

**72 FLRA No. 152**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2142  
(Union)

and

UNITED STATES  
DEPARTMENT OF THE ARMY  
CORPUS CHRISTI ARMY DEPOT  
CORPUS CHRISTI, TEXAS  
(Agency)

0-AR-5759

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DECISION

May 4, 2022

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

**I Statement of the Case**

Arbitrator Peggy A. McNeive found that the Agency had just cause to suspend an employee (the grievant) for discourteous conduct and use of abusive language. The Union filed exceptions on nonfact, contrary-to-law, and essence grounds. For the reasons discussed below, we find that the Union's exceptions fail to establish that the award is deficient. Accordingly, we deny the exceptions.

**II Background and Arbitrator's Award**

The grievant, a senior mechanic, was involved in a verbal altercation with a junior mechanic. Following the altercation, the Agency proposed a three-day suspension for discourtesy and use of abusive language. Although the proposal referred to the altercation as a first offense, it noted that the Agency had previously issued the grievant a memorandum of record (the memo) "concerning the [g]rievant's treatment of . . . a[n]other employee," after the grievant had called that employee "boy."<sup>1</sup> At step two of the grievance process,

<sup>1</sup> Award at 1-2; *see also id.* at 8-9 (finding that the Agency had counseled the grievant "concerning his treatment of junior employees" and "instructed the [g]rievant to cease making discourteous remarks and using abusive language").

the Agency's deciding official reduced the suspension to two days.

The Union grieved the suspension, which proceeded to arbitration. The parties did not stipulate to an issue, and, therefore, the Arbitrator framed the issues as: "Was the [g]rievant disciplined for just cause and, if not, what is the appropriate remedy?"<sup>2</sup>

Relying on Article 22 of the parties' agreement,<sup>3</sup> 5 U.S.C. § 7503,<sup>4</sup> and 5 C.F.R. § 752.202,<sup>5</sup> the Arbitrator determined that the Agency had the burden of proving, by a preponderance of the evidence, that the grievant engaged in the acts of discourteous conduct cited in the notice of proposed suspension.<sup>6</sup> In assessing whether the Agency met its burden, the Arbitrator found it undisputed, based on the grievant's own admission, that the grievant had previously referred to an employee as "boy."<sup>7</sup> Consequently, the Arbitrator determined that the grievant used "discourteous, unmannerly, and . . . abusive language with another employee," as alleged in the memo.<sup>8</sup>

With regard to the altercation between the grievant and junior mechanic, the Arbitrator credited the junior mechanic's testimony that the grievant said, "get off [your] [a--] and clean up all the [s--t]."<sup>9</sup> The Arbitrator also credited a supervisor who testified that the grievant "provoked the shouting match" by "continu[ing] to berate" the junior mechanic.<sup>10</sup> Given these findings, the Arbitrator concluded that the grievant "use[d] abusive and derogatory language"<sup>11</sup> toward the junior mechanic and, thus, the Agency "met its burden."<sup>12</sup>

As relevant here, the Union argued at arbitration that the Agency engaged in disparate treatment by disciplining the grievant for profanity but not the junior mechanic or any other employee who had used profanity

<sup>2</sup> *Id.* at 1.

<sup>3</sup> Article 22, Section 2 of the agreement states, in pertinent part, that "[a]dverse and disciplinary actions will be for just causes only, and will be administered consistently and in accordance with legal requirements and regulations." Exceptions, Attach. 4, Collective-Bargaining Agreement (CBA) at 192-93.

<sup>4</sup> Under § 7503(a), "an employee may be suspended for [fourteen] days or less for such cause as will promote the efficiency of the service." 5 U.S.C. § 7503(a).

<sup>5</sup> As relevant here, § 752.202(a) provides that "[a]n agency may take action under this subpart for such cause as will promote the efficiency of the service as set forth in 5 U.S.C. [§] 7503(a)." 5 C.F.R. § 752.202(a).

<sup>6</sup> Award at 7.

