68 FLRA No. 63

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
DAYTON, OHIO
(Agency)

and

NATIONAL NURSES UNITED
(Union)

0-AR-4975

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DECISION

March 19, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

The grievant, a registered nurse (RN), was suspended for seven days for allegedly "surfing"[1] sports websites and Facebook on work time. The Agency based the suspension on two charges: negligence of duties and inappropriate use of a government computer. Arbitrator Joseph A. Harris found that the Agency failed to sustain either charge and that it violated several just-cause requirements. He set aside the suspension. There are two questions before us.

The first question is whether the award is contrary to an Agency regulation dealing with personal use of government equipment, including computers. Because the Agency has not demonstrated that the award is inconsistent with the regulation's plain wording, the answer is no.

The second question is whether the award is based on nonfacts. Because the Authority will not find an award deficient on the basis of an arbitrator's factual determinations that the parties disputed at arbitration, and the factual issues that the Agency raises were so disputed, the answer is no.

[1] Award at 12.

II. Background and Arbitrator's Award

The grievant is a RN at the Agency. At the beginning of one of the grievant's shifts, the grievant or another employee on the shift reported to the shift supervisor that the unit was understaffed. Some hours later, when, according to the grievant, things had calmed down, a supervisor on her rounds observed the grievant on his computer accessing what appeared to be a website that was not work-related. After an investigation, the Agency suspended the grievant for seven days for "surfing" sports websites and Facebook for periods of time on four separate shifts.[2] The Agency based the suspension on two charges: negligence of duties and inappropriate use of a government computer.

The Agency based the negligence-of-duty charge on an alleged violation of an Agency rule, Medical Center Policy 05-14, stating that "[e]mployees shall put forth honest effort in the performance of their duties."[3] The Agency based the computer-misuse charge on an alleged violation of two rules: Veterans Affairs (VA) Directive 6001 (the directive), and the VA national rules of behavior (which state, in relevant part, that employees will follow the directive). The directive states that personal use of Agency computers "should take place during the employee's non-work time."[4]

The Union filed a grievance contesting the grievant's suspension. The Agency denied the grievance, and the parties submitted the matter to arbitration.

The Arbitrator framed the issue as: "Did [the Agency] have just cause when [it] issued the [g]rievant . . . a seven[-]day suspension . . . ? If not, what is the appropriate remedy?"[5] The Arbitrator found that the Agency "failed to sustain either of its two charges" and that "it violated several just[-]cause requirements."[6]

The Agency claimed that the grievant neglected his duties. However, the Arbitrator summarily dismissed the negligence-of-duties charge because the Agency "did not offer any examples of duties [that the grievant] failed to perform."[7]

The Arbitrator also set aside the computer-misuse charge. In its "proposed suspension" letter, the Agency alleged that the grievant used the

[2] *Id.*
[3] *Id.* at 9 (quoting Med. Ctr. Policy 05-14) (internal quotation marks omitted).
[4] *Id.* at 8 (quoting the Directive) (internal quotation marks omitted).
[5] *Id.* at 2.
[6] *Id.* at 12 (internal quotation marks omitted).
[7] *Id.* at 14.

internet for 419 minutes over a four-day period.[8] Lacking any admission by the grievant as to how much time he had spent accessing the internet, the Arbitrator examined the computer-use log and the Agency's information security officer's testimony, and made his own calculations. Based on these calculations, the Arbitrator found that the Agency "overstated its case" because, the Arbitrator determined, the grievant had used the internet for far less time than alleged.[9] As a representative example, the Arbitrator made his own calculation of the time the grievant spent on the night initially at issue. The Arbitrator took into account periods when the computer-use log showed that an accessed site was "inactive," as would occur when "a staff person who is logged onto a computer leaves the computer to care for a patient"[10] – and break times. Based on these considerations, the Arbitrator found that the grievant had spent twenty minutes of work time online – not 118, as claimed by the Agency – a reduction of more than eighty percent.[11] The Arbitrator found this a sufficient basis, without similarly recalculating the grievant's actual computer use for the other periods at issue, to conclude that the Agency "did not prove [the] claim of excessive amount of time on the internet for each day specified in the charge[]."[12]

