72 FLRA No. 127

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5617

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DECISION

February 8, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and James T. Abbott, Members
(Member Abbott concurring; Chairman DuBester dissenting in part)

Decision by Member Abbott for the Authority[1]

I. Statement of the Case

In this case, the Union filed a grievance challenging the grievant's five-day suspension for misconduct. Arbitrator Thomas F. Sonneborn mitigated the grievant's five-day suspension to a letter of reprimand because he found that the Agency did not have "just and sufficient cause" to suspend the grievant.[2] Additionally, even though the grievant's five-day suspension was not premised upon any of the grievant's whistleblowing activities, the Arbitrator found that the Agency violated the Whistleblower Protection Act[3] (WPA) by initially proposing discipline based in part upon disclosures that the grievant alleged were whistleblowing activities.

The Agency filed exceptions on exceeds-authority and other grounds. Because the parties stipulated that the sole issue before the Arbitrator was whether the Agency had just and sufficient cause to suspend the grievant, the Agency argues that the Arbitrator exceeded his authority by considering any charges that were not sustained by the Agency and, by extension, the grievant's WPA claim. We grant this exception because the Arbitrator exceeded his authority by not confining his decision to the issues submitted at arbitration. The Agency's remaining exceptions are denied.

II. Background and Arbitrator's Award

The grievant is a voluntary service assistant and has been the president of the Union since 2011. From 2017 to 2018, the grievant made a series of disclosures which he believed were protected under the WPA because they related to an alleged "inappropriate relationship" that constituted an alleged "abuse of power and authority" within the Agency.[4]

Subsequently, in August 2018, the Agency proposed removing the grievant due to several acts of misconduct that occurred from 2010 to 2018. The Agency alleged, among other things, that the grievant had improperly released another employee's personal health information, had made disparaging comments about another employee's height, and had made false accusations in his alleged WPA disclosures. The deciding official found that the only meritorious allegations were the charges regarding the unauthorized release of health information and the disparaging comments. Consequently, the deciding official did not sustain any of the charges relating to the grievant's alleged WPA disclosures and issued a five-day suspension. The Union filed a grievance and the matter proceeded to arbitration.

At arbitration, the parties stipulated to the following issue: "whether the Agency proved by a preponderance of the evidence it had just and sufficient cause to suspend the [g]rievant, and if not, what remedy is appropriate?"[5]

The Arbitrator found that the grievant's misconduct did not warrant a five-day suspension. The Arbitrator determined that the charge regarding the unauthorized release of another employee's health

[1] As expressed in *U.S. Marine Corps, Marine Corps Air Ground Combat Center, Twentynine Palms, California*, Member Abbott believes that the Authority should issue all of its decisions in a gender-inclusive manner and establish procedures that encourage parties to incorporate gender-neutral language in filings submitted to the Authority. 72 FLRA 473, 473 n.1 (2021) (Chairman DuBester dissenting on other grounds). However, to avoid delaying the issuance of this decision, and because this decision was drafted months before he expressed his commitment to issuing decisions in a gender-inclusive manner, Member Abbott has agreed to the usage of gendered pronouns in this decision.

[2] Award at 5, 29.

[3] 5 U.S.C. § 2302(b)(8)-(9). Although not pertinent to the instant decision, we note that Congress amended the WPA through the Whistleblower Protection Enhancement Act. Pub. L. No. 112-199, 126 Stat. 1465 (2012).

[4] Award at 4.

[5] *Id.* at 5.

information was unfounded. And regarding the only remaining charge concerning the grievant's disparaging comments, the Arbitrator held that the Agency "issued a penalty which was excessive and more in the nature of punishment than one designed to correct and improve behavior."[6] The Arbitrator found that a letter of reprimand was more appropriate because the grievant had never been previously disciplined for any disparaging comments and a reprimand is an "initial disciplinary step[] and should be used prior to any more serious disciplinary measures."[7] Therefore, the Arbitrator reduced the grievant's five-day suspension to a letter of reprimand and awarded the Union reasonable attorney fees and costs.

The Arbitrator also held that the stipulated issue of just cause "turns on three central questions – the first being the question of guilt of either or both charges and appropriateness of the penalty, with the second and third being allegations of Agency improprieties constituting defenses to any discipline."[8] Regarding the second allegation of Agency impropriety, the Arbitrator found that the Agency did not discipline the grievant because of his Union involvement. Therefore, the Arbitrator held that the Agency did not commit any unfair labor practices.

