

70 FLRA No. 117

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
FEDERAL EMERGENCY MANAGEMENT AGENCY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 4060
(Union)

0-AR-5273

DECISION

May 14, 2018

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

Arbitrator Kenneth E. Moffett found that the grievant disobeyed her supervisor's orders, but that the Agency's decision to place a letter of reprimand (reprimand) in her file for three years was "a bit harsh."¹ As a remedy, the Arbitrator ordered the Agency to remove the reprimand from the grievant's personnel file.

The main question before us is whether the Arbitrator exceeded his authority when he failed to resolve the issue submitted to arbitration. Because the Arbitrator failed to resolve the issue submitted to arbitration, the answer is yes. Accordingly, we set aside the award and remand the matter to the parties for resubmission to the Arbitrator, absent settlement, to resolve the agreed-upon issue.

II. Background and Arbitrator's Award

In December of 2015, the Agency issued a reprimand to the grievant as a result of her repeated failures to relocate to a designated workstation over a three-day period. The Union filed a grievance challenging the reprimand. The grievance was unresolved and the parties submitted the matter to arbitration.

Before the Arbitrator, the Agency initially stated that the issue to be resolved was whether the reprimand was warranted.² The Union did not object, but added that the Arbitrator should consider whether the issuance of the reprimand violated Articles 11 and 14 of the parties' collective-bargaining agreement (agreement).³ The Agency representative then agreed to "tack on" the Union's issue to the Agency's statement.⁴ As such, the Arbitrator stated the agreed-upon issue as: "whether the Agency violated Article[s] 11 and 14 of the [agreement] when it issued [the grievant] an official reprimand . . . pursuant to FEMA manual I3310.1, Disciplinary/Adverse Actions Procedures."⁵

In February of 2017, the Arbitrator issued his award and found that the grievant's supervisors ordered the grievant to move to her designated workstation on three separate occasions before she complied. The Arbitrator found that the grievant disobeyed the orders. However, the Arbitrator also found that the Agency's decision to place the reprimand in her personnel file for three years was "a bit harsh."⁶

The Arbitrator then found that since the grievant had a clean record prior to the workstation incident and she did not have any further discipline following this incident, the sixteen-month period that the reprimand had been in her personnel file was "sufficient punishment."⁷ The Arbitrator concluded that the grievance was "neither sustained nor rejected,"⁸ and ordered the Agency to remove the reprimand from the grievant's personnel file.

The Agency filed exceptions to the award in March of 2017. No opposition was filed.⁹

III. Analysis and Conclusion

The Agency argues that the Arbitrator exceeded his authority when he failed to resolve the issue submitted to arbitration.¹⁰

² Exceptions, Attach. 3, Tr. at 6-7.

³ *Id.*

⁴ *Id.*

⁵ Award at 2.

⁶ *Id.* at 7.

⁷ *Id.* at 9.

⁸ *Id.*

⁹ We note that the Union did not file an opposition under 5 C.F.R. § 2425.3. The opposition could have shed considerable light on the grievance and arbitration proceeding. We would take this opportunity to encourage the labor-management relations community to exercise its statutory right to file oppositions under 5 C.F.R. § 2425.3, so that the Authority may gain a deeper understanding of the issues that arise from arbitration proceedings and ultimately make decisions that promote a more effective and efficient government.

¹ Award at 7.

As relevant here, an arbitrator exceeds his or her authority when the arbitrator fails to resolve the issue submitted to arbitration.¹¹ Here, the Arbitrator stated the agreed-upon issue as: “whether the Agency violated Article[s] 11 and 14 of the [agreement] when it issued [the grievant] an official reprimand.”¹² But in the award, the Arbitrator did not make any findings about, interpret, or even mention Articles 11 or 14 of the agreement. As a result, the Arbitrator failed to resolve the issue submitted to arbitration.