In addition, the Arbitrator found that the Agency did not have just cause to discipline the grievant for the computer-misuse charge. For example, the Arbitrator found that there was no basis for inferring that the grievant knew the contents of the directive, or that he "should have known . . . that he violated [the directive]," because it was "evident that employees openly and regularly used the [Agency] computers on work time without fear of punishment."[13]

Moreover, the Arbitrator found that "it would be unfair to discipline the [g]rievant, even if he had known [the directive's] content," because the Arbitrator did not find the directive "clear and unambiguous."[14] In this connection, the Arbitrator found that the directive "does not forbid personal use of [Agency] computers during work time."[15] The Arbitrator based his finding on the directive's statement in the section applied to the grievant that personal use of Agency computers "*should* take place during the employee's non-work time."[16] The Arbitrator contrasted the directive's use of the word "should" in that section with the directive's use of the word "must" in a different section, which provides that "[t]his personal use *must* not result in loss of employee productivity or interference with official duties."[17] Based upon the use of "should" in the relevant section, as opposed to "must" in the other section, the Arbitrator concluded that the directive "frowns upon, but does not actually forbid" personal use of Agency computers during work time.[18]

Other considerations cited by the Arbitrator included: (1) "the wide range of opinion (including among management) as to an acceptable amount of personal usage of [Agency] computers during work time[; (2)] management's history of lack of providing guidance as to [the directive's] content[;] and [(3)] management's history of lack of enforcement of any standard."[19] For all these reasons, the Arbitrator concluded that "the [Agency] violated [the grievant's] just[-]cause rights by suddenly, and without notice, imposing severe discipline on him."[20] Accordingly, the Arbitrator sustained the grievance and set aside the suspension.

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

III. Analysis and Conclusions

Although the Arbitrator cited a number of defects in the Agency's charges against the grievant, the Agency does not contest most of them. Uncontested arbitral findings include the Arbitrator's dismissal of the negligence-of-duties charge and his findings as to the amount of time that the grievant spent on the internet and that the time the Agency alleged was greatly overstated. As the Agency does not challenge these findings in its exceptions, we do not discuss them further.

A. The award is not contrary to an Agency regulation dealing with personal use of government office equipment, including computers.

The Agency asserts that the Arbitrator erred when he found that the directive does not prohibit personal use of Agency computers during work time.[21] It argues that his award is therefore contrary to an Agency regulation – the directive.

In resolving grievances under the Federal Service Labor-Management Relations Statute (the

[8] *Id.* at 4-5.
[9] *Id.* at 14.
[10] *Id.* at 12.
[11] *Id.* at 12-14.
[12] *Id.* at 14-15 (internal quotation marks omitted).
[13] *Id.* at 15.
[14] *Id.* at 16.
[15] *Id.*
[16] *Id.* at 16-17 (citing § 2(a) of the Directive).
[17] *Id.* at 17 (citing § 2(b) of the Directive).
[18] *Id.* at 16-17.
[19] *Id.* at 18.
[20] *Id.*
[21] Exceptions at 4-6.

Statute), arbitrators are empowered to interpret and apply agency rules and regulations.[22] When evaluating exceptions asserting that an award is contrary to a governing agency rule or regulation, the Authority will determine whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, the rule or regulation.[23]

The Agency argues that the directive's statement – that personal use of Agency computers "*should* take place during the employee's non-work time" – prohibits such personal use during work time. "Should," in the Agency's view, "is the grammatical equivalent of 'must.'"[24]

Contrary to the Agency's argument, "should" has multiple meanings, including meanings that do not connote a mandate. For example, "should" can mean what is "probable or expected," or can be used "to express a desire or request in a polite or unemphatic manner."[25] In addition, judicial opinions – including an opinion on which the dissent relies – have recognized that "should" is not necessarily mandatory, but may be "precatory," i.e., expressing a wish or request.[26] This Agency contention therefore does not demonstrate that the award is inconsistent with the plain wording of, or is otherwise impermissible under, the directive.

