64 FLRA No. 131

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2382
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
PHOENIX, ARIZONA
(Agency)

0-AR-4382

_____

DECISION

April 28, 2010

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

I. Statement of the Case

The matter is before the Authority on exceptions to an award of Arbitrator Alonzo M. Fields, Jr. 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. [1]

The Arbitrator found that the Agency violated the parties' agreement and Agency regulations when it suspended the grievant for three days. As a remedy, the Arbitrator replaced the three-day suspension with a one-day loss of pay. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

To reduce its backlog, the Agency's Physical Therapy department (the department) began Operation Zero (the program). Award at 4-5. As part of this initiative, the department decided to begin scheduling physical therapy coverage on the weekends; as a result, weekend coverage by employees, which had been voluntary, would now be mandatory. *Id.* The department's supervisor informed the local Union President of the change, noting that employees who worked on weekends would receive either overtime or compensatory time. *Id.* at 5. The Union President demanded that the Agency cease implementing the program and requested bargaining. *Id.* The Union President appointed the grievant, a Union Steward, as the lead negotiator for the Union. *Id.* at 16.

The parties reached a tentative agreement regarding the program. *Id.* However, in a memorandum to the department's supervisor, the grievant "accused [the supervisor] of acting in bad faith by speaking to other employees about [the program] during the bargaining process" and ordered him "to cease and desist." *Id.* Negotiations were then terminated, but later resumed. *Id.*

Two co-workers filed complaints regarding the grievant's conduct during this time period. *Id.* at 6-7. One co-worker noted that he was concerned regarding the grievant's "escalating verbal aggression and personal attacks" against department board members, especially the department supervisor. *Id.* at 7. The other co-worker noted, among other things, that she had received numerous calls from the grievant at home regarding "Sunday coverage issues." *Id.* She noted that she had not given him her home phone number and did not want to be called at home unless it was an emergency. *Id.* She also noted that, at a staff meeting, the grievant called the department supervisor a "liar." *Id.* During this same time period, the department supervisor noted several other incidents of alleged misconduct, including the use of profanity when not acting in a union capacity and being disrespectful to fellow employees and supervisors. *Id.* at 4.

As a result of these incidents, the Assistant Administrator of Physical Medicine and Rehabilitation proposed to suspend the grievant for ten days. *Id.* at 8. In response, the Union argued that many of the charges were verbal confrontations where the grievant was engaged in protected activity as a Union representative under the Statute. Award at 4, 8. The Agency later reduced the ten-day suspension to three days, of which only one day resulted in the loss of pay. *Id.* at 8, 19.

The Union then filed a grievance over the suspension. *Id.* at 8. The grievance was not resolved and was submitted to arbitration. The parties stipulated to the following issue: "Did the Agency violate the master agreement and [A]gency regulations in the disciplinary

1. The Agency filed a timely response to an Authority Order directing the Agency to provide copies of its opposition. The Agency included with its submission two attachments (Joint Exs. 3 and 4) that had not been filed with its initial opposition. Because the Agency did not seek permission to file these attachments as required by § 2429.26 of the Authority's Rules and Regulations, we have not considered these documents. *See Sport Air Traffic Controllers Org.*, 55 FLRA 34, 34 n.1 (1998).

action taken against [the grievant], and if so, what will be the remedy?"[2] *Id.* at 3.

The Arbitrator found that the Agency violated Article 23, Section 4A of the parties' agreement. That section provides, among other things, that "[s]upervisory notes may only be used to support any action detrimental to an employee if such notes(s) have been shown to the employee at the earliest available time after the entry was made . . . ." *Id.* at 3, 18. The Arbitrator found that the department supervisor had kept notes regarding the grievant's alleged incidents of misconduct, but had not shown these notes to the grievant. *Id.* The Arbitrator also found that the Agency violated Article 13 of the parties' agreement regarding progressive discipline. *Id.* at 18-19. The Arbitrator noted that, until the proposed suspension, the Agency had not counseled or warned the grievant about his conduct and that this failure violated Article 13. *Id*. at 19.

