66 FLRA No. 105

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 522
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MONTGOMERY REGIONAL OFFICE
MONTGOMERY, ALABAMA
(Agency)

0-AR-4623

_____

DECISION

March 30, 2012

_____

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 Charles G. Griffin 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 had just cause to suspend the grievant for fourteen days. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievant is the Agency's primary point of contact for the Department of Veterans Affairs (VA) Casualty Assistance Program (the program). The program provides compensation to veterans' surviving dependents. Award at 11. In this role, the grievant is primarily responsible for contacting and offering assistance to military program officers once he receives e-mail notification of an in-service casualty (casualty reports). *Id.* at 11-12.

The Agency suspended the grievant, who is also the Union president, for fourteen days. The Agency suspended the grievant for: (1) inappropriately deleting government e-mails containing casualty reports; (2) negligently performing his duties; (3) unreasonably delaying customer service; and (4) failing to safeguard government records. *Id.* at 1, 11-12. As relevant here, the Union filed a grievance claiming that the suspension violated the parties' agreement.[2] *Id.* at 1-2. The parties could not resolve the grievance and submitted it to arbitration. *Id.* at 2. The Arbitrator framed the issue as: "was the [grievant's] fourteen[-]day suspension . . . for just and sufficient cause? If not, what shall the remedy be?" *Id.* at 11.

The Arbitrator concluded that the Agency had just and sufficient cause to suspend the grievant. The Arbitrator found that the grievant: (1) not only improperly deleted the e-mails at issue, but never opened and read them to see whether they were important before deleting them, *id.* at 15; (2) negligently performed his duties as the office's primary point of contact for the program because he "did not attempt to perform" those duties, *id.* at 16-18; (3) must be held responsible for neglecting his duties, and his neglect "could have foreseeabl[y] caused" unreasonable delays in customer service, *id.* at 19; and (4) did not destroy government records, but demonstrated a lack of concern for his job duties by failing to open any Agency e-mails for the time period in question and failing to make hard or electronic copies of those e-mails before deleting them, *id.* at 19-20.

The Arbitrator found that the fourteen-day suspension was within the guidelines of the VA's table of offenses and penalties. *Id.* at 20-21. He also found that the length of the grievant's suspension was supported by the factors set forth by the Merit Systems Protection Board (MSPB) in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306-07 (1981) (the *Douglas* factors).[3] Award at 22.

The Arbitrator also addressed and rejected the Union's claims that the Agency improperly denied the grievant Union representation at an investigatory interview, *id.* at 14-15, and discriminated against him based on his Union activity, *id.* at 22. As to the investigatory interview, the Arbitrator found that the parties' agreement requires the Agency to inform an

[1] The Union and the Agency also filed supplemental submissions. As the Union and the Agency failed to request leave under § 2429.26 of the Authority's Regulations to file these supplemental submissions, we do not consider them. *See AFGE, Council 215*, 66 FLRA 137, 137 n.1 (2011).

[2] In the grievance, the Union also claimed that the Agency violated § 7116(a)(1) and (2) of the Statute. Award at 1-2. However, as discussed *infra*, that claim was not part of the framed issue, *id.* at 11, and the Arbitrator did not address any alleged statutory violations.

[3] Agencies apply the *Douglas* factors in selecting the penalty to impose, and the MSPB applies them in evaluating whether the imposed penalty is appropriate. *AFGE, Local 3294*, 66 FLRA 430, 430 n.2 (2012) (Member Beck dissenting as to another matter).

employee of his or her right to Union representation before any questioning takes place. *Id.* at 14. The Arbitrator found that the Agency did not notify the grievant of this right but that, as Union president, he was "well aware" before attending the meeting that he was entitled to Union representation. *Id.* at 15. As to the Union's claim that the Agency treated the grievant unfairly because he was the Union president, the Arbitrator found that several Union officers, including the grievant, had been promoted. *Id.* at 22.

Accordingly, the Arbitrator denied the grievance.

III. Positions of the Parties

A. Union's Exceptions

The Union sets forth three exceptions to the Arbitrator's award.

First, the Union contends that "[t]he Arbitrator failed to conform to law, rule, and regulation and exceeded his authority by failing to consider issues presented for arbitration." Exceptions at 4. Specifically, the Union argues that the Arbitrator exceeded his authority by failing to address whether the grievant's fourteen-day suspension would promote the efficiency of the service within the meaning of Article 13, Section 1 of the parties' agreement and 5 U.S.C. § 7503.[4] Exceptions at 4-5.

