisor had said to him, which the Arbitrator found to be true. She

[1] Award at 2.
[2] *Id.* at 3.
[3] Exceptions, Attach. 4, Hr'g Tr. at 16.
[4] Award at 2.
[5] *Id.* at 4. Article 31 concerns conduct and discipline. Exceptions, Attach. 5, CBA (CBA) at 54.
[6] Award at 4. Article 31, Section 8(a) of the CBA states: "If requested, an employee will, in any disciplinary action, be furnished a copy of all written documents which contain evidence relied on by management which formed the basis for the reasons and specifications." CBA at 55. Section 8(b) states: "If the discipline is based on an investigative report, the employee will be furnished (if requested) all written documents from the investigation which are disclosable in accordance with applicable laws, rules, and regulations." *Id.*

concluded that the first charge was "not for just cause."[7] With regard to the second charge, the Arbitrator found "at least" a procedural violation of Sections 3 and 5 of the CBA,[8] and concluded that it was "undisputed" that on the date in question "there was no law, rule, regulation, or policy requiring [the] [g]rievant to enter his official time on his timecard."[9] She concluded that the second charge was without just cause. The Arbitrator ordered the Agency to rescind the suspension and provide the grievant back pay.

The Agency filed exceptions to the Arbitrator's award on January 10, 2020. The Union filed an opposition to the Agency's exceptions on February 7, 2020.

III. Analysis and Conclusions

A. The Agency raises a ground not recognized for review.

The Agency argues that the Arbitrator somehow erred by "not cit[ing] any law, rule or regulation, except loosely citing [the CBA] in her decision."[10] Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to raise" a ground for review listed in § 2425.6(a)-(c).[11] The Agency's general assertion here that the Arbitrator failed to cite some unspecified law, rule, or regulation in her decision is not a recognized ground for review under the Authority's Regulations.[12] Furthermore, we disagree with the Agency's unsupported assertion that, in this case regarding whether or not the Agency complied with the parties' CBA and where the Arbitrator's findings are confined to that issue, the Arbitrator was required to cite a law, rule, or regulation at all.[13] Therefore, we deny the exception.

B. The Arbitrator did not exceed her authority.

The Agency argues that the Arbitrator exceeded her authority because "[t]he significant issue" in this case was whether the Agency violated Article 31, Section 3 of the CBA, which the Arbitrator did not address "at all, or at least not in proper context."[14] As relevant here, an arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration.[15] In this case, the parties stipulated to the issue of whether the Agency's five-day suspension of the grievant complied with the requirements of the CBA[16] and the Arbitrator found that the Agency violated Article 31 with regard to both charges and that neither charge was for just cause. Because the award is directly responsive to the parties' stipulated issue, the Arbitrator

[7] Award at 4. Article 31, Section 1 states, in part, that "[a]ny disciplinary action taken should be taken for just cause." CBA at 54.

[8] Award at 4. Article 31, Section 3 states: "The supervisor will attempt to ascertain pertinent facts, both for and against the employee, before taking disciplinary action. Based on availability of personnel, the individual(s) will be advised within ten (10) workdays of potential disciplinary action." CBA at 54. Article 31, Section 5 states: "Management recognizes the need to take disciplinary action in a timely manner. Initiation of disciplinary action may be delayed pending completion of an investigation or availability of pertinent personnel." *Id.*

[9] Award at 2.

[10] Exceptions Br. at 3.

[11] 5 C.F.R. § 2425.6(e)(1).

[12] To the extent that the Agency means that the award somehow violates a law, rule, or regulation and is thus contrary to law, that argument fails because the Agency does not identify a law, rule, or regulation that the award allegedly violates. *AFGE, Local 2328*, 70 FLRA 797, 798 (2018) (denying a contrary-to-law exception as unsupported under § 2425.6(e)(1) of the Authority's Regulations); *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014) (denying an exception as unsupported).

