71 FLRA No. 44

UNITED STATES
DEPARTMENT OF THE NAVY
PUGET SOUND NAVAL SHIPYARD
AND
INTERMEDIATE
MAINTENANCE FACILITY
BREMERTON, WASHINGTON
(Agency)

and

BREMERTON METAL TRADES COUNCIL
(Union)

0-AR-5438

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DECISION

July 19, 2019

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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

This case, involving a suspension mitigated by Arbitrator Marsha Saylor from seven to five days, asks us whether the award is contrary to Executive Order (EO) 13839,[1] the Back Pay Act (BPA),[2] or the Agency's management right to discipline. EO 13839 does not abrogate collective-bargaining agreements (CBA) previously in effect, the Agency's BPA argument is unsupported, and the award does not excessively interfere with management's right to discipline under the three-part test articulated in *U.S. DOJ, Federal BOP* (*DOJ*).[3]

II. Background and Arbitrator's Award

The Agency suspended the grievant for ten days on a charge of Conduct Unbecoming a Federal Employee, based on off-duty misconduct while on temporary duty overseas. The Union grieved the suspension, disputing whether there was misconduct at all and arguing that there was no nexus between the charged misconduct and the efficiency of the service. The Agency denied the grievance but reduced the suspension to seven days. The Union invoked arbitration.

The Arbitrator framed the issues as follows: (1) whether the Agency had just cause for the seven-day suspension, and (2) if not, what should be the remedy?[4] The Arbitrator noted that Article 27 of the CBA states that disciplinary penalties should be "reasonably . . . expected to correct the [e]mployee and maintain discipline and morale[,]" and requires the Agency to take disciplinary actions only for "just cause[.]"[5] Following a hearing, the Arbitrator sustained the charge and found a nexus between the off-duty misconduct and the efficiency of the service.[6] However, the Arbitrator found that the penalty of a seven-day suspension was excessive when compared to other suspensions for the same charge and in light of the grievant's otherwise sterling work history.[7] The Arbitrator concluded that the Agency "did not have just cause" for the seven-day suspension and directed the Agency to substitute a five-day suspension and provide two days backpay.[8] The Arbitrator served her award on October 31, 2018.

[1] Exec. Order No. 13,839, 83 Fed. Reg. 25,343 (May 25, 2018).
[2] 5 U.S.C. § 5596.
[3] 70 FLRA 398 (2018) (Member DuBester dissenting).
[4] Award at 1.
[5] *Id.* at 2 (quoting Article 27).
[6] *Id.* at 9.
[7] *Id.* at 10.
[8] *Id.* at 11.

On November 15, 2018, the Agency filed exceptions, arguing that the award was contrary to law.[9]

III. Analysis and Conclusion: The award is not contrary to law.

The Agency asserts that the award is contrary to law for three reasons.[10]

First, the Agency contends that the Arbitrator's decision to mitigate the penalty is contrary to EO 13839, which, according to the Agency, "has granted supervisors and deciding officials the ability to tailor their penalty determinations to the facts and circumstances of each instance of misconduct and progressive discipline is not required."[11] The Agency cites §§ 2(a) and 2(b) of EO 13839 in support of that proposition.[12]

However, EO 13839 was issued on May 25, 2018, long after the grievant was suspended and the matter proceeded to arbitration. Section 8(b) of EO 13839 provides that "[n]othing in this order shall abrogate any collective[-]bargaining agreement in effect on the date of this order."[13] Because EO 13839, by its own terms, does not affect the grievant's antecedent rights under the CBA, the award cannot be deemed contrary to law on account of any alleged discrepancy with the order. Accordingly, we deny this exception.

The Agency also argues that the award is contrary to the BPA. Specifically, the Agency asserts that the original seven-day suspension ran from Sunday, March 4, 2017, through Saturday, March 10, 2017, encompassing five workdays, and that the reduced five-day suspension should also encompass five workdays, i.e., Monday through Friday.[14] Hence, the Agency argues, the grievant

[9] We note that the Union filed exceptions to the Arbitrator's award on December 4, 2018. In its brief, the Union indicated that the Arbitrator served the award by email on November 17, 2018. The Agency filed an opposition to the Union's exceptions, in which it argued, among things, that the Union's exceptions were untimely filed because the Arbitrator first served the award by email on October 31, 2018, and the November 17, 2018 version merely corrected a typographical error. The Authority issued an Order to Show Cause, directing the Union to provide a copy of the original award and explain how its exceptions were timely. In its response, the Union alleges that the Arbitrator initially served an unsigned award; that the Union representative contacted the Arbitrator's office to discuss unspecified discrepancies and inquire if it was a final draft; and that a signed, completed award was not served until November 17, 2018. The Union provides an unsigned copy of the award, dated October 23, 2018, which misstates the name of the Union. The Union also provides copies of email correspondence between the Union and the Arbitrator's office. The correspondence includes an October 31, 2018 email from the Arbitrator's office, which included the uncorrected award as an attachment, and a November 17, 2018 email in which the Arbitrator provided only a corrected cover sheet, explaining that the original version misstated the name of the Union due to an autocorrect error. The Authority has held that when a party asks an arbitrator to clarify his or her award, and the arbitrator responds by instead modifying the original award, the time limit for filing exceptions to the modified award begins upon service of that modified award on the excepting party. *U.S. DOL, Wash., D.C.*, 59 FLRA 131, 132 (2003) (Chairman Cabaniss concurring). However, the arbitrator must modify the award in such a way as to give rise to the deficiencies alleged in the exceptions. *U.S. Customs Serv., Region I, Bos., Mass.*, 15 FLRA 816, 817 (1984). Here, the Arbitrator's *clarification*, namely, correcting the Union's name on the title caption, did not give rise to the deficiencies alleged in the Union's exceptions. Hence, the deadline for filing exceptions was thirty days after October 31, 2018, the original date of service. 5 C.F.R. § 2425.2(b); *see, e.g.*, *AFGE, Local 12*, 61 FLRA 628, 630 (2006). Because the Union failed to meet that deadline, we dismiss its exceptions as untimely. Accordingly, we need not consider the Agency's opposition to the Union's exceptions.

