68 FLRA No. 86

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1156
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL SUPPLY BUSINESS SYSTEMS CENTER
MECHANICSBURG, PENNSYLVANIA
(Agency)

0-AR-4954

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DECISION

April 30, 2015

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

I. Statement of the Case

The Agency suspended the grievant for three days for fighting with his wife while he was teleworking, and for "lack of candor" in reporting the incident to his supervisors.[1] Arbitrator Rochelle K. Kaplan sustained the Union's grievance, in part, and reduced the grievant's suspension to one day. But the Arbitrator found no need for a backpay order; the grievant's three-day suspension included a weekend, and he therefore lost only one day of pay – commensurate with the one-day suspension that the Arbitrator left in place. The Arbitrator also found that the Union was not entitled to attorney fees. This case presents the Authority with two questions.

The first question is whether the award is contrary to law because the Arbitrator failed to apply Merit Systems Protection Board (MSPB) case law requiring a nexus between the employee's conduct and the efficiency of the federal service. The Union argues that the Arbitrator erred by leaving in place a one-day suspension of the grievant despite finding no nexus "between [the grievant's] conduct and the efficiency of [the] federal service."[2] As the Union's exception is based on a misunderstanding of the award, and, in any event, as the Arbitrator was not required to apply MSPB principles because the disputed suspension was for less than fifteen days, the answer is no.

The second question is whether the Arbitrator's denial of attorney fees to the Union is contrary to law. Because the Back Pay Act (BPA) requires that an award of attorney fees be in conjunction with an award of backpay on correction of the personnel action, and the Arbitrator did not award the grievant backpay, the answer is no.

II. Background and Award

The grievant, an employee with "[seventeen] years of successful [f]ederal service,"[3] was suspended for three days for fighting while on duty and for lack of candor in reporting the incident. The incident occurred while the employee was teleworking. An argument between the grievant and his wife "escalated into a physical altercation."[4] The grievant called 911 and "reported that he was being assaulted by his wife."[5] The police ultimately arrested the grievant, who spent the night in jail, but was released the next morning "without any formal charges filed against him by his wife, the police[,] or the [d]istrict [a]ttorney."[6] Following his release, the grievant spoke with his supervisor about the incident and asked to use earned annual leave for the day of the incident and the following day. His supervisor initially approved the leave, but later revoked her approval of leave for the part of the first day when the fight allegedly occurred.

The Union grieved the suspension, and also requested that the grievant's duty status be changed to annual leave for the entire day of the incident. The matter was unresolved and submitted to arbitration.

The Arbitrator framed the issue as: "Whether the Agency had just and reasonable cause to suspend the [g]rievant for three days for the offenses of lack of candor and fighting? If not, what shall be the remedy?"[7]

The Arbitrator concluded that the grievant's three-day suspension was "not just and reasonable."[8] The Arbitrator cited three considerations. First, the Arbitrator found that the evidence supported only the fighting charge, and she dismissed the lack-of-candor charge. The Arbitrator found in this regard that the grievant had been "forthcoming in his description of the event" and that his

[1] Award at 7.
[2] Exceptions at 11 (quoting Award at 30-31).
[3] Award at 6.
[4] *Id*. at 2; *see also id*. at 25.
[5] *Id*. at 2.
[6] *Id*.
[7] *Id.* at 8.
[8] *Id*. at 42.

statement to the Agency "was detailed to a fault."[9] Second, the Arbitrator found mitigating factors affecting the fighting charge, including that the grievant's wife started the fight. Third, concerning whether there was a connection – a "nexus" in the Arbitrator's words – "between the discipline given to the [g]rievant and the efficiency of [the] service,"[10] the Arbitrator found that "the nexus . . . was not proven."[11] Based on these considerations, the Arbitrator reduced the three-day suspension to a one-day suspension. The Arbitrator also found that the Agency's reasons for partially revoking approval of the grievant's request to use earned annual leave were "not appropriate," and ordered the grievant's "status . . . changed from 'on duty' to 'annual leave'" for the first part of the day when the fighting allegedly took place.[12]

Although the Arbitrator reduced the grievant's suspension from three days to one day, the Arbitrator found no need for backpay. The Arbitrator found that, as the three-day suspension included a weekend, "[t]here [was] no need for a back[]pay order, since the [g]rievant only lost one day of pay."[13] The loss of one day of pay was commensurate with the one-day suspension that the Arbitrator left in place. Finally, the Arbitrator found that the Union was not entitled to attorney fees.

