73 FLRA No. 150

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ASHLAND, KENTUCKY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1286
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5865

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DECISION

January 9, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

The grievant is a correctional officer. The Agency required him to take a breathalyzer test and then, while the Agency investigated, it reassigned him to a position that was ineligible for overtime. The Union grieved, claiming the way in which the Agency conducted the breathalyzer test violated § 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute)[1] and the parties' collective-bargaining agreement. Arbitrator John S. West issued an award sustaining the grievance and directing the Agency to both return the grievant to his previous assignment and make him whole for missed overtime opportunities.

The Agency filed exceptions arguing the award is contrary to law and based on a nonfact. Because the Agency could have raised its contrary-to-law exceptions before the Arbitrator, but did not, we dismiss those exceptions under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.[2] As the award does not contain sufficient findings for us to assess the nonfact exception, we remand the matter to the parties to obtain clarification from the Arbitrator, absent settlement.

II. Background and Arbitrator's Award

Based on employee reports, the Agency suspected that the grievant was intoxicated while on duty. The Agency ordered him to report to his supervisor's office for a breathalyzer test. Before reporting, the grievant requested the presence of his Union representative. In response, the Agency contacted a Union representative. The Union representative escorted the grievant to the supervisor's office, but the Agency prohibited the representative from witnessing the breathalyzer test.

Stating that the test showed alcohol in his system, the Agency sent the grievant home and then, while the Agency investigated, it reassigned the grievant to a position that was ineligible for overtime. The Union grieved, arguing the Agency violated the grievant's right to union representation during a disciplinary examination under § 7114(a)(2)(B) of the Statute (*Weingarten* right)[3] by not permitting the Union representative to witness the breathalyzer test. In the grievance, the Union requested that the Agency return the grievant to his previous assignment and make him whole for lost overtime pay. The grievance proceeded to arbitration.

At arbitration, the Arbitrator considered whether the breathalyzer test was an examination covered by § 7114(a)(2)(B) of the Statute and Article 6, Section (f) (Article 6(f)) of the parties' agreement. Section 7114 states that a union representative must be given an opportunity to be present at "any examination of an employee in the unit . . . in connection with an investigation if (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation."[4] The Arbitrator noted that Article 6(f) of the parties' agreement provides a nearly identical requirement.[5]

The Arbitrator found that a breathalyzer test "is part of an investigation[,] and an employee has more than a reasonable belief that this aspect of the examination may result in disciplinary action against the employee."[6] Additionally, the parties stipulated that the grievant requested the presence of his Union representative. Consequently, the Arbitrator determined the Agency

[1] 5 U.S.C. § 7114(a)(2)(B).
[2] 5 C.F.R. §§ 2425.4(c), 2429.5.
[3] Section 7114(a)(2)(B) of the Statute provides a right to representation during certain investigative examinations, which is similar to the private-sector decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), and therefore it is often called the *Weingarten* right. *See U.S. Dep't of HUD*, 72 FLRA 450, 450 n.3 (2021) (Chairman DuBester dissenting on other grounds).
[4] 5 U.S.C. § 7114(a)(2)(B).
[5] Award at 24 (citing Exceptions, Attach. B, Collective-Bargaining Agreement at 11-12).
[6] *Id.* at 24-25.

violated the grievant's *Weingarten* right under § 7114(a)(2)(B) of the Statute and Article 6(f) of the parties' agreement by denying him Union representation.

The Arbitrator also observed that, due to the Agency's *Weingarten* violation, the grievant did not have a witness "to any possible irregularities regarding the preparation, administration[,] and reading of the breathalyzer test."[7] Quoting an Agency policy, the Arbitrator noted that "[e]mployees are subject to disciplinary action if found to possess a .02 or greater blood[-]alcohol content while on duty."[8] The Arbitrator found no record evidence concerning the grievant's blood-alcohol content. He then asserted, "Since the Agency has failed to meet its burden of proof to show that there was just cause, [the grievant] is entitled to be made whole" for "all overtime he was denied."[9] In addition to the make-whole remedy, the Arbitrator also directed the Agency to return the grievant to his previous assignment (reinstatement).

The Agency filed exceptions to the award on February 16, 2023, and the Union filed an opposition on March 20, 2023.

III. Preliminary Matter: We dismiss the Agency's contrary-to-law exceptions.

The Agency argues the award's reinstatement and make-whole remedies are contrary to law—specifically, Authority precedent[10] and management's right to discipline employees under the Statute.[11] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments or evidence that could have been, but were not, presented to the arbitrator.[12]

Here, the Union requested the reinstatement and make-whole remedies at arbitration and in its grievance.[13] Thus, the Agency could have argued to the Arbitrator that these remedies are contrary to law. The record does not reflect that the Agency did so.[14] Consequently, we do not consider those arguments, and we dismiss the Agency's contrary-to-law exceptions.[15]

IV. Analysis and Conclusions

A. The Agency does not establish that the award fails to draw its essence from the parties' agreement.

The Agency's exceptions brief includes a sentence that states, "Essence – [r]eads out [the] provision allowing employees to be reassigned during [an] investigation."[16] Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c).[17] Consistent with § 2425.6(e)(1), when a party does not provide any arguments to support its exception, the Authority will deny the exception.[18]

