

**67 FLRA No. 63**

UNITED STATES  
DEPARTMENT OF HEALTH  
AND HUMAN SERVICES  
FOOD AND DRUG ADMINISTRATION  
SAN DIEGO, CALIFORNIA  
(Agency)

and

NATIONAL TREASURY  
EMPLOYEES UNION  
(Union)

0-AR-4908

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DECISION

February 18, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

Arbitrator Sara Adler sustained a grievance, in part, and reduced the grievant's three-day suspension to a written reprimand. There are two questions before us.

The first question is whether the award is based on a nonfact. The Agency has not shown that, but for the Arbitrator's alleged factual error, she would have reached a different result. Therefore, the answer is no.

The second question is whether the award fails to draw its essence from the parties' agreement. Because the Agency's essence exception is premised on its nonfact argument, which we reject, the answer is no.

**II. Background and Arbitrator's Award**

The Agency issued the grievant a three-day suspension for three separate incidents of alleged misconduct. At the time of the incidents underlying the suspension, the grievant had one prior written reprimand.

The Union filed a grievance contesting the grievant's suspension. The Agency denied the grievance, and the parties submitted the matter to arbitration. The issue before the Arbitrator was whether "the [three]-day suspension of [the] [g]rievant [was] for such cause as will

promote the efficiency of the service? . . . If not, what is the appropriate remedy[?]"<sup>1</sup>

The Arbitrator found that the Agency had just cause to discipline the grievant for some, but not all, of the alleged incidents of misconduct. In this regard, the Arbitrator concluded that the Agency failed to "prove all of the alleged misconduct and the severity of the [g]rievant's proven misconduct."<sup>2</sup> In the context of determining an appropriate remedy, the Arbitrator stated that the Agency's deciding official testified that, when she had decided to impose a three-day suspension, she had not considered the grievant's prior written reprimand. The Arbitrator stated that she would "follow [the deciding official's] lead"<sup>3</sup> and not consider that reprimand in deciding an appropriate remedy. She then reduced the three-day suspension to a written reprimand.

The Agency filed exceptions to the Arbitrator's award. The Union filed an opposition to the Agency's exceptions.

**III. Analysis and Conclusions****A. The award is not based on a nonfact.**

The Agency argues that the award is based on a nonfact because the Arbitrator erred by finding that the deciding official testified to not considering the grievant's prior reprimand in determining the appropriate level of discipline.<sup>4</sup> In this connection, the Agency claims that the Arbitrator erred because the deciding official "expressly testified on the record that she considered [the grievant's] previous discipline and that she relied on the prior reprimand to determine the appropriate level of discipline."<sup>5</sup>

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>6</sup>

Even assuming that the challenged finding is a factual determination, the Arbitrator also relied on other factors – such as, "the failure of the Agency to prove all of the alleged misconduct and the severity of the [g]rievant's proven misconduct" – to fashion the remedy.<sup>7</sup> The Agency has provided no basis for finding that, but for the alleged factual error, the Arbitrator would

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<sup>1</sup> Award at 2.

<sup>2</sup> *Id.* at 7.

<sup>3</sup> *Id.*

<sup>4</sup> Exceptions at 9.

<sup>5</sup> *Id.* at 9-10.

<sup>6</sup> *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).

<sup>7</sup> Award at 7.

have reached a different conclusion.<sup>8</sup> Therefore, the Agency has not shown that the award is based on a nonfact.

- B. The award draws its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from: (1) Article 44, Section 4.B. of the parties' agreement, which states that "[n]o employee will be disciplined except for such cause as will promote the efficiency of the service"; and (2) Article 44, generally, which, according to the Agency, "recognizes the progressive discipline model for disciplinary actions."<sup>9</sup> Specifically, the Agency claims that the Arbitrator erred by not fashioning the appropriate level of discipline in accordance with the parties' agreement because she did not consider the grievant's prior reprimand. The Arbitrator did not consider the grievant's prior reprimand, according to the Agency, because she relied on the alleged "nonfact" discussed above.<sup>10</sup>

When the Authority has rejected a nonfact claim, the Authority also has rejected an essence argument that was based on that nonfact claim.<sup>11</sup> The Agency's argument is premised on its nonfact argument.<sup>12</sup> Thus, the above principles support rejecting the Agency's essence claim.

Although the Agency cites *U.S. DOJ, INS, Del Rio Border Patrol Sector, Texas*,<sup>13</sup> that decision is distinguishable. In that decision, the Authority found an arbitrator's award deficient where the arbitrator set aside the grievant's discipline despite the arbitrator's finding that there was just cause to sustain the discipline.<sup>14</sup> By contrast, here, the Arbitrator did not set aside the grievant's discipline.

Consistent with the analysis set forth above, we find that the award does not fail to draw its essence from the parties' agreement.<sup>15</sup>

#### IV. Decision

We deny the Agency's exceptions.

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<sup>8</sup> *U.S. Dep't of the Treasury, IRS*, 66 FLRA 528, 529 (2012).

<sup>9</sup> Exceptions at 12.

<sup>10</sup> *Id.*

<sup>11</sup> *IFPTE, Local 77, Prof'l & Scientists Org.*, 65 FLRA 185, 190 (2010) (*IFPTE*) (denying essence exception premised on party's previously rejected nonfact argument); *see also AFGE, Local 3937*, 64 FLRA 1113, 1115 (2010) (same).

<sup>12</sup> Exceptions at 10, 12.

<sup>13</sup> 45 FLRA 926 (1992).

<sup>14</sup> *Id.* at 932.

<sup>15</sup> *IFPTE*, 65 FLRA at 190.