

70 FLRA No. 65

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1992
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY
RICHMOND, VIRGINIA
(Agency)

0-AR-5166
(69 FLRA 567 (2016))

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DECISION

August 9, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman,
and Ernest DuBester, Member

I. Statement of the Case

Arbitrator Kenneth E. Moffett issued an award (first award) in *AFGE, Local 1992 (AFGE I)*¹ denying the Union's grievance alleging that the Agency improperly denied the grievant's reasonable-accommodation request. The Union filed exceptions to the Arbitrator's award, and the Authority granted the Union's exceptions, remanding the award to the parties for resubmission to the Arbitrator, absent settlement.

On remand, the Arbitrator reversed his original finding and issued an award (remand award) finding that the Agency "ha[d] not made an effort to find reasonable accommodations" for the grievant.² The Arbitrator granted relief in the form of telework, but did not grant any monetary damages. Both parties filed exceptions to this remand award.

The Agency's first exception argues that the award is contrary to law because the Arbitrator failed to comply with the remand instructions in *AFGE I* and did not cure the contrary-to-law deficiencies of the first award. Because the Arbitrator failed to make any necessary findings—and by doing so the Authority again

cannot determine whether the award is contrary-to-law—we again remand the matter to the parties for resubmission to the Arbitrator—or a different one—absent settlement, for further proceedings consistent with this decision.

The Agency's remaining exceptions and the Union's exceptions challenge the remedy granted in the remand award. Because we are remanding this case on the merits, we will not consider them now.

II. Background and Arbitrator's Award**A. The First Award and *AFGE I***

Since *AFGE I* discusses the facts of this case in detail, we will only briefly address them here.

The Agency informed the grievant, an employee with a disability, that the Agency was reassigning him from Richmond, Virginia, to Quantico, Virginia. The grievant submitted a first request for a reasonable accommodation that the Agency denied. The grievant then submitted a second reasonable accommodation request, asking to work two, non-consecutive days a week at Quantico while teleworking the remaining days. The Agency also denied this request, and the Union filed a grievance on behalf of the grievant.

The Arbitrator acknowledged that both parties agreed that the grievant is an individual with a disability. The Arbitrator found that "[t]he circumstances in Richmond were different from th[ose] of Quantico" and that "[t]he new environment had to be assessed[,] and without the formal request for a specific reasonable accommodation in Quantico[,] the matter of addressing the disability would have to be put on hold."³ The Arbitrator was also "not persuaded by the Union[']s argument that [the grievant] need not file a new request when [his] duty station change[d]."⁴ Therefore, the Arbitrator found that, "[b]ecause of a procedural mistake made by the Union, I deny the [g]riev[an]ce."⁵

The Union filed exceptions to the award, and the Agency filed an opposition to those exceptions.

In *AFGE I*, the Authority found that "the Arbitrator's determination denying the grievance is inconsistent with" the principles of the interactive process triggered by a request for a reasonable accommodation.⁶ The Authority also found that the Arbitrator had not made sufficient findings for the Authority to determine whether the award was contrary to law. As such, the

³ First Award at 11-12.

⁴ *Id.* at 13-14.

⁵ *Id.* at 14.

⁶ 69 FLRA at 569.

¹ 69 FLRA 567 (2016) (then-Member Pizzella concurring).

² Remand Award at 5.

Authority remanded the case to the parties for resubmission to the Arbitrator, absent settlement. In doing so, the Authority instructed that, should the parties resubmit the case to the Arbitrator, the Arbitrator should address:

(1) whether the grievant is a qualified individual who could perform the essential functions of the position in question, with or without a reasonable accommodation; and (2) if so, whether the grievant was discriminated against because of his disability; that is, whether the Agency failed to reasonably accommodate a qualified individual with a known disability or whether the Agency demonstrates that the requested accommodation would impose an undue hardship on the Agency.⁷

B. The Remand Award

The parties, unable to resolve the dispute, resubmitted the first award to the Arbitrator. In the remand award that followed, the Arbitrator made one additional finding on the merits. The Arbitrator found that “the Agency ha[d] not made an effort to find reasonable accommodations for [the grievant] after [it] learned and admitted that he is disabled.”⁸

As a remedy, the Arbitrator stated that the grievant should receive three days of telework a week. The Arbitrator also imposed certain conditions on how the telework days would operate. The Arbitrator did not grant any additional remedies.

Both the Agency and the Union filed exceptions to the award as well as oppositions to the exceptions filed by the other party.

III. Analysis and Conclusion: We again remand the case to the parties for further proceedings, absent settlement.

The Agency alleges that the award is contrary to law.⁹ When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception de novo.¹⁰ In applying the

⁷ *Id.*

⁸ Remand Award at 5.

⁹ Agency Exceptions Form at 4.