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

III. Analysis and Conclusions

The Union contends that the award is contrary to law.[14] 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.[15] 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.[16] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that those factual findings are deficient as nonfacts.[17]

A. The award is not contrary to any applicable legal requirement of a nexus linking the employee's conduct with the efficiency of the federal service.

The Union argues that the Arbitrator's determination, substituting a one-day suspension of the grievant for his original three-day suspension, is contrary to law.[18] The Union contends that MSPB case law requires a nexus linking the employee's conduct with the efficiency of the service.[19] The award violates this principle, in the Union's view, because the Arbitrator found that "the nexus" between the grievant's conduct and the efficiency of the federal service "was not proven."[20] For the reasons discussed below, the Union's exception does not provide a basis for finding the award deficient.

The Arbitrator's finding that the Union cites – that "the nexus . . . was not proven"[21] – appears to relate to the Arbitrator's consideration of whether there was a "nexus between the *discipline* given the [g]rievant and the efficiency of [the] service."[22] Thus, the Union's exception, based on the view that the Arbitrator found no "nexus" between the grievant's *conduct* and the efficiency of the service, would suggest a misunderstanding of the award, and we reject the exception on that basis.[23]

But even if the Union's understanding of the award is accurate, it still would not provide a basis for finding the award deficient. It is well established that arbitrators considering suspensions of fourteen days or less may, but are not required to, apply legal principles established by the MSPB in reviewing adverse actions.[24] As a result, where a suspension of fourteen days or less is at issue, an arbitrator's alleged misapplication of MSPB precedent does not provide a basis for finding that the award is deficient.[25]

The suspension the Arbitrator considered in this case was for only three days. Therefore, the Arbitrator was not required to apply the MSPB precedent on which the Union relies.[26] Consequently, the Arbitrator's alleged

[9] *Id.* at 35.
[10] *Id.* at 24.
[11] *Id.* at 41.
[12] *Id.* at 42.
[13] *Id.*
[14] Exceptions at 4.
[15] *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)).
[16] *U.S. DOD, Dep't's of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).
[17] *NAIL, Local 15*, 66 FLRA 817, 818 (2012).
[18] Exceptions at 2.
[19] *Id.* at 10-11.
[20] *Id.* at 11 (quoting Award at 41).
[21] Award at 41.
[22] *Id.* at 24 (emphasis added).
[23] *AFGE, Local 12*, 67 FLRA 387, 390 (2014) (citing *AFGE, Local 2382*, 66 FLRA 664, 667 (2012)).
[24] *AFGE, Local 12*, 66 FLRA 750, 751 (2012) (*AFGE*) (citing *AFGE, Local 522*, 66 FLRA 560, 563 (2012)); *NTEU, Chapter 128*, 62 FLRA 382, 383 n.* (2008).
[25] *See AFGE, Local 1770*, 67 FLRA 93, 95 (2012) (*Local 1770*); *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 60 FLRA 883, 885 (2005) (*El Paso*).
[26] *AFGE*, 66 FLRA at 751.

misapplication of MSPB precedent does not provide a basis for finding that the award is deficient.[27]

Accordingly, we deny this contrary-to-law exception.

B. The Arbitrator's denial of attorney fees to the Union is not contrary to law.

The Union argues that the award is contrary to law because the Arbitrator: (1) denied the Union attorney fees before the Union submitted its attorney-fee petition; and (2) failed to make specific findings regarding attorney fees.[28]

A threshold requirement for an award of attorney fees under the BPA is that an award of attorney fees must be in conjunction with an award of backpay to the grievant on correction of the personnel action.[29] "[A]ttorney fees may not be awarded if backpay is not awarded."[30] The Union fails to demonstrate that it has satisfied this requirement in this case.

