72 FLRA No. 31

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3369
(Union)

and

SOCIAL SECURITY ADMINISTRATION
(Agency)

0-AR-5587

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DECISION

April 5, 2021

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

I. Statement of the Case

Arbitrator David J. Weisenfeld found that the Agency had just cause to suspend the grievant, a Union official, for two days for violating official-time rules (rules) in the parties' collective-bargaining agreement. The Union filed exceptions on nonfact, fair-hearing, essence, and contrary-to-law grounds. We find that the Union's exceptions do not demonstrate that the award is deficient and we deny them.

II. Background and Arbitrator's Award

On April 17, 2017, the grievant attended an "[i]ntervention" meeting held by Agency and Union officials to discuss official time and its usage.[1] On November 8, 2017, the Agency issued the grievant a reprimand for his failure to request official time for a meeting at his duty station regarding an equal employment opportunity matter.

Subsequently, the Agency met with the grievant on or about December 18, 2017 concerning his alleged failure to adequately document his official time. The Agency then conducted "Weingarten" investigatory interviews regarding the grievant's documentation of his official time use.[2] The first interview occurred on March 12, 2018[3] for official time use on January 31. The second interview occurred on March 26 for official time use on March 14-16. The Agency then suspended the grievant for two days on June 8. The Union grieved the suspension and ultimately invoked arbitration.

At arbitration, the parties stipulated that the issues were whether the Agency had "just cause to discipline the [g]rievant for failing to follow Agency rules regarding the use of [o]fficial [t]ime," and if so, was the "two-day suspension an appropriate penalty?"[4]

The Arbitrator found that before disciplining a Union official for a violation of official time[5] rules under Article 30, Section 9 of the parties' agreement, the Agency was required to "bring the matter to the attention of an appropriate union official, and discuss the matter with either the local or council president."[6] Based on the Agency's meeting agenda and the parties' testimony, he found that the Agency provided the notice required by Section 9 at the "[i]ntervention"[7] meeting because "the topic of [o]fficial [t]ime and the mechanics of its usage" were discussed.[8]

The Arbitrator also found that the Agency had "just cause" to suspend the grievant, as required by Article 23 of the parties' agreement (Article 23).[9] The Arbitrator rejected the Union's argument that the Agency "lacked just cause" because "it did not have a clear rule, clearly communicated to the [g]rievant with clear notice to him of the consequences of non-compliance."[10] Citing

[1] Award at 4.
[2] *Id.* As referenced *infra* section III.D., "Weingarten" refers to the Supreme Court decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).
[3] Unless otherwise noted, all dates referenced hereafter occurred in 2018.
[4] Award at 3.
[5] Member Abbott notes that our Statute authorizes union representatives official time that is reasonable and necessary to perform their representational responsibilities. Most CBAs, much like the agreement here, set forth procedures by which union representatives request, and agency supervisors approve, official time. Time and again, federal unions file grievances and unfair labor practice charges when agency officials do not follow those procedures set forth in their agreements or unlawfully restrict the use of official time as required by the Statute. Any number of remedies are assessed against agencies when they violate those procedures. It should not be a surprise when, nor a rarity that, a union official is held to account for a failure (or, as here, repeated failures) to follow the same contractual procedures.
[6] *Id.* at 7. Section 9 requires that "[a]lleged abuses of official time shall be brought to the attention of the appropriate union official on a timely basis by an appropriate management official" to discuss the matter. *Id.* at 4.
[7] *Id.* at 4.
[8] *Id.* at 8; *see also id.* at 7.
[9] *Id.* at 9-13; *see also id.* at 3 (providing that the parties "agree to the concept of progressive discipline" and "[b]argaining unit employees will be subject to disciplinary or adverse action only for just cause" (quoting Article 23)).
[10] *Id.* at 6.

the 2017 reprimand and December 2017 discussion, the Arbitrator found that the grievant had appropriate notice of possible consequences for non-compliance with the rules.[11] He also noted that after the March 12 interview, the grievant "proceeded to violate [the] rules again virtually immediately on . . . March 14, March 15, and March 16."[12] And because the grievant had been a Union official since 2012, the Arbitrator rejected the Union's argument that the grievant did not understand that further discipline would result from non-compliance.[13]

The Arbitrator also rejected the Union's argument that the Agency applied the rules inconsistently, finding that the Union presented no evidence to support its claim and did not argue that a past practice had modified the rules. And he found that the record did not support the Union's assertion that the grievant had been a "victim of anti-union animus."[14] Therefore, he concluded that the Agency had just cause to suspend the grievant[15] and that the two-day suspension was appropriate. Consequently, the Arbitrator denied the grievance.

