

72 FLRA No. 92

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL CENTER
PETERSBURG, VIRGINIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2052
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5615

DECISION

September 16, 2021

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

I. Statement of the Case

In this case, we reiterate that a violation of a governing agency regulation constitutes an unjustified or unwarranted personnel action under the Back Pay Act (the Act).¹

The Union filed a grievance alleging that the Agency unlawfully prevented the grievant, a pregnant employee with a medical condition, from returning to work with a reasonable accommodation. Arbitrator Dean L. Burrell issued an award finding that the Agency violated an Agency regulation when it failed to engage in the requisite interactive process after receiving the grievant's reasonable-accommodation request. As a result, the Arbitrator reinstated the grievant and awarded her back pay.

In its exceptions, the Agency argues that the award is contrary to management's right to determine internal security practices under § 7106(a)(1) of the Federal Service Labor-Management Relations Statute

(the Statute).² The Agency also contends that the Arbitrator's backpay remedy is deficient under the Act. Because the Agency fails to demonstrate that the award is contrary to the Statute or the Act, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant worked as a facilities assistant and law enforcement officer at the Agency's Federal Correctional Center in Petersburg, Virginia. While on duty, the grievant – who was pregnant at the time – experienced a seizure and fell, activating her body alarm. Later that week, the Agency prohibited the grievant from entering the facility and placed her in a leave-without-pay status. The Agency requested that the grievant provide medical documentation concerning her ability to (1) perform her job duties and (2) meet the Agency's fourteen physical requirements for law enforcement officers. As relevant here, the Agency's physical requirements mandate that law enforcement officers be alert at all times and be capable of recognizing and responding to emergencies.

In response to the Agency's request, the grievant submitted a letter from her treating neurologist stating that the grievant could return to work even though her pregnancy could cause additional seizures. The neurologist maintained that the grievant could meet the fourteen physical requirements for law enforcement officers and perform her job duties. After providing the Agency with the letter, the grievant made a request for a reasonable accommodation and asked that her duty station be relocated to an area of the facility that is inaccessible to inmates. The request identified the human resources computer lab as a suitable location because the grievant's work was primarily computer based, and the Agency had previously granted requests to work in the computer lab as a reasonable accommodation.

¹ 5 U.S.C. § 5596.

² 5 U.S.C. § 7106(a)(1).

Upon reviewing the grievant's accommodation request and medical documentation, an Agency doctor determined that granting the request would impose an undue hardship on the Agency.³ To support this determination, the Agency doctor asserted that the grievant's seizures posed a safety risk to herself and others, regardless of her location in the facility. In the doctor's view, no accommodation could be granted in the absence of documentation establishing that the grievant would not have a seizure while on duty. Based on that opinion, the Agency denied the grievant's reasonable-accommodation request and informed her that she could not enter the facility until sometime after her expected delivery date.

During the following week, the grievant submitted two doctor's notes stating that she could return to work immediately with a reasonable accommodation. The Agency did not respond or permit the grievant to return to work. Subsequently, the Union filed a grievance alleging that the Agency's denial of a reasonable accommodation was improper. The Agency denied the grievance, and the Union invoked arbitration.

At arbitration, the parties agreed to the following issues: (1) whether the Agency's decision to prohibit the grievant from returning to work after she provided medical documentation was appropriate; (2) whether the Agency's decision to deny the grievant's reasonable-accommodation request was appropriate; and (3) what is the appropriate remedy?

As an initial matter, the Arbitrator found that the grievant was a qualified individual with a disability who was entitled to a reasonable accommodation so long as the accommodation did not pose an undue hardship on the Agency. The Arbitrator determined that Program Statement (PS) 3720.03—a regulation establishing the Agency's reasonable-accommodation program—"impose[d] the specific obligation on the employee and [the] Agency to engage in [an] interactive process" over

³ Under the Rehabilitation Act, 29 U.S.C. §§ 701-96, an agency commits unlawful discrimination by failing to reasonably accommodate a qualified individual with a known disability unless the agency demonstrates that such accommodation would impose an undue hardship on the agency. *AFGE, Loc. 2145*, 71 FLRA 818, 819 (2020) (citing *AFGE, Loc. 1992*, 69 FLRA 567, 568 (2016) (Member Pizzella concurring)); *see also* 29 C.F.R. § 1630.2(p) (defining an undue hardship as "significant difficulty or expense incurred by a covered entity, when considered in light of . . . (i) [t]he nature and net cost of the accommodation needed . . . (ii) [t]he overall financial resources of the facility . . . (iii) [t]he overall financial resources of the covered entity . . . (iv) [t]he type of operation or operations of the covered entity . . . and (v) [t]he impact of the accommodation upon the operation of the facility").

