

64 FLRA No. 10

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
LOUISVILLE, KENTUCKY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1133
(Union)

0-AR-4288

DECISION

September 18, 2009

Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members ¹

I. Statement of the Case

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

The Arbitrator sustained a grievance alleging that the Agency had improperly suspended the grievant for five days. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant, a housekeeper, was suspended for five days "because of his alleged provocation of [an] incident" with a patient in the Agency's psychiatric ward that "result[ed] in the patient's increased agitation and lack of control." Award at 2. Specifically, the grievant was charged with "[i]nappropriate conduct and interaction with a patient[.]" Exceptions, Attach. 3; Opposition, Attach. 10.

The Union filed a grievance challenging the grievant's suspension. The matter was not resolved and was submitted to arbitration. The parties did not stipulate to the issues. The Arbitrator did not set forth a statement of the issues, but stated that the "[g]rievant was sus-

pending for five days, . . . [t]he Union appealed the suspension to arbitration, and the matter came on for hearing before the undersigned Arbitrator[.]" Award at 2.

As an initial matter, the Arbitrator determined that the Agency committed procedural errors that "would cause one to question whether the discipline was properly administered." *Id.* at 13. Specifically, the Arbitrator found that the Agency erroneously relied on prior discipline that should have been removed from the grievant's official personnel folder, but was not, in issuing the discipline in this case.

The Arbitrator further found that the Agency failed to interview all potential witnesses. According to the Arbitrator, under Article 13, Section 10(A) of the parties' agreement, the Agency "had the responsibility of investigating the entire incident by interviewing any employees who may have had some personal knowledge of what occurred." ² *Id.* at 15. The Arbitrator determined that, in order to fulfill its responsibility of conducting a fair and impartial investigation, the Agency was "bound to obtain statements from any person with personal knowledge of the incident." *Id.* Specifically, the Arbitrator cites the Agency's failure to interview a nurse who was a partial eye witness, another nurse, and a patient. *Id.*

Noting that the concepts of due process, impartiality, and fair treatment are "essential" under the parties' agreement, the Arbitrator also found that the Agency was "duty bound" to interview the grievant as part of its investigation and explicitly rejected the Agency's argument that it was not. *Id.* In this regard, the Arbitrator noted that Article 13, Section 10(B) of the parties' agreement provides that "[d]isciplinary investigations will be conducted fairly and impartially, and a reasonable effort will be made to reconcile conflicting statements by developing additional evidence" *Id.* at 16; *see also* Exceptions, Attach. 15 at 37. The Arbitrator found that the Agency based the grievant's discipline on the statements of one witness who was not an eyewitness and whose statement was based on what she learned from others. With respect to another Agency

2. Article 13, Section 10 -- Investigation of Disciplinary Action, (A), provides, in pertinent part:

Management will investigate an incident or situation as soon as possible to determine whether or not discipline is warranted. . . . The employee who is the subject of the investigation will be informed of [his or her] right to representation before any questioning takes place[] or signed statements are obtained

1. Member DuBester did not participate in this decision.

Exceptions, Attach. 15 at 37; *see also* Award at 15.

eyewitness, the Arbitrator found that her statement was “far from complete as to exactly what happened.” Award at 16. Further, the Arbitrator found that neither of these witnesses were able to testify as to what either the grievant or the patient said and their testimony was in conflict regarding the grievant’s actions during the incident. *Id.* Based on the foregoing, the Arbitrator found that the Agency made little effort to reconcile the conflicting statements of potential or actual witnesses, and concluded that the Agency had failed to conduct its investigation as thoroughly and as soon after the incident as possible. *Id.*

With respect to the charge against the grievant, the Arbitrator noted that the Agency has a long-standing policy of protecting patients “from any form of abuse, whether it [is] in the form of physical, mental, or verbal abuse.” *Id.* at 13. The Arbitrator cited testimony by the Agency’s Medical Director describing the Agency’s policy regarding patient abuse and found that all of the Agency’s employees, including the grievant, were subject to the prohibition against verbal abuse. *Id.* (citing Tr. at 9, 10). According to the Arbitrator, the grievant was disciplined “because he allegedly violated the policy against verbal abuse.” *Id.*

As to the actual events giving rise to the discipline, the Arbitrator determined that, without knowing the “exact words” the patient said to the grievant and how the grievant responded, there was no way for him to determine whether the patient had provoked the grievant “to comment in an improper manner.” *Id.* at 17. Further, the Arbitrator specifically credited the grievant’s testimony that: the patient repeatedly spoke to the grievant and called him a racial slur; the patient accused the grievant of belonging to a gang; and the grievant “simply kept walking” and did not respond to the patient. *Id.* at 18-19 (citing Tr. at 163). According to the Arbitrator, this was the only evidence presented with regard to what was actually said during the confrontation between the grievant and the patient. *Id.* at 19.