The Union filed exceptions on January 23, 2020, and the Agency filed an opposition on February 26, 2020.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union argues that the award is based on nonfacts, specifically the Arbitrator's: (1) reference to the grievant's "alleged abuse of [o]fficial [t]ime" when there was no evidence of such abuse;[16] (2) reliance on statements by an Agency manager who did not testify; (3) failure to consider that there was no investigation into the matter after the Weingarten interviews; and (4) rejection of the Union's exhibit 4, a proposed settlement agreement (exhibit 4).[17]

To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[18] Further, 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.[19]

Here, each of the Union's arguments merely challenges the Arbitrator's evaluation of the evidence, which does not provide a basis for finding that the award is based on a nonfact.[20] Moreover, the Union does not establish that the Arbitrator's findings are clearly erroneous.[21] And to the extent that the Union is challenging the Arbitrator's failure to cite all of the evidence upon which he relied in making his findings, such an argument does not demonstrate that the award is deficient.[22] Accordingly, we deny this exception.

[11] *Id.* at 10. The Arbitrator noted that Article 30, Section 7 of the parties' agreement requires Union officials to "document, in advance, where they are going to be, and when; [and] that changes of plan must be relayed to management, also in advance." *Id.* at 9. And he found that "for purposes of [Section 7], the Union office is not a second duty station," and that "visits there must be reported in advance in the same manner as visits to any other site other than the [U]nion official's normal duty station." *Id.* at 9-10.

[12] *Id.* at 10.

[13] *Id.* at 11.

[14] *Id.*

[15] To establish just cause, the Arbitrator considered whether: the agency has "a rule against the particular conduct the employee is accused of engaging in"; the rule is "reasonable"; the grievant had "proper notice regarding the rule and the consequences for violating it"; the grievant "in fact commit[ed] the offense [he] stand[s] accused of"; "the discipline imposed on the grievant [was] proportionate to the offense"; "there [are] material mitigating, or aggravating, factors that take the particular application of the rule or the punishment to the grievant outside of ordinary parameters"; "the rule [has] been consistently applied . . . [o]r has its application been inconsistent to the point that applying it against the grievant would be unfair"; and "the grievant [has] been accorded due process[.]" *Id.* at 9 (citing *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981)); s*ee also* Exceptions, Ex. 5, Union's Post-Hr'g Br. at 13.

[16] Exceptions Form at 8; *see also* Exceptions Br. at 17.

[17] Exceptions Form at 8; Exceptions Br. at 5-6, 8-9 (arguing that testimony demonstrated there was no further investigation following the *Weingarten* interview), 17-18 (arguing absence of evidence of official time abuse, relying on nonwitness statements, and Arbitrator's rejection of the Union exhibit as nonfacts).

[18] *NLRB Pro. Ass'n*, 68 FLRA 552, 554 (2015).

[19] *E.g.*, *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018).

[20] *Id.* (rejecting nonfact exception that merely challenges arbitrator's evaluation of evidence concerning grievant's duties); *AFGE, Loc. 2302*, 70 FLRA 202, 204 (2017) (argument that arbitrator relied on flawed investigation merely challenges arbitrator's evaluation of the evidence and does not provide a basis for finding award based on nonfact).

[21] The Union also argues that the Arbitrator erred when he considered the grievant's reprimand, Exceptions Br. at 15, but does not argue that the Arbitrator's finding regarding the reprimand is clearly erroneous.

[22] *Indep. Union of Pension Emps. for Democracy & Just.*, 71 FLRA 822, 823 (2020) (citations omitted).

B. The Arbitrator did not deny the Union a fair hearing.

The Union argues that the Arbitrator denied it a fair hearing because he refused to accept a copy of exhibit 4 as evidence.[23] The Authority will find that an arbitrator failed to conduct a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence or that he conducted the proceedings in a manner that so prejudiced a party as to affect the fairness of the proceedings as a whole.[24]

Exhibit 4 is an unsigned and undated proposed settlement document purporting to memorialize the intervention meeting.[25] The Arbitrator marked the exhibit for identification at the hearing but did not accept it into evidence.[26] According to the Union, exhibit 4 would have established that the intervention meeting did not concern the grievant's use of official time, and the Arbitrator's failure to consider the exhibit led to his conclusion that the Agency had satisfied Section 9's notice requirements.[27] However, in reaching that conclusion, the Arbitrator relied on witness testimony and the Agency's agenda for the intervention meeting.[28] And, nothing in the Union's exceptions demonstrates that exhibit 4 would have materially affected his conclusion in this respect.[29] Moreover, it is well established that an arbitrator has considerable latitude in conducting a hearing,[30] and an arbitrator's limitation on the submission of evidence does not, by itself, demonstrate that the arbitrator failed to provide a fair hearing.[31]

