66 FLRA No. 50

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3701
(Union)

and

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
CLEVELAND AREA OFFICE
CLEVELAND, OHIO
(Agency)

0-AR-4766

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DECISION

October 21, 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 Dennis E. Minni 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.[1] The Agency did not file an opposition to the Union's exceptions.

The Arbitrator found that the Agency had just cause to suspend the grievant based on his conduct during an office move. For the reasons that follow, we deny the Union's exceptions.

[1] Because the Authority could not determine, based on the record before it, whether the Union's exceptions were timely filed, the Authority issued an Order to Show Cause (Order) requesting the Union to, among other things, submit documentation showing the date and method of service of the award. Order at 2. The Union filed a timely response to the Authority's Order. The documents provided by the Union show that the exceptions were timely filed from the date of service of the award. *See* 5 C.F.R. §§ 2425.2, 2429.21(a), 2429.22.

II. Background and Arbitrator's Award

The grievant, a Public Housing Revitalization Specialist, is President of the Union and the Union's representative in the case. Award at 2, 3. Following a renovation of the Agency's office space, the grievant's work space was to be moved. *Id.* at 4. Before the move, the grievant's supervisor approved certain furniture to be placed in the grievant's office, including a large desk. *Id.*

On the day of the move, the grievant noticed that the desk that had been designated for his work space was being placed somewhere else. The grievant brought this to the attention of the managers supervising the move (move supervisors) "without satisfaction." *Id.* at 5. The grievant then attempted to have the movers bring the desk to his new work space, but one of the move supervisors directed that the desk be moved to another location. *Id.* Becoming "increasingly agitated," the grievant "said and shouted things and postured before a number of co-workers and visitors leaving no doubt as to his displeasure over the apparent loss of the larger desk." *Id.* Shortly after this incident, the grievant again engaged in a verbal confrontation with another employee in which he made the "same type of accusations" against Agency management. *Id.* at 19; *see also id.* at 20.

After conducting an investigation regarding the grievant's conduct, the Agency found the grievant guilty of three charges: (1) misrepresentation of authority; (2) use of insulting language to and about other employees; and (3) disruptive behavior. *Id.* at 5-7. The Agency suspended the grievant for five days. This grievance followed. When the parties were unable to resolve the grievance, it was submitted to arbitration. *Id.* at 3, 5. The Arbitrator stated that the issue before him was: "Did the Agency have just and sufficient cause to suspend [the grievant] without pay for five (5) working days . . . ? If not, what shall the remedy be?" *Id.* at 2.

Before addressing the merits of the issues before him, the Arbitrator noted that the grievant also had raised allegations of racial bias. The Arbitrator noted that, although he would discuss such allegations in his analysis, he was doing so solely "to be fully dispositive of each defensive point asserted by the Union." *Id.* at 8. The Arbitrator noted that, while he had allowed the Union to present such evidence, he had not permitted the Union to "broaden[] the scope of [the] grievance to touch on claims of employment discrimination based on race" – a point that he "felt [the grievant] understood." *Id.*

With respect to the charge regarding misrepresentation of authority, the Arbitrator found that the grievant was "conducting [U]nion business" on the day of the move and did not misrepresent his authority.

Id. at 14. Accordingly, the Arbitrator directed that this charge did not support the disputed suspension. *Id.* at 15.

Considering the charge involving the use of insulting language, the Arbitrator found that the grievant "excoriated [the move supervisors] with epithets such as 'liar, cheater, or thief'" and further remarked to one of the supervisors "that he was 'going to mop the floor with your ass'" if he did not get his furniture. *Id.* at 12; *see also id.* at 17. The Arbitrator further found that the grievant "went off on the [move supervisors] and blustered the movers in an effort to obtain the furniture for his use." *Id.* at 12. Although the Arbitrator found that the grievant "had some reason to feel aggravated," the Arbitrator noted that the grievant could have resolved the situation at a later date either through the grievance process or through discussions with his immediate supervisor. *Id.* at 18; *see also id.* at 19. Moreover, the Arbitrator found that the grievant's "verbal assault on Agency [m]anagement" shortly after this incident was "a continuation of the insults [he had] lodged earlier." *Id.* at 20.