<sup>7</sup> *Id.* at 7-8.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 10.

in the workplace. Addressing the Union's allegations, the Arbitrator determined that the grievant and junior mechanic were not similarly situated employees because the grievant: (1) provoked the altercation;<sup>13</sup> (2) "acknowledged he was the aggressor;"<sup>14</sup> and (3) held a senior position.<sup>15</sup> Next, the Arbitrator held that the grievant "was not disciplined for his use of profanity" but, rather, for using "abusive and offensive language" that "was both demeaning and directed toward[]" the junior mechanic.<sup>16</sup> Additionally, the Arbitrator found that "the Union did not introduce evidence o[f] other employees [who] had been disciplined for the same or similar reasons."<sup>17</sup> As a result, the Arbitrator concluded that the Agency's proposed discipline did not constitute disparate treatment.

In evaluating whether the suspension was appropriate, the Arbitrator found that the Agency's table of penalties permitted a penalty ranging from a written reprimand to a ten-day suspension for a first offense of discourteous conduct and use of abusive or offensive language. Because the two-day suspension fell within that range, and the Union presented "[n]o evidence . . . warrant[ing] a further reduction of the discipline," the Arbitrator concluded that the suspension was appropriate.<sup>18</sup>

Based on these findings, the Arbitrator held that the Agency had just cause to suspend the grievant, and denied the grievance.

The Union filed exceptions to the award on August 24, 2021, and the Agency filed an opposition to the exceptions on September 23, 2021.

### III Preliminary Matter: We deny the requests to file supplemental submissions.

After the Agency filed its opposition, the Union requested leave to file, and did file, a response. Subsequently, the Agency requested leave to file, and did file, a reply to the Union's response. These supplemental submissions concern the standing of a national Agency representative to file an opposition with

<sup>13</sup> *Id.* at 9; *see also id.* at 11 (finding that the grievant "treat[ed] . . . [the] junior mechanic . . . disrespectfully," then "continued to harangue [the junior mechanic] . . . to the point where [the junior mechanic] decided to talk back").

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *See id.* (noting that the grievant "[took] on a leadership role" and gave instructions to other employees due to his status as a "senior mechanic").

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 12; *see also id.* at 11 ("Other than its argument that the [g]rievant was treated differently than [the junior mechanic], [the Union] presented no prior cases where the Agency imposed less disciplinary actions for the same or similar behavior.").

<sup>18</sup> *Id.* at 12.

the Authority on behalf of one of the Agency's organizational elements.

The Authority has held that a party is free to designate different representatives for different purposes,<sup>19</sup> and national headquarters personnel may file exceptions on behalf of their organizational elements.<sup>20</sup> Moreover, nothing in the Authority's Regulations requires an opposition to be filed solely by a party's representative at an arbitration hearing.<sup>21</sup>

A national representative from the Department of the Army's Labor and Employee Relations Division filed the opposition on behalf of the Agency. Consistent with the principles set forth above, we find that the opposition is properly before the Authority. Accordingly, we decline to consider the parties' supplemental submissions.<sup>22</sup>

### IV. Analysis and Conclusions

#### A. The award is not based on nonfacts.

The Union asserts that the award is based on nonfacts.<sup>23</sup> The Authority will find that an award is based on a nonfact if the excepting party establishes that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>24</sup> A party's 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.<sup>25</sup>

First, the Union argues the Arbitrator's finding that the grievant "was not disciplined for his use of profanity" is a nonfact.<sup>26</sup> According to the Union, the "use of profanity was the crux of the charge against the grievant."<sup>27</sup> However, in finding that the Agency disciplined the grievant for discourtesy and abusive

<sup>19</sup> *SSA*, 51 FLRA 1700, 1704 (1996) (citing *U.S. Dep't of the Navy, Norfolk Naval Shipyard, Portsmouth, Va.*, 36 FLRA 304, 308-09 (1990)).

<sup>20</sup> *Id.* (citing *Puget Sound Naval Shipyard*, 33 FLRA 56, 58 (1988)).

<sup>21</sup> *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 58 FLRA 137, 139 (2002) (Member Pope dissenting, in part, on other grounds).

<sup>22</sup> *See NLRB*, 72 FLRA 334, 335-36 (2021) (declining to consider supplemental submissions where record was sufficient for the Authority to resolve the issue).