Lastly, the Arbitrator found that the Agency violated the WPA and retaliated against the grievant because of his disclosures. In particular, the Arbitrator found that the Agency acted with a particular animus because of the grievant's disclosures and that it "tunnel[ed] back eight years to find misconduct alleged to have occurred in 2010 to bolster the proposed termination of [the] [g]rievant."[9] However, the Arbitrator did not provide any remedies for the WPA violation because the grievant's suspension was not based on his whistleblower activities.

On March 11, 2020, the Agency filed exceptions to the award, and on April 9, 2020, the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[10] Furthermore, the Authority has held that those sections bar challenges to a remedy if one of the parties requested the remedy at arbitration and the other party did not object.[11]

The Agency argues that the award does not draw its essence from the parties' agreement.[12] In particular, the Agency argues that the remedy—the mitigation of the grievant's suspension—directly conflicts with provisions in the parties' agreement that "guarantee employees mutual respect, fair treatment and working conditions . . . ."[13] However, the Agency acknowledges that it never presented these arguments to the Arbitrator.[14] Moreover, the award demonstrates that the Agency was on notice that the Union was claiming that the Agency did not have just cause to discipline the grievant.[15] Accordingly, we dismiss the Agency's essence exception to the extent that it challenges the mitigation of the grievant's suspension.[16]

IV. Analysis and Conclusions

A. The Arbitrator exceeded his authority.

The Agency argues that the Arbitrator exceeded his authority by addressing the grievant's WPA claim.[17] Specifically, the Agency contends that, because the grievant's suspension was not based on any of his whistleblowing disclosures, the only stipulated issue before the Arbitrator was whether the Agency had just and sufficient cause to suspend the grievant based on the charges sustained by the deciding official.[18] Therefore, the Agency argues that the Arbitrator should not have addressed the alleged WPA violation.[19]

[6] *Id.* at 20.
[7] *Id.*
[8] *Id.* at 15.
[9] *Id.* at 29.
[10] 5 C.F.R. §§ 2425.4(c), 2429.5.
[11] *U.S. Dep't of VA, Cent. Ark. Veterans Healthcare Sys. Cent.*, 71 FLRA 593, 595 n.21 (2020) (*Ark. VA*) (then-Member DuBester concurring) (dismissing a management's right exception because it was never presented at arbitration); *U.S. Dep't of VA, John J. Pershing Veterans Admin.*, 71 FLRA 511, 512 (2020) (*Pershing VA*) (dismissing a contrary-to-law exception because the agency did not object to the remedy at arbitration).
[12] Exceptions at 31.
[13] *Id.*
[14] *Id.*
[15] Award at 13-15.
[16] *See Ark. VA*, 71 FLRA at 595 n.21; *Pershing VA*, 71 FLRA at 512.
[17] Exceptions at 34.
[18] *Id.*
[19] *Id.*

The Authority has held that arbitrators exceed their authority when they resolve an issue not submitted to arbitration or they disregard specific limitations on their authority.[20] Additionally, the Authority has repeatedly affirmed that arbitrators must confine their decisions to the issues submitted to arbitration and that they may not decide matters that are not before them.[21]

Here, the parties stipulated that the sole issue before the Arbitrator was whether the Agency had just cause to suspend the grievant for five days.[22] Additionally, the Arbitrator found that the grievant's suspension was not based on any of the aforementioned whistleblowing activities.[23] Therefore, the only issue before the Arbitrator was whether the Agency had just cause to suspend the grievant because of the alleged unauthorized release of health information and the disparaging comments.[24] Consequently, the Arbitrator exceeded his authority and went beyond the scope of the stipulated issue when he used the Agency's initial discipline proposal to find a WPA violation.[25] Put another way, the phrasing of the stipulated issue limited the Arbitrator's authority to the charges that were sustained by the deciding official.[26] The Arbitrator did not need to decide the WPA claim to resolve the stipulated issue.[27] Therefore, we grant the Agency's exceeds-authority exception and set aside the Arbitrator's finding that the Agency violated the WPA.[28]

B. The award is not incomplete, ambiguous, or contradictory.

The Agency argues that the award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible.[29] The Agency claims that the award is contradictory because the Arbitrator mitigated the grievant's suspension even though he found that the grievant made disparaging comments to another employee.[30] Furthermore, the Agency cites a litany of testimony that describes the disparaging comments that were made by the grievant.[31] However, the Agency does not successfully challenge—either by a nonfact, contrary to law, or essence exception—any of the findings made by the Arbitrator as to why the five-day suspension was excessive, and so, its exception here fails to demonstrate an internal contradiction. Most importantly, none of the Agency's assertions explain how implementation of the award is impossible because the meaning and effect of the award

[20] *U.S. Dep't of the Army, Nat'l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 524 (2020) (then-Member DuBester dissenting).