Turning to remedy, the Arbitrator noted that, although "[p]rogressive [d]iscipline is appropriate in most disciplinary actions," the grievant's conduct here was "so outrageous that some form of disciplinary action [was] required." *Id.* at 18. In making this determination, the Arbitrator noted that the grievant was "very negative and confrontational"; that the grievant "acted as if he was always in a [U]nion capacity when he was not always and vented his employee frustrations under the guise of protected language"; that the confrontational incidents "involved the use of profanity and insulting language" and had a "deleterious effect" in the work environment; that the grievant's "verbal outbursts were designed and not impulsive" and "occurred in non-private settings in front of other employees and patients"; and that the "[g]rievant . . . knew his conduct was inappropriate, but since he was getting away with it, he continued doing it." *Id.* at 17-18. The Arbitrator also found that the record did not show that the grievant's "outbursts were in any way provoked or that the grievant was in bargaining sessions or grievance meetings." *Id.* at 17. The Arbitrator, accordingly, reduced the suspension to a one-day loss of pay, stating that such reduction "will follow the concept of progressive discipline and serve to place [the] grievant on notice that any further inappropriate language and bad behavior will result in a more severe penalty."[3] *Id.* at 19.

2. The relevant provisions of the parties' agreement are set forth in the Appendix to this decision.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the award does not draw its essence from the parties' agreement. The Union contends that, despite the Arbitrator's finding that the Agency violated the requirements of Article 23 of the parties' agreement by failing to show the supervisory notes to the grievant, the Arbitrator "devised an award that punishes the grievant and rewards the [A]gency[.]" Exceptions at 3. The Union asserts that the Arbitrator stated that he believed the grievant's conduct was so outrageous that some form of disciplinary action was required. *Id.* The Union contends that this finding does not reflect a plausible interpretation of Article 23, noting, in this regard, that "[i]t is not for the [A]rbitrator to substitute his own brand of industrial justice for what the labor contract requires." *Id.*

The Union also contends that the award does not draw its essence from Article 13, Section 5 of the parties' agreement. The Union asserts that the Arbitrator found that the Agency violated this provision because it did not adhere to the concept of progressive discipline. *Id.* at 3-4. According to the Union, the grievant was "deprived of his bargained-for right to be timely advised of any concerns about his behavior" so that he could address them before discipline was proposed. *Id.* at 4. The Union asserts that the Arbitrator's determination that the grievant's conduct was so egregious that some discipline was necessary, despite the absence of a prior warning, disregards the wording and purpose of the parties' agreement, does not represent a plausible interpretation of the agreement, and evidences a manifest disregard of it. *Id.*

The Union further contends that the Arbitrator exceeded his authority. According to the Union, the grievance was based on violations of three articles of the parties' agreement. *Id.* The Union asserts that the Arbitrator "refused to address" its allegation that the Agency violated Article 2, "Robust Discussion," of the parties'

3. In determining the appropriate remedy, the Arbitrator also noted that the Agency's Table of Penalties provided the following:

> Item 16. NATURE OF OFFENSE
>
> Disrespectful conduct, use of insulting, abusive, or obscene language to or about other personnel, patients or visitors.
>
> | 1st Offense | 2nd Offense | 3rd Offense |
> |---|---|---|
> | Reprimand | 10 days | Removal |
> | Removal | Removal | |

Award at 18.

agreement by punishing the grievant "for engaging in protected activity in violation of the [Statute]."[4] *Id.* at 4-5. The Union asserts that the Arbitrator could not decide the grievance without reaching this issue. *Id.* at 5.

Lastly, the Union asserts that the Arbitrator was biased. According to the Union, despite finding that the Agency had violated provisions of the parties' agreement, the Arbitrator "shifted all the blame to the employee[.]" *Id.* at 6. The Union contends that this bias is evidenced by the Arbitrator's statement that the "[g]rievant . . . knew his conduct was inappropriate but since he was getting away with it, he continued doing it." *Id.* (quoting Award at 18).

B. Agency's Opposition

The Agency asserts that the Union's essence exception constitutes mere disagreement with the award. Opposition at 4. According to the Agency, although the Arbitrator noted that he was troubled, at no time did he conclude that the grievant's "procedural due process rights [had been] violated." *Id*. The Agency contends that the grievant received "on the spot" corrections regarding his behavior from his supervisor and that these corrections "provided ample notice that his behavior was unwelcome and inappropriate[.]" *Id.* at 5.

