71 FLRA No. 186

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VA GREATER
LOS ANGELES HEALTHCARE SYSTEM
LOS ANGELES, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1061
(Union)

0-AR-5544

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DECISION

September 10, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, the Arbitrator determined that the Agency did not have just cause to suspend the grievant for an incident involving alleged abuse of leave. The Agency argues that the Arbitrator denied it a fair hearing because he did not consider evidence that the Agency submitted in its post-hearing brief, that the award fails to draw its essence from the parties' agreement, and that the award of attorney fees is contrary to the Back Pay Act (BPA).[1]

We find that the Agency's arguments simply represent disagreement with the Arbitrator's evaluation of the evidence, that it failed to support its essence argument, and that its contrary-to-law exception challenges a determination that the Arbitrator did not make in the award. We deny the Agency's exceptions.

II. Background and Arbitrator's Award

As relevant here, the grievant works as a nurse for the Agency. On August 23, 2018, the grievant submitted a request for annual leave for her evening shifts on September 5 and 6, 2018, but her supervisor did not deny the request until September 4, 2018 when the grievant was not on duty. Having not received a response to her leave request, the grievant intended to report to work September 5.

On September 5, 2018, before her shift, the grievant went to a previously scheduled doctor's appointment. The doctor ordered her to remain off work for medical reasons that evening and the next day. She immediately called in sick and later faxed the Agency a copy of the doctor's note placing her off work for medical reasons. While the grievant was off work, her supervisor denied the sick leave request and marked her absent without leave (AWOL).

The Agency proposed a three-day suspension for abuse of leave. According to her supervisor, the grievant requested sick leave only because her annual leave request was denied. The deciding official imposed a one-day suspension because of the timing of the denial of the grievant's annual leave request. The Union grieved the suspension and the matter proceeded to arbitration.

The arbitration hearing took place on June 14, 2019. In its post-hearing brief dated August 2, 2019, the Agency included additional evidence, not presented during the hearing, that challenged the validity of the grievant's doctor's note.

In his award dated August 12, 2019, the Arbitrator found that the Agency failed to show it had just and sufficient cause to discipline the grievant. The Arbitrator also found that Article 44 of the parties' agreement permits the Arbitrator to determine what "procedures [will be] used to conduct an arbitration hearing" and explained that he did not consider the post-hearing evidence submitted by the Agency in its post-hearing brief.[2] Because the grievant was not required to provide a medical note, and the Agency never requested one, the Arbitrator questioned the Agency's authority to verify the grievant's doctor's note. Further, he noted that the Agency's evidence included hearsay, had been available prior to the hearing, and that its late inclusion would undermine the fairness of the hearing since it had not been subject to cross-examination. In the award, the Arbitrator ordered the Agency to remove the suspension from the grievant's personnel file, remove the AWOL determination from her pay records, and to provide her backpay. The award did not mention attorney fees.

On September 12, 2019, after the award issued, the Agency sent an email to the Arbitrator styled as a

[1] 5 U.S.C. § 5596.

[2] Award at 17.

"Request To Not Award Attorney's Fees."[3] The Arbitrator responded also by email that although the Union had not yet filed a motion for attorney fees, "[t]he award issued by the arbitrator on August 12, 2019 clearly granted reasonable attorney fees to the Union."[4] He denied the Agency's request.

The Agency filed exceptions to the award on September 16, 2019. The Union filed an opposition to the Agency's exceptions on October 9, 2019.

III. Analysis and Conclusions

A. The Agency was not denied a fair hearing.

The Agency asserts that it was denied a fair hearing because the Arbitrator failed to consider the "relevancy and probative value" of the evidence that it submitted in its post-hearing brief.[5]

The Authority will find an award deficient where, as relevant here, a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence.[6] In general, mere disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded to it, provides no basis for finding an award deficient.[7]

Here, the Arbitrator rejected the evidence that the Agency submitted, for the first time in its post-hearing brief, for several reasons. He found that this evidence, which challenged the validity of the doctor's note, contained inadmissible hearsay and implicated the fairness of the hearing since the Union had not had an opportunity to challenge the evidence or cross-examine relevant witnesses.[8] He also concluded that the validity of the note was not at issue because it had not been requested and was voluntarily submitted.[9] The Agency has not shown that the Arbitrator's refusal to consider the Agency's proffered evidence on these grounds was improper,[10] and its arguments, in short, simply constitute mere disagreement with the Arbitrator's evaluation of the evidence and provide no basis for finding the award deficient.[11]

We deny the Agency's exception.