[10] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo. *AFGE, Local 933*, 70 FLRA 508, 510 n.13 (2018) (*Local 933*). In reviewing de novo, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *Id.*

[11] Agency's Exceptions Br. (Exceptions Br.) at 5.

[12] In *AFGE, AFL-CIO v. Trump*, 318 F.Supp.3d 370 (D.D.C. 2018) (*AFGE*), *rev'd*, --- F.3d ---, 2019 WL 3122446 (D.C. Cir. 2019), the U.S. District Court for the District of Columbia found that §§ 3, 4(a), and 4(b) of EO 13839 were invalid, and enjoined the President's subordinates from implementing or giving effect to those provisions. *AFGE,* 318 F.Supp.3d at 440. The injunction left § 2(b) undisturbed. *Id.* Section 2(a) concerns performance-based removals and has no relevance to this case.

[13] Exec. Order No. 13,839, 83 Fed. Reg. 25,343 (May 25, 2018).

[14] Exceptions Br. at 6.

is not entitled to any backpay as a result of the Arbitrator's decision to mitigate the penalty. However, the Arbitrator made no findings as to when the seven-day suspension began, or whether it was measured in calendar days or workdays. Nor does the record contain a Standard Form 50 or any other document substantiating the Agency's assertions.[15] Because the Agency's exception is unsupported, we deny it.[16]

Finally, we address the Agency's contention that the award excessively interferes with management's right to discipline its employees under § 7106(a)(2)(A) and the three-part *DOJ* framework.[17]

Article 27 of the CBA requires that disciplinary actions be taken only for just cause,[18] and the Arbitrator concluded that the Agency lacked just cause for the seven-day suspension.[19] Correspondingly, in answering *DOJ*'s first question, it is undisputed that the Arbitrator found that the Agency's imposition of a seven-day suspension violated Article 27 of the CBA.

Turning to the second question, the Agency contends that the awarded remedy does not reasonably and proportionally relate to the violation of Article 27's "just cause" requirement.[20] But the Agency provides no support for its contention beyond its mere disagreement with the Arbitrator's conclusion that a five-day suspension was appropriate based on the average suspension for such a charge, and, so, the Agency violated Article 27 by imposing a seven-day suspension without just cause.[21] Accordingly, the answer to the second question is also yes.

The third question under the *DOJ* test is whether the Arbitrator's interpretation of the CBA excessively interferes with a § 7106(a) management right. Again, while the Agency emphatically disagreed with the Arbitrator's award, the Agency failed to demonstrate how the two-day mitigation excessively interfered with its right to discipline under § 7106(a)(2)(A). Accordingly, we conclude that the answer to the third question is no. We therefore deny the exception.

IV. Decision

We deny the exceptions.

Member DuBester, concurring:

I concur only in the decision to deny the Agency's exceptions.

[15] *See* 5 C.F.R. § 2425.4(a)(2)-(3).
[16] *See id.* § 2425.6(e)(1); *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting in part) (clarifying that an exception that fails to support a properly raised ground is subject to denial).
[17] Under the three-part framework set forth in *DOJ*, the first question is whether the arbitrator found a violation of a contract provision. *DOJ,* 70 FLRA at 405. We proceed to the second question of whether the arbitrator's remedy reasonably and proportionally relates to that violation. *Id.* If the answer to both questions is yes, then the final question is whether the arbitrator's interpretation of the provision excessively interferes with a § 7106(a) management right. *Id.* If the answer to that question is yes, then the arbitrator's award is contrary to law and must be vacated. *Id.* at 406.
[18] Award at 2.
[19] *Id.* at 11.
[20] Exceptions Br. at 7 ("Article 27 does not set forth what penalty a supervisor should assign for a specific type of misconduct, it only states that discipline shall be taken for just cause.").
[21] The Agency contends that the Arbitrator erred in finding that a five-day suspension was the average given for similar misconduct, but it provides no support for its assertion, such as the evidence of the comparator employees plainly reviewed by the Arbitrator below. Parties are reminded that exceptions must be accompanied by any relevant documents that the Authority cannot easily access, such as, exhibits presented during the arbitration hearing. 5 C.F.R.§ 2425.4(a)(3). In any case, this argument challenges the Arbitrator's factual finding, but the Agency does not argue that the award is based on nonfacts. S*ee generally SSA, Seattle Region*, 58 FLRA 374, 375 (2003) (Member Pope concurring); Exceptions Br. at 2. As previously noted, the Authority defers to the Arbitrator's factual findings absent a demonstration that those findings are nonfacts. *Local 933*, 70 FLRA at 510 n.13.