Second, the Union asserts that "[t]he Arbitrator failed to conform to law, rule, and regulation and exceeded his authority by failing to consider pertinent facts." *Id.* at 5. As to law, rule, or regulation, the Union alleges that the award is contrary to 5 U.S.C. § 7703(c) and the *Douglas* factors because the Arbitrator failed to consider each factor.[5] *Id.* at 5-8. Citing MSPB and Federal Circuit precedent, the Union also alleges that the Agency failed to carry its burden of establishing by a preponderance of the evidence that the suspension should be sustained.[6] *Id.* at 9-10 (citations omitted). In addition, citing Federal Circuit precedent, the Union argues that the Arbitrator erroneously failed to find that the penalty imposed was an abuse of Agency discretion. *Id.* at 11-12 (citation omitted). Further, the Union cites Authority and Supreme Court precedent raising constitutional-due-process concerns. *Id.* at 17-18 (citations omitted).

As to its claim that the Arbitrator "exceeded his authority by failing to consider pertinent facts," *id.* at 5; *see also id.* 4, 8-16, the Union argues that, if the Arbitrator had considered certain facts and evidence, then he would have overturned the discipline. For example, the Union claims, the record evidence establishes that the Agency failed to meet its "burden of proof" to establish "by a preponderance of the evidence that the charges [against the grievant] [should] be sustained." *Id.* at 9. In addition, the Union alleges, the record evidence establishes that the penalty imposed on the grievant was not reasonable. *Id.* at 9-12, 16-18. Further, the Union contends, if the Arbitrator had considered certain facts and evidence, then "it is reasonable to conclude that the [grievant's] suspension was . . . reprisal for [his] Union activity." *Id.* at 16. Moreover, the Union alleges that the Arbitrator "failed to conform to law, rule and regulation" in concluding that the grievant "was not due Union representation." *Id.* at 12.

Third, the Union alleges that the Arbitrator "exceeded his authority by ruling on issues not presented for arbitration" when he considered whether the grievant was guilty of the charge of inappropriate deletion of government e-mails containing casualty reports. *Id.* at 16. According to the Union, the Arbitrator did not rule on whether the grievant was guilty of inappropriate deletion, but instead found him guilty of "the new issue [that] the Arbitrator raised himself" concerning whether the grievant read the e-mails and made copies of them before deleting them. *Id.* at 16-17. The Union asserts that the Arbitrator addressed this issue after the hearing without giving the Union an opportunity to address it. *Id.* at 16, 17.

B. Agency's Opposition

As to the Union's first exception, the Agency asserts that the Arbitrator was not required to address the issues presented by the Union because the parties did not stipulate the issue to be decided by the Arbitrator. The Agency argues that, where, as here, the parties allow an

---

[4] Article 13, Section 1 of the parties' agreement provides, in pertinent part: "No bargaining unit employees will be subject to disciplinary action except for just and sufficient cause. Disciplinary actions will be taken only for such cause as will promote the efficiency of the service." Award at 3. Title 5 U.S.C. § 7503(a) provides, in pertinent part: "an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service . . . ."

[5] Title 5 U.S.C. § 7703(c) states, in pertinent part:

> In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be –
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence;
>
> . . . .

[6] Although the Union also cites § 7106(a)(2)(B) of the Statute, Exceptions at 10, it does not assert that the award violates that provision of the Statute, and we do not address it further.

arbitrator to frame the issue, the Authority will accord that framing substantial deference. Opp'n at 1-2 (citations omitted).

As to the Union's second exception, with respect to the Union's claim that the Arbitrator failed to consider pertinent facts, the Agency asserts that the Arbitrator supported his decision with specific references to the record evidence. *Id.* at 2. The Agency also argues that the Arbitrator's failure to set forth specific findings or discuss all of the allegations in the grievance does not render the award deficient. *Id.* at 2- 3 (citations omitted). With respect to the Union's claim that the Arbitrator failed to adequately consider the *Douglas* factors, the Agency asserts both that the Arbitrator did consider them and that the Authority has consistently held that arbitrators are not required to consider the *Douglas* factors in cases, such as this one, involving suspensions of fourteen days or less. *Id.*

As to the Union's third exception, the Agency asserts that the Arbitrator did not consider additional issues, but that he considered each of the charges against the grievant in determining whether to uphold the grievant's discipline.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Union argues that the Arbitrator exceeded his authority in two ways: (1) by failing to address whether the grievant's fourteen-day suspension would promote the efficiency of the service within the meaning of Article 13, Section 1 of the parties' agreement and 5 U.S.C. § 7503,[7] Exceptions at 4-5; and (2) "by ruling on issues not presented for arbitration," when, according to the Union, he did not rule on whether the grievant was guilty of inappropriate deletion of government e-mails, and instead found that the grievant failed to read the e-mails before deleting them, *id.* at 16-17.

