69 FLRA No. 1

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 2455
(Union)

0-AR-5109

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DECISION

October 8, 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 Union filed a grievance challenging the Agency's decision to suspend a U.S. Border Patrol agent (the grievant) for five days for the charge of conduct unbecoming a law-enforcement officer. Arbitrator Robert T. Simmelkjaer found that the Agency lacked just cause for the suspension, and he sustained the grievance. There are three questions before us.

The first question is whether the award is contrary to law because: (1) the Arbitrator relied on the incorrect standard of proof; or (2) the Arbitrator improperly discounted a police report related to the suspension (the police report). Because: (1) the Arbitrator did not apply the standard of proof that the Agency claims; and (2) the Arbitrator considered the police report, the answer is no.

The second question is whether the Arbitrator denied the Agency a fair hearing by disregarding the police report and the charge underlying the suspension. Because the Arbitrator considered both the police report and the charge, the answer is no.

The third question is whether the award is based on a nonfact. Because the Agency does not establish that the alleged nonfact is either clearly erroneous or central to the award, the answer is no.

II. Background and Arbitrator's Award

While the grievant was off duty and driving his privately owned vehicle, he was involved in a single-vehicle accident. The accident occurred after the grievant left a bar where he admittedly consumed alcohol. The accident caused damage to a fence, a guard rail, and a street sign. As a result of the grievant's performance of field sobriety tests administered by a police officer (the officer), the officer arrested the grievant under suspicion of driving while intoxicated (DWI). The police did not obtain the grievant's blood-alcohol content, and, ultimately, did not pursue criminal charges against the grievant.

After the grievant notified the Agency of his arrest, the Agency placed him on administrative duty, which precluded him from working administratively uncontrollable overtime (AUO). The Agency then suspended the grievant for five days for conduct unbecoming a law-enforcement officer. In its documentation of the charge, the Agency recited the contents of the police report, including the officer's description of the grievant's performance of the field sobriety tests.

The Union filed a grievance challenging the suspension, and the grievance went to arbitration.

The issues before the Arbitrator were: "(1) Whether the five[-]day suspension of [the grievant] was for just and sufficient cause and only for reasons as will promote the efficiency of the [s]ervice"; and "(2) If not, what is the appropriate remedy?"[1] Specifically, the parties asked the Arbitrator to determine whether the Agency had met its burden to show that: "(1) the charged conduct occurred[;] (2) a nexus exist[ed] between the conduct and efficiency of the service[;] and (3) the particular penalty imposed [was] reasonable."[2] In this regard, the parties agreed that, in order for the Arbitrator to uphold the Agency's action, a "preponderance" of the evidence had to support that action.[3]

"Considering the evidence in its entirety," the Arbitrator found that the Agency had not established "by a preponderance of the credible evidence" that it had just cause to discipline the grievant for conduct unbecoming of a law-enforcement officer.[4] Regarding the charged "conduct," the Arbitrator found that the Agency essentially "equate[d] the alleged conduct for which [the grievant] was arrested [with] a conviction for DWI."[5] Although the grievant admitted to drinking on the night

[1] Award at 3.
[2] *Id.* at 16 (internal quotation marks omitted) (citation omitted).
[3] *Id.* at 16, 29.
[4] *Id.* at 41.
[5] *Id.* at 42.

of the accident, the Arbitrator noted that this did not establish that the grievant's blood-alcohol level exceeded the legal limit when the accident occurred. In this regard, the parties stipulated at arbitration that the officer believed he had probable cause to arrest the grievant based on his performance of the field sobriety tests. But the parties also stipulated that this was not "in and of itself . . . conclusive evidence that [the grievant] was [guilty of DWI]."[6] Thus, the Arbitrator found "problematic the Agency's exclusive reliance on the hearsay evidence of the police report,"[7] as well as the arrest, in order to establish the grievant's misconduct.

