69 FLRA No. 43

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2923
(Union)

and

UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
NATIONAL INSTITUTE OF ENVIRONMENTAL
HEALTH SCIENCES
NATIONAL INSTITUTES OF HEALTH
RESEARCH TRIANGLE PARK, NORTH CAROLINA
(Agency)

0-AR-5141

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DECISION

April 11, 2016

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

I. Statement of the Case

Arbitrator James E. Rimmel issued an award upholding the Agency's decision to suspend the grievant for three days for failing to follow the instructions of her supervisor. We must decide six substantive questions.

First, we must decide whether the award fails to draw its essence from the parties' collective-bargaining agreement. Because the Union's argument claims that the Arbitrator failed to consider material evidence, and not that the Arbitrator misinterpreted the parties' agreement, the answer to this question is no.

Second, we must decide whether the award is contrary to an internal Agency policy because the Agency failed to conduct an investigation before suspending the grievant. Because the Union provides no basis for finding that the Agency's actions violated its human-resources manual, the answer to this question is no.

Third, we must decide whether the award is contrary to law because the Arbitrator did not find that the Agency's failure to conduct an investigation constituted "harmful error" under 5 U.S.C. § 7701(c)(2).[1] Because arbitrators are bound by the harmful-error rule set forth in § 7701 only when resolving grievances covered by 5 U.S.C. § 4303 or serious adverse actions covered by 5 U.S.C. § 7512, the answer to this question is no.

Fourth, we must decide whether the award is contrary to law because the Agency violated the grievant's constitutional right to due process by failing to provide the grievant with all of the available information related to her suspension. Because the Union has not shown that the new information obtained during *ex parte* communications between the Agency official who decided to suspend the grievant (the deciding official) and Agency human-resources employees was material information, the answer to this question is no.

Fifth, we must determine whether the award is based on a nonfact because the Arbitrator found that the grievant had scheduled certain meetings without first seeking her supervisor's approval. Because this matter was disputed by the parties below, and the Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration, the answer to this question is no.

Sixth, we must determine whether the Arbitrator denied the Union a fair hearing because the Arbitrator refused to hear evidence concerning whether the deciding official was the subject of a separate grievance filed previously by the grievant. Because the Union could have raised, but did not raise, these fair-hearing concerns at the arbitration hearing, and issues regarding the conduct of an arbitrator must be raised at the hearing, the answer to this question is no.

II. Background and Arbitrator's Award

The grievant is a contracting specialist with the Agency who frequently schedules meetings with Agency customers. Upon joining the Agency, the grievant's supervisor (the supervisor) informed her employees that she was instituting a new office policy under which she would attend all future meetings between her staff and Agency customers. As such, the supervisor instructed her employees to "confirm her availability prior to scheduling meetings" in order to ensure that she would be able to attend.[2]

Shortly after the supervisor announced this policy, the grievant emailed her supervisor regarding two meetings which the grievant had scheduled with a customer for later that week. In the same email, the

[1] Exceptions at 9.
[2] Award at 7 (quoting the deciding official's decision letter).

grievant also noted that she planned to have "several meetings" with that customer the following week.[3] The grievant did not first confirm her supervisor's availability to attend those meetings as she had been instructed by her supervisor. As such, the Agency suspended the grievant for three days for her failure to follow her supervisor's instructions. The Union filed a grievance, which was unresolved, and the parties proceeded to arbitration.

At arbitration, the Union argued that the grievant did not actually "schedule" any of the meetings at issue, but was merely suggesting the proposed times to her supervisor in order to check the supervisor's availability.[4] The Union also argued that the deciding official failed to conduct an investigation into the matter, thus denying the grievant of her right to due process. Additionally, the Union noted that the grievant had filed complaints with the U.S. Equal Employment Opportunity Commission (EEO complaints) against both her first- and second-line supervisors, and alleged that the Agency suspended her in retaliation for filing these complaints. The Union also noted that the grievant had previously filed a grievance against the deciding official and asserted that the deciding official acted with a retaliatory motive in deciding to suspend her.