¹⁰ *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)).

standard of de novo review, the Authority assesses whether an arbitrator’s legal conclusions—not his or her underlying reasoning—are consistent with the applicable standard of law.¹¹ In making this assessment, the Authority defers to the arbitrator’s underlying factual findings.¹²

The Agency alleges that the remand award, like the first award, “lacks the necessary findings to assess whether the Agency complied with its obligations under the [parties’ agreement] and the Rehabilitation Act [(the Act)]”¹³ and that “the Authority should set aside the award for the same reason it set aside [the Arbitrator’s] first decision.”¹⁴

In *AFGE I*, the Authority found that “the Arbitrator did not make sufficient findings for [the Authority] to determine whether his legal conclusion is consistent with the Act.”¹⁵ Consequently, the Authority remanded the case to the parties and, were the parties to resubmit the case to the Arbitrator, the Authority directed the Arbitrator to address two issues:

(1) whether the grievant is a qualified individual who could perform the essential functions of the position in question, with or without a reasonable accommodation; and (2) if so, whether the grievant was discriminated against because of his disability; that is, whether the Agency failed to reasonably accommodate a qualified individual with a known disability or whether the Agency demonstrates that the requested accommodation would impose an undue hardship on the Agency.¹⁶

However, on remand, the Arbitrator only made one additional factual finding. Specifically, the Arbitrator’s additional finding, in its entirety, was that “the Agency ha[d] not made an effort to find reasonable accommodations for [the grievant] after [it] learned and admitted that he is disabled.”¹⁷ The Arbitrator failed to

¹¹ *U.S. DHS, U.S. CBP*, 68 FLRA 276, 277, *recons. denied*, 68 FLRA 807 (2015), *pet. for review dismissed sub nom., U.S. DHS, U.S. CBP v. FLRA*, No. 15-1342, 2016 WL 231956 (D.C. Cir. Jan. 4, 2016).

¹² *U.S. DOD, Dep’ts of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

¹³ 29 U.S.C. §§ 701-95.

¹⁴ Agency Exceptions Br. at 9.

¹⁵ 69 FLRA at 569.

¹⁶ *Id.*

¹⁷ Remand Award at 5.

address either of the two issues the Authority directed him to address. By failing to address the issues as directed, the remand award lacks sufficient findings for us to determine whether the award is contrary to law. As such, we are, again, unable to determine whether the Arbitrator's legal conclusion is consistent with the Act. We grant the Agency's contrary-to-law exception, and we vacate the award for the same reasons found in *AFGE I*.¹⁸

In its opposition, the Union argues that the Arbitrator did adequately address the remanded issues because he found that the grievant had a disability and "[o]nce it is established that an employee has a disability, the burden shifts to the Agency to show that it cannot accommodate the disability without suffering an undue hardship."¹⁹ However, the Arbitrator did not—and the Union does not present any argument that the Arbitrator did—address the issue, as directed in our remand, of whether the grievant was a qualified individual. Under the Act, the burden does not shift to the Agency until the Union can demonstrate not only that the grievant is an individual with a disability, but also that the grievant is a qualified individual who could perform the essential functions of his position with or without a reasonable accommodation.²⁰ Additionally, the Arbitrator failed to address the Agency's defense that the requested accommodation would create an undue hardship on the Agency.²¹

Normally, where the Authority is unable to determine whether an award is contrary to law, the Authority remands the award to the parties for further findings by the arbitrator, absent settlement.²² However, the Federal Service Labor-Management Relations Statute permits the Authority "to take such action and make such recommendations concerning [an arbitration] award as it considers necessary, consistent with applicable laws, rules, or regulations."²³ In unusual circumstances, these actions have included permitting the parties to choose a different arbitrator, absent settlement, upon remand.

Accordingly, in light of this case's circumstances, including that this is now the second remand, we will give the parties the option of seeking a

different arbitrator should one party object to returning this case to the original arbitrator upon remand. The arbitrator should address the issues originally remanded in *AFGE I*, namely: (1) whether the grievant is a qualified individual who could perform the essential functions of the position in question, with or without a reasonable accommodation; and (2) if so, whether the grievant was discriminated against because of his disability; that is, whether the Agency failed to reasonably accommodate a qualified individual with a known disability or whether the Agency demonstrates that the requested accommodation would impose an undue hardship on the Agency.

In light of this determination, it is unnecessary to address the Union's²⁴ and the Agency's²⁵ remaining exceptions concerning the remedy granted in the remand award.²⁶

IV. Decision

We grant the Agency's contrary-to-law exception and vacate the award. We remand this case to the parties for further proceedings, absent settlement. On remand, either party may object to resubmission of this matter to the original Arbitrator. Should such an objection arise, the parties are directed to mutually select a different arbitrator.

¹⁸ 69 FLRA at 570; e.g., *U.S. DHS, U.S. Citizenship & Immigration Servs.*, 69 FLRA 512, 517 (2016).

¹⁹ Union Opp'n at 6.

²⁰ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Englewood, Colo.*, 69 FLRA 474, 476 (2016); *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 64 FLRA 39, 49 (2009) (*IRS*) (citing *U.S. Dep't of the Army, Corps of Engr's, Huntington Dist., Huntington, W. Va.*, 59 FLRA 793, 797 (2004) (*Dep't of the Army*)).

²¹ *IRS*, 64 FLRA at 49 (citing *Dep't of the Army*, 59 FLRA at 797).

²² *AFGE I*, 69 FLRA at 569.

²³ 5 U.S.C. § 7122(a).

²⁴ Union Exceptions at 4 (alleging that the remand award is contrary to law because it failed to award certain remedies); *id.* at 10 (alleging that the Arbitrator exceeded his authority by failing to rule on requested remedies).

²⁵ Agency Exceptions at 11 (The Arbitrator "violated the law and exceeded his authority in directing the Agency to allow the grievant to telework three days per week."); *id.* at 12 ("The Arbitrator's [remand] award infringes upon management's right to assign and direct an employee.").

²⁶ *AFGE I*, 69 FLRA at 569.