64 FLRA No. 107

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1164
(Union)

and

SOCIAL SECURITY ADMINISTRATION
SOMERVILLE, MASSACHUSETTS
(Agency)

0-AR-4392

DECISION

March 25, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Louis P. Pittocco filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator found that the Agency appropriately suspended the grievant for two days for inappropriate, disrespectful, and disruptive behavior. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievant, the Executive Vice President of the Union for the region, was in the office working on Union matters. Award at 8. The Assistant District Manager (ADM) sent an email to all employees inviting everyone to have cake and sing "Happy Birthday" to an employee who would be in the office in the afternoon. *Id.* The grievant attended the celebration and allegedly interrupted the ADM to make loud comments to the effect that this was "a blatant and ridiculous display of management's power." *Id.* She also allegedly commented loudly to other employees that the celebration was "disgusting" and management was "making a fool" of her. *Id.*

Later that afternoon, the grievant was heard talking to a police officer, who was not an employee. *Id.* When the officer "stopped at [the grievant's] desk to chat after visiting the water fountain[,]" the grievant was allegedly overheard loudly complaining about the dress code and that management had "no right to determine what staff should wear." *Id.* She also allegedly called the ADM "ridiculous," and complained about her immediate supervisor loudly enough that other employees, including her supervisor, could hear. *Id.*

Subsequently, the supervisor reminded the grievant of previous occasions when she had counseled her about using "foul language and . . . disrespectful behavior[,]" and advised the grievant that her behavior that day was "unprofessional and disrespectful." *Id.* The grievant responded that she was engaged in "robust debate" with management or staff and that what she said was protected by her Union position. *Id.* The Agency subsequently suspended the grievant for two days for inappropriate, disrespectful, and disruptive behavior in the office. *See* Attachment to Exceptions (Suspension Letter Aug. 1, 2007) at 1. The Union filed a grievance challenging the suspension, and when the grievance was not resolved, it was submitted to arbitration.

As relevant here, the Arbitrator framed the issue as: "[D]id the [Agency] violate the [parties' agreement] when the [g]rievant received a two-day suspension . . . . [and] [i]f so, what will the remedy be?" [1] Award at 1.

The Arbitrator set forth several provisions of the parties' agreement, including, as relevant here, Article 2 – "Union Rights and Responsibilities" – which includes a provision that the Agency "shall not restrain, interfere with, or coerce representatives of the Union in the exercise of their rights under 5 U.S.C. 71 and this agreement." *Id.* at 2. The Arbitrator also set forth Section 1 of Article 3 of the parties' agreement – "Right to Unionism" – which states that: "Each employee shall have the right to join or assist the Union, or to refrain from such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." *Id.*

The Arbitrator found that the grievant engaged in the conduct as alleged, and that her comments were not protected as "robust debate" connected to her Union activities because "she never debated anything that day with any member of management and the comments that she made that were overheard by management . . . were disruptive, disrespectful and inappropriate for the work place." *Id.* at 10. The Arbitrator referred to the

1. It is unclear whether the parties stipulated the issue. The Arbitrator also addressed an arbitrability issue and found that the grievance was arbitrable. Award at 9. As no exceptions were filed to this finding, we will not discuss it further.

grievant's history of discourteous and disrespectful conduct toward coworkers, including an incident in which the grievant allegedly used "foul language" toward a coworker, which had resulted in a written reprimand. *Id.* In this connection, the Arbitrator stated that "[t]here was no record presented that the reprimand was grieved." *Id.* The Arbitrator also noted that the Agency regularly reminds its employees of their obligation to exhibit courtesy and conduct themselves with propriety when dealing with coworkers or serving the public. *Id.* at 9. According to the Arbitrator, these standards of conduct applied regardless of whether the grievant was on or off duty. *Id.* at 9-10. The Arbitrator found that the grievant's two instances of misconduct on the day of the birthday celebration "were offensive enough for [the Agency] to take action other than counseling and make a recommendation for suspension." *Id.* at 10.