The Agency also relies on language from the directive's transmittal sheet. The language states that "[t]h[e] directive . . . allows employees to use [g]overnment office equipment, including [computers], for non-[g]overnment purposes when such use . . . is performed on the employee's non-work time."[27] The Agency argues that this language identifies the only time "when" personal use of Agency computers is permissible.

This Agency contention is also unpersuasive. Even if language from the directive's transmittal sheet carries the same force as language from the directive itself, the language that the Agency relies on does not expressly prohibit anything. Moreover, this language contrasts with language in a section of the directive that the Arbitrator found specifically prohibits certain personal uses of Agency computers, such as for "gambling purposes, pornography, personal business, [or] terrorism."[28] This Agency contention therefore also does not demonstrate that the award is inconsistent with the plain wording of, or is otherwise impermissible under, the directive.

Accordingly, because the Agency has not demonstrated that the award is contrary to the directive, we deny the Agency's exception.

B. The award is not based on nonfacts.

The Agency alleges that the award is based on nonfacts.[29] To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[30] However, the Authority will not find an award deficient on the basis of an arbitrator's factual determination that the parties disputed at arbitration.[31]

The Agency argues that the Arbitrator erred in finding that: (1) there was a "wide range of opinion (including among management) as to an acceptable amount of personal [use] of [Agency] computers during work time;"[32] and (2) management had a history of lack of enforcement of any standard for personal use of Agency computers during work time.[33] But both matters were disputed before the Arbitrator.[34] Although the dissent, like the Agency, wishes to dispute the Arbitrator's factual findings, factual matters that were disputed at arbitration cannot be challenged as nonfacts.[35] Therefore, the Agency's arguments do not demonstrate that the award is based on nonfacts.

Accordingly, we deny the Agency's nonfact exceptions.

IV. Decision

We deny the Agency's exceptions.

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[22] *SSA, Region IX*, 65 FLRA 860, 863 (2011).
[23] *Id.*
[24] Exceptions at 5-6 (emphasis added) (quoting the Directive at 3).
[25] *Webster's Third New International Dictionary* 2104 (2002).
[26] *Griessenauer v. Dep't of Energy*, 754 F.2d 361, 364 (Fed. Cir. 1985) (finding government-wide regulation's use of term "should" indicated that provision was precatory, not mandatory); *see also Robinson v. Johnson*, 343 F. App'x 778, 781 (3d Cir. 2009) (finding a state's policy distinguished "items that are mandatory ('shall'); items that are required to the extent practicable ('should'); and items that are optional ('may')").
[27] Exceptions at 5 (quoting the Directive at 1).
[28] Award at 12.
[29] Exceptions at 6-10.
[30] *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry AFB*).
[31] *Id.* at 593-94.
[32] Exceptions at 7 (quoting Award at 18).
[33] *Id.* at 9 (quoting Award at 18).
[34] Award at 15, 17-18.
[35] *AFGE, Local 1770*, 67 FLRA 93, 94 (2012); *Lowry AFB*, 48 FLRA at 593-94.

Member Pizzella, dissenting:

Confucius is reported to have said, over twenty-five centuries ago, that "the beginning of wisdom is to call things by their proper names."[1] After considering the record in this case, I doubt that Confucius would have lasted long as a federal employee or an arbitrator.

Some federal regulations are complex and difficult to understand. Others are not. The Veterans Affairs (VA) directive that is at issue here is one that is not. But, still, the parties in this case have managed to argue for two years over the meaning of the word "*should*" in a policy that has remained unchanged for fifteen years.