The Agency next contends that the Arbitrator did not exceed his authority. According to the Agency, the Arbitrator resolved the issue that was before him. *Id.* at 6. The Agency asserts that the record clearly shows that the Union did not present a statutory unfair labor practice charge for the Arbitrator to decide. *Id.* at 7. Rather, according to the Agency, the Union sought to raise "'robust language' as an affirmative defense to some . . . of the allegations against the grievant." *Id.*

The Agency asserts that the Union has presented no evidence that the award was procured by improper means, that the Arbitrator was partial or corrupt, or that he engaged in misconduct that prejudiced the grievant's rights. *Id*.

4. In its post-hearing brief, the Union stated that "Article 2 requires the [A]gency to comply with all Federal statutes and government[-]wide regulations in effect at the time this agreement was approved." Exceptions, Attach. (Union's Post-Hearing Brief) at 3. The Union did not include a copy of Article 2 with its exceptions.

IV. Analysis and Conclusions

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

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard 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. *U. S. 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.

In this case, the parties agreed that the issue to be decided was "[d]id the Agency violate the . . . agreement and [A]gency regulations in the disciplinary action taken against [the grievant], and if so, what will be the remedy?" Award at 3; *see also id.* at 15. In resolving this issue, the Arbitrator considered the record evidence, including Article 23, which provides, in part, that "[s]upervisory notes may only be used to support any action detrimental to an employee if such note(s) have been shown to the employee at the earliest time after the entry was made and a copy provided to the employee." *Id.* at 3. The Arbitrator found that the Agency had violated this provision of the agreement and awarded the grievant a remedy for this violation. Although the Union contends that the Arbitrator "substitute[d] his own brand of industrial justice" for what the agreement requires, Exceptions at 3, nothing in Article 23 – or any other provision of the agreement – prohibits the Arbitrator from remedying the Agency's violation by reducing the grievant's three-day suspension to a one-day loss of pay. Moreover, the issue as submitted by the parties concerned what remedy should be awarded if a violation of the parties' agreement by the Agency was found. The Arbitrator's remedy is based on his evaluation of the evidence and his interpretation and application of the agreement. Accordingly, the Union has not demonstrated that the Arbitrator's interpretation is irrational,

unfounded, implausible or a manifest disregard of the parties' agreement.

The Union further claims that the award does not draw its essence from Article 13, Section 5 of the parties' agreement because the Arbitrator's determination that the grievant's conduct was "so egregious" that some discipline was necessary disregards the wording and purpose of the provision, Award at 19, does not represent a plausible interpretation of the provision, and evidences a manifest disregard of it. The Arbitrator's determination was based on his interpretation and application of Article 13, Section 5, and his evaluation of the record evidence, including the Agency's Table of Penalties. *See id.* at 18. That table provides a range of penalties from "[r]eprimand" to "[r]emoval" for a first-time offense of "[d]isrespectful conduct, use of insulting, abusive, or obscene language to or about other personnel, patients[,] or visitors." *Id.* at 18; *see also id.* at 12. The Union, thus, has failed to demonstrate that the Arbitrator's mitigation of the three-day suspension to a one-day loss of pay cannot in any rational way be derived from the agreement, does not represent a plausible interpretation of the agreement, or evidences a manifest disregard of the agreement. As a result, the Union has not demonstrated that the award fails to draw its essence from the parties' agreement.

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. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). Furthermore, arbitrators have great latitude in fashioning remedies under the Statute to correct violations of collective bargaining agreements. *See, e.g.*, *NLRB*, 50 FLRA 88, 94 (1995) (citing *AFGE, Local 2076*, 47 FLRA 1379, 1383 (1993)).

The Union claims that the Arbitrator exceeded his authority because he refused to address the Union's allegation that the Agency violated Article 2, "Robust Discussion," of the parties' agreement by punishing the grievant for engaging in protected activity in violation of the Statute. Exceptions at 4-5.