Notwithstanding the officer's observations in the police report, the Arbitrator stated that "the legal standard requires preponderant evidence as opposed to suspicion of guilt," and he noted a lack of non-circumstantial, "objective," "documentary," or "probative testimonial" evidence of the grievant's guilt.[8] "Absent an admission of DWI by [the grievant] or an independent fact-finding investigation conducted by the Agency establishing that [the grievant] committed the crime of DWI,"[9] the Arbitrator found that the Agency "improperly inferred that [the grievant] was guilty of driving under the influence of alcohol" based solely on the police report and the grievant's arrest.[10] And, "irrespective" of the "overlay" of the charge of "conduct unbecoming [a law-enforcement officer]," the Arbitrator found that the "underlying conduct" at issue was an alleged occurrence of DWI, which the Agency had not proven.[11]

In finding that the grievant's arrest provided an insufficient basis for charging him with misconduct, the Arbitrator rejected the Agency's argument that the grievant had violated Agency "policies and guidelines" that discourage employees from engaging in "criminal, infamous, dishonest, or notoriously disgraceful conduct."[12] In this regard, the Arbitrator noted that "to the extent that violations of those policies implicate criminal conduct, the criminal standard of proof beyond a reasonable doubt for conviction becomes applicable, with the preponderance[-]of[-]the[-]evidence standard retained for adverse and disciplinary purposes."[13]

Based on the foregoing, the Arbitrator concluded that the Agency "failed to provide a preponderance of evidence that [the grievant] is guilty of DWI."[14] Consequently, the Arbitrator stated that he need not inquire into the nexus between the grievant's alleged misconduct and the efficiency of the service. Nonetheless, he found that the Agency failed to establish the required nexus.

As the Agency had failed to prove either that the grievant committed the charged misconduct or the requisite nexus between the charged conduct and the efficiency of the service, the Arbitrator found that the Agency's five-day suspension of the grievant was unreasonable. Nevertheless, because the parties presented the Arbitrator with arguments concerning the reasonableness of the penalty under *Douglas v. Veterans Administration*,[15] the Arbitrator proceeded to analyze the reasonableness of the penalty using the twelve factors set forth in that decision (the *Douglas* factors).

The Arbitrator found that many of the *Douglas* factors weighed against finding that the Agency's chosen penalty was appropriate. As relevant here, the Arbitrator found that the twelfth factor – the adequacy and effectiveness of alternative sanctions to deter such conduct in the future – weighed against the suspension. In particular, the Arbitrator found that the grievant had shown that he had "learned his lesson."[16] The Arbitrator based this conclusion, in relevant part, on his findings that the grievant: (1) made restitution to the owner of the property he damaged; (2) successfully completed a "[p]re-[t]rial [d]iversion [p]rogram"; and (3) lost $7,800 in AUO pay that he was not entitled to recover.[17] Considering the *Douglas* factors "in the aggregate," the Arbitrator concluded that the five-day suspension was "excessive and inappropriate."[18]

Based on the foregoing, the Arbitrator sustained the grievance. The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions.

[6] *Id.* at 47 (internal quotation mark omitted).
[7] *Id.* at 43.
[8] *Id.* at 44.
[9] *Id.*
[10] *Id.* at 42.
[11] *Id.* at 45.
[12] *Id.* at 46 (internal quotation mark omitted).
[13] *Id.*
[14] *Id.* at 43.
[15] 5 M.S.P.R. 280 (1981).
[16] Award at 56.
[17] *Id.*
[18] *Id.* at 55.

III. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law in two respects.[19] In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo.[20] In applying a de novo standard of review, the Authority assesses whether the Arbitrator's legal conclusions are consistent with the applicable standard of law.[21] Under this standard, the Authority defers to the Arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[22]

When evaluating exceptions to an arbitration award, the Authority considers the award and the record as a whole.[23] That is, the Authority interprets the language of an award in context.[24] Additionally, the Authority has long held that disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, provides no basis for finding an award deficient.[25] And the Authority has held that exceptions based on misunderstandings of an arbitrator's award do not demonstrate that the award is contrary to law.[26]

1. The Arbitrator did not rely on the incorrect standard of proof.

The Agency argues that the award is contrary to law because the Arbitrator applied an incorrect standard of proof.[27] At arbitration, the parties agreed that the Agency's action must be supported by a "preponderance" of the evidence in order to be upheld by the Arbitrator.[28] The Arbitrator found that the Agency failed to meet this burden with respect to the charged misconduct because the Agency "equate[d] the alleged conduct for which [the grievant] was arrested [with] a conviction for DWI."[29] The Agency argues that, in so finding, the Arbitrator incorrectly required the Agency to prove that the grievant was guilty of DWI under the standard of proof used in the criminal context, i.e., "beyond a reasonable doubt."[30]