Based on the evidence before him, the Arbitrator concluded that the Agency failed to carry its burden of proving that the grievant verbally abused the patient. The Arbitrator further found that the procedural errors made it “impossible” to show that the grievant had been “treated with the kind of impartiality and fairness that is demanded by the [c]ontract.” *Id.* at 19. Accordingly, he sustained the grievance.

III. Positions of the Parties

A. Agency’s Exceptions

The Agency alleges that the Arbitrator exceeded his authority by failing to address an issue before him and addressing an issue that was not before him. Specifically, the Agency claims that the Arbitrator erred in addressing whether the grievant engaged in “patient abuse” when the only issue before him was whether the grievant engaged in “inappropriate conduct and interaction with a patient.” Exceptions at 4 (emphasis omitted). In connection with this claim, the Agency sets forth an extensive discussion of the testimony of the Agency’s witnesses, asserts that the grievant lacks credibility, and essentially argues that the Arbitrator should have credited the testimony of its witnesses over that of the grievant. *Id.* at 5, 9 n.1.

The Agency further argues that the award fails to draw its essence from Article 13, Section 10(A) of the parties’ agreement. According to the Agency, under this provision, the Arbitrator found that, in order to fulfill its responsibility of conducting a fair and impartial investigation, the Agency was “bound to obtain statements from any person with personal knowledge of the incident” that gave rise to the discipline. *Id.* at 5 (quoting Award at 15). The Agency argues that nothing in Article 13, Section 10(A) requires the Agency to interview “each and every person with person[al] knowledge.” *Id.* at 6. Further, the Agency argues that the provision does not require the Agency to interview the employee who is the subject of the investigation prior to proposing discipline, but merely requires that, “if an employee is questioned, [then] the employee must be advised of the right to representation before questioning can begin.” *Id.* at 6 (emphasis omitted). The Agency also asserts that it does not have the legal authority to force its patients to participate in an investigation.

Finally, the Agency alleges that the Arbitrator’s finding that the Agency denied the grievant due process by failing to interview the grievant prior to proposing discipline is contrary to federal case law. In support, the Agency cites Supreme Court, United States Court of Appeals for the Fourth Circuit and Merit Systems Protection Board precedent. The Agency also asserts that the grievant was given an opportunity to respond to the charges against him before a final decision was rendered, “in full compliance with the requirements of 5 USC § 7513.” *Id.* at 7. Based on the foregoing, the Agency claims that “the Arbitrator is wrong regarding what is required for due process prior to proposing a disciplinary action.” *Id.* at 8 (emphasis omitted).

B. Union's Opposition

The Union disputes the Agency's exceeds authority claim, arguing that "it was clearly [the Agency's] intent to argue this case around the charge of patient abuse[.]" as evidenced by the documents it entered into evidence at the hearing. Opposition at 2-3 (citations omitted). Further, the Union contends that the charge of inappropriate conduct and interaction with a patient and the charge of patient abuse are "inherently inseparable in this case." *Id.* at 3 (emphasis omitted).

With respect to the Agency's essence claim, the Union contends that the Agency has misquoted the language of Article 13, Section 10(A) and states that the provision does not contain the word "if" as the Agency alleges. *Id.* at 3. The Union further disputes the Agency's claim that it cannot force its patients to participate in an investigation, noting that when a patient who witnessed the incident came forward willingly and offered to provide a statement, the deciding official decided not to speak with him. *Id.* at 4-5.

Finally, the Union argues that the award is not contrary to law because the parties' arguments before the Arbitrator were based solely on the parties' agreement, and not on law. *Id.* at 5.

