

67 FLRA No. 98

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 54
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY
MEDICAL DEPARTMENT ACTIVITY
FORT BENNING, GEORGIA
(Agency)

0-AR-4990

DECISION

April 25, 2014

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

I. Statement of the Case

Arbitrator Vicki Peterson Cohen upheld the Agency's decision to suspend the grievant for creating a disturbance in the workplace. There are two substantive questions before us.

The first question is whether the award is based on a nonfact. Because the Union challenges facts that were disputed before the Arbitrator, the answer is no.

The second question is whether the award is contrary to law. Because the Arbitrator resolved a purely contractual issue and was not required to apply statutory standards, the answer is no.

II. Background and Arbitrator's Award

The grievant, a paramedic and Union steward, worked a shift with a fellow paramedic and bargaining-unit member (the partner). During the shift, the grievant had a conversation with another bargaining-unit member who told the grievant that the partner was "bragging about all the money she was making on overtime" and how the bargaining-unit member believed other employees were being offered overtime "when [the bargaining-unit member] was the

most senior."¹ Subsequently, the grievant told the partner, "I hope you are saving some of the money you are making on extra overtime because it is illegal[,] and you may have to pay it back."² The partner became visibly upset and "told the [g]rievant she could not pay back the money and started crying."³ The partner called the head paramedic to report what the grievant had said. Later, the head paramedic called the chief supervisor to report the incident.

The Agency issued the grievant a seven-day suspension for creating a disturbance in the workplace, and the Union filed a grievance contesting the suspension. The Agency denied the grievance, and the parties submitted the matter to arbitration. The parties stipulated to the following issue: "Was the [g]rievant's suspension for just cause? If not, what shall be the remedy?"⁴ The Union submitted the partner's written statement about the incident into evidence in lieu of testimony.⁵

The Arbitrator found that the grievant's comment about "paying back illegal overtime money" was "unnecessary and threatening in nature" and "clearly caused a disturbance in the workplace."⁶ The Arbitrator found that the comment was "threatening" because "[the partner] believed that[,] as a Union [r]epresentative, the [g]rievant may have [had] the power to make her pay back the . . . money."⁷ Thus, the Arbitrator found that the grievant's comments had "an adverse effect on [the partner's] morale" because she became upset, cried, and called the head paramedic.⁸ The Arbitrator further found that the grievant's comment was a "baseless personal warning" that was "outrageous under the circumstances" and would have "disturb[ed] any reasonable person."⁹ Accordingly, the Arbitrator denied the grievance and found that "[t]he Agency had just cause to issue the [g]rievant a [seven]-day suspension."¹⁰

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

¹ Award at 6 (internal quotation mark omitted).

² *Id.* (internal quotation marks omitted).

³ *Id.*

⁴ Award at 2; Exceptions at 2.

⁵ Exceptions at 4 n.1; *see* Exceptions, Attach. 3.

⁶ Award at 11 (internal quotation marks omitted).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 12-13.

¹⁰ *Id.* at 13.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact because the Arbitrator erred by “drastically over-inflat[ing] the level of distress experienced by [the partner].”¹¹ According to the Union, the partner was not upset at the grievant, but was concerned “with the possibility that she may have to repay overtime money that was improperly assigned.”¹² Furthermore, the Union alleges that the Arbitrator ignored the partner’s written statement about the incident in making her factual determination about the level of distress experienced. The Union contends that this “error . . . had a direct impact on [the Arbitrator’s] determination as to the flagrant nature of [the grievant’s] behavior.”¹³

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.¹⁴ 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.¹⁵ In addition, the Authority has long held that 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 the award deficient.¹⁶

Here, the Union challenges facts that the parties disputed at arbitration about the partner’s level of distress caused by the grievant’s comment.¹⁷ As stated above, we will not find the award deficient on this basis.¹⁸ Additionally, the Union’s disagreement with the Arbitrator’s evaluation of the partner’s written statement and the weight accorded to the statement does not provide a basis for finding the award deficient.¹⁹ Therefore, the Union has not shown that a central fact underlying the award was clearly erroneous, but for which the Arbitrator would have reached a different result.²⁰

Accordingly, we deny the Union’s nonfact exception.

¹¹ Exceptions at 8.

¹² *Id.*

¹³ *Id.* at 9.