<sup>23</sup> Exceptions Br. at 12-15.

<sup>24</sup> *AFGE, Loc. 2516*, 72 FLRA 567, 568 (2021) (citing *AFGE, Loc. 0922*, 70 FLRA 34, 35 (2016)).

<sup>25</sup> *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018) (citing *U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015)).

<sup>26</sup> Exceptions Br. at 14-15 (quoting Award at 11).

<sup>27</sup> *Id.* at 14.

language, the Arbitrator distinguished the grievant's misconduct from general profanity. Relying on the credited testimony of the junior mechanic and a supervisor, the Arbitrator determined that the grievant did not merely utter profane words but, instead, used "abusive and offensive" language that was "demeaning and directed toward[]" the junior mechanic.<sup>28</sup> The Arbitrator's findings are consistent with the Agency's notice of proposed suspension which charged the grievant with discourtesy and use of abusive language, not "profanity."<sup>29</sup> As the Union merely disagrees with the Arbitrator's evaluation of the evidence concerning the Agency's basis for discipline, the Union does not demonstrate that a central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different result.<sup>30</sup>

Second, the Union challenges the Arbitrator's finding that "the Union did not produce evidence" of employees receiving lesser discipline for behavior similar to the grievant's.<sup>31</sup> Specifically, the Union claims that the Arbitrator failed to consider evidence that the Agency did not discipline employees who "engaged in similar discourteous behavior as the grievant through [the] use of profanity."<sup>32</sup> Contrary to the Union's claim, the Arbitrator considered the Union's evidence but found that it was irrelevant given that the grievant was not disciplined for using profanity and the grievant and junior mechanic were not similarly situated.<sup>33</sup> Once again, the Union's disagreement with the Arbitrator's evaluation of the record evidence fails to establish that the award is based on a nonfact.<sup>34</sup>

Accordingly, we deny the Union's nonfact exceptions.

B. The award is not contrary to 5 C.F.R. § 752.202.

The Union argues that the award is contrary to 5 C.F.R. § 752.202 because the Arbitrator failed to find that the grievant and junior mechanic were similarly situated.<sup>35</sup> Under that regulation, an agency "should consider appropriate comparators" when evaluating a potential disciplinary action, including, "individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct."<sup>36</sup>

Here, the Arbitrator considered the Union's allegation that the junior mechanic was an appropriate comparator for purposes of § 752.202. However, the Arbitrator determined that the grievant's conduct was not similar to the junior mechanic's because, among other things, the grievant initiated the altercation and was the aggressor.<sup>37</sup> The Arbitrator also held that the record contained no evidence of other appropriate comparators.<sup>38</sup> As the Union has not demonstrated that these factual findings are nonfacts, we defer to them.<sup>39</sup> And because these findings support the Arbitrator's legal conclusion that the Agency did not subject the grievant to

<sup>28</sup> Award at 11.

<sup>29</sup> See Exceptions, Attach. 4, Notice of Proposed Suspension at 7-9 (charging the grievant with "[d]iscourtesy" and applying the Agency's table of penalties for a first offense of "[d]iscourtesy, [u]se of [a]busive [l]anguage").

<sup>30</sup> See *AFGE, Loc. 17*, 72 FLRA 162, 163 (2021) (*Loc. 17*) (Member Abbott concurring on other grounds) (holding that excepting party's disagreement with arbitrator's factual finding and evaluation of evidence did not demonstrate that award was based on a nonfact); *AFGE, Loc. 3369*, 72 FLRA 158, 159 (2021) (*Loc. 3369*) (denying nonfact exception where excepting party did not establish that arbitrator's factual finding was "clearly erroneous").

<sup>31</sup> Exceptions Br. at 12-13.

<sup>32</sup> *Id.* at 13.

<sup>33</sup> Award at 11.