IV. Analysis and Conclusions

A. The Arbitrator did not fail to conduct a fair hearing.

We construe the Agency's challenge to the grievant's credibility and its assertion that the Arbitrator should have credited the testimony of its witnesses over that of the grievant as a claim that the Arbitrator failed to conduct a fair hearing. *See, e.g., United States Dep't of Labor, Wash., D.C.*, 59 FLRA 511, 515 (2003).

The Authority will find an award deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995). Arbitrators have considerable latitude in conducting a hearing, and the fact that an arbitrator conducts a hearing in a manner that a party finds objectionable does not, by itself, provide a basis for finding an award deficient. *See AFGE, Local 22*, 51 FLRA 1496, 1497-98 (1996). Further, it is well established that disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence,

provides no basis for finding an award deficient. *See AFGE, Local 3295*, 51 FLRA 27, 32 (1995).

As set forth above, the Arbitrator found that the Agency based the grievant's discipline on the statements of one witness who was not an eyewitness and whose statement was based on what she learned from others. Award at 16. With respect to another Agency eyewitness, the Arbitrator found that her statement was "far from complete as to exactly what happened." *Id.* Further, the Arbitrator found that neither of these witnesses were able to testify as to what either the grievant or the patient said and their testimony was in conflict regarding the grievant's actions during the incident, *id.*; the Agency does not dispute these findings. Having observed the witnesses and examined the evidence, the Arbitrator credited the grievant's testimony -- over that of the Agency's witnesses -- that he walked away from the patient. Specifically, the Arbitrator credited the grievant's testimony that: the patient repeatedly spoke to the grievant and called him a racial slur; the patient accused the grievant of belonging to a gang; and the grievant "simply kept walking" and did not respond to the patient. *Id.* at 18-19 (citing Tr. at 163).

The Agency's assertions take issue with the Arbitrator's evaluation of the evidence and his determination of the weight to be accorded such evidence. As set forth above, disagreements with an arbitrator's findings of fact and evaluation of the evidence and testimony, including the credibility of witnesses and the weight given their testimony, do not establish that an award is deficient. *See AFGE, Local 3295*, 51 FLRA at 32. Accordingly, we find that the Arbitrator did not fail to conduct a fair hearing and deny the Agency's exception.

B. The Arbitrator did not exceed his authority.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. *See United States Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).

Here, the parties did not stipulate to, and the Arbitrator did not frame, the issues. In the absence of a framed or stipulated issue, it is nonetheless clear that the purpose of the arbitration hearing was to challenge the grievant's five-day suspension. *See Award at 2; see also United States Dep't of Veterans Affairs, Fin. Ctr., Austin*,

Tex., 50 FLRA 73, 76-77 (1994) (arbitrator established issue for resolution by characterizing nature of dispute). The Agency claims that the Arbitrator erred in addressing whether the grievant committed patient abuse when the only issue before him was whether the grievant engaged in inappropriate conduct and interaction with a patient. Exceptions at 4.

Based on the evidence before him, the Arbitrator concluded that the Agency had failed to carry its burden of proving that the grievant's five-day suspension was warranted. In so finding, the Arbitrator specifically credited the grievant's testimony over that of the Agency's witnesses and found that: the patient repeatedly spoke to the grievant and called him a racial slur; the patient accused the grievant of belonging to a gang; and the grievant "simply kept walking" and did not respond to the patient. *Id.* at 18-19 (citing Tr. at 163). Thus, no matter what the charge against the grievant, the Arbitrator found no evidence that the grievant engaged in any wrongdoing warranting discipline. That is, even assuming that the Arbitrator improperly considered the charge of patient abuse instead of the charge of inappropriate conduct and interaction with a patient, absent any factual findings that the grievant did anything wrong, there is no basis for finding the Arbitrator's award deficient. Accordingly, we find that the Arbitrator did not exceed his authority by failing to specifically address whether the grievant engaged in inappropriate conduct and interaction with a patient and deny the Agency's exception.

C. The award does not fail to draw its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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. *See United States Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's

construction of the agreement for which the parties have bargained." *Id.* at 576.