With respect to the charge regarding disruptive behavior, the Arbitrator found that the grievant "did not have a right to engage in a protracted raging rant and commence his own type of investigation" to show that the Agency discriminated against African American employees with respect to office space assignments. *Id.* at 17. In this regard, the Arbitrator found that the grievant "really crossed the line" when he told one of the move supervisors that "he was 'going to mop the floor with [her] ass.'" *Id.* According to the Arbitrator, this statement could be taken by the move supervisor as "a threat of personal harm," particularly given the supervisor knew the grievant "had been agitated [earlier] and possessed the relative physical ability to inflict harm on her if he struck or otherwise assaulted her." *Id.* The Arbitrator also noted that the grievant had a prior incident of disruptive conduct in his record for which he was reprimanded. *Id.*

The Arbitrator rejected the grievant's reliance on an "award which speaks to union officers being allowed to engage in 'robust' conversation,'" finding it was not "pertinent to this case." *Id.* at 20. The Arbitrator found that the grievant's "total conduct" on the day of the move included "more than speech or aggressive conversation." *Id.; see also id.* (noting that grievant's "words were far beyond 'locker room talk'"). The Arbitrator further noted that the grievant's conduct involved a "threat component" and "went on for a long enough time to bring about damaging results." *Id.*

Finding discipline was warranted, the Arbitrator evaluated the five-day suspension under the Agency's table of penalties. *Id.* Noting that the range of penalties for the charges of use of insulting language and disruptive behavior is between five and thirty days off, the Arbitrator found the Agency had selected the minimum penalty that it could impose for these charges. *Id.* Further, he found that the penalty was "not unduly harsh or predicated upon ill will or retribution" and that no mitigating factors existed to mitigate it. *Id.* at 21. Accordingly, the Arbitrator denied the grievance "in full." *Id.*

III. Union's Exceptions

The Union contends that the award is contrary to law. According to the Union, because the Arbitrator found that "the grievant was acting in his role as a [U]nion representative[,] . . . 'robust debate' [wa]s permissible." Exceptions at 3 (emphasis omitted); *see also id.* at 21-22. Moreover, the Union contends that the Agency "failed to charge the grievant with 'flagrant misconduct' or 'exceeding the bounds of protected activity.'" *Id.* at 3 (emphasis omitted); *see also id.* at 20. The Union avers that, even if the Agency had charged the grievant with such conduct, the Arbitrator erred because the record does not show that the grievant engaged in flagrant misconduct or overstepped the bounds of protected activity as a union official. *Id.* at 4-5, 20-21.

The Union further argues that certain of the Arbitrator's factual findings are nonfacts. *Id.* at 5-6, 21, 22. In this regard, the Union contends that the Arbitrator erred in finding that: (1) the grievant's statement to the move supervisor involved a threat, *id.* at 5-6; (2) the grievant did not have a right to engage in a "'protracted raging rant and commence his own type of investigation,'" *id.* at 6 (quoting Award at 17); and (3) the grievant made the "'mopping the floor'" statement, *id.* at 22 (quoting Award at 12); *see also id.* at 6-8. The Union further asserts that, because the Arbitrator found that the five-day suspension was based on "all three charges," the Arbitrator should have reduced the grievant's suspension when he reversed the misrepresentation charge. *Id.* at 18.

Additionally, the Union contends that the Arbitrator erred in his assessment of the grievant's allegations of racial bias. *Id.* at 14, 16, 18, 21. The Union also claims that the Arbitrator erred in finding that the second incident involving the employee was a continuation of the move incident. *Id.* at 14.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Authority reviews questions of law 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 a standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Union contends that the award is contrary to law because the Arbitrator failed to find that the grievant engaged in "flagrant misconduct or overstepp[ed] the bounds of protected activity." Exceptions at 4. This claim is raised in cases where an agency is alleged to have violated § 7116 of the Statute by taking actions against an individual based on that individual's actions during the course of protected activity.[2] *See U.S. Dep't of Transp., FAA*, 64 FLRA 365, 369 (2009) (Member Beck concurring). Specifically, where an agency is alleged to have committed an unfair labor practice (ULP) on this basis, "a necessary part of the [agency's] defense" against the ULP allegation is that the individual's actions "constituted flagrant misconduct or otherwise exceeded the bounds of protected activity." *Id.* (emphasis omitted).

The Authority has held that arbitrators are required to apply statutory burdens of proof when resolving an alleged ULP. *See, e.g., U.S. GSA, Ne. & Caribbean Region, N.Y.C., N.Y.*, 60 FLRA 864, 866 (2005). By contrast, where an arbitrator resolves a claim of a contractual, not statutory, violation, "unless a specific burden of proof is required, an arbitrator may establish and apply whatever burden the arbitrator considers appropriate." *Id.* In this connection, the Authority distinguishes allegations that an agency lacked just cause for discipline under a parties' agreement from allegations of unlawful interference with protected rights under the Statute. *See NAGE, Local R3-32*, 59 FLRA 458, 459 (2003) (Chairman Cabaniss concurring) (where parties stipulated a just-cause issue, Authority declined to consider claim of alleged violation of § 7102(a) of the Statute that was not raised before arbitrator). In addition, when an arbitrator is not required to apply a statutory standard, alleged misapplications of that standard do not provide a basis for finding the arbitrator's award deficient. *See, e.g., SSA*, 65 FLRA 286, 288 (2010).