[21] *U.S. DHS, U.S. CBP*, 71 FLRA 895, 896 (2020) (*DHS*) (then-Member DuBester dissenting); *U.S. Small Bus. Admin.*, 70 FLRA 885, 887 (2018) (*SBA*) (then-Member DuBester dissenting); *U.S. DHS, U.S. CBP*, 64 FLRA 916, 920 (2010) (*CBP*).

[22] Award at 5.

[23] *Id.* at 30.

[24] *See id.* at 4-5.

[25] *See DHS*, 71 FLRA at 897 ("But, where parties stipulate that the issue for resolution is whether *a grievance* is filed timely, arbitrators must look to *the grievance*—not to contradictory arguments made later during an arbitration proceeding held years later."); *SBA*, 70 FLRA at 887 (finding that the arbitrator "expanded her jurisdiction when she went beyond the narrow issue presented to her"); *CBP*, 64 FLRA at 920.

[26] *See* Award at 4-5.

[27] *CBP*, 64 FLRA at 920 (finding that the arbitrator exceeded his authority by deciding an issue that was not necessary to resolve the stipulated issue). While the dissent argues that "the Arbitrator acted well within his authority in addressing whether the Agency's disciplinary action violated the WPA," Dissent at 9, the Arbitrator did not need to address the alleged WPA violation to resolve the stipulated issue. Consequently, it is axiomatic that the WPA claim does not fall within the stipulated issue.

[28] Award at 19-20. Additionally, because we set aside the Arbitrator's finding that the Agency violated the WPA, we do not reach the Agency's remaining exceptions that concern the alleged WPA violation. *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 573 (2018) (then-Member DuBester dissenting) (finding it unnecessary to address remaining arguments when an award has been set aside); *see* Exceptions at 6-7 (arguing that the Arbitrator's finding of a WPA violation is contrary to law); *id.* at 8-9 (arguing that the Arbitrator found a WPA violation without the required specificity); *id.* at 13-20 (arguing that the Arbitrator made multiple findings that evidence bias as to the finding of a WPA violation); *id.* at 20-23 (arguing that the Agency had a duty to investigate the grievant's disclosures and that the Arbitrator's finding of a WPA violation is contrary to public policy); *id.* at 23-27 (arguing that the Arbitrator relied on a nonfact to find that the Agency violated the WPA); *id.* at 28-32 (arguing that the Arbitrator's finding of a WPA violation does not draw its essence from the parties' agreement).

[29] Exceptions at 11-12. To demonstrate that an award is deficient on this ground, the excepting party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain. *AFGE, Loc. 1415*, 69 FLRA 386, 389 (2016).

[30] Exceptions at 11-12.

[31] *Id.*

are too unclear or uncertain.[32] Therefore, we deny the Agency's exception.

V. Decision

We grant the Agency's exceeds-authority exception and set aside the portion of the award in which the Arbitrator found that the Agency violated the WPA. The Agency's remaining exceptions are denied.

[32] *U.S. Dep't of Transp., FAA*, 71 FLRA 932, 934 (2020) (then-Member DuBester dissenting in part). The Agency also makes several claims in its ambiguous-incomplete-or-contradictory exception that the Arbitrator is biased for the same reasons that the award is contradictory. Exceptions at 12 ("While the Arbitrator found that anyone would know not to make these comments, he faulted the Agency for not intervening immediately and used what he deemed to be the Agency's failure to mitigate the penalty of a five-day suspension down to a written reprimand."). While the Agency passionately argues that the Arbitrator is biased for finding that the five-day suspension was excessive, this is not evidence of arbitral bias. Rather, an agency's identification of several arbitral determinations that did not favor it does not, by itself, show bias. *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 70 FLRA 924, 929-30 (2018) (then-Member DuBester concurring, in part, and dissenting, in part). Accordingly, we also deny the Agency's exception to the extent that it claims bias. *Id.*

Member Abbott, concurring:

I agree that the Arbitrator exceeded their authority by addressing the alleged violation of the Whistleblower Protection Act.[1] However, I write separately to highlight several issues that will continue to bedevil the federal labor-management relations community. Thus, while I agree with the instant decision, I am hesitant to conclude that the Agency did not sufficiently address its argument that the parties' collective-bargaining agreement prevents a mitigation of penalty before the Arbitrator to warrant our review.

