66 FLRA No. 72

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 278
(Union)

0-AR-4770

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DECISION

December 16, 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 Mollie H. Bowers 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 Union filed an opposition to the Agency's exceptions.

The Arbitrator sustained the grievance, finding that the Agency had failed to demonstrate that the grievant's seven-day suspension was reasonable and for the efficiency of the civil service. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency suspended the grievant, a Customs and Border Protection Officer (Officer), for seven days based on charges of: (1) "Unprofessional Conduct" and (2) "Failure to be at Assigned Work Position." Award at 5. The first charge involved the grievant's alleged angry and rude interaction with airline passengers, at least one Skycap, and a supervisor (i.e., the incident) while in the performance of his duties. *Id.* at 3-4, 11. The second charge involved the grievant's absence from his work station when he went to the restroom and received a call on his personal, cellular telephone regarding a family emergency. *Id.* at 2, 5.

The Union filed a grievance alleging that the suspension violated the parties' agreement because it was not for just cause and failed to promote the efficiency of the service. *Id.* at 1; Opp'n at 4. The grievance was unresolved and submitted to arbitration, *id.* at 4-5, where the Arbitrator stated that the issue was whether "the [g]rievant's seven-day suspension [was] reasonable, and in furtherance of the service" and "[i]f not, what should the remedy be?" Award at 1.

Addressing the first charge, the Arbitrator found that the deciding official (Director), who effected the suspension, relied entirely on written reports provided by the grievant's supervisors, who had not written them until days after the incident occurred. *Id.* at 13-14. The Arbitrator determined that the Director had not verified these reports' veracity, interviewed the grievant, or sought out any exculpatory evidence. *Id.* at 6, 14-15. And the Arbitrator considered that no passengers or Skycaps filed a complaint against the grievant. *Id.* at 7.

Because the Director had relied exclusively on the supervisors' written reports, the Arbitrator limited the supervisors' testimony at the arbitration hearing to affirming that their statements were true and accurate. *Id.* at 3, 4, 14-15. In assessing the weight of the supervisors' reports and testimony, the Arbitrator found that one supervisor did not possess "substantial knowledge" of what transpired during the incident because he had witnessed it from a distance. *Id.* at 14. And the Arbitrator found that the Director "did not question the veracity of the written statements provided by [the supervisors], but rather took them at face value even though they were not provided contemporaneously." *Id.*

Regarding the second charge, the Arbitrator found that the Agency had no written policy or past practice regarding an Officer's use of the restroom or prohibiting the receipt of cell-phone calls while using the restroom. *Id.* at 6-7, 13. In this connection, the Arbitrator found that the evidence showed that the grievant: (1) had not left the worksite; (2) had not gone to the restroom when there were passengers to be processed; and (3) had ended the telephone call and returned to his station when he learned that his supervisor was looking for him. *Id.* at 13. The Arbitrator thus determined that the Agency "failed to shoulder its burden of proof" in supporting its case. *Id.* at 12.

These findings, along with the Arbitrator's consideration of the Director's statement that no unit employee had been disciplined for the same conduct as the grievant's, led the Arbitrator to conclude that the

Agency did not "persuade her that the [g]rievant's discipline was 'reasonable and in furtherance of the service.'" *Id.* at 16. The Arbitrator therefore sustained the grievance.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is contrary to law, regulation, and Authority precedent, and fails to draw its essence from the parties' agreement. Exceptions at 7. Specifically, the Agency states that Article 28, Section 6.J of the agreement[1] requires the Agency to prove its disciplinary actions under the preponderance-of-the-evidence standard set forth in 5 C.F.R. § 1201.56(a).[2] The Agency claims that the Arbitrator held the Agency to a higher burden of proof by not accepting the supervisors' written statements as "sufficient evidence" for the Director to approve the suspension. *Id.* at 8-10.

The Agency also argues that the Arbitrator denied the Agency a fair hearing. *Id.* at 10. In this connection, the Agency contends that the Arbitrator erroneously limited the supervisors' testimony to affirming the truth and accuracy of their written statements. And the Agency claims that the Arbitrator's limitation on the supervisors' testimony, compounded with her negative credibility determinations regarding the supervisors' written statements, "prejudiced the Agency and affected the fairness of the arbitration as a whole." *Id.* at 10-12.

B. Union's Opposition

The Union argues that the award is not contrary to law or regulation and does not fail to draw its essence from the parties' agreement. Opp'n at 7. According to the Union, the Arbitrator properly applied the preponderance-of-the-evidence standard because she weighed the record evidence as a whole and concluded that it "is more likely to be true than untrue" that the suspension was not for just cause and did not promote the efficiency of the service. *Id.* at 8-10; 11 (citing Award at 15). In addition, the Union argues that the Arbitrator conducted a fair hearing. *Id.* at 12-14.

IV. Analysis and Conclusions

A. The award is not contrary to law, rule, or regulation, and does not fail to draw its essence from the parties' agreement.