[13] In its exception, the Agency also challenges several of the Arbitrator's factual and legal determinations. To the extent the Agency is disputing the Arbitrator's determinations that providing a heavily redacted copy of the investigation report appeared to be "without any basis in law, rule[,] or regulation" and that it was "undisputed" that "there was no law, rule, regulation, or policy requiring [the] [g]rievant to enter his official time on his timecard," such challenges also fail. Award at 4; *see AFGE, Local 12*, 70 FLRA 582, 583 (2018) (*Local 12*) (stating disagreement with the arbitrator's evaluation of the evidence provides no basis for finding the award deficient); *NLRB Prof'l Ass'n*, 68 FLRA 552, 556 (2015) (*NLRB I*) (citing *AFGE, Local 779*, 64 FLRA 672, 674 (2010)) (rejecting as misplaced a party's contrary-to-law exception to an arbitrator's contractual interpretation).

[14] Exceptions Br. at 6.

[15] *NLRB Prof'l Ass'n*, 71 FLRA 737, 739 n.34 (2020) (*NLRB II*) (citing *AFGE, Local 3254*, 70 FLRA 577, 578 (2018)); *Local 12*, 70 FLRA at 583 (citing *U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996)).

[16] Award at 2.

did not exceed her authority.[17] Accordingly, we deny this exception.[18]

C. The award is not ambiguous or contradictory and draws its essence from the agreement.

The Agency argues that the award is ambiguous and contradictory because the Arbitrator's opinion "is so overly broad, does not cite any law, and does not properly cite the [CBA] provision in which she believes the Agency violated."[19] The Agency contends that it is not clear "what exactly the Agency violated."[20] In order for an award to be found deficient as incomplete, ambiguous, or contradictory, the excepting party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain.[21] Here, the Agency's argument that the award is unclear is nonsensical when the Agency plainly acknowledges in its exceptions that the Arbitrator found it violated Article 31 with respect to both charges.[22] In addition, the Agency fails to explain how the award, which ordered the Agency to rescind the suspension and make the grievant whole, is impossible to implement. We deny this exception.[23]

The Agency also argues that the award fails to draw its essence from the parties' agreement[24] for the same reasons it argues the award is ambiguous, emphasizing that it believes that the Arbitrator should have explained in greater detail how the Agency violated Article 31 for both charges.[25] Although the Agency may have liked a different award, merely arguing that the Arbitrator did not provide enough detail in reaching her conclusion that the Agency violated the CBA does not demonstrate how that conclusion is implausible or unconnected to or in manifest disregard of the parties' agreement.[26]

In addition, the Agency argues, with regard to the first charge, that the award fails to draw its essence from the parties' CBA because the Agency acted in accordance with Article 31, Section 8 by providing the grievant a redacted copy of the investigation report.[27] Article 31, Section 8(a) states in part that employees will "be furnished a copy of all written documents *which contain evidence relied on by management which formed the basis for the reasons and specifications*" and Section 8(b) states that "[i]f the discipline is based on an investigative report, the employee will be furnished (if requested) all written documents from the investigation *which are disclosable in accordance with applicable laws, rules, and regulations*."[28] Although the

[17] *NAIL, Local 10*, 71 FLRA 513, 515 (2020) (denying an exceeds-authority exception); *Local 12*, 70 FLRA at 583 (denying an exceeds-authority exception where the arbitrator's determination was directly responsive to the framed issue); *Haw. Fed. Emps. Metal Trades Council*, 70 FLRA 324, 325 (2017) (denying an exceeds-authority exception where the award was directly responsive to the issue).

[18] In its exception, the Agency also states that "the Arbitrator's lack of applying the [CBA] in her decision excessively and inappropriately interferes with the Agency's right to discipline its employees." Exceptions Br. at 6. However, aside from this brief assertion, the Agency makes no argument that the Arbitrator somehow exceeded her authority because of this allegation, or further explains how the award is contrary to management's right to discipline, and we thus deny this argument as unsupported. *U.S. Dep't of HHS, Office of Medicare Hearings & Appeals*, 71 FLRA 677, 679 n.26 (2020) (Member Abbott concurring; Chairman Kiko dissenting on other grounds) (citing 5 C.F.R. § 2425.6(e)(1)) (denying an exception containing only a brief assertion as unsupported).

[19] Exceptions Br. at 6.

[20] *Id.* at 6-7.

[21] *AFGE, Local 2846*, 71 FLRA 535, 536 n.13 (2020) (*Local 2846*) (citing *AFGE, Local 1395*, 64 FLRA 622, 624 (2010); *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1074 (2001)).