We have emphasized that a party should not have to use "magic words" to properly raise an exception.[2] Consequently, we have endeavored to limit the situations where a party's exceptions are dismissed because of a "technical trap fall."[3] However, I fear that the Authority has overstepped the rational limits of our Regulations by creating another form of a technical trap fall: the dismissal of a party's exception because they failed to raise a specifically worded argument at arbitration.

Generally, the Authority will not consider arguments that could have been, but were not, presented to the arbitrator.[4] Yet, there are certain situations where a party may put forth general arguments at arbitration. For example, a party may generally argue below that certain discipline was for just cause. In that situation, I do not believe that the Authority's Regulations universally demand that a party's exception ought to be dismissed—for failing to raise the specific argument below—when the arguments in that exception naturally flow from its claim that the discipline was for just cause. Therefore, while the instant case is not a prime example of this principle,[5] I believe that the Authority should not so narrowly construe a party's arguments and thereby create another technical trap fall when that argument stems naturally from positions taken at arbitration.

Additionally, while the Agency does not claim that the five-day suspension was proper because it was consistent with a table of penalties, it bears repeating that arbitrators should not disturb the discipline imposed on an employee when the penalty is consistent with that agency's table of penalties.[6] Here, I find it disturbing that the Arbitrator mitigated the grievant's suspension to a letter of reprimand even though the Arbitrator sustained one of the charges brought against the grievant.[7] Therefore, arbitrators should be hesitant to disturb discipline when a chosen penalty falls within the range established by the Agency's table of penalties.

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[1] For the same reasons as I expressed in *U.S. Department of the Army, Corpus Christi Army Depot, Corpus Christi, Texas*, arbitrators do not have the unfettered authority to define their own jurisdiction and "the dissent characterizes 'the scope of arbitral authority' in a manner that demands total obeisance." 72 FLRA 541, 549 (2021) (Concurring Opinion of Member Abbott) (citing *U.S. EPA, Region 5*, 70 FLRA 1033, 1035 n.16 (2018) (then-Member DuBester dissenting) ("Member Abbott notes that deference to arbitral factual findings does not mean blind obeisance. As we note below, the [a]rbitrator failed to apply the proper legal rigor as he reached his factual findings. In such circumstances, no deference, let alone blind obeisance, is warranted.")).

[2] *See U.S. Dep't of VA, Med. Ctr., Topeka, Kan.*, 70 FLRA 151, 153 (2016) (Dissenting Opinion of Member Pizzella) ("[T]he United States Court of Appeals for the District of Columbia Circuit has made clear that the Authority may not require parties 'to invoke magic words in order to adequately raise an argument before the Authority.'"); *AFGE, Loc. 1738*, 65 FLRA 975, 976 (2011) (Separate Opinion of Member Beck) ("[T]he Authority's revised regulations 'do not require parties to invoke any particular magical incantations when filing exceptions.'").

[3] *U.S. Dep't of Educ., Off. of Fed. Student Aid*, 71 FLRA 1105, 1107 n.24 (2020) (Chairman Kiko dissenting) (citing *U.S. Dep't of Treasury, IRS*, 70 FLRA 806, 809 n.34 (2018) (then-Member DuBester dissenting)); *see also NTEU v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) ("A party is not required to invoke 'magic words' in order to adequately raise an argument before the Authority.").

[4] 5 C.F.R. §§ 2425.4(c), 2429.5.

[5] Majority at 3-4.

[6] *U.S. DHS, Citizenship & Immigr. Servs., Dist. 18*, 71 FLRA 167, 168 (2019) (then-Member DuBester dissenting) ("Because the [a]gency imposed a fourteen-day suspension, the severity of that penalty is consistent with the [t]able of [p]enalties, and we find no basis for modifying that penalty.").

[7] Majority at 2-3.