In July 2000, the VA implemented Directive 6001 (the directive) which established "new *privileges* and *additional responsibilities*" for VA employees pertaining to the personal use of VA equipment, including computers.[2] And, while the directive permitted "limited [personal] use"[3] of government computers, it *explicitly* reaffirmed that employees have "*no inherent right*" to use government equipment for any purpose "other than official activities."[4]

Against this backdrop (which was ignored entirely by Arbitrator Harris),[5] the directive devotes just *thirteen words* to establish what VA employees are *permitted to do* when it comes to the personal use of VA computers − "VA employees are permitted *limited use* of [g]overnment [computers] for personal needs."[6] But the directive devotes *five pages (approximately 1500 words)* to define the "controls" and restrictions that apply to this "limited" personal use. The restrictions include such prohibitions as:

- "use does not interfere with official business . . ."[7]
- "should take place *during* the employee's *non-work time*,"[8] which is defined as the time when an employee "is *not otherwise expected* to be addressing *official business* . . . during their *own off-duty hours*[,] such as before or after a workday . . . , lunch periods, [and] authorized breaks."[9]
- "[t]his privilege . . . *may be revoked* or limited at any time . . ."[10]
- "must not result in loss of employee productivity or interfere[] *with official duties*."[11]
- "[e]mployees have *no inherent right* to use [g]overnment [computers] for *other than official activities*."[12]

That is pretty darn clear to me. In fact, in over twenty years as a senior official at seven federal agencies, I have encountered few regulations that are as clear as the directive. What is there not to understand?

But, according to the National Nurses United Union, Arbitrator Harris, and the majority, the directive is so "unclear"[13] that it would be "unfair"[14] to discipline an employee for violating any of its proscriptions.

Brian Welch is a registered nurse at the VA Medical Center in Dayton, Ohio, where he typically works an overnight, seven-and-one-half-hour shift.[15] Over the course of four days in May 2012, Welch spent *over five hours*, out of an available thirty work hours, on the internet satisfying his personal interests in sports, electronics, and Facebook during times when he was on official duty and was supposed to be taking care of patients.[16] During those same four days, he made "several complaints" to his supervisor that his unit required "additional help."[17]

But on the fourth day, May 17, Welch tried a different approach. When he complained to his supervisor that his unit needed "additional help," he threatened to file a complaint "with the [U]nion."[18] At that point, the supervisor went to check out the staffing situation. When she arrived at the unit, the supervisor discovered that Welch was engaged in personal activities on his VA computer[19] rather than attending to his

[1] http://www.goodreads.com/quotes/106313-the-beginning-of-wisdom-is-to-call-things-by-their
[2] Exceptions, Ex. 8, VA Directive 6001 (Directive) at 1, Reason For Issue § 1.a. (emphasis added).
[3] *Id.* at 3.
[4] *Id.* at 1, Reason For Issue § 1.b. (emphasis added)
[5] Award at 7-8.
[6] Directive at 3.
[7] *Id*., § 2.a. (emphasis added).
[8] *Id*. (emphasis added).
[9] *Id*. at 7, § 5.a (emphasis added).
[10] *Id.* at 3, § 2.a.
[11] *Id.*, § 2.b. (emphasis added).
[12] *Id.* at 5, § 2.i. (emphases added).
[13] Opp'n, Ex. A, Union's Post-Hr'g Br. at 15.
[14] Award at 16.
[15] Exceptions, Ex. 4 at 1-2.
[16] *Id.* at 2.
[17] Award at 2.
[18] *Id.*
[19] *Id.* at 2-3.

responsibilities.[20] (Ironic, yes, but as I have said before, "one cannot just make this stuff up.")[21]

The supervisor determined that the "staffing [in Welch's unit] was adequate."[22] Four registered nurses (including Welch) were on duty, and the nursing assistant who was assigned to that shift was "sit[ting]" with a patient who required constant care.[23] Based on the supervisor's observations, she requested that the Office of Information and Technology (OIT) investigate Welch's recent computer usage because, at the time she observed Welch on the internet, he was on duty, was not on a scheduled break, and there were duties to which he needed to attend.