As noted previously, the agreed-upon issue before the Arbitrator was "[d]id the Agency violate the master agreement and [A]gency regulations in the disciplinary action taken against [the grievant], and if so, what will be the remedy?" Award at 3; *see also* Exceptions at 1; Union's Post-Hearing Brief at 1-2. The agreed-upon issue, thus, did not include whether the Agency had violated a provision of the Statute, but rather, concerned only whether the Agency had violated the parties' agreement. [5]

Moreover, in resolving the agreed-upon issue, the Arbitrator did consider the grievant's role as a union representative, as well as the conduct that is permitted by such a representative when advocating for employees. The Arbitrator determined that the grievant "acted as if he was always in a [U]nion capacity when he was not always and vented his employee frustrations under the guise of protected language." Award at 17. The Arbitrator also found that the record did not show that the grievant's "outbursts were in any way provoked or that the grievant was in bargaining sessions or grievance meetings." *Id*. Finally, the Arbitrator concluded, based on the record as a whole, that the grievant's conduct was "so outrageous that some form of disciplinary action [was] required." *Id.* at 18. Furthermore, that an award does not mention a specific provision of an agreement does not establish that such provision was not considered by the arbitrator and does not provide a basis for finding the award deficient. *See U.S. Dep't of the Army, Transp. Ctr., Fort Eustis, Va.*, 45 FLRA 480, 482 (1992); *Ill. Air Nat'l Guard, 182nd Tactical Air Support Group*, 34 FLRA 591, 593-94 (1990).

Accordingly, because the Arbitrator addressed the agreed-upon issue submitted to him, the Union has not demonstrated that the Arbitrator exceeded his authority by failing to address an issue submitted to arbitration. *See U.S. Dep't of the Air Force*, 61 FLRA 797, 801 (2006) (arbitrator did not exceed his authority when his findings were directly responsive to the issue he framed).

C. The Arbitrator was not biased.

To demonstrate that an award is deficient because of bias, a party must establish that the award was procured by improper means, that there was partiality or corruption on the part of the Arbitrator, or that the Arbitrator engaged in misconduct that prejudiced the rights

5. To the extent that the Union's argument could be construed as a claim that a violation of Article 2 also constitutes a violation of the Statute, we note that Union did not include a copy of Article 2 in its exceptions and that this provision is not contained in the record. Under § 2425.2(d) of the Authority's Regulations, it is the responsibility of the excepting party to provide all necessary documents to support its claim. Since the Union did not provide a copy of Article 2 or place it in the record below, it has not supported this claim. *See U.S. Dep't of Labor, Wash., D.C.* 55 FLRA 1019, 1022 (1999); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Corr. Inst., McKean, Pa.*, 49 FLRA 45, 49 (1994).

of the party. *See U.S. Dep't of Veterans Affairs, Med. Ctr., N. Chi., Ill.,* 52 FLRA 387, 398 (1996). Moreover, the Authority has denied exceptions based on an arbitrator's remarks indicating concern with a party's conduct. *See AFGE, Local 4044, Council of Prisons Local 33*, 57 FLRA 98, 100 (2001) (citing *DHHS, SSA*, 26 FLRA 6, 7-8 (1987)).

The Union asserts that the Arbitrator's statement that the grievant "knew his conduct was inappropriate but since he was getting away with it, he continued doing it" shows bias on the part of the Arbitrator. Exceptions at 6 (quoting Award at 18). The Arbitrator's statement does not establish that the award was procured by improper means or that there was partiality or corruption on the part of the Arbitrator. Accordingly, the Union has not shown that the Arbitrator engaged in any misconduct that prejudiced its rights or that he was biased.

V. Decision

The Union's exceptions are denied.

APPENDIX

Pertinent provisions of the parties' collective bargaining agreement:

Article 1 - RECOGNITION AND COVERAGE

Section 2 - AFGE Role

> As the sole and exclusive representative, the Union is entitled to act for and to negotiate agreements covering all employees in the bargaining unit. The Union is responsible for representing the interests of all employees in the bargaining unit.

Article 13 - DISCIPLINE AND ADVERSE ACTION

Section 5 - Alternative and Progressive Discipline

> The parties agree to a concept of alternative discipline, which shall be a subject for local negotiations. The parties also agree to the concept of progressive discipline, which is discipline designed primarily to correct and improve employee behavior, rather than punish.

Article 23 - OFFICIAL RECORDS

Section 4C - Supervisory Notes

> Supervisory notes may only be used to support any action detrimental to an employee if such note(s) have been shown to the employee at the earliest time after the entry was made and a copy was provided to the employee. Once anemployee has received a copy of the supervisory note(s), the note(s) can be provided to an appropriate management official with a legitimate need to know for the performance of their duties.

Award at 3.