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). Absent a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. *See U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn*., 52 FLRA 920, 924 (1997) (*Army, Corps of Eng'rs*). In addition, where there is no stipulation, that an arbitrator's formulation of an issue differs from the issues alleged in the grievance does not provide a basis for finding that the arbitrator exceeded his or her authority. *See AFGE, Local 1547*, 59 FLRA 149, 150-51 (2003) (*Local 1547*). In those circumstances, the Authority examines whether the award is directly responsive to the issue the arbitrator framed. *See id.*

It is undisputed that the parties did not stipulate the issue to be resolved at arbitration. *See* Exceptions at 3 ("[t]he Arbitrator only framed one issue"); Opp'n at 1-2. In the absence of a stipulation, the Arbitrator framed the issue as "was the [grievant's] fourteen[-]day suspension . . . for just and sufficient cause? If not, what shall the remedy be?" Award at 11.

The Arbitrator's finding that the Agency had just cause to discipline the grievant is directly responsive to the issue that he framed. As such, the Union's exception does not demonstrate that the Arbitrator exceeded his authority by failing to address whether the grievant's fourteen-day suspension would promote the efficiency of the service within the meaning of Article 13, Section 1 of the parties' agreement and 5 U.S.C. § 7503. *See Local 1547*, 59 FLRA at 150-51.

The Union's claim that the Arbitrator resolved an issue not submitted to arbitration is also without merit. In sustaining the charge of inappropriate deletion of e-mails, the Arbitrator found that the "greater issue is not necessarily the deletion of the e-mails, but the fact [that] the [g]rievant did not open his e-mails to read them to see if they were important." Award at 15; *see id.* at 16 (crediting grievant's testimony that he did not open and read the e-mails at issue before deleting them). As such, the Arbitrator's finding was part of his resolution of the issue that he framed, and does not establish that the award is deficient. *See NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996).

Accordingly, we deny the Union's exceeds-authority exceptions.

B. The award is not contrary to law.

The Union alleges that the award is contrary to 5 U.S.C. § 7703(c) because it is "unsupported by substantial evidence." Exceptions at 5-8. The Union also argues that the Arbitrator misapplied the *Douglas* factors. *Id.* at 6-9. In addition, citing MSPB and Federal Circuit precedent, the Union claims that the Agency failed to carry its burden of establishing by a preponderance of the evidence that the suspension should be sustained, *id.* at 9-10, and that the Arbitrator erroneously failed to find that the penalty imposed was an abuse of Agency discretion. *Id.* at 11-12. Further, the Union cites Authority and Supreme Court precedent raising constitutional-due-process concerns. *Id.* at 17-18.

[7] *See supra* note 4.

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.*

Although arbitrators considering suspensions of fourteen days or less *may* use and apply the legal principles established by the MSPB and the Federal Circuit for review of adverse actions under § 7703, such use is not mandatory. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 160, 163 (2010) (*CBP*) (Member Beck dissenting as to other matters); *AFGE, Local 2172*, 57 FLRA 625, 629 (2001) (*Local 2172*); *U.S. Dep't of Justice, INS, Jacksonville, Fla.*, 36 FLRA 928, 932 (1990). Arbitrators are also not required to consider the *Douglas* factors in cases involving suspensions of fourteen days or less. *See SSA, Balt., Md.*, 64 FLRA 516, 518 (2010) (*SSA*) (citing *NATCA, MEBA/NMU*, 52 FLRA 787, 792 (1996)). Thus, a claim that an arbitrator failed to apply or misapplied § 7703, the *Douglas* factors, a preponderance burden, or an abuse-of-discretion standard in a case involving a suspension of fourteen days or less will not establish that an award is deficient. *See, e.g., CBP*, 65 FLRA at 163; *SSA*, 64 FLRA at 518; *Local 2172*, 57 FLRA at 629.

As the suspension at issue here is a fourteen-day suspension, the Arbitrator was not required to apply § 7703, the *Douglas* factors, a preponderance burden, or an abuse-of-discretion standard. *See, e.g., CBP*, 65 FLRA at 163; *SSA*, 64 FLRA at 518; *Local 2172*, 57 FLRA at 629. Consequently, the Union's claims that the Arbitrator failed to apply or misapplied them do not provide a basis for finding the award deficient.[8]

The Union's reliance on cases concerning constitutional due process is similarly misplaced. Where a union's claim challenges an arbitrator's actions in the conduct of the hearing and not an agency's actions as part of the pre-decisional process of proposing and deciding to suspend a grievant, the union's claim questions what process was due the grievant from the arbitrator, as a matter of law. The Authority has held that federal employees suspended for fourteen days or less are not entitled to any post-suspension proceedings. *AFGE, Local 3911*, 66 FLRA 59, 61 (2011) (citing *NTEU, Chapter 45*, 52 FLRA 1458, 1465 (1997)). As a post-suspension proceeding in a case like this involving a suspension of fourteen days or less is not required as a matter of law, there are no procedures specified by law that the Arbitrator was required to follow in resolving the grievance. *Id.* Accordingly, the Union's exception does not demonstrate that the Arbitrator denied the grievant the process that was due him as a matter of law.