The Arbitrator framed the issue as whether "the Agency ha[d] just cause to mete out . . . the . . . three-day suspension."[5] The Arbitrator found that the grievant's email to her supervisor clearly indicated that the grievant had already scheduled the meetings at issue and that the email exchange between the grievant and her supervisor "belie[d] [the] grievant's claims" that she never finalized the meetings.[6] The Arbitrator also found that the deciding official conducted a reasonable investigation and that the Agency did not deprive the grievant of her due process rights. Accordingly, the Arbitrator denied the grievance and upheld the grievant's three-day suspension.

The Union filed exceptions to the Arbitrator's award. The Agency did not file an opposition.

[3] *Id*. at 13.
[4] *Id*. at 15.
[5] *Id*. at 21.
[6] *Id*. at 22-24.

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

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.[7]

In its exceptions, the Union raises four arguments that it could have raised, but did not raise, before the Arbitrator. First, the Union argues that the award is contrary to 5 U.S.C. § 2302(b)(9)(A), which makes it illegal to take any personnel action against an employee because of the exercise of any appeal, complaint, or grievance right granted by law.[8] Second, the Union alleges that the award is contrary to Section 501 of the Rehabilitation Act of 1973,[9] which prohibits employment discrimination against individuals with disabilities.[10] Third, the Union alleges that the temporal proximity of the Agency's disciplinary action to her filing of the EEO complaints establishes a prima facie case of discrimination under § 7116(a)(2) of the Federal Service Labor-Management Relations Statute,[11] which makes it an unfair labor practice to discourage membership in any labor organization through discrimination.[12] However, the Union does not demonstrate that it raised these arguments before the Arbitrator, nor is there any explanation as to why the Union could not have done so.[13] Accordingly, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations[14] bar these exceptions.

Fourth, the Union argues that the award is contrary to "the anti-retaliation provision" of Title VII of the Civil Rights Act of 1964 (Title VII).[15] The Union claims in its exceptions that the parties' agreement incorporates Title VII,[16] and that it "clearly assert[ed]" in its grievance that the Agency "retaliate[d]" against the grievant in violation of "Articles [of the parties' agreement] regarding EEO rights."[17] However, the Authority has previously found that a sweeping invocation of a body of law or regulations,

[7] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also AFGE, Local 3571*, 67 FLRA 218, 219 (2014).
[8] Exceptions at 6 (citing "5 CFR § 2302 (9)(A)").
[9] 29 U.S.C. § 791.
[10] Exceptions at 6 (citing 29 U.S.C. § 791).
[11] 5 U.S.C. § 7116(a)(2).
[12] Exceptions at 7.
[13] *See generally id.* Attachs. 2, Grievance (Grievance), and 5, Union's Post-Hr'g Br. (Union's Brief).
[14] 5 C.F.R. §§ 2425.4(c), 2429.5.
[15] Exceptions at 6-8 (citing 42 U.S.C. § 2000e-3).
[16] *Id*. at 3.
[17] *Id*. at 6 (quoting Grievance at 2).

without any further reference to specific rules or provisions, is "too general to sufficiently preserve . . . claims" on appeal to the Authority.[18] Consistent with this principle, the Union's singular mention of "EEO rights"[19] provisions contained within the parties' agreement is "too general"[20] to preserve the Union's claim that the Agency violated Title VII. Moreover, although the Union argued before the Arbitrator that the Agency acted under an improper retaliatory motive,[21] the Union provides no evidence that it claimed that the Agency's alleged retaliation violated Title VII. For these reasons, the Union has not demonstrated that, before the Arbitrator, it sufficiently raised a claim that the Agency violated Title VII. Because it could have done so, but did not, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations[22] bar this exception.[23]

IV. Analysis and Conclusions

A. The award does not fail to draw its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from the parties' agreement.[24] When 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.[25] Under this standard, the appealing party must establish 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.[26] 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."[27]

Here, the Union contends that Article III, Section 1 of the parties' agreement incorporates Title VII.[28] The Union notes that both the grievant's first- and second-line supervisors were subjects of pending EEO complaints filed by the grievant but claims that the Arbitrator refused to consider any testimony, or other evidence, regarding these EEO complaints.[29] The Union also notes that, a year prior to the grievant being suspended, it filed a grievance against the deciding official on behalf of the grievant (the 2013 grievance), but the Arbitrator did not allow any evidence regarding the 2013 grievance.[30] The Union claims that had the Arbitrator allowed such evidence, the Union would have been able to show that the grievant's suspension was in retaliation for filing the EEO complaints against her first- and second-line supervisors and the 2013 grievance.[31] Consequently, because Title VII is incorporated into the parties' agreement, the Union argues that the award fails to draw its essence from the parties' agreement.[32]