Chairman DuBester, dissenting in part:

I agree with the majority's conclusion that the Agency has not demonstrated the award is incomplete, ambiguous, or contradictory. However, I do not agree that the Arbitrator exceeded his authority by resolving whether the Agency violated the Whistleblower Protection Act[1] (WPA).

In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective-bargaining agreement.[2] Arbitrators do not exceed their authority by addressing any issue that is necessary to decide a stipulated issue, or by addressing any issue that necessarily arises from issues specifically included in a stipulation.[3] Nor do they exceed their authority by resolving matters closely related to the issue giving rise to the grievance.[4] Moreover, even where a stipulated issue does not expressly include a particular matter, arbitrators do not exceed their authority by addressing that matter if doing so is consistent with the arguments raised before them.[5]

Here, the issue the parties stipulated to the Arbitrator was whether the Agency had "just and sufficient cause to suspend the [g]rievant."[6] The Arbitrator found that resolution of this issue depended, in part, "on . . . allegations of Agency improprieties constituting *defenses* to *any* discipline,"[7] which included whether "the Agency retaliated against the [g]rievant for his whistleblower activities."[8] This finding was consistent with the parties' post-hearing briefs, both of which addressed the affirmative defense to the discipline that the Agency retaliated against the grievant for his whistleblowing activities.[9] Based on this record, the Arbitrator acted well within his authority in addressing whether the Agency's disciplinary action violated the WPA.

In reaching its contrary conclusion, the majority asserts that the Arbitrator was not authorized to consider this issue because his review was limited "to the charges that were sustained by the deciding official."[10] And it presumably bases this assertion on its observation that the Agency's deciding official did not sustain a charge that the grievant "had made false accusations in his alleged WPA disclosures."[11]

But the mere fact that the Agency decided not to pursue this charge does not insulate from arbitral review whether it improperly retaliated against the grievant by pursuing the charges that *were* sustained. And upon reviewing this question, the Arbitrator found that the Agency violated the WPA by retaliating against the grievant, even where it did not explicitly base its final disciplinary action on the grievant's whistleblowing activities.[12]

It is clear to me that the Arbitrator did not exceed his authority by resolving this issue. Indeed, the Arbitrator arguably would have erred by failing to do so.[13] Accordingly, I would deny the Agency's exceeds-authority exception and reach the Agency's remaining exceptions.

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[1] 5 U.S.C. § 2302(b)(8)-(9). Although not pertinent to the instant decision, I note that Congress amended the WPA through the Whistleblower Protection Enhancement Act. Pub. L. No. 112-199, 126 Stat. 1465 (2012).

[2] *AFGE, Council of Prisons Locs., Council 33*, 70 FLRA 191, 193 (2017).

[3] *SSA*, 69 FLRA 208, 211 (2016); *SSA, Reg. IX*, 65 FLRA 860, 865 (2011) (Member Beck dissenting).

[4] *AFGE, Loc.* 3911, 68 FLRA 564, 568 (2015).

[5] *Id.*

[6] Award at 5; *see id.* at 15.

[7] *Id.* at 15 (emphasis added).

[8] *Id.*

[9] *See* Opp'n, Union Ex. 1, Union's Post-Hr'g Br. at 28 ("The Union proved . . . [that the grievant] made a protected whistleblower disclosure and that it was a contributing factor in the Agency's decision to propose and threaten disciplinary action against him."); *id.* at 29-31; *see also* Opp'n, Union Ex. 2, Agency's Post-Hr'g Br. at 3 (stating that the Union alleges that the "grievant's report to the Office of Special Counsel constituted a whistleblower disclosure that has something to do with this disciplinary matter" and "that the Agency's actions constitute retaliation," and asserting that the "[U]nion's affirmative defenses are baseless"); *id.* at 34.

[10] Majority at 5.

[11] *Id.* at 2.

[12] Award at 28-29.

[13] *See, e.g.*, *NAGE, Loc. R5-66*, 40 FLRA 504, 513-14 (1991) (vacating award because arbitrator failed to address affirmative defense alleging that agency retaliated against grievant for making a protected disclosure). Contrary to my colleague's assertion, the conclusion that the Arbitrator properly addressed an issue necessary to resolve the parties' dispute does not require "blind obeisance" to arbitral authority. Concurring Opinion at 7 n.1. Rather, it simply reflects application of well-established Authority precedent governing exceeds-authority exceptions.