Based on the foregoing, the Arbitrator concluded that the Agency appropriately suspended the grievant for two days, and denied the grievance. *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is contrary to law because it violates an employee's rights to assist and act on behalf of a labor organization under 5 U.S.C. § 7102.[2] Exceptions at 4. The Union contends that the Arbitrator erred by failing to apply the "flagrant misconduct" test, which, according to the Union, is used to determine whether words or conduct exceed the boundaries of protected activity. *Id.* (citing *Dep't of Defense, Defense Mapping Agency Aerospace Ctr., St. Louis, Mo.,* 17 FLRA 71 (1985); *Dep't of the Air Force, Grissom Air Force Base*, Ind., 51 FLRA 7 (1995)). In this regard, the Union argues that the Arbitrator erred when "[i]nstead of reviewing the facts of the case through the lens of the flagrant misconduct test, [the Arbitrator] relied upon the term 'robust debate' and stated that since no actual debate had occurred, the [g]rievant was not protected by the Statute." Exceptions at 5.

The Union also argues that the award is based on two nonfacts. First, the Union argues that the Arbitrator ignored the grievant's testimony when he found no evidence in the record that the grievant's prior reprimand had been grieved. *Id.* at 5-6 (citing Award at 10). Second, the Union argues that the Arbitrator erred when he found that the grievant used inappropriate language, spoke loudly so that coworkers could overhear her, and that her voice carried into public areas. Exceptions at 6 (citing Award at 10).

B. Agency's Opposition

The Agency argues that because the Arbitrator resolved the grievance based on his interpretation of the parties' agreement, rather than the Statute, the "flagrant misconduct" test does not apply and that the award should be reviewed under the "essence" standard. Opp'n at 9-11. Alternatively, the Agency argues that even if the Union properly raises a contrary to law exception, the "flagrant misconduct" test does not apply because there was no evidence that the grievant was engaged in protected activity. *Id.* at 11. In addition, the Agency disputes the Union's claim that the award is based on nonfacts. *Id.* at 14-16.

IV. Analysis and Conclusions

A. The award is not contrary to law, rule and/or regulation.

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*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

We note that the exception here is based on an alleged violation of the Statute, and the issue before the Arbitrator was framed in contractual terms. *See* Exceptions at 4-5; Award at 1. Nevertheless, the Authority previously has applied statutory standards in assessing the application of contract provisions that mirror, or are intended to be interpreted in the same manner as, the Statute. *U.S. Dep't of the Treasury, U.S. Customs Serv., Port of N.Y. & Newark*, 57 FLRA 718, 721 (2002), *pet. for review denied sub nom. NTEU, Chapter 161 v. FLRA*, 64 F. App'x 245 (D.C. Cir. 2003). Article 2 of the parties' agreement specifically refers to the Statute, and Section 1 of Article 3 is virtually identical to § 7102 of the Statute.[3] Award at 2. It is unclear whether, in finding no contract violation, the Arbitrator relied upon

2. The pertinent wording of § 7102 is set forth *infra*.

3. The relevant provisions of Articles 2 and 3 of the parties' agreement are set forth *supra*.

these articles or solely upon the Agency's standards of conduct and the provisions of the parties' agreement concerning discipline. *See* Award 9-10. Even assuming that the Arbitrator relied upon Articles 2 and 3, and that statutory principles apply, we find, for the following reasons, that the Union has not established that the award is contrary to law.

Section 7102 of the Statute provides, in pertinent part, that "[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." 5 U.S.C. § 7102. However, "an employee's involvement in union activities does not immunize the employee from discipline." *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla.*, 35 FLRA 1146, 1151 (1990). *See also Long Beach Naval Shipyard, Long Beach, Cal. & Long Beach Naval Station, Long Beach, Cal.*, 25 FLRA 1002, 1005 (1987) (*Long Beach Naval*). When an employer's allegedly discriminatory discipline is for *conduct occurring during protected activity*, the Authority must determine whether the conduct exceeded the bounds of protected activity. [4] *See U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis Monthan Air Force Base, Tucson, Ariz.*, 58 FLRA 636, 636 (2003). However, consistent with the Statute, an agency has the right to discipline an employee union representative for activities which "are not specifically on behalf of the exclusive representative[.]" *Long Beach Naval*, 25 FLRA at 1005. Similarly, an employee's complaints to, or about, an employer do not necessarily constitute protected activity under the Statute. *See, e.g.*, *U.S. Dep't of the Army Headquarters, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 39 FLRA 1149, 1153 (1991) (employee's complaints not protected where there was no indication that she was "acting on behalf or with the authorization of the Union or any of her co-workers or that she was attempting to pursue any rights accorded her under the collective bargaining agreement.").