OIT's investigation into Welch's personal use of his VA computer, on May 13, 15, 16, and 17, indicated that he had used his VA computer for personal activity on those days for at least *six hours* out of the *thirty hours* he was supposed to be working.[24] The Arbitrator took a somewhat different view of the usage records and ultimately concluded that Welch had spent only *five hours and twenty-one minutes* on personal activity, as if that should make any difference.[25] Even Welch, himself, admitted that he spent *at least five hours* during that thirty-hour work week on personal activity that was not work related.[26]

As a consequence, the VA suspended Welch for seven days for spending "an *excessive amount of time* on the internet . . . when [he] should have been providing patient care" in violation of the directive and the VA's rules of behavior.[27]

Let's make one thing clear: it should make no difference whether Welch spent *five hours, five hours and twenty-one minutes, or six hours* on personal activities in a thirty-hour workweek. From my perspective, any employee, in any business (especially when that business is a federal agency and taxpayers pay for that agency's budget), should be suspended, or even fired, when that employee spends close to twenty percent – *that is **20%*** – of his work time on personal affairs rather than his official duties. *That is excessive*, regardless of whether the employee is surfing the internet, playing Solitaire, or napping.

Despite the fact that Nurse Welch complained to his supervisor "several" times that his unit needed "additional help,"[28] he now argues that he was on the computer during "downtime."[29] Downtime? Welch admits that he was not on an official break and had not even started his "I&Os, accu-checks, vitals, ADL's and anything else a veteran may need"[30] when his supervisor found him on the computer on May 17. I wonder if it is even possible for a floor nurse in an active medical unit to have "downtime"? The record indicates otherwise. After a nurse completes his or her initial duties, he or she still has the responsibility to "assist[]" other unit nurses and perform "non-direct patient care" such as "checking, ordering, and stocking [medications and IV fluids]"[31] in addition to the other duties that Welch admits he had not even begun.

Abass Wane, the Union representative, argues that Welch was "confused" about the policy, even though he had received *annual*, mandatory training on the directive[32] and had acknowledged that he understood the directive when he signed the national rules of behavior on August 10, 2011, just nine months earlier.[33] Nonetheless, Wane actually argued to the Arbitrator that the directive's use of the word "should" in one sentence – "[t]his limited personal use of [g]overnment [computers] *should* take place during the employee's non-work time"[34] – makes the entire policy so "vague" that it is impossible to understand what it means.[35]

To put this in perspective, the National Nurses United, in essence, argued that any employee should be able to determine when he or she has done enough work and to put off other duties just so he or she can have play time on his or her work computer.

It is even more incredible to me that Arbitrator Harris was swayed by this specious argument. Arbitrator Harris concluded that, because the directive uses the word "should" in that one sentence, it "does not *actually forbid* the use of VA computers for personal purposes during work time"[36] but, rather, *simply "frowns upon"* upon such use.[37]

[20] *Id.* at 10.
[21] *U.S. Dep't of VA Med. Ctr., Kansas City, Mo.*, 67 FLRA 627, 629 (2014) (Concurring Opinion of Member Pizzella).
[22] Award at 2.
[23] *Id.* at 4.
[24] *Id.* at 2-3.
[25] *Id.* at 13-14.
[26] Exceptions, Attach., Tr. at 149-150, 157.
[27] Award at 14 (emphasis added) (internal quotation marks omitted).
[28] *Id.* at 2.
[29] *Id.* at 10.
[30] *Id.* at 4.
[31] *Id.* at 10; *see also* Exceptions, Ex. 9, Agency's Post-Hr'g Br. (Agency's Post-Hr'g Br.) at 10.
[32] Agency's Post-Hr'g Br. at 4 (citing Joint Ex. 2, Tab 11).
[33] Exceptions, Ex. 2 at 1.
[34] Union's Post-Hr'g Br. at 8 (emphasis added) (citing Directive at 3).
[35] *Id.* at 11.
[36] Award at 17 (emphasis added).
[37] *Id.* (emphasis added).