In arguing that the Arbitrator was required to apply the preponderance-of-the-evidence standard, the Agency argues that, in arbitrations concerning disciplinary actions, arbitrators must apply the same substantive standards that the Merit Systems Protection Board (MSPB) would apply.[31] But the Authority has repeatedly clarified that where, as here, an arbitrator is considering a suspension of fourteen days or less, the arbitrator is not required to apply the legal principles established by the MSPB and the Federal Circuit for review of adverse actions under 5 U.S.C. § 7703.[32] In this regard, the Authority has stated that "a claim that an arbitrator failed to apply or misapplied . . . a preponderance burden . . . in a case involving a suspension of fourteen days or less will not establish that an award is deficient."[33]

However, the Authority has also held that "[i]f 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."[34] Here, as discussed above, the parties agreed at arbitration that the Arbitrator would apply the preponderance-of-the-evidence standard.[35] Even assuming that the Agency can challenge the Arbitrator's application of that standard on contrary-to-law grounds,[36] the Agency's argument is premised on its allegation that the Arbitrator actually applied the beyond-a-reasonable-doubt standard. As discussed further below, this allegation is unsupported by the award, so we deny this exception.[37]

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[19] Exceptions at 12.
[20] *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)).
[21] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[22] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012) (*IRS*)).
[23] *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, Red River, Texarkana, Tex.*, 67 FLRA 609, 611 (2014) (*DOD*).
[24] *Id.*
[25] *IRS*, 67 FLRA at 103.
[26] *U.S. DHS, CBP*, 68 FLRA 157, 162 (2015) (citing *SPORT Air Traffic Controllers Org.*, 66 FLRA 552, 554 (2012)).
[27] Exceptions at 12.
[28] Award at 16, 29; Exceptions at 14.
[29] Award at 42.
[30] Exceptions at 16 (internal quotation marks omitted).
[31] *Id.* at 12 (citing *Cornelius v. Nutt*, 472 U.S. 648, 660 (1985)).
[32] *E.g., AFGE, Local 12*, 66 FLRA 750, 751 (2012); *AFGE, Local 522*, 66 FLRA 560, 563 (2012) (*Local 522*).
[33] *Local 522*, 66 FLRA at 563 (citations omitted).
[34] *AFGE, Local 3911*, 66 FLRA 59, 61 (2011) (citing *AFGE, Local 3310*, 65 FLRA 437, 441 (2011)).
[35] *See* Award at 16, 29; Exceptions at 14.
[36] *Cf. AFGE, Local 2250*, 52 FLRA 320, 323-24 (1996) ("If a standard of proof is set forth in law, rule, regulation, *or a collective[-]bargaining agreement*, an arbitrator's failure to apply the prescribed standard will constitute a basis for finding the award deficient as contrary to law, rule, regulations, *or as failing to draw its essence from the agreement.*" (emphasis added)).
[37] *See, e.g., Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1008-09 (2015) (citing *U.S. Dep't of Transp., FAA, Wash., D.C.*, 65 FLRA 950, 955 n.2 (2011)) (denying exceptions based on faulty premise).

In his award, the Arbitrator repeatedly referred to the Agency's burden of proof as being the "preponderance[-]of[-]the[-]evidence" standard.[38] For example, the Arbitrator began his analysis by stating that the Agency had not established "by a preponderance of the credible evidence" that it had just cause to discipline the grievant for conduct unbecoming of a law-enforcement officer.[39] And, in his analysis, the Arbitrator noted the lack of non-circumstantial, "objective," "documentary," or "probative testimonial" evidence of the grievant's guilt.[40] In this regard, the Arbitrator stated that the grievant may have consumed alcohol and driven without a blood-alcohol level that exceeded the legal limit.[41] And the Arbitrator noted the parties' stipulation that the officer's decision to arrest the grievant based on his performance of the field sobriety tests was not "in and of itself . . . conclusive evidence that [the grievant] was [guilty of DWI]."[42] Ultimately, the Arbitrator concluded that the Agency "failed to provide a preponderance of evidence that [the grievant] is guilty of DWI."[43]