¹⁴ NFFE, Local 1984, 56 FLRA 38, 41 (2000) (Local 1984).

¹⁵ *Id.*

¹⁶ AFGE, Local 3295, 51 FLRA 27, 32 (1995) (Local 3295).

¹⁷ Award at 8-10; Exceptions at 8-9.

¹⁸ Award at 4, 6, 8-13; Local 1984, 56 FLRA at 41.

¹⁹ See Local 3295, 51 FLRA at 32.

²⁰ See Local 1984, 56 FLRA at 41.

B. The award is not contrary to law.

The Union argues that the award is contrary to law because the grievant’s suspension was an unfair labor practice (ULP) under § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute). According to the Union, the suspension was a ULP because the grievant’s activity as a Union steward – questioning the partner about overtime – was protected pursuant to § 7102(1) of the Statute.²¹

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*.²² 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.²³ In making that assessment, the Authority defers to the arbitrator’s underlying factual findings.²⁴

As indicated above, the Union alleges that the grievant’s suspension was a ULP. Under § 7102(1) of the Statute, an employee has the right “to act for a labor organization in the capacity of a representative.”²⁵ Section 7116(a)(1) of the Statute further makes it a ULP “for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter.”²⁶ However, involvement in protected union activity “does not immunize [an] employee from discipline.”²⁷ And where an agency is alleged to have committed a ULP for disciplining an employee who was engaged in protected activity, “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.²⁸

The Authority has held that arbitrators are required to apply statutory burdens of proof when resolving an alleged ULP.²⁹ But, where an arbitrator resolves a contractual claim rather than a statutory claim, an arbitrator may establish and apply whatever burden the arbitrator considers appropriate unless a specific burden

²¹ 5 U.S.C. §§ 7102(1), 7116(a)(1); Exceptions at 9-10, 15.

²² 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)).

²³ U.S. DOD, Dep’ts of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala., 55 FLRA 37, 40 (1998).

²⁴ *Id.*

²⁵ 5 U.S.C. § 7102(1).

²⁶ 5 U.S.C. § 7116(a)(1); see U.S. Dep’t of VA, VA Md. Healthcare Sys., 65 FLRA 619, 621 (2011) (VA).

²⁷ AFGE, Local 1164, 64 FLRA 599, 601 (2010).

²⁸ See U.S. Dep’t of Transp., FAA, 64 FLRA 365, 369 (2009).

²⁹ U.S. GSA, Ne. & Caribbean Region, N.Y.C., N.Y., 60 FLRA 864, 866 (2005).

of proof is required.³⁰ In this connection, the Authority distinguishes allegations that an agency lacked just cause for discipline under a collective-bargaining agreement from allegations of unlawful interference with protected rights under § 7116 of the Statute.³¹ 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.³²

Here, the stipulated issue before the Arbitrator was whether there was "just cause" for the Agency to issue the grievant a seven-day suspension under the parties' agreement, and not whether the suspension violated § 7116 of the Statute.³³ Accordingly, the Arbitrator found that there was just cause to suspend the grievant.³⁴ Because the issue before the Arbitrator was based on the parties' agreement and, therefore, was purely contractual, the Arbitrator was not required to apply the statutory standards for protected activity under § 7116.³⁵ Therefore, the Union has not shown that the award is contrary to law.

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

IV. Decision

We deny the Union's exceptions.

³⁰ *Id.*

³¹ See *AFGE, Local 2018*, 65 FLRA 849, 851 (2011) (*Local 2018*) (citing VA, 65 FLRA at 621 (finding that where the parties stipulated to a just-cause issue, the Authority declines to consider a claim of a violation of § 7116)); *see also U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, St. Louis Dist., St. Louis, Mo.*, 65 FLRA 642, 645 (2011) (*Army*) (citing *AFGE, Local 2923*, 65 FLRA 561, 563 (2011) (finding that because the issue before the arbitrator was whether there was just cause to suspend the grievant, there was no need to make a determination regarding whether there was a violation of § 7116)).

³² SSA, 65 FLRA 286, 288 (2010).

³³ Award at 2; Exceptions at 2.

³⁴ Award at 13.

³⁵ *Local 2018*, 65 FLRA at 851; *Army*, 65 FLRA at 645.