The Arbitrator determined that the grievant was not entitled to backpay because the grievant's actual lost wages were commensurate with the one-day suspension the Arbitrator left in place.[31] However, the Union argues that it is entitled to attorney fees because: (1) the Arbitrator ordered that the grievant's duty status for the part of the day when the fighting allegedly took place be changed to annual leave; and (2) the Arbitrator granted "other benefits to which the grievant should be entitled because of the reduced penalty."[32]

The Arbitrator's order to change the grievant's duty status to annual leave does not represent an award of backpay – i.e., an award of pay, allowances, or differentials.[33] Although an award of annual leave – such as an award restoring any annual leave that a grievant had taken – would qualify as a backpay award,[34] the Arbitrator in this case did not award the grievant any annual leave. Rather, the Arbitrator simply permitted the grievant to use earned annual leave for part of the day of the fight. The Union also fails to identify any "other benefits to which the grievant should be entitled" that would qualify as backpay.[35]

Because the Arbitrator did not award backpay, a threshold requirement for attorney fees is not met. Consequently, as there is no basis for an attorney-fee award under the BPA, we do not address the Union's other contrary-to-law arguments dealing with this subject. Accordingly, we deny this contrary-to-law exception.

We agree with the concurrence that misconduct at a telework site is a serious matter, and should not be excused merely because the misconduct did not occur at the employee's regular worksite. That said, we note that the Agency did not file exceptions to the Arbitrator's award in this case. Consequently, the concurrence's critical review of the Arbitrator's award, suggesting and resolving arguments the Agency could have made had it decided to except, addresses issues that are not properly before us. The same is true of the concurrence's criticism of the grievant's use of annual leave that the grievant had previously earned. Accordingly, we will not comment further on the concurrence's views, whether or not those views have or lack merit.

IV. Decision

We deny the Union's exceptions.

[27] *Local 1770*, 67 FLRA at 95; *El Paso*, 60 FLRA at 885.
[28] Exceptions at 4.
[29] *U.S. GSA, Ne. & Caribbean Region, N.Y.C., N.Y.*, 61 FLRA 68, 69 (2005).
[30] *U.S. Dep't of VA Med. Ctr., Detroit, Mich.*, 60 FLRA 306, 310 (2004) (citing *U.S. Dep't of VA, Veterans Integrated Serv. Network 7, Network Bus. Office, Duluth, Ga.*, 60 FLRA 122, 123 (2004)); *see also U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div.*, 60 FLRA 530, 532 (2004) (award of attorney fees contrary to law when arbitrator did not award backpay or any other monetary relief).
[31] Award at 42.
[32] Exceptions at 6 (internal quotation marks omitted).
[33] 5 U.S.C. § 5596; 5 C.F.R. § 550.803.
[34] *AFGE, Local 1592*, 64 FLRA 861, 862 (2010).
[35] Exceptions at 6 (internal quotation marks omitted).

Member Pizzella, concurring:

The American Federation of Government Employees (AFGE) proudly proclaims that, as "A Union Of, By, and For Government Employees," it exists "[f]or the purpose of promoting unity of action in all matters affecting the *mutual interests* of government civilian employees . . . and for the improvement of government service."[1]

I do not see how AFGE, Local 1156's request in this case − to totally absolve one of its bargaining-unit members from any responsibility for fighting with and bruising his wife to such a degree that he was arrested by the Seattle police while on duty – "promot[es] unity" or "the mutual interests" of the other members of its bargaining unit.[2] And, if the other employees, represented by Local 1156 and across the nation by the national office of AFGE, were made aware of the circumstances of this case, I doubt that many would agree that the Union's request "promot[es] unity" amongst their members or serves their "mutual interests."[3]

Terry Hoy, the grievant in this case, is a systems analyst for the Naval Supply Information Systems Activity (NAVSUP) at the Kitsap-Bremerton naval station in Bremerton, Washington. He works from home several days a week, under NAVSUP's telework program[4] which is fairly typical of other federal telework programs. It requires its employees who telework to "ensure that a *proper* work environment is *maintained*,"[5] and to be "*bound by* DOD/Navy Standards of Conduct *while working at* the approved alternate worksites[.]"[6]

