73 FLRA No. 43

BREMERTON METAL
TRADES COUNCIL
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
PUGET SOUND
NAVAL SHIPYARD AND INTERMEDIATE
MAINTENANCE FACILITY
(Agency)

0-AR-5809

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DECISION

August 31, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members

I. Statement of the Case

Arbitrator Ira Cure found that the Agency did not violate the parties' collective-bargaining agreement or an abeyance agreement when it suspended the grievant for one day. The Union filed exceptions challenging the award on contrary-to-law, nonfact, and essence grounds. Because the Union failed to raise its contrary-to-law argument before the Arbitrator, we dismiss it. We deny the nonfact and essence exceptions because the Union does not demonstrate the award is deficient on either ground.

II. Background and Arbitrator's Award

In August 2020, the Agency proposed suspending the grievant for one day. The parties resolved that matter by executing an abeyance agreement. The abeyance agreement "placed the [grievant's one]-day suspension . . . in abeyance for a period of [two] years . . . to allow [the grievant] the opportunity to demonstrate acceptable attendance, conduct[,] and performance; and to refrain from any further disciplinary offenses."[1] The abeyance agreement provides that if the grievant "violate[s] any of the [Agency's] attendance, conduct[,] or performance rules or expectations at any time during" the agreement's duration, such action "will be in direct violation of th[e] [a]greement."[2] It further provides that the failure to comply with any of its conditions "will result in the [Agency] effecting [the one]-day suspension base[d] on the [August 2020] charge without an additional notice period."[3]

Subsequently, the Agency proposed discipline against the grievant based on incidents in March and April 2021. The grievant agreed to settle by accepting a suspension for those incidents. Based on those incidents, the Agency concluded that the grievant also violated the abeyance agreement. Therefore, the Agency imposed the one-day suspension that had been held in abeyance since 2020, without giving the grievant an additional notice period prior to imposing discipline.

The Union grieved the one-day suspension, asserting that the Agency violated the abeyance agreement and Section 2703 of the parties' agreement (Section 2703) because Section 2703 provides that an employee "who is 'issued a notice of proposed suspension of [fourteen] days or less' is permitted ten working days to respond" to the notice.[4] The parties could not resolve the matter and it went to arbitration.

The parties stipulated the issue as: "Was there a violation of the abeyance agreement that brought about the one-day suspension of [the grievant] that was previously held in abeyance?"[5]

Before the Arbitrator, the Agency asserted that, because the grievant violated the abeyance agreement, the Agency was not required to comply with Section 2703 and could impose the one-day suspension under the terms of the abeyance agreement. The Arbitrator agreed, stating that "[u]nder the unique circumstance of this case," it was unnecessary to determine whether the Agency complied with Section 2703.[6] Instead, the Arbitrator noted that the grievant settled the 2021 disciplinary matters by accepting a suspension regarding those incidents. The Arbitrator determined that, by doing so, the grievant had "implicitly admitted" violating the abeyance agreement's conditions.[7] As a result, the abeyance agreement's penalty for noncompliance – reinstating the one-day suspension – became effective. Therefore, the Arbitrator found that the Agency was justified in suspending the grievant for the one additional day and denied the grievance.

On April 27, 2022, the Union filed exceptions to the award, and on May 27 2022, the Agency filed an opposition to the Union's exceptions.

[1] Award at 3 (quoting Opp'n, Attach. 3, Abeyance Agreement (Abeyance Agreement) at 1).
[2] *Id.*
[3] *Id.*
[4] *Id.* at 5 (quoting collective-bargaining agreement).
[5] *Id.* at 2 (quoting Exceptions, Attach. 5, Tr. (Tr.) at 7).
[6] *Id.* at 5.
[7] *Id.* at 6.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union's contrary-to-law exception.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments that could have been, but were not, presented to the arbitrator.[8]

The Union asserts that the award violates 5 U.S.C. § 7503 because the grievant did not have an opportunity to respond to the proposed discipline and the Agency was permitted to unilaterally decide that a violation of the abeyance agreement occurred.[9] Although the Union asserts that it raised this argument at arbitration, we find that the cited portions of the transcript contain only a vague reference to a "statutory right" to respond to proposed discipline.[10] Moreover, our review of the record reveals no evidence that the Union specifically raised 5 U.S.C. § 7503 below. Therefore, because the Union could have raised this argument before the Arbitrator, but did not, we dismiss the Union's contrary-to-law exception.[11]

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact because the Arbitrator found that the grievant "agreed to settle his grievance by accepting a one or two-day penalty" for the 2021 disciplinary incidents.[12] According to the Union, it is "impossible" that the grievant could have entered into the abeyance agreement in 2020 to settle matters that had not yet occurred.[13] 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.[14]

It is well established that arguments based on a misunderstanding of an award do not provide a basis for finding the award deficient on nonfact grounds.[15] Here, the Union's argument – that the award is based on a finding that the grievant settled the 2021 disciplinary matter by entering into the abeyance agreement in 2020 – misunderstands the award. The Arbitrator did not find that the abeyance agreement settled the 2021 disciplinary matter. Rather, the Arbitrator found that the grievant settled the 2021 disciplinary matter in a *separate* agreement, but that, by doing so, the grievant "implicitly admitted" to violating the abeyance agreement's requirement to "refrain from any further discipline" while the abeyance agreement was in effect.[16] The Union's argument does not establish that this finding is clearly erroneous, and therefore does not provide a basis to conclude the award is based on a nonfact.[17]

Accordingly, we deny the nonfact exception.