However, a claim that an arbitrator refused to hear or consider pertinent evidence is an argument that the arbitrator denied the excepting party a fair hearing.[33] The Union does not argue that the Arbitrator incorrectly interpreted Article III, Section 1 of the parties' agreement. Rather, the Union argues that the Arbitrator failed to consider the evidence that would have implicated Article III, Section 1 of the parties' agreement.[34] As such, the Union does not demonstrate that the Arbitrator erred in interpreting the parties' agreement, or that the award fails to draw its essence from the parties' agreement.

Because the Union does not establish that the Arbitrator's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, we deny the Union's essence exception.

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[18] *SSA, Fredericksburg Dist. Office*, 65 FLRA 946, 948 (2011) (*SSA, Fredericksburg*) (citing *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 61 FLRA 366, 369 (2005)).
[19] Award at 6 (quoting Grievance at 2).
[20] *SSA, Fredericksburg*, 65 FLRA at 948.
[21] *See* Award at 26; Union's Brief at 25-27.
[22] 5 C.F.R. §§ 2425.4(c), 2429.5.
[23] Member DuBester notes that he would assume, without deciding, that the Union sufficiently raised its Title VII claim before the Arbitrator, and that the *SSA, Fredericksburg* decision cited by the majority is distinguishable. However, Member DuBester would deny the Union's contrary-to-law exception based on Title VII because the Union's retaliation claim is not supported by the Arbitrator's factual findings.
[24] Exceptions at 2-4.
[25] *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[26] *U.S. DOD, Def. Contract Audit Agency, Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*DOL*)).
[27] *Id.* (quoting *DOL*, 34 FLRA at 576).
[28] Exceptions at 2-3.
[29] *Id.* at 3.
[30] *Id.* at 4.
[31] *Id.* at 3-4.
[32] *Id.* at 3.
[33] *See AFGE, Local 2152*, 69 FLRA 149, 152 (2015) (*Local 2152*) (citing *AFGE, Local 1668*, 50 FLRA 124, 126 (1995) (*Local 1668*)).
[34] Exceptions at 3-4.

B. The award is not contrary to law.

The Union argues that the award is contrary to law.[35] 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.[36] 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.[37] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[38]

The Union advances several arguments as to why the award is contrary to law. First, the Union claims that the Agency violated its own human-resources manual because it failed to conduct an investigation into the grievant's misconduct before disciplining her.[39] In particular, the Union asserts that the Agency failed to "question anyone" or perform "[a] simple check on basic facts" of the case.[40] The Union thus claims that the Arbitrator erred when he failed to find that the Agency violated its internal policies.[41]

However, the Union provides no basis for finding that the Agency's actions violated its human-resources manual. Although the Agency's human-resources manual states that the Agency must "[p]romptly investigat[e] and document[] circumstances related to incidents of employee misconduct,"[42] it does not require that the Agency's investigation take a particular form. The Union does not demonstrate how the Agency's actions – as described by the Arbitrator in his award[43] – failed to satisfy the plain terms of the human-resources manual. Accordingly, the Union has not demonstrated that the award is contrary to law, rule, or regulation in this regard.

Similarly, the Union argues that the Agency's failure to conduct an investigation is a violation of 5 U.S.C. § 7701(c)(2),[44] which prohibits adverse actions in which the affected employee can demonstrate "harmful error in the application of the agency's procedures in arriving at such a decision."[45] However, the Authority has previously held that arbitrators "are bound by the harmful-error rule set forth in 5 U.S.C. § 7701(c)(2)(A) 'only when they . . . resolv[e] grievances . . . covered by 5 U.S.C. § 4303 or serious adverse actions covered by 5 U.S.C. § 7512.'"[46] This case involves only a three-day suspension, which is not covered by either §§ 4303 or 7512.[47] Accordingly, as 5 U.S.C. § 7701(c)(2) does not apply to this case, the Union has not demonstrated that the award is contrary to law in this respect.[48]