On February 6, 2012, while teleworking at home, Hoy seemed determined to recreate the famous scene from the movie, *A Streetcar Named Desire*, where an insulted Stanley Kowalski (played by Marlon Brando) retorts to his wife: "Don't you ever talk that way to me . . . just remember . . . I'm the king around here, and don't you forget it."[7] But, unlike Stanley Kowalski, Hoy was teleworking when he acted out and ended up in jail.

About 7:00 a.m., the time his workday was supposed to have already begun, Hoy got into an argument with his wife about the family's laundry. Even though laundry duties are not part of his job description, Hoy ordered his wife to remove her clothes from the dryer because he "was wearing [his] last clean T-shirt."[8] She refused and, according to a written statement that Hoy provided to NAVSUP officials, Hoy alleged that his wife "attacked" him with "a rolled[-]up magazine," before he "[*took*] *her down to the floor* and *hit*[] *her several times*."[9] The police were called, and Hoy went to jail after the police noticed "three visible injuries"[10] on his wife including "bruises" and "scratches."[11] In a written statement to his supervisor, Hoy averred that the police told him that either he or his wife "had to go to jail" but that he made the chivalrous "deci[sion]" to go,[12] apparently to hide the fact that he had been arrested while he was on duty. (Obviously, he did not *choose* to be arrested, but at least it is true that he was *on duty*.)

As a consequence for getting into the fight with his wife while he was "on duty" and for his "lack of candor"[13] in reporting what had actually occurred, Hoy was suspended for three days, two of which ran over a two-day weekend, resulting in the loss of just one day of pay.[14] (Unfortunately for Hoy, that weekend was not a three-day holiday. If it had been, he would not have lost any pay at all.)

Not satisfied with this lenient penalty, Local 1156 filed a grievance on Hoy's behalf. Arbitrator Rochelle Kaplan concluded that Hoy was guilty of fighting with his wife, but that she was not at all concerned about his "lack of candor."[15] Accordingly, she reduced the penalty even further to a one-day suspension and ordered NAVSUP to change Hoy's work status on the day of the big fight from "on duty" to "annual leave."[16]

Still not satisfied, Local 1156 brought in an attorney from its national office − staff counsel, Gregory Watts, from the General Counsel's office of the AFGE, AFL-CIO. In the exceptions filed on behalf of Local 1156, Watts argues that Hoy's conduct had absolutely "no nexus" to his job. Watts goes even one step further and argues that Arbitrator Kaplan's award is contrary to law because Hoy deserved absolutely *NO disciplinary action*, is entitled to *backpay*, and that AFGE is entitled to attorney fees for its persistence.[17] It does not appear that Local 1156 has fully apprised its membership of its attempt to absolve their co-worker, Hoy, of his abhorrent conduct that occurred while he was

[1] http://www.afge.org/Index.cfm?page=OurMission (emphasis added).
[2] *Id*.
[3] *Id*.
[4] Award at 2.
[5] *Id.* at 11 (emphasis added) (quoting NAVSISA Instruction 5330.4).
[6] *Id*. at 12 (emphasis added).
[7] *A Streetcar Named Desire* (Warner Bros. 1951) (*Streetcar*).
[8] Award at 3.
[9] *Id*. at 3 (emphasis added); *see also id.* at 29.
[10] *Id.* at 29.
[11] *Id*. at 27.
[12] *Id.* at 6.
[13] *Id.* (quoting Joint Ex. 4).
[14] *Id*. at 7 (citing Joint Ex. 6).
[15] *Id*. at 42.
[16] *Id*. (internal quotation marks omitted).
[17] Exceptions at 12.

on duty. In its monthly newsletter, *The Observer*, Local 1156 simply listed this case, along with others, as "[e]mployee disciplined for *alleged misconduct* at home as [t]elework day began[.]"[18]

As I have said before, "[o]ne cannot just make this stuff up!"[19]

I agree with the majority that AFGE's exceptions should be denied. But, with respect to the majority's determination that the arbitrator was not required to apply the "nexus" standard,[20] I disagree. That determination is contrary to 5 U.S.C. § 7503 and Authority, Merit Systems Protection Board (MSPB), and federal court precedent.