B. The award does not fail to draw its essence from Section 2703 or the abeyance agreement.

The Union asserts that the award fails to draw its essence from Section 2703.[18] The Authority will find that an award fails to draw its essence from an 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.[19]

The Union argues that the award "ignores" Section 2703 and that the abeyance agreement does not "negate" the applicability of the parties' collective-bargaining agreement to future misconduct.[20] As noted, Section 2703 generally provides employees with ten days to respond to a notice of proposed discipline.[21]

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[8] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. Dep't of VA, James A. Haley VAMC, Tampa, Fla.*, 73 FLRA 47, 48 (2022) (*VA*) (citing *U.S. Dep't of VA*, 72 FLRA 518, 519 (2021) (Chairman DuBester concurring) (dismissing contrary-to-law argument not raised to arbitrator)).

[9] Exceptions at 4-5.

[10] *Id.* at 6 (citing Tr. at 9-11; 71-80); *see* Tr. at 9.

[11] *VA*, 73 FLRA at 48 (finding a general reference before arbitrator insufficient to raise specific argument on exception (citing *Indep. Union of Pension Emps. for Democracy & Just.*, 69 FLRA 158, 160 (2016); *U.S. Dep't of VA, Bos. Healthcare Sys., Bos., Mass.*, 68 FLRA 116, 117 (2014))).

[12] Exceptions at 7.

[13] *Id.*

[14] *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022) (citing *U.S. Dep't of HHS, Food & Drug Admin., San Antonio, Tex.*, 72 FLRA 179, 179-80 (2021) (Chairman DuBester concurring)).

[15] *U.S. DHS, CBP*, 68 FLRA 157, 160 (2015) (*CBP*) (Member Pizzella dissenting) (citing *AFGE, Nat'l Joint Council of Food Inspection Locs.*, 64 FLRA 1116, 1118 (2010)).

[16] Award at 3 (quoting Abeyance Agreement at 1); *id.* at 6.

[17] *E.g.*, *Bremerton Metal Trades Council*, 73 FLRA 90, 94 (2022) (denying nonfact exception where excepting party failed to demonstrate that challenged finding was clearly erroneous); *CBP*, 68 FLRA at 160 (rejecting nonfact argument based on misunderstanding of award).

[18] Exceptions at 8-9.

[19] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 67, 69 (2022) (Member Kiko concurring) (citing *SSA, Off. of the Gen. Couns.*, 72 FLRA 554, 555 (2021)).

[20] Exceptions at 9.

[21] Award at 5.

However, the Arbitrator determined that it was unnecessary to decide whether the Agency complied with Section 2703 because the terms of the abeyance agreement controlled the imposition of the one-day suspension.[22] Further, applying the abeyance agreement, the Arbitrator concluded that because the grievant had "implicitly admitted" to violating the abeyance agreement by settling the 2021 disciplinary matters and accepting a suspension for those matters, the Agency could impose the one-day suspension without respect to the notice requirements of Section 2703.[23]

We find that this conclusion is consistent with the plain wording of the abeyance agreement, which states that "failure to comply with any of the conditions of this [a]greement within the [two]-year period, will result in the [Agency] effecting [the one]-day suspension base[d] on the [August 2020] charge *without an additional notice period*."[24] The Union's argument to the contrary does not establish that the award is irrational, unfounded, or in manifest disregard of either Section 2703 or the abeyance agreement.[25]

Accordingly, we deny the essence exception.

V. Decision

We dismiss the Union's exceptions, in part, and deny them, in part.

[22] *Id.* at 5-6.
[23] *Id.*; *see also id.* at 3-4.
[24] *Id.* at 3 (emphasis added).
[25] *See U.S. Dep't of VA*, 72 FLRA 518, 519-20 (2021) (finding arbitrator's interpretation of parties' memorandum of understanding was plausible and rejecting agency's attempt to relitigate its preferred interpretation); *see also, e.g.*, *AFGE, Loc. 3917*, 72 FLRA 651, 654 (2022) (Chairman DuBester concurring) (denying essence exception where union failed to show contract provision applied to dispute); *AFGE, Loc. 2338*, 71 FLRA 1039, 1041 (2020) (citing *NAIL, Loc. 10*, 71 FLRA 513, 515 (2020)) (denying essence exception where union failed to establish arbitrator was required to apply cited contract provision); *U.S. Dep't of the Air Force, 442nd Fighter Wing, Whiteman Air Force Base, Mo.*, 66 FLRA 357, 363 (2011) (denying essence exception where agency failed to demonstrate that arbitrator's determination of applicable contract provisions was deficient).