In his discussion of Agency "policies and guidelines" that discourage employees from engaging in criminal conduct, the Arbitrator noted that "to the extent that violations of those policies implicate criminal conduct, the criminal standard of proof beyond a reasonable doubt for conviction becomes applicable, with the preponderance[-]of[-]the[-] evidence standard retained for adverse actions and disciplinary purposes."[44] However, the context of this statement, and a review of the award as a whole, make clear that the Arbitrator did not require the Agency to prove that the grievant was guilty of DWI beyond a reasonable doubt.[45] Rather, the Arbitrator found that the Agency's evidence was insufficient under the agreed-upon evidentiary standard because "the legal standard requires preponderant evidence as opposed to suspicion of guilt."[46]

Based on the foregoing, the Agency has not demonstrated that the Arbitrator required it to prove the grievant's misconduct "beyond a reasonable doubt."[47] Accordingly, the Agency's argument is based on a misunderstanding of the award and, therefore, provides no basis for finding the award contrary to law in this respect.

2. The Arbitrator did not improperly discount the police report.

The Agency also argues that the award is contrary to law because the Arbitrator "discounted" the police report as hearsay,[48] thereby "incorrectly disregard[ing] stipulated facts contained in the police report."[49] However, the Agency does not establish, and the award does not reflect, that the Arbitrator "discounted" the police report.[50] Although the Arbitrator characterized "the Agency's exclusive reliance on the hearsay evidence of the police report" as "problematic,"[51] he did not exclude the police report as inadmissible.

Moreover, rather than "disregard[ing]" the parties' stipulations concerning the police report,[52] the Arbitrator noted them in his analysis.[53] For example, he noted the parties' stipulation that the officer believed he had probable cause to arrest the grievant based on his performance of the field sobriety tests, and the related stipulation that this was not "in and of itself . . . conclusive evidence that [the grievant] was [guilty of DWI]."[54] Ultimately, the Arbitrator concluded that the police report and the arrest, without more, were insufficient to sustain the Agency's evidentiary burden concerning the grievant's alleged misconduct. But this conclusion does not demonstrate that the Arbitrator "discounted" the police report.[55] As the Agency merely disagrees with the evidentiary value that the Arbitrator assigned to the police report, this argument does not provide a basis for finding the award contrary to law.[56] Accordingly, we deny this exception.

[38] Award at 29, 42, 43, 46; *see also id.* at 16, 41, 44.
[39] *Id.* at 41.
[40] *Id.* at 44.
[41] *See id.* at 44, 52.
[42] *Id.* at 47 (internal quotation mark omitted).
[43] *Id.* at 43.
[44] *Id.* at 46.
[45] *See DOD*, 67 FLRA at 611 (Authority considers an arbitration award and record "as a whole" and "interprets the language of an award in context").
[46] Award at 44.
[47] Exceptions at 16 (internal quotation marks omitted).
[48] *Id.* at 12.
[49] *Id.* at 19.
[50] *Id.* at 12.
[51] Award at 43.
[52] Exceptions at 19.
[53] *See* Award at 42, 47.
[54] *Id.* at 47 (internal quotation mark omitted).
[55] Exceptions at 12.
[56] *See IRS*, 67 FLRA at 103.

B. The Arbitrator did not deny the Agency a fair hearing.

The Agency argues that the Arbitrator denied it a fair hearing by refusing to consider the police report,[57] and by "disregarding" the specific charge underlying the discipline – conduct unbecoming a law-enforcement officer.[58] An arbitrator denies a party a fair hearing when the arbitrator refuses to hear or consider pertinent and material evidence, or conducts the proceedings in a manner that so prejudices the party as to affect the fairness of the proceedings as a whole.[59] As discussed above, disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient.[60]