The question of whether or not an employee's misconduct has a nexus with their federal employment, is typically more of an issue in cases that involve *off-duty* misconduct.[21] It is, nonetheless, an essential element that an agency must establish in order to prevail in any 5 U.S.C. § 7503 disciplinary action. In such cases, an agency is required to prove that the employee "actually committed the conduct" with which he is charged[22] *and* that there is a "nexus" between "the misconduct and the efficiency of the service."[23]

Federal courts[24] and the MSPB[25] have recognized, however, that certain types of conduct are so egregious that nexus is "presumed" – e.g. fighting with one's supervisor "off-duty,"[26] "deliberate deception,"[27] and fighting "on duty."[28] In those cases, the connection between the misconduct and the efficiency of the service "speaks for itself."[29] The Authority has consistently followed this precedent.[30]

For these reasons, I would conclude that the Arbitrator's award is contrary to law in two respects. If the Arbitrator is correct that "nexus to [the] federal service *was not* proven,"[31] then her award, sustaining a one-day suspension, is contrary to law because § 7503 requires a showing of a nexus between a charge of misconduct and the efficiency of the service[32] in order to sustain a disciplinary action. On the other hand, insofar as the Arbitrator found that there was no nexus between Hoy's misconduct and the efficiency of the service, her award is contrary to law because, as discussed above, any charge of fighting, whether on- or off-duty, carries a presumption of nexus with the efficiency of the service.[33]

The Authority has never before had the opportunity to address employee misconduct that occurs while an employee teleworks at an "alternate worksite."[34] In that respect, this is a case of first impression. And even though my colleagues would prefer not to address this issue, I believe it is imperative that the Authority take this opportunity to make absolutely clear that misconduct, which occurs while an employee is working at a remote telework location, should be treated no less (and no more) seriously than the conduct would be treated if it had occurred at the employee's actual worksite of record. When an employee teleworks, the alternate worksite is their post of duty, and all federal rules of comportment still apply to them even though they may not be present at their regular worksite. And, just as a teleworking employee would be considered AWOL if they decided to go shopping at the local mall during regular work hours, neither should a an agency be expected to ignore uncontested evidence that an employee fought with his wife, and spent time in jail, when he was supposedly on duty.

I agree with the Majority only insofar as they deny the Union's exceptions. I am well aware that the Agency did not except to the Arbitrator's mitigation of the suspension from three days to one. My colleagues believe that because the Agency did not see fit to file an exception that I should not comment any further on several aspects of the Arbitrator's award that are clearly erroneous. But I cannot leave the impression that I agree