Unlike Nurse Welch and the Arbitrator, I have never been particularly confused by what the word "should" means. I am, therefore, unpersuaded by Arbitrator Harris' reasoning on this point and am unwilling to conclude that the directive simply "frowns upon" an employee spending time on a VA computer when he is *supposed to be working*.

Rather than looking at the directive in its entirety, the Arbitrator, and now the majority, tries to turn this grievance into an amorphous etymological debate over the meaning of the word "should."[38] In doing so, they change the entire meaning of the directive into something the VA never intended and runs counter to common sense.

My colleagues note that Webster's Dictionary ascribes several meanings to the word "should," including one that "express[es] a desire or request."[39] And, even though the majority admits the word "should" may also mean what is "probable or expected,"[40] they ignore entirely the preferred iterations, which indicate an "obligation," something one will "have to do," or something that *will* occur if something else happens.[41]

Federal courts have not looked favorably (one might say, to borrow from Arbitrator Harris' lexicon, have "frown[ed]"[42]) upon such debates.[43] In any event, the courts and the Authority have long held that an award is not a plausible interpretation of an agency policy when the award is not "rationally derived from the plain language of [that policy]."[44]

Therefore, whether the word "should" connotes something that is "mandatory," or merely something that is "*required* to the extent practicable,"[45] it is simply not plausible to interpret the plain language of the directive – which devotes over 1500 words to describe the limits on its permissive "limited use" policy − to presume that an employee may use a government computer for his own purposes (consuming nearly twenty percent of his work time) *whenever he or she determines* that he or she has done enough work.

I would vacate the Arbitrator's award and reimpose the seven-day suspension. Perhaps then Nurse Welch would have enough "downtime" to catch up on his sports news and update his Facebook page sufficiently so that he could return to work and concentrate on his duties.

Thank you.

[38] Majority at 3.
[39] *Id.* at 5.
[40] *Id.*
[41] http://www.merriam-webster.com/dictionary/should.
[42] Award at 17.
[43] *Robinson v. Johnson*, 343 F. App'x 778, 781 (3d Cir. 2009) (*Robinson*) (citing *Spruill v. Gillis*, 372 F.3d 218, 233 (3d Cir. 2004) (*Spruill*) ("[S[hould" denotes something "required to the extent practicable."); *see also Harsh v. Barone*, 2011 WL 6100804 at *4 (W.D. Pa. 2011) (citing *Robinson*, 343 F. App'x at 781)).
[44] *U.S. Dep't of Commerce, Patent & Trademark Office*, 65 FLRA 13, 27 (2010) (Dissenting Opinion of Member Beck) (arbitrator's interpretation of agency policy not "rationally derived from the plain language" of the policy) (citing *U.S. Dep't of VA, Med. & Reg'l Ctr., Togus, Me.*, 55 FLRA 1189, 1196 (1999) (citing *Carter v. Tisch*, 822 F.2d 465, 468-69 (4th Cir. 1987) (award that is inconsistent with regulation's plain language is unenforceable)); *U.S. Dep't of the Treasury, Brooklyn Dist., Brooklyn, N.Y.*, 51 FLRA 1487, 1494 (1996) (award that is contrary to the plain language of regulation must be set aside); *see also Dickenson-Russell Coal Co. v. Secretary of Labor, Fed. Mine Safety & Health Review Comm'n.*, 747 F.3d 251, 258 (4th Cir. 2014) (referencing Webster's Online Dictionary to determine that ALJ's decision is consistent with plain language of regulation).
[45] *Robinson*, 343 F. App'x at 781 (citing *Spruill v. Gillis*, 372 F.3d at 233).