<sup>34</sup> See *U.S. Dep't of VA, VA Puget Sound Healthcare Sys., Seattle, Wash.*, 72 FLRA 441, 443 (2021) (Chairman DuBester concurring) (finding that the excepting party's disagreement with arbitrator's evaluation of evidence and testimony provided no basis for finding award deficient on nonfact grounds); *AFGE, Loc. 2076*, 71 FLRA 1023, 1025 (2020) (then-Member DuBester concurring on other grounds) (denying nonfact exception where excepting party challenged arbitrator's weighing of testimony and record lacked evidence indicating that arbitrator's findings were clearly erroneous).

<sup>35</sup> Exceptions Br. at 10-11. When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo. *U.S. Dep't of VA, VA Hosp. Med. Ctr.*, 72 FLRA 677, 678 n.13 (2022) (citation omitted). 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. *Id.* (citation omitted). In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *Id.* (citation omitted).

<sup>36</sup> 5 C.F.R. § 752.202(d).

<sup>37</sup> Award at 11.

<sup>38</sup> *Id.* at 11-12.

<sup>39</sup> See *Loc. 17*, 72 FLRA at 164 (deferring to arbitrator's factual findings in resolving contrary-to-law exception where excepting party did not demonstrate that those findings were nonfacts). Although the Union asserts that "the [A]rbitrator's factual findings did not derive from any known, or cited[,] legal analysis," the Union's disagreement with the Arbitrator's factual findings, absent a successful nonfact exception, provides no basis for finding that the award is contrary to law, rule, or regulation. See *U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 293, 296 (2021) (Member Kiko concurring on other grounds; Member Abbott concurring on other grounds).

disparate treatment in administering discipline, we deny this exception.<sup>40</sup>

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

The Union asserts that the award fails to draw its essence from Article 22, Section 2,<sup>41</sup> Article 20, Section 5;<sup>42</sup> and Articles 1 and 24<sup>43</sup> of the parties' agreement.<sup>44</sup>

As relevant here, Article 22, Section 2 provides that "disciplinary actions will be for just causes only, and will be administered consistently and in accordance with legal requirements and regulations."<sup>45</sup> The Union alleges that the Agency's "disparate treatment of the grievant" demonstrates that the Agency did not administer discipline "consistently" or "in accordance with legal requirements."<sup>46</sup> But this allegation merely restates the Union's nonfact and contrary-to-law arguments that the grievant was similarly situated to other employees that did not receive discipline. Consistent with our denial of the Union's nonfact and contrary-to-law exceptions, we find that the Union's allegation fails to demonstrate that the award is deficient.<sup>47</sup>

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<sup>40</sup> See *AFGE, Loc. 331*, 67 FLRA 295, 296 (2014) (award not deficient on contrary-to-law grounds where excepting party challenged arbitrator's factual determinations and did not demonstrate that those determinations were nonfacts); *AFGE, Loc. 2328*, 62 FLRA 63, 66 (2007) (denying contrary-to-law exception because arbitrator's factual findings supported legal conclusion).

<sup>41</sup> Exceptions Br. at 3-9.

<sup>42</sup> *Id.* at 16-17.

<sup>43</sup> *Id.* at 18-20.

<sup>44</sup> 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 collective-bargaining 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. *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs Dist., St. Paul, Minn.*, 72 FLRA 634, 635 (2022) (citation omitted). The Authority will not find that an award fails to draw its essence from a collective-bargaining agreement when the excepting party fails to establish that the arbitrator's interpretation of that agreement conflicts with its express provisions. *U.S. Dep't of the Air Force, Edwards Air Force Base, Cal.*, 68 FLRA 817, 819 (2015) (citation omitted).

<sup>45</sup> CBA at 192-93.

<sup>46</sup> Exceptions Br. at 5-7.

<sup>47</sup> See *NAIL, Loc. 5*, 69 FLRA 573, 576 (2016) (declining to address essence claim that restated a denied contrary-to-law exception); *U.S. Dep't of HHS, Food & Drug Admin., San Diego, Cal.*, 67 FLRA 255, 256 (2014) (holding that an essence argument based on same premise as denied nonfact exception failed to establish that award was deficient).