Here, the record shows that the issue before the Arbitrator was whether the Agency had "just and sufficient cause" to suspend the grievant -- not whether the suspension violated § 7116 of the Statute. Award at 3, 8. Further, the record shows that the Union understood the issue before the Arbitrator was whether the Agency had "just and sufficient cause" to discipline the grievant. *Id.* at 9. Thus, the issue before the Arbitrator was purely contractual. As such, the Arbitrator was not required to determine whether the grievant's conduct was flagrant or otherwise exceeded the bounds of protected activity. As a result, the Arbitrator's alleged failure to find such does not provide a basis for setting aside the award.[3] *See, e.g., AFGE, Local 2923*, 65 FLRA 561, 563 (2011); *SSA*, 65 FLRA at 288.

Accordingly, we deny the Union's contrary to law exception.

B. The award is not based on nonfacts.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See, e.g., U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *Id.* at 594. A challenge to the weight that an arbitrator has accorded testimony does not provide a basis for finding an award deficient. *AFGE, Local 1164*, 64 FLRA 599, 601 (2010) (citing *AFGE, Local 376*, 62 FLRA 138, 141 (2007)).

With regard to the Union's contentions that the Arbitrator erred in finding that: (1) one of the grievant's statements to the move supervisor involved a threat, Exceptions at 5-6; (2) the grievant did not have a right to engage in a "'protracted raging rant and commence his own type of investigation,'" *id.* at 6 (quoting Award at 17); and (3) the grievant made the "'mopping the floor'" statement, *id.* at 22 (quoting Award at 12), the

[2] Section 7116(a)(2) of the Statute provides, in pertinent part, that it is an unfair labor practice for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]"

[3] Even if the award concerned a statutory claim, the Union's assertion that the grievant did not engage in flagrant misconduct or otherwise exceed the bounds of protected activity as a union official would not provide a basis for setting aside the award. Here, the Arbitrator found that the grievant's "total conduct" on the day of the move included "more than speech or aggressive conversation." Award at 20; *see also id.* (noting that grievant's "words were far beyond 'locker room talk'"). The Arbitrator further noted that the grievant's conduct involved a "threat component" and "went on for a long enough time to bring about damaging results." *Id.* Such conduct exceeds the bounds of protected activity. *See, e.g., AFGE, Local 987*, 63 FLRA at 364 (finding that, even if employee was engaged in protected activity, employee's conduct exceeded the bounds of protected activity where nature of employee's conduct was intimidating and threatening, and caused at least one co-worker to apprehend that certain employee was at risk of being "beat up").

record shows that these facts were disputed at arbitration, *see* Award at 9, 17, 20 (grievant's conduct involving threat statement); *see also* Exceptions, Attach., Union's Post-Hearing Brief (Union's Brief) at 5, 8-9; Award at 5, 9, 17-18; Exceptions, Attach., Union's Brief at 12-13 (grievant's raging rant conduct); Award at 17-18; Exceptions, Attach., Union's Brief at 8-9 (mopping the floor statement). Accordingly, such contentions provide no basis for finding the award deficient. *See, e.g.*, *AFGE, Local 376*, 62 FLRA at 141 (challenge to factual findings disputed at arbitration provided no basis for finding award deficient); *NFFE, Local 1984*, 56 FLRA 38, 41-42 (2000) (award not deficient based on a nonfact where excepting party challenged a factual matter that the parties disputed at arbitration).

With respect to the Union's assertion that, because the Arbitrator found that the five-day suspension was based on all three charges, the Arbitrator should have reduced the suspension when he reversed one of the charges, such contention does not challenge any factual findings, but instead challenges the Arbitrator's assessment of the reasonableness of the penalty imposed. As a result, it provides no basis for finding the award deficient. *See, e.g., NAGE, Local R1-109*, 58 FLRA 501, 503 (2003) (denying nonfact exception that did not challenge any factual findings, but instead challenged factors used by arbitrator to assess the reasonableness of penalty imposed).

Accordingly, we deny the Union's nonfact exceptions.[4]

V. Decision

The Union's exceptions are denied.

[4] With respect to the Union's contention that the Arbitrator erred in his assessment of the grievant's allegations of racial bias, we note that the Arbitrator specifically stated that he had not permitted the Union to "broaden[] the scope of [the] grievance to touch on claims of employment discrimination based on race." Award at 8. Moreover, even if the Arbitrator had permitted such claims, the Union has not set forth a recognized ground under the Authority's Regulations for finding the award deficient on this basis. In this regard, the Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, were revised effective October 1, 2010. *See* 75 Fed Reg. 42,283 (2010). Because the Union's exceptions were filed after this date, we apply the revised Regulations here. *See* 5 C.F.R. § 2429.1; *see also* 5 C.F.R. § 2425.6(a)-(b) (setting forth the grounds for review that the Authority recognizes). Similarly, the Union has not set forth a recognized ground under the Authority's Regulations for finding the award deficient based on its contention that the Arbitrator erred in finding that the second incident involving the employee was a continuation of the move incident. Because the Union has not raised a ground for finding the award deficient under the Authority's Regulations, we dismiss these two exceptions.