The Agency asserts that the award fails to draw its essence from Article 13, Section 10(A) of the parties' agreement. However, in finding that the Agency violated the grievant's contractual rights, the Arbitrator found violations of Article 13, Section 10(A) and Article 13, Section 10(B). Award at 15. In this respect, the Arbitrator found that the Agency had violated Article 13, Section 10(A) by failing to interview all potential witnesses. Under Article 13, Section 10(B), the Arbitrator found that the Agency had failed to conduct the investigation fairly and impartially because it did not interview the grievant and did not reconcile the conflicting statements of the witnesses. In this connection, the Arbitrator found that obtaining statements from any person with knowledge of the incident was required under the parties' contractual fair and impartial investigation standard set forth in Article 13, Section 10(B). *Id.* at 16. Further, the Arbitrator explicitly rejected the Agency's contention that it was not required to interview the grievant prior to proposing discipline, finding that such an approach "ignores the essential concept of fair treatment for one who is to be disciplined." *Id.*

Accordingly, as the Agency has failed to challenge the Arbitrator's findings with respect to Article 13, Section 10(B), the Agency has failed to establish that the award is implausible, irrational, or evidences a manifest disregard of the parties' agreement. *See, e.g., United States Dep't of Energy, Office of Scientific & Technical Info., Oak Ridge, Tenn.*, 63 FLRA 219, 220 (2009) (*Oak Ridge*) (when an arbitrator has based an award on separate and independent grounds, an excepting party must establish that all of the grounds are deficient before the Authority can find that the award is deficient); *AFGE, Local 1546*, 59 FLRA 126, 128 (2003) (same).

Moreover, even assuming that the Arbitrator erred in finding that the parties' agreement required the Agency to obtain statements from any person with knowledge of the incident, it is harmless error because, as set forth above, his pivotal finding is that the grievant engaged in no misconduct.

Accordingly, we find that the Agency's exception does not demonstrate that the award fails to draw its essence from the parties' agreement and deny the Agency's exception.

D. The award is not contrary to law.

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 *United States 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 *United States Dep't of Def., Dep'ts of the Army and 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.*

Even assuming the Arbitrator found that the Agency had violated the grievant's due process rights, the Agency's exception fails to establish that the award is deficient as contrary to law. In this regard, not only did the Arbitrator find that the Agency had committed "procedural errors" in its investigation of the grievant, but the Arbitrator also found that the Agency failed to establish that the five-day suspension was warranted on the merits. Award at 19. As set forth previously, when an arbitrator has based an award on separate and independent grounds, an excepting party must establish that all of the grounds are deficient before the Authority can find that the award is deficient. See, e.g., *Oak Ridge*, 63 FLRA at 220; *AFGE, Local 1546*, 59 FLRA at 128. As the Arbitrator sustained the grievance on the basis of both procedural errors *and* the merits, we find that the Agency's exception fails to establish the award is contrary to law and denying the exception.

Moreover, this case is distinguishable from cases where the Authority has considered whether an arbitrator's interpretation of a contractual due process provision is contrary to law. See, e.g., *United States Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 4 (2005), *reconsideration denied*, 61 FLRA 393 (2005) (*Customs*). In *Customs*, the arbitrator found that the agency had committed "a fatal contract violation" under the parties' negotiated due process provision, and, without consideration of the merits, sustained the grievance challenging the grievant's suspension. *Customs*, 61 FLRA at 5. On exceptions, the agency alleged that the award was contrary to statutory and regulatory due process provisions. As there was no dispute that the contractual, regulatory, and statutory due process provisions were "virtually identical[.]" *id.* at 6, the Authority considered whether the arbitrator's interpretation and application of the contractual provision was consistent with law.

Here, the Agency cites federal case law interpreting statutory and regulatory due process provisions. The Arbitrator, however, interpreted only provisions of the parties' agreement regarding the investigation of disciplinary actions and found that the Agency had

failed to conduct a fair and impartial investigation of the grievant under those provisions. Thus, even assuming that those provisions constitute contractual due process provisions, the Agency has failed to provide any argument or assertion that the parties' contractual provision should be interpreted consistent with the constitutional due process provisions set forth in the federal case law it cites in its exceptions. Unlike in *Customs* where the parties' agreement was identical to the statutory and regulatory provisions regarding due process, here, the Arbitrator was not obligated to apply federal case law regarding due process.

V. Decision

The Agency's exceptions are denied.