In addition, the Union contends that the award fails to draw its essence from Article 22, Section 2 because the Arbitrator did not analyze just cause or discuss the just-cause test that the Union cited in its post-hearing brief.<sup>48</sup> However, the Union does not identify any contractual wording that required the Arbitrator to apply a particular standard for assessing just cause. And contrary to the Union's claim, the Arbitrator analyzed whether the Agency had just cause as evidenced by the Arbitrator's consideration of whether the grievant engaged in the alleged misconduct and received an appropriate disciplinary penalty.<sup>49</sup> Therefore, the Union's argument provides no basis for finding that the award fails to draw its essence from Article 22, Section 2.<sup>50</sup>

Next, the Union asserts that Article 20, Section 5 precluded the Arbitrator from considering the memo because the Agency failed to provide that memo to the grievant within ten weeks of the counseling on which it is based.<sup>51</sup> Article 20, Section 5 states, in pertinent part, that the Agency will create a memorandum "[w]hen counseling related to informal corrective actions occurs" and "provide a copy to the employee."<sup>52</sup> Because the Arbitrator considered the memo, the Union contends that the award permits the Agency to provide a memorandum to an employee "at any time,"<sup>53</sup> which is inconsistent with Article 20, Section 5. But the plain wording of Article 20, Section 5 imposes no time frame during which the Agency must provide an employee with a memorandum of record. Therefore, the Union does not demonstrate that the award is irrational, unfounded,

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<sup>48</sup> Exceptions Br. at 9.

<sup>49</sup> See Award at 10 ("The Agency met its burden of [proving] the allegations upon which the discipline was imposed."), 12 (upholding the Agency's proposed discipline because "[n]o evidence was introduced which warrants a . . . reduction of the discipline").

<sup>50</sup> See *Loc. 3369*, 72 FLRA at 160 (award not deficient on essence grounds where excepting party "d[id] not demonstrate that any provision in the parties' agreement required the [a]rbitrator to apply particular criteria for determining just cause"); *AFGE, Loc. 1897*, 67 FLRA 239, 241 (2014) (Member Pizzella concurring on other grounds) (denying essence exception where excepting party did not demonstrate that arbitrator failed to apply a just-cause standard).

<sup>51</sup> Exceptions Br. at 16-17.

<sup>52</sup> CBA at 187-88.

<sup>53</sup> Exceptions Br. at 17.

implausible, or in manifest disregard of the parties' agreement.<sup>54</sup>

Finally, the Union argues that the Arbitrator disregarded Articles 1 and 24 of the parties' agreement by permitting a former Agency supervisor to testify at arbitration.<sup>55</sup> Article 1 addresses "Recognition and Unit Coverage"<sup>56</sup> and Article 24 covers "Arbitration."<sup>57</sup> According to the Union, neither Article 1 nor Article 24 provides former bargaining-unit employees with a "right[] to participate in an arbitration hearing."<sup>58</sup> But the Union fails to identify any wording in Articles 1 or 24 – and none is apparent – that limits the Arbitrator's authority to admit testimony from former employees. Consequently, the Union's argument fails to establish that the award is deficient on this ground.<sup>59</sup>

Accordingly, we deny the Union's essence exceptions.

## V. Decision

We deny the Union's exceptions.

## Chairman DuBester, concurring:

I agree with the Decision denying the Union's exceptions.

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<sup>54</sup> See *AFGE, Nat'l Council of Field Lab. Locs.*, 71 FLRA 1180, 1181 (2020) (denying essence exception where excepting party provided its own interpretation of parties' agreement but did not explain how arbitrator's interpretation was deficient); *U.S. Dep't of VA, Member Servs. Health Res. Ctr.*, 71 FLRA 311, 312 (2019) (then-Member DuBester concurring) (where arbitrator's interpretation was "plausible and consistent with the plain wording" of the parties' agreement, excepting party failed to establish that the award failed to draw its essence from the agreement).

<sup>55</sup> Exceptions Br. at 18-20.

<sup>56</sup> CBA at 6.

<sup>57</sup> *Id.* at 222.

<sup>58</sup> Exceptions Br. at 18.

<sup>59</sup> See *AFGE, Loc. 2382*, 66 FLRA 664, 666-67 (2012) (denying essence exception because excepting party "d[id] not identify any specific contractual wording to establish that" the arbitrator's interpretation of parties' agreement was deficient).