The Agency argues that, "[b]y disregarding the police report altogether," the Arbitrator "completely disregarded management's authority to discipline its own employees."[61] But, as discussed above, the Arbitrator did not "disregard[] the police report altogether."[62] Instead, in his factual findings, the Arbitrator repeatedly relied on the officer's observations as documented in the police report.[63] Rather than demonstrating that the Arbitrator refused to consider the police report, the Agency's exception essentially challenges the weight that the Arbitrator accorded it. This does not provide a basis for finding the award deficient on the basis of an unfair hearing.[64]

Similarly, the Agency argues that the Arbitrator denied the Agency a fair hearing by "disregarding the actual charge – conduct unbecoming [a law-enforcement officer]."[65] But the Arbitrator did not "disregard[]" the charge.[66] Rather, he found that the police report and the arrest were insufficient, standing alone, to support the charge.[67] In this regard, the Arbitrator found that "irrespective" of the "overlay" of the charge of "conduct unbecoming [a law-enforcement officer]," the "underlying conduct" at issue was an alleged occurrence of DWI, which the Agency had not proven.[68] Accordingly, the Agency has not shown that the Arbitrator "disregard[ed] the . . . charge,"[69] and its argument provides no basis for finding that the Arbitrator denied the Agency a fair hearing.

C. The award is not based on a nonfact.

The Agency argues that the award is based on a nonfact.[70] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[71]

As part of his discussion of the twelfth *Douglas* factor, the Arbitrator found that the grievant: (1) made restitution to the owner of the property he damaged; (2) successfully completed a "[p]re-[t]rial [d]iversion [p]rogram"; and (3) lost $7,800 in AUO pay that he was not entitled to recover.[72] The Agency alleges that the award is based on a nonfact "inasmuch as the Arbitrator erroneously relied on the [g]rievant's assertion that he 'lost' AUO" pay.[73] The Agency acknowledges that "[the grievant] did not receive $7,800 in AUO" because the Agency placed him on administrative duty.[74] However, the Agency argues that because the grievant had no contractual entitlement to AUO,[75] the Arbitrator "inappropriately relied" on the "nonfact" of the grievant's "loss" of AUO as "a basis to overturn the disciplinary action."[76]

As the Agency concedes that the grievant "did not receive $7,800 in AUO" pay because the Agency placed him on administrative duty,[77] the Agency does not explain how the alleged nonfact is clearly erroneous. In any event, however, neither the loss of AUO pay nor the Arbitrator's related finding concerning the unreasonableness of the Agency's penalty under the *Douglas* factors was dispositive of the Arbitrator's decision to sustain the grievance. In this regard, the Arbitrator first found that the Agency failed to prove, by a preponderance of the evidence, that the grievant committed the charged misconduct.[78] Despite stating that this finding provided a sufficient basis for sustaining the grievance,[79] the Arbitrator also went on to find that the Agency failed to establish the requisite nexus between the alleged misconduct and the efficiency of the service.[80]

[57] Exceptions at 21.
[58] *Id.* at 22.
[59] *AFGE, Local 1668*, 50 FLRA 124, 126 (1995).
[60] *IRS*, 67 FLRA at 103.
[61] Exceptions at 22.
[62] *Id.*
[63] Award at 7-10.
[64] *See IRS*, 67 FLRA at 103.
[65] Exceptions at 22.
[66] *Id.*
[67] Award at 41-45.
[68] *Id.* at 45.
[69] Exceptions at 22.
[70] *Id.* at 19.
[71] *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993).
[72] Award at 56.
[73] Exceptions at 19.
[74] *Id.*
[75] *Id.* at 20.
[76] *Id.* at 21.
[77] *Id.* at 19.
[78] Award at 41-45.
[79] *See id.* at 48-49.
[80] *Id.* at 41, 47-50.

And, again, although the Arbitrator could have stopped here, the Arbitrator proceeded to evaluate the reasonableness of the Agency's prescribed penalty.[81] As relevant here, the Arbitrator briefly noted the grievant's "loss" of AUO pay as one part of one factor in his discussion of the twelve *Douglas* factors.[82] But this falls far short of demonstrating that the grievant's "loss" of AUO pay is a central factual finding but for which the Arbitrator would have reached a different result.[83] Accordingly, we deny the Agency's nonfact exception.

IV. Decision

We deny the Agency's exceptions.

[81] *Id.* at 50-56.
[82] *Id.* at 56.
[83] *Id.*