[18] *AFGE, Local 1156*, The Observer, (Vol. 6, Issue 3, Sept. 2014).
[19] *Dep't of VA Med. Ctr., Kan. City, Mo.*, 67 FLRA 627, 629 (2014) (Concurring Opinion of Member Pizzella).
[20] Majority at 4.
[21] *Id.*; *NAGE, Local R1-109*, 58 FLRA 501, 504 (2003).
[22] *McClaskey v. U.S. Dep't of Energy*, 720 F.2d 583, 589 n.3 (9th Cir. 1983) (*McClaskey*) (quoting *D.E. v. Dep't of the Navy, MSPB*, 721 F.2d 1165, 1166 (9th Cir. 1983).
[23] *Id.*; *NTEU, Chapter 128*, 62 FLRA 382, 383 n.* (2008) (the same standard which "applies to more serious disciplinary actions" under 5 U.S.C. § 7513 must still be applied in cases which involve a suspension less than fourteen days under 5 U.S.C. § 7503).
[24] *McClaskey*, 720 F.2d at 589; *Parker v. U.S. Postal Serv.*, 819 F.2d 1113, 1116 (Fed. Cir. 1987); *Dominguez v. Dep't of the Air Force*, 803 F.2d 680, 682-83 (Fed. Cir. 1986) (*Dominguez*).
[25] *Wiley v. U.S. Portal Serv.*, 102 M.S.P.R. 535, 542 (2006) (*Wiley*); *Brown v. U.S. Postal Serv.*, 119 M.S.P.R. 274, slip op. at 3 (Mar. 20, 2013) (*Brown*).
[26] *Dominguez*, 803 F.2d at 683.
[27] *McClaskey*, 720 F.2d at 589
[28] *Brown*, 119 M.S.P.R. 274, slip op. at 3.
[29] *Dominguez*, 803 F.2d at 682-83 (internal quotation marks omitted).
[30] *NTEU, Chapter 128*, 62 FLRA at 383; *NAGE, Local R-1-109*, 58 FLRA at 504.
[31] Award at 41 (emphasis added).
[32] *NTEU, Chapter 128*, 62 FLRA at 384.
[33] *McClaskey*, 720 F.2d at 589; *Dominguez*, 803 F.2d at 682-83; *Wiley*, 102 M.S.P.R. at 542; *Brown*, 119 M.S.P.R. 274, slip op. at 3.
[34] Award at 11 (quoting NAVSISA Instruction 5330.4).

in any respect with the Arbitrator's decision to mitigate the penalty. The Arbitrator was simply wrong when she found that there was no "nexus" between the efficiency of the service and Hoy's fight with his wife, while on duty, and then lying to his supervisor, while on duty, about the incident.[35] In that respect, the Arbitrator ignored the Agency's telework policy, which specifically warns that an employee performing telework must "ensure that a *proper* work environment is *maintained*."[36] Fighting is not permitted at a worksite,[37] and it ought not to be condoned at a telework site either.

Contrary to my colleagues, I do not believe that my responsibility as a Member of the Authority *to comment* on an erroneous and irresponsible award depends upon whether or not a party chooses to file an exception. That practice will only establish bad precedent.

Stanley Kowalski thought he was lucky. As he said,"[l]uck is believing you're lucky . . . [t]o hold a front position in this rat-race, you've got to believe you're lucky."[38] Hoy must believe that he, too, was pretty darn lucky. Even though he was arrested by the Seattle police for his conduct, the Agency ran his three-day suspension over a weekend so that he only lost one day of pay,[39] and the Union successfully persuaded Arbitrator Kaplan that Hoy was sufficiently "forthcoming"[40] and that his three-day suspension should be reduced to a one-day suspension on his personnel record.[41] The Arbitrator even directed the Agency to change the time he spent fighting with his wife and in jail to "annual leave."[42]

The taxpayers, who pay Hoy's salary and the salaries of his AFGE representatives, are not so lucky. They get stuck paying for the vacation time that Arbitrator Kaplan awarded to Hoy for the time he spent fighting with his wife and going to jail.

Would it have been too much to expect Hoy to use his own time (perhaps . . . the night before) to tell his wife to take the clothes out of the dryer, so they could get their argument out of the way before it was time for him to start work the next morning? I doubt that Congress – by encouraging federal agencies to establish telework programs for their employees – ever expected that taxpayers would end up paying vacation time to a teleworking employee, who *was supposed to be working*, in order to fight his wife and spend time in jail.

But, this Arbitrator's award teaches Hoy nothing more than, what Kowalski's sister-in-law, Blanche DuBois (played by Vivien Leigh) learned over the years, that "realism" is overrated and that "I [can] misrepresent things. I don't tell truths. I tell what ought to be truth."[43]

Thank you.

[35] *Id.* at 41.
[36] *Id.* at 11 (emphasis added) (citing NAVSISA Instruction 5330.4).
[37] *Brown*, 119 M.S.P.R. 274, slip op. at 3.
[38] *Streetcar*.
[39] Award at 7.
[40] *Id.* at 35.
[41] *Id.* at 42.
[42] *Id.* (internal quotation marks omitted).
[43] *Streetcar*.