65 FLRA No. 190

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3239
(Union)

0-AR-4673

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DECISION

June 13, 2011

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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 Richard D. Kimbel 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 Arbitrator determined that the Agency did not have just cause to suspend the grievant for three days, and mitigated the suspension to a written reprimand. For the reasons that follow, we dismiss the Agency's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

The Agency suspended the grievant for three days for "inappropriate and discourteous behavior toward a manager, and disruption of the workplace[.]" Award at 2. The Union filed a grievance, which was unresolved and was submitted to arbitration. The Arbitrator stated the issues as follows:[1] "Was the three[-]day suspension of the [g]rievant for [j]ust [c]ause? If not[,] what shall be the remedy?" *Id.* at 3. The Arbitrator stated that the Agency had the burden of proving that the suspension was for just cause, which would require showing that: (1) the grievant "violate[d] an Agency rule or policy which warrants discipline[;]" and (2) the "discipline imposed is reasonable under the circumstances[.]" *Id.* The Arbitrator found that the first requirement was met because there was "no doubt . . . that the [g]rievant engaged in behavior in breach of the [parties' agreement]." *Id.* at 4.

In regard to the requirement that the discipline imposed be reasonable, the Arbitrator considered "mitigating circumstances." *Id.* In this regard, the Arbitrator credited "un-rebutted" testimony that the grievant's inappropriate behavior was "out of character[,]" *id.* at 5, and found that the grievant had a "long federal service record of over [twenty-two] years, a good overall work record, and . . . no prior discipline record[,]" *id.* at 6. Further, the Arbitrator cited Article 23, Section 1 of the parties' agreement (Article 23), which states that the "parties agree to the concept of progressive discipline[,]" *id.* at 5, but that the Agency may bypass steps of progressive discipline where it "determines by the *severe nature* of the behavior that a lesser form of discipline would not be appropriate[,]" *id.* at 6 (Arbitrator's emphasis). In this connection, the Arbitrator found that "there was a work disruption" resulting from the grievant's interaction with her supervisor, but that it was not "the degree of disruption that the Agency tried to portray." *Id.* at 5. The Arbitrator concluded that, under the circumstances, the Agency "*failed to meet its burden* of proving that the [g]rievant[']s behavior was *so severe* that it warranted the bypassing of a written reprimand." *Id.* at 6. Thus, the Arbitrator concluded that the three-day suspension was not reasonable under the circumstances and that, as a result, the second requirement for finding just cause was not met. *Id.* Accordingly, he directed the Agency to mitigate the suspension to a written reprimand, and awarded the grievant backpay. *Id.*

III. Agency's Exceptions[2]

The Agency argues that the mitigation of the suspension violates management's right to discipline employees under § 7106(a)(2)(A) of the Statute. Exceptions at 6-7. In addition, the Agency argues that the award fails to draw its essence from the parties' agreement because the mitigation reflects a "manifest disregard" of the Agency's right, under Article 23, to "bypass the earlier steps of progressive discipline where it determines that misconduct is so severe that lesser penalties would not be appropriate." *Id.* at 8. In this regard, the Agency asserts that the circumstances, including the

1. It is unclear from the record whether the parties stipulated the issues.

2. The Union did not file an opposition.

grievant's prior receipt of an oral warning, did not warrant the mitigation. *Id.* at 9-10. For support, the Agency cites: *SSA*, 64 FLRA 1119 (2010) (*SSA*) (Chairman Pope dissenting; Member DuBester concurring); *SSA, St. Paul, Minn.*, 61 FLRA 92, 93-94 (*St. Paul*) (then-Member Pope dissenting), *recons. denied*, 61 FLRA 256 (2005), *overruled by SSA*, 65 FLRA 286, 288-89 (2010) (*SSA II*); and *AFGE, Local 3342*, 58 FLRA 448, 449-50 (2003) (*Local 3342*). Exceptions at 8-9.[3]

IV. Analysis and Conclusions

A. Preliminary Issue: Whether § 2429.5 of the Authority's Regulations (§ 2429.5) bars the Agency's exception regarding management's right to discipline under § 7106(a)(2)(A) of the Statute.

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5.[4] Under § 2429.5, the Authority will not consider an issue that could have been, but was not, presented to the arbitrator. *See, e.g., U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 730, 731-32 (2011) (*DOJ*).

Here, the issues before the Arbitrator included whether the Agency's three-day suspension of the grievant was for just cause and the Arbitrator found, and the Agency concedes, that the just cause determination included the question of whether the penalty assessed was appropriate. *See* Award at 3; Exceptions at 3. Thus, the Agency could have argued to the Arbitrator that mitigating the Agency's chosen penalty would conflict with management's right to discipline. There is no indication in the record that the Agency did so. Accordingly, we dismiss this exception as barred by § 2429.5. *See, e.g., DOJ*, 65 FLRA at 731-32.

B. Whether the award fails 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 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.

Article 23 provides, in pertinent part, that "[a] common pattern of progressive discipline is reprimand [followed by] short[-]term suspension," but that "[a]ny of the[] steps [of progressive discipline] may be bypassed where management determines by the severe nature of the behavior that a lesser form of discipline would not be appropriate." Exceptions, Attach. B (CBA) at 23-1. The Arbitrator found that the Agency had not demonstrated that the grievant's behavior was "*so severe* that it warranted the bypassing of a written reprimand[,]" Award at 6, and the Agency provides no basis for finding that the Arbitrator erred in this regard. In addition, although the Agency asserts that the grievant received an "oral warning" prior to the incident for which she was suspended, Exceptions at 10, Article 23 provides that "oral warnings . . . are informal in nature and not recorded[,]" CBA at 23-1. Thus, there is no basis for finding that an oral warning constitutes discipline or required the Arbitrator to find that the Agency was permitted to bypass the reprimand step of progressive discipline.

Further, the decisions relied upon by the Agency do not demonstrate that the award fails to draw its essence from the parties' agreement. In *SSA*, the Authority set aside an award where the arbitrator found just cause for discipline, but nonetheless mitigated a suspension. 64 FLRA at 1121-22. By contrast, here, the Arbitrator found that the Agency

3. We note that the Agency also cites an arbitration award. *See* Exceptions at 10 (citing *Dep't of Transp., FAA*, 98 F.L.R.R. 2-1112 (June 11, 1998)). However, as arbitration awards are not precedential, *see, e.g., U.S. Dep't of Homeland Sec., Customs & Border Prot.*, 63 FLRA 495, 499 (2009), we do not address this citation further.

4. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency's exceptions were filed before that date, we apply the prior Regulations.

did *not* have just cause to suspend the grievant. Award at 6. In addition, the Agency's reliance on *St. Paul*, which also involved Article 23, is misplaced because the Authority overturned that decision in *SSA II*, 65 FLRA at 288-89. Finally, in *Local 3342*, the Authority denied an essence exception to an arbitrator's finding that the agency had established that an employee's misconduct warranted bypassing progressive discipline steps. 58 FLRA at 450. However, as discussed above, the Arbitrator here found that the Agency had *not* demonstrated that the grievant's misconduct warranted bypassing a written reprimand. Award at 6.

For the reasons stated above, the Agency provides no basis for finding that the Arbitrator's interpretation of Article 23 is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Accordingly, we deny this exception.

V. Decision

The Agency's contrary-to-law exception is dismissed, and its essence exception is denied.