Therefore, we deny the Union's fair-hearing exception.[32]

C. The award draws its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from the parties' agreement because the Arbitrator found that the Agency had just cause to discipline the grievant.[33] When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[34]

Specifically, the Union asserts that, in finding that the Agency gave the grievant proper notice of his alleged violations before imposing the suspension, the Arbitrator "ignored" evidence and relied on evidence that did not support his conclusion.[35] The Union also claims that the Arbitrator did not follow the test established for just cause in the parties' agreement.[36] However, the Union does not demonstrate that any provision in the parties' agreement required the Arbitrator to apply particular criteria for determining just cause.[37] Moreover, the Union's disagreement with the Arbitrator's evaluation of the evidence and his factual findings does not demonstrate that the award fails to draw its essence from the parties' agreement.[38]

Accordingly, we deny the essence exception.

[23] Exceptions Br. at 18 (citing Exceptions, Ex. 2); *see also id.* at 5.
[24] *AFGE, Loc. 3294*, 70 FLRA 432, 435-36 (2018); *Nat'l Nurses United*, 70 FLRA 166, 167 (2017).
[25] Award at 6. The Union asserts, without support, that because it referred to the settlement agreement in its post-hearing brief, the Arbitrator had a "clear obligation to reach out to the [p]arties for clarification regarding the status" of that exhibit. Exceptions Br. at 6.
[26] Award at 6.
[27] Exceptions Br. at 6-7.
[28] *See* Award at 7-8.
[29] *E.g.*, *U.S. Dep't of HHS, SSA, Off. of Hearings & Appeals*, 41 FLRA 504, 510 (1991).
[30] *AFGE, Loc. 3979, Council of Prisons Locs.*, 61 FLRA 810, 813 (2006).
[31] *AFGE, Loc. 2923*, 69 FLRA 286, 291 (2016) (citation omitted); *U.S. Dep't of Com., Pat. & Trademark Off., Arlington, Va.*, 60 FLRA 869, 879 (2005).
[32] *U.S. Dep't of HHS, SSA, Bos. Region*, 48 FLRA 943, 946 (1993).
[33] Exceptions Br. at 7-14.
[34] *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017); *see also U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 104 & n.13 (2019).
[35] *See* Exceptions Br. at 7-8, 12-14, 16.
[36] *Id.* at 8.
[37] The Union cites Article 23, Section 7, and Article 30 of the parties' agreement, but only challenges the Arbitrator's application of the facts to the requirements of those provisions, not his interpretation of the provisions. *See* Exceptions Form at 9-10 (citing Art. 23, § 7; Art. 30, § 9); Exceptions Br. at 13-14 (citing Art. 30, § 7), 16 (citing Art. 30, § 9).
[38] *AFGE, Loc. 3740*, 68 FLRA 454, 455-56 (2015) (citing *SSA*, 66 FLRA 6, 9 (2011)) (union's disagreement with arbitrator's factual findings as to whether agency had just cause under parties' agreement to discipline grievant does not establish that award fails to draw essence from agreement).

D. The award is not contrary to law.

The Union argues that the award is contrary to law, citing the U.S. Supreme Court's decision in *NLRB v. J. Weingarten, Inc.* (*Weingarten*).[39] More specifically, the Union argues that the Arbitrator "ignored" the Agency's use of the *Weingarten* interviews as its investigation.[40] However, other than asserting that a *Weingarten* interview is only the "beginning" of an investigation into just cause, the Union does not explain how the award is contrary to *Weingarten*'s legal principles.[41]

The Union also argues that the award is contrary to 5 U.S.C. § 7102 because it deprives the grievant of his right to "form, join and assist a labor organization," and interferes with his duty of fair representation.[42] However, the Union's claim is premised on its assertion that the Agency took disciplinary action against the grievant based on anti-union animus.[43] The Arbitrator found no evidence to support that claim.[44] Because the Union has not demonstrated that the Arbitrator's finding is a nonfact, we defer to it. Consequently, the Union has not demonstrated that the award is contrary to § 7102.

Accordingly, we deny the Union's contrary to law exception.

IV. Decision

We deny the Union's exceptions.

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[39] 420 U.S. 251; Exceptions Form at 4. 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. *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist., Portland, Or.*, 68 FLRA 178, 180 (2015) (*Interior*). 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. *Interior*, 68 FLRA at 180. In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *Interior*, 68 FLRA at 180-81.

[40] Exceptions Form at 4.

[41] *AFGE, Loc. 2328*, 70 FLRA 797, 798 (2018) (denying a contrary-to-law exception as unsupported under 5 C.F.R. § 2425.6(e)(1)).

[42] Exceptions Br. at 5.

[43] *See id.* at 4-5, 16-17.

[44] Award at 11.