Here, the Arbitrator rejected the grievant's claim that the comments for which she was disciplined were protected by the Statute as "robust debate." Award at 10. The Union claims that the Arbitrator erred because he did not review the discipline "through the lens of the flagrant misconduct test," but does not specifically except to the Arbitrator's finding that the grievant was not engaged in representational activity. Exceptions at 5. Further, although the grievant was in the office to work on Union matters when the two incidents leading to her suspension took place, there is no indication that she was acting in a representational capacity when she disrupted the birthday celebration or complained to a non-employee. Award at 8. In this regard, there is no evidence that she was acting on behalf of the Union or any of her fellow employees or that she was attempting to pursue any rights pursuant to the Statute or the parties' collective bargaining agreement. Similarly, there is no evidence that complaining to a police officer who "stopped at her desk to chat after visiting the water fountain" constituted a labor-relations dialogue in which the grievant participated in her representational capacity. *Id.* As there is no basis for finding that the grievant was engaged in statutorily protected activity, there is no basis for finding that the Arbitrator was required to determine whether the grievant's conduct exceeded the bounds of protection under the Statute. Accordingly, we find that the Union has not demonstrated that the award is contrary to law, and we deny the exception.

B. The award is not based on nonfacts.

To establish that an award is based on a nonfact, a party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). However, the Authority will not find an award deficient as based on a nonfact on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration. *See id*. at 594. A challenge to the weight that an arbitrator has accorded testimony does not provide a basis for finding an award deficient. *AFGE, Local 376,* 62 FLRA 138, 141 (2007).

The Union argues that the grievant testified that she had grieved a prior reprimand and, thus, that the Arbitrator erred when he stated that there was "no record presented" that the previous reprimand had been grieved. Exceptions at 5-6 (quoting Award at 10). Even assuming that the Arbitrator's statement constitutes a finding that the previous reprimand had not been grieved, [5] the Arbitrator also found that the two incidents

4. Flagrant misconduct is a sufficient, but not necessary, condition for a loss of protection under § 7102, and merely "illustrative of," but not the only type of action that could justify removal from the protection of § 7102. *AFGE, Local 987*, 63 FLRA 362, 363 (2009) (citations omitted). Accordingly, an agency has the right to discipline an employee who is engaged in otherwise protected activity for remarks or actions that: (1) constitute flagrant misconduct; or (2) *otherwise exceed the bounds of protected activity. Id.* at 364 (citations omitted).

5. It is unclear whether the Arbitrator, in fact, failed to consider the grievant's testimony, or whether the Arbitrator meant that no *written* record was presented that the reprimand was grieved. *See* Award at 10.

that resulted in the grievant's suspension in this case "were offensive enough for [the Agency] to take action other than counseling and make a recommendation for suspension." Award at 10. Therefore, even if the Arbitrator erroneously found that the grievant had not grieved the prior reprimand, the Union fails to establish a clearly erroneous central fact underlying the award, but for which the Arbitrator would have reached a different result.

In addition, the Union excepts to the Arbitrator's findings that the grievant "continued to use inappropriate language[,]" "spoke loudly so that co-workers would clearly hear her conversations[,]" and that "her voice would carry into the public areas as well." Exceptions at 6 (quoting Award at 10). With regard to the grievant's language, the Union argues that the grievant did not make threats or use "profanity or obscene language[.]" Exceptions at 6. However, this does not establish that the Arbitrator erred in finding that the grievant used "inappropriate" language. Exceptions at 6. In this connection, we note that the Arbitrator found that, during the incidents at issue, the grievant called management "ridiculous[,]" and complained that the birthday party was "disgusting." Award at 8. With regard to the Arbitrator's finding that the grievant's complaints were loud, the Union provides no basis for concluding that the Arbitrator clearly erred in making this finding. As the Union does not demonstrate that any of the disputed factual findings are clearly erroneous, the Union provides no basis for finding that the award is based on nonfacts, and we deny the nonfact exceptions.

V. Decision

The Union's exceptions are denied.