[22] Exceptions Br. at 7 (stating that "[t]he Arbitrator concluded that there were 'several procedural irregulates that occurred in violation of Article 31 of the [CBA]' with respect to Charge 1" and that "[w]ith respect to Charge 2, the Arbitrator concluded that this charge was 'at least a violation of Sections 3 & 5 of the [CBA]'"); *see also* Award at 4.

[23] *Local 2846*, 71 FLRA at 536 (denying an exception asserting that the award was incomplete, ambiguous, or contradictory); *AFGE, Local 2338*, 71 FLRA 371, 372 (2019) (finding an award neither ambiguous nor impossible to implement).

[24] The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligations of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *U.S. Dep't of VA, James A. Haley Veterans Hosp.*, 71 FLRA 699, 700 n.24 (2020) (Member DuBester dissenting) (citing U*.S. Dep't of the Treasury, IRS, Office of Chief Counsel*, 70 FLRA 783, 785 n.31 (2018) (Member DuBester dissenting)).

[25] Exceptions Br. at 6-7. Chairman Kiko and Member Abbott note that the award lacks clarity in its statements concerning the Agency's contractual violations. Although the Agency has not supported and explained its essence exception enough to establish that the award is deficient, the parties would have been better served if the Arbitrator had provided supporting reasoning when making statements such as "Charge 2 rests on . . . at least a violation of Sections 3 [and] 5 of the [CBA]." Award at 4.

[26] *See U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 105 (2019) (*VA*) (denying an exception that reiterated the same argument that the Authority had just rejected); *see also Bremerton Metal Trades Council*, 71 FLRA 569, 570 (2020) (denying an essence exception as unsupported).

[27] Exceptions Br. at 7.

[28] CBA at 55 (emphasis added).

Agency argues that it "provided what it believed could be disclosed,"[29] the Arbitrator found that disclosing only a heavily redacted investigation report made a "mockery" of the grievant's right to respond and appeared to be "without any basis in law, rule[,] or regulation."[30] Because the Agency merely disagrees with the Arbitrator's conclusion, and fails to specify how the award was otherwise irrational, unfounded, implausible, or in manifest disregard of the CBA, we deny the exception.[31]

D. The award is not based on nonfacts.

The Agency argues that the award is based on several nonfacts,[32] "which changed the result of the arbitration."[33] With regard to the first charge, the Agency contends that the Arbitrator erred in finding that the command-directed investigation began in 2017, that the Agency provided the grievant an investigation report with all but the grievant's name redacted, and that the grievant only repeated what he was told.[34] As to the second charge, the Agency maintains that the Arbitrator erred in finding that there was no law, rule, regulation, or policy requiring the grievant to enter his official time on his timecard.[35] The Agency asserts that it presented evidence to the contrary for each of the Arbitrator's above factual findings. However, such an argument simply challenges the Arbitrator's evaluation of the evidence, which provides no basis for finding the award deficient.[36] We deny the exception.

IV. Decision

We deny the Agency's exceptions.

Member DuBester, concurring:

I agree with the Decision to deny the Agency's exceptions.

[29] Exceptions Br. at 7.
[30] Award at 4.
[31] *SSA*, 71 FLRA 580, 581 (2020) (Member DuBester concurring) (denying an essence exception where the agency merely disagreed with the arbitrator's conclusion); *VA*, 71 FLRA at 104-05 (denying an essence exception where the party failed to demonstrate how the award failed to draw its essence from the agreement).
[32] 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. *NLRB II*, 71 FLRA at 739 n.33 (citing *SSA, Office of Hearing Operations*, 71 FLRA 177, 178 (2019)). However, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact. *See, e.g.*, *Local 2846*, 71 FLRA at 536-37.
[33] Exceptions Br. at 8.
[34] *Id.* at 8-9.
[35] *Id.* at 9.
[36] *Local 12*, 70 FLRA at 583 (denying a nonfact exception because disagreement with an arbitrator's evaluation of evidence does not provide a basis for finding that an award is based on a nonfact); *NLRB I*, 68 FLRA at 554-55 (denying nonfact exceptions).