Because the Agency provides no arguments to support its single-sentence essence exception, we deny the exception as unsupported under § 2425.6(e)(1) of the Authority's Regulations.[19]

B. We are unable to determine whether the award is based on a nonfact.

The Agency argues the award is based on a nonfact.[20] Specifically, the Agency claims "[t]he central fact that is clearly erroneous" is the Arbitrator's finding that "the Agency has failed to meet its burden of proof to show that there was just cause," such that the grievant "is entitled to be made whole."[21] The Agency contends this finding is "based on the erroneous fact that the Agency

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[7] *Id.* at 26.
[8] *Id.* at 27.
[9] *Id.* at 26-28.
[10] Exceptions Br. at 9 (citing *Dep't of VA, Med. Ctr., Leavenworth, Kan.*, 49 FLRA 1624, 1643-44 (1994)).
[11] *Id.* at 9-10 (citing 5 U.S.C. § 7106(a)(2)(A)). In *Consumer Financial Protection Bureau* (*CFPB*), the Authority revised its test for assessing management-rights exceptions to arbitrator awards enforcing collective-bargaining agreements. 73 FLRA 670 (2023). As a result, the Authority's Office of Case Intake and Publication issued an order to the parties granting them "an opportunity to file briefs addressing how the revised test applies in this case." Order at 1. The Union filed a brief on October 25, 2023; the Agency did not respond. We note the order stated that, "irrespective of any party's supplemental submission, the Authority may ultimately resolve this case on grounds unrelated to management rights." *Id.* at 2.
[12] 5 C.F.R. §§ 2425.4(c), 2429.5.
[13] Award at 10 (describing requested remedies in grievance); Opp'n, Attach. 9, Union's Post-Hr'g Br. at 5 (reiterating requested remedies).
[14] Exceptions, Attach. A, Agency's Post-Hr'g Br. at 13 (responding to Union's requested remedies by arguing only that Agency complied with the parties' agreement when it reassigned the grievant).
[15] *See U.S. DHS, U.S. CBP, U.S. Border Patrol, San Diego Sector*, 68 FLRA 642, 642-43 (2015) (dismissing exception challenging remedy where the excepting party did not raise the underlying argument before the arbitrator, but the union had repeatedly requested the challenged remedy at arbitration).
[16] Exceptions Br. at 6.
[17] *NTEU*, 70 FLRA 57, 60 (2016).
[18] *Id.* (citing *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014)).
[19] *See Haw. Fed. Emps. Metal Trades Council*, 70 FLRA 324, 325-26 (2017) (denying exceptions where excepting party "fail[ed] to support [its] exceptions with any arguments").
[20] Exceptions Br. at 15.
[21] *Id.* (quoting Award at 27).

. . . disciplined the grievant when it reassigned him."[22] According to the Agency, "the only way the Agency would have the burden of proof and have to show just cause is if it had taken a disciplinary or adverse action against the grievant," and "the only way a make[-]whole remedy could ever be appropriate in a case like this would be if the Agency had taken some form of final action against the grievant" – which it claims it had not done at the time of the arbitration hearing.[23]

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[24] In order to meet this standard, the Agency argues (1) the Arbitrator found that the Agency disciplined the grievant; (2) this finding was a factual error; and (3) the Arbitrator would not have awarded the make-whole remedy but for this factual error.[25]

The award is unclear as to what the Arbitrator relied on for his just-cause findings. The Arbitrator quoted an Agency policy, which provides, "Employees are subject to disciplinary action if found to possess a .02 or greater blood[-]alcohol content while on duty."[26] However, that policy does not contain any wording regarding just cause, and the Arbitrator did not say whether he was interpreting it as imposing a just-cause requirement. Further, the Arbitrator did not cite any other source, contractual or otherwise, for his just-cause findings. Nor did he specify whether he considered the grievant's reassignment, or something else, to constitute discipline – and, if so, on what grounds. Additionally, as the Arbitrator based his make-whole remedy on his just-cause findings, the basis for that remedy also is unclear.[27]

For the above reasons, the award does not contain sufficient findings for us to assess the Agency's nonfact arguments. Consequently, we remand the case to the parties to resubmit this matter to the Arbitrator for clarification, absent settlement.[28] On remand, the Arbitrator should clarify the matters discussed above.

V. Decision

We dismiss the Agency's contrary-to-law exceptions, deny its essence exception, and remand the matter to the parties for resubmission to the Arbitrator, absent settlement.

[22] *Id.* (citing Award at 27).
[23] *Id.* at 16.
[24] *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 64 FLRA 39, 56 (2009) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).
[25] Exceptions Br. at 15-16.
[26] Award at 27.
[27] *Id.* ("Since the Agency has failed to meet its burden of proof to show that there was just cause, [the grievant] is entitled to be made whole.").
[28] *See AFGE, Loc. 779*, 64 FLRA 672, 674 (2010) (remanding for clarification where "it [was] unclear whether, but for th[e arbitrator's error], the [a]rbitrator would have reached a different result"); *AFGE, Loc. 1617*, 55 FLRA 345, 347 (1999) (remanding for clarification where Authority was "unable to determine whether the award is deficient as based on a nonfact").