Based on the foregoing, we deny the Union's contrary-to-law exceptions.[9]

C. The Arbitrator did not fail to provide a fair hearing.

We construe the Union's claims that the Arbitrator "failed to consider . . . facts," Exceptions at 6-11, 14-16, as contentions that the Arbitrator failed to provide a fair hearing.[10] *See, e.g., PBGC*, 64 FLRA 692, 697 (2010) (construing claim that arbitrator "failed to consider evidence" as failure to provide a fair hearing); *NATCA*, 62 FLRA 469, 470 (2008) (construing arbitrator's alleged "fail[ure] to consider material facts" as failure to provide a fair hearing). We also construe the Union's claim that the Arbitrator addressed an issue after the hearing without giving the Union an opportunity to respond, Exceptions at 16, 17, as a contention that the Arbitrator failed to provide a fair hearing. *See, e.g., NATCA, MEBA/AFL-CIO*, 47 FLRA 638, 648 (1993) (*NATCA*) (construing claim that arbitrator improperly considered submitted information after hearing as failure to provide a fair hearing).

An award will be found 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

[8] In light of our conclusion that the Arbitrator was not required to apply the *Douglas* factors, we do not separately analyze and address the Union's claims, Exceptions at 6-8, that the Arbitrator "failed to consider" certain facts in analyzing those factors.

[9] The Union also alleges that the Arbitrator "failed to conform to law, rule[,] and regulation" in concluding that the grievant "was not due Union representation." Exceptions at 12. As the Union cites no law with which the award allegedly conflicts, we deny this exception as a bare assertion. *See, e.g., AFGE, Local 1547*, 65 FLRA 928, 930 n.2 (2011) (rejecting contrary-to-law argument as a bare assertion where the excepting party did not identify any law with which the award conflicted).

[10] In construing these exceptions, we note that the Union's exceptions were filed before the October 1, 2010 effective date of the Authority's revised arbitration Regulations.

Because the Union only identifies these exceptions as exceeds-authority exceptions, which is one of the seven private-sector grounds for review currently recognized by the Authority, Member DuBester would resolve these exceptions on that basis without construing them as fair-hearing exceptions. *See* 5 C.F.R. § 2425.6; *U.S. Dep't of the Air Force, 442nd Fighter Wing, Whiteman Air Force Base, Mo.*, 66 FLRA 357, 362 n.5 (2011).

party as to affect the fairness of the proceeding as a whole. *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995). But an arbitrator's failure to mention a particular evidentiary item in his or her award does not demonstrate that the arbitrator refused to consider it or failed to provide a fair hearing. *See AFGE, Local 3615*, 57 FLRA 19, 22 (2001) (*Local 3615*). Further, Authority case law holds that disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding an award deficient. *See U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr. Louisville, Ky.*, 64 FLRA 70, 72 (2009) (*VAMC Louisville*).

The Union claims that the Arbitrator "failed to consider" certain facts and evidence. Exceptions at 9; *see id.* at 9-12. These facts and evidence, the Union asserts, show that the Agency failed to meet its burden of establishing by a preponderance of the evidence that the charges against the grievant should be sustained. Exceptions at 9; *see also id.* at 9-12. The Union also asserts that the Arbitrator failed to consider evidence that the grievant was treated unfairly because of his Union activity. *Id.* at 14. In addition, the Union argues, if the Arbitrator had considered certain facts, evidence, and testimony, then "it is reasonable to conclude that the [grievant's] suspension was . . . reprisal for [his] Union activity." *Id.* at 16.

That the Arbitrator did not specifically cite or rely on the facts and evidence cited by the Union does not establish that the Arbitrator failed to consider them. *Local 3615*, 57 FLRA at 22. The Union's claims constitute disagreement with the weight accorded the evidence and, as such, provide no basis for finding the award deficient. *VAMC Louisville*, 64 FLRA at 72.

The Union's claim that the Arbitrator improperly addressed whether the grievant read and made copies of e-mails before deleting them without giving the Union an opportunity to respond, Exceptions at 16, 17, is also without merit. As set forth above, the grievant testified before the Arbitrator about whether he had opened and read Agency e-mails before deleting them. Award at 15-16. Thus, the Union did have an opportunity to address this issue. Absent any evidence that the Arbitrator considered additional evidence that was not presented at the hearing, the Union's exception provides no basis for finding the award deficient. *NATCA*, 47 FLRA at 648.

Accordingly, we deny the Union's fair-hearing exceptions.

V. Decision

The Union's exceptions are denied.