B. The Agency fails to support its exception that the award fails to draw its essence from the parties' agreement.

The Agency also asserts that the award fails to draw its essence[12] from Article 44 of the parties' agreement. According to the Agency, Article 44 "allows the Arbitrator to consider the new evidence, regardless of whether it was introduced at or after the hearing."[13]

Article 44 provides the Arbitrator with the discretion to make evidentiary rulings, and the Arbitrator exercised that discretion. Although the Agency argues that the Arbitrator should have considered the evidence submitted in its post-hearing brief, the Agency fails to argue how the Arbitrator's interpretation of Article 44 was irrational, unfounded, implausible, or in manifest disregard of the agreement.[14] Because Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground" for review listed in § 2425.6(a)-(c),[15] we find that the

[3] Exceptions, Attach. 9 at 1.
[4] Exceptions, Attach. 10, Arbitrator's Email at 1.
[5] Exceptions Br. at 4-5.
[6] *AFGE, Local 2923*, 69 FLRA 286, 288 (2016) (citing *AFGE, Local 2152*, 69 FLRA 149, 152 (2015)).
[7] *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 71 FLRA 338, 340-41 (2019) (*Air Force*) (Member DuBester concurring) (citing *U.S. DHS, U.S. CBP*, 66 FLRA 409, 411 (2011)).
[8] Award at 17-18
[9] *Id.* at 17.
[10] *See AFGE, Council of Prison Locals, Local 3828*, 66 FLRA 504, 505 (2012) (denying the union's fair hearing exception in part because the fact that the arbitrator limited the submission of exhibits and testimony did not alone demonstrate the arbitrator failed to provide a fair hearing).
[11] *See Air Force*, 71 FLRA at 340-41 (denying a fair hearing exception); *U.S. Dep't of Transp., FAA*, 65 FLRA 320, 323 (2010) (denying a fair hearing exception); *U.S. DOD, Dependents Schools Mediterranean Region*, 47 FLRA 3, 8 (1993) (rejecting the union's fair hearing exception in part because it constituted mere disagreement with the arbitrator's evaluation of the evidence).
[12] The Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes 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 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. *AFGE, Local 1148*, 70 FLRA 712, 713 n.11 (2018) (Member DuBester concurring) (citing *U.S. Dep't of the Treasury, IRS*, 70 FLRA 539, 542 n.24 (2018) (Member DuBester concurring)).
[13] Exceptions Br. at 4.
[14] *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 71 FLRA 304, 305 (2019) (Member DuBester concurring) (denying the agency's essence exception because the arbitrator's determination was not irrational, unfounded, implausible, or in manifest disregard of the agreement).
[15] 5 C.F.R. § 2425.6(e)(1).

Agency has failed to support its exception and we deny it.[16]

C. The award is not contrary to the BPA.

The Agency argues that the Arbitrator's award of attorney fees is contrary to law[17] because the grievant was not affected by an unjustified or unwarranted personnel action that resulted in a loss of pay, allowances, or differentials.[18]

However, the Arbitrator did not order attorney fees in the award before us, at all. The August 12, 2019 arbitration award is completely silent as to attorney fees. We will not consider a post-award email that attempts to award an entirely new measure of relief not contained within the four corners of the award, the very document that is properly before us.[19] Here, the Arbitrator's final award is clear, and the type of informal, back-and-forth post-award communications seen in this case only serves to introduce confusion where there should be none. Consequently, because the Agency's contrary-to-law exception challenges a determination that the Arbitrator did not make in the award, we deny the exception.[20]

IV. Decision

We deny the Agency's exceptions.

[16] *AFGE, Local 2328*, 70 FLRA 797, 798 (2018) (denying an exception as unsupported under § 2425.6(e)(1) of the Authority's Regulations).

[17] When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any questions of law raised by the exception and the award de novo; in doing so, it determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. But the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts. *U.S. DOD, Educ. Activity*, 71 FLRA 373, 375 (2019) (Member DuBester concurring in part and dissenting in part) (citing *U.S. Dep't of State, Bureau of Consular Affairs, Passport Serv. Directorate*, 70 FLRA 918, 919 (2018)).