When an exception involves an arbitration 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.*

"If a burden of proof is set forth in applicable law, rule, or regulation, or in the parties' collective bargaining agreement, then an arbitrator must apply the prescribed burden." *AFGE, Local 3911*, 66 FLRA 59, 61 (2011). Here, it is undisputed that the parties' agreement required the Arbitrator to apply the preponderance-of-the-evidence standard that the Merit Systems Protection Board (MSPB) applies in adverse-action cases. *See* Exceptions at 7-8 (citing the parties' agreement, Article 28, Section 6.J); Opp'n at 7-8 (citing the parties' agreement, Article 28, Section 6.J). The Arbitrator did not find to the contrary.

In adverse-action cases, the MSPB applies 5 C.F.R. § 1201.56(a), which requires, in pertinent part, that an agency action "must be sustained" if it "is supported by a preponderance of the evidence." 5 C.F.R. § 1201.56(c)(2) defines a preponderance of the evidence as "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue."

The Arbitrator's finding that the Agency "failed to shoulder its burden of proof" to establish that it was more likely that the suspension was "reasonable and in furtherance of the service" was based on her weighing the record as a whole, which included both the supervisors' written statements and the hearing testimony of the supervisors, the grievant, and the Director. Award at 2-8; 12-16. For example, the Arbitrator gave the supervisors'

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[1] Article 28, Section 6.J of the parties' agreement states, in pertinent part: "The invoking [p]arty shall bear the burden of proving its case by a preponderance of the evidence, except: in disciplinary . . . cases, in which case the burdens applied shall be those of the Merit Systems Protection Board . . . in adverse action cases." Agency Ex. 14 at 18.

[2] 5 C.F.R. § 1201.56(a) states, in pertinent part, that an agency adverse action, other than one brought under 5 U.S.C. § 4303 involving unacceptable performance, "must be sustained" if it "is supported by a preponderance of the evidence." 5 C.F.R. § 1201.56(c)(2) defines a preponderance of the evidence as "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue."

written statements little weight because: (1) they were not contemporaneous statements of the grievant's alleged misconduct; (2) one of the supervisors was a distance away from and did not have "substantial knowledge" of what had transpired; and (3) the Director never questioned the statements' veracity, or considered whether there was other evidence of the alleged misconduct or whether exculpatory evidence existed. Award at 13-15. The Agency does not explain how the Arbitrator's decision to give the supervisors' written statements little weight based on the above-stated reasons demonstrates that she did not "consider[] the record as a whole" to conclude that it "[was] more likely to be true than untrue" that the suspension was not reasonable and for the efficiency of the service. 5 C.F.R. § 1201.56(c)(2). Thus, the Agency does not show that the Arbitrator misapplied the preponderance-of-the-evidence standard. Accordingly, the Agency has not demonstrated that the award is contrary to law or regulation, and we deny this exception.

The Agency's essence argument is premised on the Agency's claim that the award is contrary to law and regulation. As such, and as we have denied the Agency's contrary-to-law exception, we also deny the Agency's essence exception.

B. The Arbitrator conducted a fair hearing.

The Agency contends that the Arbitrator failed 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 party as to affect the fairness of the proceeding as a whole. *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995). It is well established that an arbitrator has considerable latitude in conducting a hearing and an arbitrator's limitation on the submission of evidence does not, by itself, demonstrate that the arbitrator failed to provide a fair hearing. *See U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 60 FLRA 869, 879 (2005). In addition, the Authority has held that "absent extraordinary circumstances, issues involving arbitrator conduct at the hearing should be raised at the hearing." *Bremerton Metal Trades Council*, 59 FLRA 583, 588 (2004) (*Bremerton*). Thus, when such issues "could have been, but were not raised before the arbitrator, [they] will not be considered for the first time on review of the award unless extraordinary circumstances are present." *Id*. Further, disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, provides no basis for finding an award deficient on fair-hearing grounds. *See Antilles Consol. Educ. Ass'n*, 64 FLRA 675, 678 (2010) (*Antilles*).

The Agency's fair-hearing exception challenges the Arbitrator's decision to limit the supervisors' testimony to affirming that their written statements were true and accurate, and his negative credibility determinations regarding both statements. Exceptions at 10-12. With regard to the Arbitrator's decision to limit the supervisors' testimony, the Arbitrator made this decision because the Director confirmed under oath that he based the suspension exclusively on these written statements. Award at 6. The Agency does not claim, and there is no indication from the record before the Authority, that, at the arbitration hearing, the Agency objected to the Arbitrator's decision to limit the supervisors' testimony. Further, the Agency does not allege that there are extraordinary circumstances that excuse its failure to object before the Arbitrator. Therefore, the Agency has not established that the Arbitrator failed to conduct a fair hearing in this respect. *See Bremerton*, 59 FLRA at 588.

With regard to the Arbitrator's negative credibility determinations concerning the supervisors' statements and testimony, as stated above, disagreement with an arbitrator's determination of the weight to be accorded evidence does not provide a basis for setting aside an arbitration award on fair-hearing grounds. *Antilles*, 64 FLRA at 678. Therefore, the Agency has not shown that the Arbitrator failed to conduct a fair hearing in this respect.

For the foregoing reasons, we deny the Agency's fair-hearing exception.

V. Decision

The Agency's exceptions are denied.