Where arbitrators exceed their authority by failing to resolve the issue submitted to arbitration, the Authority will remand the award to the parties for resubmission to the arbitrator, absent settlement, to resolve the stipulated issue.¹³ Because the Arbitrator failed to resolve the issue that the parties agreed upon, we set aside the award and remand the matter to the parties for resubmission to the Arbitrator, absent settlement, for the Arbitrator to address the agreed-upon issue.

As we set aside the award because the Arbitrator exceeded his authority, it is unnecessary to resolve the Agency’s remaining exceeds-authority and essence exceptions.¹⁴

IV. Decision

We set aside the award and remand the matter to the parties for resubmission to the Arbitrator, absent settlement, to resolve the agreed-upon issue.

¹⁰ Exceptions Form at 11-12.

¹¹ *AFGE, Local 3911*, 69 FLRA 233, 236 (2016) (citing *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996)).

¹² Award at 2. The record does not show that the parties stipulated the issue before the Arbitrator, but rather, the parties agreed upon the issue at the hearing. Exceptions Form at 12. *But see* Tr. at 6-9.

¹³ *U.S. DHS, Fed. Emergency Mgmt. Agency*, 69 FLRA 444, 445 (2016) (Member Pizzella dissenting in part, on other grounds) (citing *AFGE, Local 1547*, 65 FLRA 91, 95 (2010)).

¹⁴ *U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 304 (2011) (setting aside the award in connection with an exceeded-authority exception and finding it unnecessary to address remaining exception)); *see also AFGE, Nat’l Border Patrol Council, Local 2455*, 69 FLRA 171, 173 (2016) (Member Pizzella concurring) (citing *U.S. DOJ, Exec. Office of Immigration Review*, 66 FLRA 221, 224 (2011)) (arbitrator’s failure to apply the same substantive standards as the MSPB in cases involving suspension of fourteen days or less will not establish that an award is deficient); *AFGE, Local 2959*, 70 FLRA 309, 311 (2017) (citing *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014)) (when a party does not provide any arguments to support its exception, the Authority denies the exception).

Member DuBester, dissenting:

Because the award is responsive to the issue before the Arbitrator, the Arbitrator did not exceed his authority. Accordingly, there is no need to remand the award.

Contrary to the majority, the award’s findings do make it reasonably clear that the Arbitrator concluded, in part, that the Agency violated Article 14 of the parties’ agreement (agreement). Article 14 requires that “[e]mployees shall be given reasonable, advance notice . . . , but no less than 24 working-hours’ notice,” of workstation moves.¹ The Arbitrator was well aware of this requirement, and the Agency’s violation of it – highlighting “that the [g]rievant was required to move immediately.”²

But the Arbitrator also concluded that the reprimand was justified. The Arbitrator focused on the grievant’s insubordination, specifically finding that the grievant disobeyed orders and “failed to follow [her supervisor’s] instructions.”³

Faced with these countervailing considerations, it is not surprising that the Arbitrator resolved the issue – “whether the Agency violated Article 11 and 14 of the [agreement] . . . when it issued [the grievant] an official reprimand” – by adopting a compromise between sustaining and rejecting the grievance.⁴ The Arbitrator reasonably left the reprimand in place, but modified the punishment – reducing the reprimand’s three years in the grievant’s “official file” to sixteen months.⁵

A remand is not needed here. It will impose additional costs and effort on the parties to obtain an unnecessary clarification.⁶ Accordingly, I dissent.

¹ Exceptions, Attach. 1, Collective-Bargaining Agreement Article 14, Section 5 at 14-1.

² Award at 3.

³ *Id.*

⁴ *Id.* at 2.

⁵ *Id.* at 9.

⁶ Additionally, remand is the least desirable resolution of this case. As the Arbitrator stated, “this is a simple case and certainly should have been worked out without the necessity of going to [a]rbitration.” Award at 7. All the more reason not to remand and send the parties back to arbitration a second time.