[18] Exceptions Br. at 5-6.

[19] *U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys.*, 71 FLRA 752, 753 (2020) (Member DuBester concurring) (citing 5 U.S.C. § 7105(a)(2)(H); *AFGE, Local 3749*, 69 FLRA 519, 524 (2016) (Dissenting Opinion of Member Pizzella)). We note that it is the informal nature of the communication – not its transmission over email – that prevents us from according it the legal and procedural status of an arbitral award. Arbitrators are free to transmit awards – including amended or clarified awards – via email. But "[t]he Statute authorizes the Authority to resolve exceptions to an 'arbitrator's *award*,' it does not authorize the Authority to referee email communications between parties and an arbitrator." *Id.* (emphasis added).

[20] *AFGE, Local 933*, 70 FLRA 508, 510 (2018) (denying a contrary-to-law exception challenging a conclusion that the arbitrator did not make).

Member DuBester, concurring:

I agree that the Agency's exceptions should be denied. However, I write separately to address the majority's flawed disposition of the contrary-to-law exception.

Even if the majority was correct that the award is "silent" as to attorney fees,[1] the Arbitrator subsequently clarified in an email to the parties that the award granted attorney fees, and set forth the list of remedies granted by the award.[2] In that communication, the Arbitrator stated that "the award issued . . . on August 12, 2019 clearly granted reasonable attorney fees to the Union."[3] He then stated that "[t]he following is the full and complete remedy issued" and listed the six numbered remedies in the award with the addition of "[t]he [g]rievant shall be awarded reasonable attorney fees in accordance with the Back Pay Act, 5 U.S.C. [§] 5596(b)(1)(A)(iii)."[4] The Arbitrator's email to the parties is clearly a clarification, if not a correction, of his award.[5]

[1] Majority at 5.

[2] Exceptions, Ex. 10, Arbitrator's Email at 1-2.

[3] *Id.* at 1.

[4] *Id.* at 1-2.

[5] I note that neither party argued that the Arbitrator was without authority to clarify the award and, in any event, the Arbitrator retained jurisdiction over the dispute for ninety days. Award at 21; *see also* Exceptions at 4; Opp'n at 3.

The Authority has long held that arbitrators may clarify their awards, and it has generally not required that such clarifications be provided in any specific format.[6] I disagree with the majority's refusal to consider any such clarifications without any reasonable justification or clearly articulated rationale for abandoning our precedent.[7]

Additionally, I would find that the Arbitrator correctly concluded that an award of attorney fees is appropriate, subject to the Union submitting a fee petition to the Arbitrator. Here, the Agency committed an unjustified and unwarranted personal action by suspending the grievant without just cause, causing her to lose pay. As the Arbitrator found,[8] this satisfies the requirements of the Back Pay Act.

[6] *E.g.*, *AFGE, Local 3749*, 69 FLRA 519, 521 (2016) (Member Pizzella dissenting) (considering the arbitrator's clarification of an attorney-fee jurisdictional issue sent to the parties in an email three weeks after issuing award); *AFGE, Local 3690*, 69 FLRA 154 (2015) (Member Pizzella concurring, in part, and dissenting, in part) (addressing whether an award, as clarified by the arbitrator's subsequent email, was contrary to the Back Pay Act); *AFGE, Council 243*, 67 FLRA 96, 97 (2012) (considering whether arbitrator's email clarified or modified award); *NFFE, Local 11*, 53 FLRA 1747 (1998) (treating arbitrator's letter as a supplemental award where neither party disputed that the letter constituted an award); *Dep't of the Air Force, Air Force Logistics Command, Kelly Air Force Base, Tex. Activity*, 15 FLRA 200, 200 (1984) (considering arbitrator's clarification of award in response to a dispute over the remedy).

[7] If there is any common rationale to the majority's recent refusals to consider post-award communications, it appears to be that the communications were rendered through emails between the arbitrator and the parties. *See, e.g.*, Majority at 5 (finding that "the type of informal, back-and-forth post-award communications seen in this case only serves to introduce confusion"). While it is true that email communications sometimes lack the formality of traditional written correspondence, we should not let that factor determine whether the communication constitutes a clarification of the award.

[8] Award at 20-21.