68 FLRA No. 126

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
SPRINGFIELD, MASSACHUSETTS
(Agency)

and

ASSOCIATION OF ADMINISTRATIVE
LAW JUDGES
INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
(Union)

0-AR-4960

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DECISION

July 28, 2015

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

I. Statement of the Case

The grievant is employed by the Agency as an administrative law judge (ALJ) who decides appeals from denied disability claims. A claimant, whose appeal the grievant denied, submitted a letter to the Agency alleging that the grievant was biased and failed to give her a fair hearing. The Agency initially found that the grievant was not biased and did not engage in unfair conduct. But several months later, the Agency initiated another investigation into the claimant's allegations to determine whether there was evidence of misconduct. Following this investigation, the Agency issued the grievant a counseling memorandum. Arbitrator James S. Cooper found that the counseling memorandum constituted discipline and thus had to meet the standard of being just and fair. Finding that it did not meet that standard, the Arbitrator concluded that the Agency violated the parties' agreement when it issued the counseling memorandum to the grievant. This case presents us with three substantive questions.

The first question is whether the award is based on a nonfact. Because the Agency's nonfact exception is based on a matter disputed at arbitration – whether the counseling memorandum constituted discipline because it caused embarrassment for the grievant – the answer is no.

The second question is whether the award fails to draw its essence from the parties' agreement. Because the Agency does not establish that the Arbitrator's interpretation of the parties' agreement – that a counseling memorandum may be disciplinary and issued only when an ALJ's actions are sufficiently egregious – is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, the answer is no.

The third question is whether the Arbitrator exceeded his authority. Because the Agency's exceeds-authority exception is premised on the same arguments as its essence exception that we deny, the answer is no.

II. Background and Arbitrator's Award

The Agency processes social-security-disability claims. As stated previously, the grievant is an Agency ALJ who decides appeals from denied claims. The Agency's Decision Review Board (DRB) reviews ALJ decisions. The grievant issued a decision denying a claimant's appeal, and the claimant subsequently submitted a letter to the DRB alleging that the grievant was biased and failed to give her a fair hearing. The DRB listened to the recording of the claimant's hearing and found no evidence of bias or of an unfair hearing. But the DRB did find that the grievant's decision was "faulty" because it did not adequately evaluate the claimant's condition.[1] Therefore, the DRB remanded the decision to another ALJ for a new hearing.

Several months later, the Agency's Division of Quality Services (DQS) ordered an investigation into the claimant's allegations "for evidence of [misconduct]."[2] The investigation concluded that "simply presenting" the complaint to the grievant would serve to notify him that he should be less confrontational "without the need for more formal action," and advised that no further action was necessary.[3] But DQS' acting director issued a memorandum recommending that the grievant be "counseled,"[4] noting that complaints about the grievant had been filed in other cases and that "once again his tone is sometimes brusque[and] he appears argumentative."[5] The Agency then issued a counseling memorandum to the grievant advising him that his tone and line of questioning were inappropriate, "brusque, argumentative, and judgmental," and instructing him to temper his tone and to "refrain from making comments that appear judgmental of claimants' conditions or way of life."[6]

[1] Award at 3.
[2] *Id.* (internal quotation marks omitted).
[3] *Id.* (internal citation omitted).
[4] *Id.* at 5 (internal citation omitted); *see also* Exceptions, Ex. M.
[5] *Id.* at 4-5 (internal citation omitted).
[6] *Id*. at 6 (internal citation omitted).

The Union filed a grievance, claiming four violations of the parties' agreement. As relevant here, the grievance alleged that the matter was improperly investigated and that the grievant "was not accorded his rights under the [parties' agreement]."[7] The parties could not resolve the matter and it was submitted to arbitration.

The parties stipulated the issue for arbitration as "[w]hether the Agency violated the [parties' agreement] . . . when the Agency issued a counseling memorandum to the grievant[.]"[8]

Before the Arbitrator, the Union argued, among other things, that the Agency violated Article 5 of the parties' agreement when it issued the counseling memorandum because, even though other ALJs may have questioned the claimant and her witness differently, the Agency initially recommended that a counseling memorandum "was unwarranted."[9] Article 5, Section 1 acknowledges that ALJs "are engaged in the performance of duties which require the consistent exercise of discretion, knowledge and judgment in the conduct of hearings."[10] Article 5, Section 2 provides, in relevant part, that "all [j]udges shall be treated fair and equitably."[11]