Next, the Union argues that the award conflicts with the grievant's constitutional right to due process in two respects. First, the Union claims that the Arbitrator incorrectly concluded that the grievant had scheduled the meetings in dispute.[49] According to the Union, "[s]ince the [g]rievant did not commit a violation[,] then her discipline is a contravention of the U.S. Constitution."[50] The Union further argues that "[b]y sustaining the disciplinary action[,] the Arbitrator has violated the guarantee of due process."[51] However, constitutional due process, insofar as it relates to disciplinary actions taken by federal agencies against civil-service employees, concerns only whether the disciplining agency offered a grievant notice of the proposed adverse action and an opportunity to respond.[52] It does not concern whether or not an arbitrator committed factual errors in arriving at the conclusions in his award.[53] Accordingly, the Union does not provide a basis for finding that the award is contrary to law in this respect.

Second, the Union argues that the Agency failed to provide the grievant with notice of her proposed suspension and an opportunity to respond.[54] The Union asserts that due process requirements are not satisfied "if

[35] *Id.* at 4-10.
[36] *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (*Local 3506*) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)); *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994) (citing 5 U.S.C. § 7122(a)(1)).
[37] *Local 3506*, 65 FLRA at 123 (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[38] *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (*Naval Station Honolulu*) (citation omitted).
[39] Exceptions at 4.
[40] *Id.*
[41] *Id.* at 4-5.
[42] *Id.* Attach. 6 at 7.
[43] *See* Award at 25-26.
[44] Exceptions at 5-6.
[45] 5 U.S.C. § 7701(c)(2)(A).
[46] *NFFE, Local 1658*, 55 FLRA 668, 671 (1999) (quoting *AFGE, Local 2142*, 52 FLRA 739, 746 (1996)).
[47] *See* 5 U.S.C. §§ 4303, 7512.
[48] Similarly, the Union cites 5 U.S.C. § 7512, 5 C.F.R. § 752.404(b)(1), and related case law, to argue that the Agency committed harmful procedural error. Exceptions at 9-10. However, because this case does not involve a serious adverse action, these provisions do not apply. *See* 5 U.S.C. § 7512; 5 C.F.R. § 752.404.
[49] Exceptions at 5.
[50] *Id.*
[51] *Id.*
[52] *See, e.g., U.S. DOL*, 68 FLRA 927, 929 (2015) (citing 5 U.S.C §§ 4303, 7513); *AFGE, Local 12*, 67 FLRA 387, 389-90 (2014); *SSA, Balt., Md.*, 64 FLRA 516, 518 (2010) (citing *AFGE, Local 1151*, 54 FLRA 20, 26-27 (1998)).
[53] *AFGE, Local 522*, 66 FLRA 560, 563 (2012).
[54] Exceptions at 8-10.

the employee has notice only of certain charges or portions of the evidence, and the deciding official considers new and material information."[55] According to the Union, the deciding official contacted human-resources employees within the Agency to inquire about punishments that had been issued in other disciplinary actions, but failed to share what he learned with the grievant.[56] The Union asserts that these *ex parte* communications between the deciding official and Agency employees constitute "unknown and questionable evidence" and violate the grievant's right to proper "notice."[57] In support of this argument, the Union cites *Stone v. FDIC*, a case in which *ex parte* communications between the agency's proposing and deciding officials were found to violate a terminated federal employee's due process rights.[58]

Even assuming, without deciding, that the precedent that the Union relies on applies in this case,[59] the Union has not demonstrated that the Agency deprived the grievant of due process. The court in *Stone* found that "[o]nly *ex parte* communications that introduce new and *material* information to the deciding official will violate the due process guarantee of notice."[60] The Union does not cite any authority for the proposition that a deciding official's conversation with human-resources employees to confirm that discipline is consistent with the discipline of other employees is the type of "material" *ex parte* communication that deprives an employee of constitutional due process.[61] This is especially true where, as is the case here, the deciding official then decides to *mitigate* the penalty that was initially proposed.[62] Accordingly, the Union has failed to demonstrate that the award is contrary to law in this regard.

We therefore deny the Union's exception that the award is contrary to law.

C. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact.[63] 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.[64] The Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[65]

The Union alleges that the Arbitrator based the award on the nonfact that the grievant "did not confirm her supervisor's availability before scheduling a meeting."[66] According to the Union, the grievant, in her email to her supervisor, was merely confirming whether or not her supervisor was available for certain proposed meeting dates that had not yet been scheduled.[67] The Union also alleges that "[n]o meeting was scheduled or cancelled," and the Agency "offered no evidence that these meetings appeared on the master calendar, that an Outlook invite was sent, or that any such meetings were actually cancelled."[68] As such, the Union claims that the grievant never disobeyed the instruction that she was required confirm her supervisor's availability before scheduling a meeting, because she never actually scheduled a meeting.[69]

However, this factual matter was disputed extensively by the parties at arbitration.[70] As stated above, the Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[71] Accordingly, the Union has not demonstrated that the award is deficient on this particular basis, and we deny this exception.

[55] *Id.* at 8 (citing *Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir. 1999)).
[56] *Id.*
[57] *Id.*
[58] 179 F.3d at 1376-78.
[59] *See, e.g., AFGE, Local 1897*, 67 FLRA 239, 242 (2014) (finding it unnecessary to decide whether *Stone* applied).
[60] *Stone*, 179 F.3d at 1377 (emphasis added).
[61] *Id.*
[62] Award at 9 (citing the deciding official's decision letter).
[63] Exceptions at 10-11.
[64] *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).
[65] *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 628 (2012) (*Laredo*) (citing *NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009)).
[66] Exceptions at 11.
[67] *Id.* at 10-11.
[68] *Id.* at 11.
[69] *Id.* at 10.
[70] *See* Award at 10-11, 13-14.
[71] *Laredo*, 66 FLRA at 628.

D. The Arbitrator did not deny the Union a fair hearing.

The Union argues that the Arbitrator denied it a fair hearing.[72] The Authority will find an award deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.[73] An arbitrator's limitation on the submission of evidence does not, by itself, demonstrate that the arbitrator failed to provide a fair hearing.[74]

The Union argues that the Arbitrator denied it a fair hearing because he refused to allow evidence showing that the deciding official was involved in the 2013 grievance.[75] According to the Union, if the Arbitrator had allowed such evidence, "he would have determined that [the deciding official] . . . lied under oath during the hearing," and that the deciding official's decision to suspend the grievant was in retaliation to her filing the 2013 grievance.[76]

However, the Union does not demonstrate that it objected during the hearing to the Arbitrator's conduct at the hearing that the Union challenges.[77] Absent extraordinary circumstances, issues involving arbitrator conduct at the hearing should be raised at the hearing.[78] When they could have been, but were not raised before the arbitrator, such issues will not be considered for the first time on review of an award unless extraordinary circumstances are present.[79]

The Union noted in its post-hearing brief that the Arbitrator disallowed several lines of questioning regarding the 2013 grievance.[80] However, the Union provided with its exceptions only selected pages of the transcript, and neither those pages, nor any other evidence the Union provides, demonstrate that the Union objected before the Arbitrator regarding the decision to exclude that evidence.[81] As such, the Union did not sufficiently raise a fair hearing concern before the Arbitrator.

As the Union neither explains why it could not have raised these concerns before the Arbitrator, nor demonstrates the existence of any extraordinary circumstances that would justify considering such concerns for the first time before the Authority, we deny this exception.

V. Decision

We dismiss, in part, and deny, in part, the Union's exceptions.

[72] Exceptions at 11-12.
[73] *Local 2152*, 69 FLRA at 152 (citing *Local 1668*, 50 FLRA at 126).
[74] *U.S. Dep't of VA*, 60 FLRA 479, 481 (2004) (citing *U.S. Dep't of the Navy, Phila. Naval Shipyard*, 41 FLRA 535, 541 (1991)).
[75] Exceptions at 12.
[76] *Id*.
[77] *See generally*, Attach. 4, Hr'g Tr. (Transcript), & Union's Brief.
[78] *U.S. DHS, U.S. CBP*, 66 FLRA 409, 411 (2011) (*CBP*) (citing *Bremerton Metal Trades Council*, 59 FLRA 583, 588 (2004) (*Bremerton*)); *AFGE, Local 3979, Council of Prisons Locals*, 61 FLRA 810, 814 n.5 (2006) (citing *Bremerton*, 59 FLRA at 588).
[79] *CBP*, 66 FLRA at 411 (citing *Bremerton*, 59 FLRA at 588).
[80] Union's Brief at 13.
[81] *See* Transcript.