At arbitration, the parties disputed whether the counseling memorandum issued to the grievant constituted discipline, and whether the memorandum was warranted. The Arbitrator determined that because ALJs hold a particular position of responsibility in the government, a counseling memorandum "takes on far more importance than a simple warning to any employee."[12] Finding that the counseling memorandum has "all the trappings of a charge of serious ALJ misconduct,"[13] the Arbitrator determined that it operated as discipline. And even though the Agency "downplay[ed] the significance" of the counseling memorandum, the Arbitrator found that it must "meet the same standard as any discipline, namely that it must be just and fair."[14]

After reviewing the claimant's recorded hearing "many times,"[15] the Arbitrator determined that the grievant "did absolutely nothing wrong,"[16] and that the Agency's claim that the grievant was "brus[que] and argumentative"[17] was based on "a matter of personal style, not an error worthy of chastising [the grievant]."[18] The Arbitrator therefore found that the Agency's issuance of a counseling memorandum to the grievant was not just and fair because the record failed to show that the grievant engaged in "egregious" misconduct that could interfere with the claimant's rights.[19] The Arbitrator further found that the Agency "piled its concern" about the grievant's conduct in other cases into its rationale for issuing the counseling memorandum to the grievant.[20] As the grievant's action did not warrant discipline, the Arbitrator sustained the grievance and directed the Agency to remove the counseling memorandum from the grievant's personnel file and to expunge it from the Agency's records.[21]

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

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's contrary-to-law exception.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[22] Here, the Agency argues that the award is contrary to law because the Arbitrator's interpretation of the parties' agreement affects management's right to direct employees under § 7106(a)(2)(A) of the Federal Service Labor-Management Relations Statute,[23] and there is no provision in the agreement negotiated under § 7106(b) that limits that right.[24] Specifically, the Agency contends that a counseling memorandum is an exercise of management's right to supervise and guide its employees, and that the award affects that right because the Arbitrator "created" a "just and fair" standard that requires the Agency to find first that the grievant engaged in wrongdoing before issuing a counseling memorandum.[25]

[7] *Id.* at 7 n.9.
[8] *Id*. at 1-2.
[9] *Id.* at 12-13.
[10] *Id.* at 13 n.14; Exceptions, Ex. D, Art. 5 Section 1.
[11] Exceptions, Ex. D, Art. 5, Section 2(a).
[12] *Id*. at 14.
[13] *Id*. at 14-15.
[14] *Id*. at 15.
[15] *Id*.
[16] *Id.*
[17] *Id.* at 16 (internal quotation marks omitted).
[18] *Id.*
[19] *Id.* at 15-16.
[20] *Id.* at 16.
[21] *Id.* at 17.
[22] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also U.S. DHS, U.S. CBP*, 66 FLRA 335, 337 (2011), *recons. denied*, 66 FLRA 634 (2012); *AFGE, Local 1546*, 65 FLRA 833, 833 (2011).
[23] 5 U.S.C. § 7106(a)(2)(A).
[24] Exceptions at 11.
[25] *Id.* at 13 (internal quotation marks omitted); *see also id.* at 15, 17.

The issue before the Arbitrator, as stipulated by the parties, concerned whether the Agency violated the parties' agreement when the Agency issued the counseling memorandum to the grievant.[26] As the counseling memorandum was the subject of the precise issue addressed at arbitration, the Agency could have presented any arguments relevant to management's right to issue counseling memoranda at that time. However, the record contains no evidence that the Agency made such arguments before the Arbitrator. Accordingly, this exception is barred under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, and we dismiss it.[27]

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the award is based on a nonfact – "that a counseling memorandum is the equivalent of discipline because it causes embarrassment among colleagues and concomitant unease and suspicion of local counsel."[28] 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.[29] However, the Authority will not find an award deficient based on an arbitrator's determination of any factual matter that the parties disputed at arbitration.[30]

The record indicates that the parties disputed at arbitration whether the counseling memorandum was disciplinary.[31] The Agency now argues that the award is based on a nonfact because "the Arbitrator speculated that the counseling memorandum carried with it embarrassment among colleagues and concomitant unease and suspicion of local counsel."[32] But the record demonstrates that the grievant testified about the embarrassment and stress caused by the counseling memorandum.[33] Therefore, at arbitration, the parties disputed matters concerning the nature of the counseling memorandum and the negative effect that it had on the grievant. Consequently, assuming that these matters are purely factual matters, the Agency does not demonstrate that the award is based on a nonfact.[34] Accordingly, we deny this exception.

B. The award draws its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator improperly "inserted his own provision" into the parties' agreement "that makes counseling memoranda disciplinary."[35] Further, the Agency argues that the Arbitrator improperly "created a standard" for the issuance of counseling memoranda; that is, "that an ALJ's actions are 'so egregious that their actions could reasonably [be] said to interfere with the rights of the claimant' before the Agency."[36]

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.[37] 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.[38] 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."[39] Where an arbitrator interprets a collective-bargaining agreement as imposing a particular requirement, the agreement's silence with respect to that requirement does not demonstrate, by itself, that the arbitrator's award fails to draw its essence from the agreement.[40]

The Arbitrator found that the counseling memorandum operated as discipline and therefore had "to

[26] Award at 1-2.
[27] *E.g., U.S. CBP*, 66 FLRA at 636-37; *U.S. Dep't of the Treasury, IRS*, 66 FLRA 120, 121 (2011) (*IRS*); *see also, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Oakdale, La.* 63 FLRA 178, 179-80 (2009) (*DOJ*).
[28] Exceptions at 20.
[29] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*NFFE*).
[30] *Id.* (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).
[31] *See* Opp'n Ex. 4, Tr. at 61-62.
[32] Exceptions at 21.
[33] Opp'n, Ex. 4, Tr. at 81.
[34] *E.g., U.S. DOD, Def. Contract Mgmt. Agency*, 66 FLRA 53, 56 (2011) (*Def. Contract*); *U.S. Dep't of Energy, Nat'l Energy Tech. Lab.*, 64 FLRA 1174, 1175 (2010); *NFFE*, 56 FLRA at 41.
[35] Exceptions at 17.
[36] *Id.*
[37] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[38] *U.S. DOL* (*OSHA*), 34 FLRA 573, 575 (1990).
[39] *Id.* at 576 (citing *Dep't of HHS, SSA, Louisville, Ky. Dist.*, 10 FLRA 436, 437 (1982); *Paperworks v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).
[40] *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003) (*Johnson Med. Ctr.*).

meet the same standard as any discipline, namely that it must be just and fair."[41] The Arbitrator also found that "only when the ALJ's actions are so egregious that [his] actions could reasonably [be] said to interfere with the rights of the claimant [should] the ALJ . . . be issued a [c]ounseling [m]emorandum."[42] The Agency argues that the Arbitrator "inserted his own provision" and "created a standard" for the Agency's use of counseling memoranda.[43] But, as stated above, an agreement's alleged silence with respect to an agreement's requirements does not demonstrate, by itself, that an arbitrator's award identifying a particular requirement fails to draw its essence from the parties' agreement.[44] Moreover, the Agency does not cite to any provision in the parties' agreement that precludes the Arbitrator from finding that a counseling memorandum can operate as discipline, or that it must meet certain requirements.

Accordingly, because the Agency does not provide any basis for finding that the award is irrational, unfounded, implausible, or manifests a disregard for the parties' agreement, we deny this exception.

C. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority by adding to, or altering the terms of, the parties' agreement.[45] 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 persons who are not encompassed within the grievance.[46] When the Authority denies an essence exception, and an exceeded-authority exception reiterates the same arguments as the essence exception, the Authority denies the exceeded-authority exception.[47]

The Agency contends that the Arbitrator exceeded his authority by "creating his own standard" and finding that a counseling memorandum is "tantamount" to a disciplinary action, thus requiring a showing of wrongdoing, without citing a provision in the parties' agreement.[48] The Agency's exceeds-authority exception is based on the same premise as the Agency's essence exception – that the Arbitrator improperly inserted a disciplinary standard for the issuance of counseling memoranda that does not exist in the parties' agreement.[49] Consistent with our denial of the Agency's essence exception, we also deny its exceeded-authority exception.[50] We note in this connection that the Agency relies on *HHS, SSA, Charlotte, N.C.* (*SSA*)[51] to support its exceeds-authority exception. But *SSA* involved a claim that an award was contrary to management rights under § 7106 of the Statute, not that an arbitrator exceeded his authority.[52] As discussed in Section III above, there is no management-rights claim properly before us. Accordingly, the Agency's reliance on *SSA* is misplaced and provides no basis for finding that the Arbitrator exceeded his authority.

V. Decision

We deny the Agency's exceptions.

[41] Award at 15.
[42] *Id.* at 16.
[43] Exceptions at 17 (citing Ex. D).
[44] *Johnson Med. Ctr.*, 58 FLRA at 414.
[45] Exceptions at 18.
[46] *Def. Contract*, 66 FLRA at 58; *see also U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995).
[47] *Def. Contract*, 66 FLRA at 58 (citing *AFGE, Local 3354*, 63 FLRA 330, 334 (2009)).
[48] Exceptions at 19-20.
[49] *See id.* at 17-18.
[50] *See, e.g., Def. Contract*, 66 FLRA at 58.
[51] 17 FLRA 103 (1985).
[52] *Id.* at 103-06.