the grievant's reasonable-accommodation request.⁴ PS 3720.03 provides, in relevant part, that "the need for an accommodation should begin an interactive and flexible process between the employee and supervisor in order to identify an effective accommodation."⁵

The Arbitrator found that the grievant's accommodation request was reasonable because the grievant could perform her job duties from the computer lab, inmates did not have access to the lab, and the request was limited to a change in location only.⁶ Additionally, the Arbitrator noted that the Agency had previously relocated two employees to the computer lab as a reasonable accommodation.⁷ Although the Arbitrator determined that the Agency had not been required to "immediately reinstate[]" the grievant after receiving the initial letter from the grievant's neurologist,⁸ the Arbitrator also found that the Agency erred by making no effort to participate in the required interactive process with the grievant.⁹ As a result, the Arbitrator held that the Agency's undue-hardship defense did not provide a basis for denying the grievant's accommodation request.

Based on these findings, the Arbitrator concluded that the Agency violated PS 3720.03 by denying the grievant's request for a reasonable accommodation without first engaging in the interactive process.¹⁰ As remedies, the Arbitrator directed the Agency to reinstate the grievant and pay backpay, restore annual and sick leave, and award retirement benefits for the time that the grievant was available to work but did not because the Agency improperly denied her reasonable-accommodation request.

⁴ Award at 18; *see also* 29 C.F.R. § 1630.2(o)(3) (describing the "informal, interactive process" that an individual with a disability and their employer may utilize to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations").

⁵ Opp'n, Attach. 5, Union Ex. 1, Program Statement 3720.03 at 5. The interactive process includes an "analysis of the particular job . . . [a] consultation with the employee . . . [a]n identification of potential accommodations . . . [and c]onsideration of the preference of the employee." *Id.*

⁶ Award at 17-18.

⁷ *Id.* at 19.

⁸ *Id.* at 17; *see also id.* (finding that the Agency "raised legitimate concerns as to whether [the g]rievant's disability posed a danger to herself and the orderly operation of the institution").

⁹ *Id.* at 18 (finding that the grievant attempted to initiate the interactive process but the Agency made "no corresponding effort"), 19 ("[T]he Agency had no intent to enter into the interactive process.").

¹⁰ *See id.* at 18 (concluding that the Agency did not engage in the interactive process, and thus violated PS 3027.03, by failing to "schem[e] a consultation . . . propos[e] other potential locations or types of accommodations," or "seek individualized medical information" from the grievant).

The Agency filed exceptions to the award on April 6, 2020, and the Union filed an opposition on May 5, 2020.

III. Analysis and Conclusions

The Agency argues that the award is contrary to law in two respects, which we address separately below. The Authority reviews questions of law raised by the exceptions *de novo*.¹¹ In applying the standard of *de novo* review, the Authority determines whether the Arbitrator's legal conclusions are consistent with the applicable standard of law.¹² In making this assessment, the Authority defers to the arbitrator's factual findings unless the excepting party establishes that they are nonfacts.¹³

A. The award does not violate management's right to determine internal security.

The Agency asserts that the award is contrary to management's right to determine the internal security practices of the Agency under § 7106(a)(1) of the Statute.¹⁴ The Authority will apply the three-part framework established in *U.S. DOJ, Federal BOP*¹⁵ only in "cases where the awards or remedies affect[] a management right."¹⁶

The right to determine internal security practices includes the authority to determine the policies and practices that are part of an agency's plan to secure or safeguard its personnel, physical property, or operations against internal or external risks.¹⁷ If an agency fails to demonstrate a reasonable connection between a disputed practice and the agency's security objective, the Authority will find that management's right to determine its internal security practices is not affected.¹⁸

Here, the Agency argues that its security decisions are entitled to a "higher standard of deference," and the Arbitrator should have deferred to the Agency's decision to prohibit the grievant from returning to work until her seizures subsided.¹⁹ According to the Agency, by permitting the grievant to return to work, the award interferes with the Agency's policy of "not having employees within the secure perimeter of the institution if they are not able to respond to emergencies."²⁰

However, the Arbitrator determined, as a factual matter, that the grievant *could* perform the duties of a law enforcement officer—including being alert and responding to emergencies—if she was relocated to the computer lab as an accommodation.²¹ Further, the Arbitrator found that the Agency failed to reconcile its denial of the grievant's requested accommodation with its granting of accommodations for other employees who were similarly limited by physical ailments.²² Because the Agency does not challenge the Arbitrator's finding that the grievant could have worked in the computer lab without creating a security risk, we defer to that finding.²³ Consequently, the Agency has failed to establish a reasonable connection between its denial of the grievant's reasonable-accommodation request and the Agency's alleged security objective. Accordingly, we deny this exception.²⁴

B. The award is not contrary to the Act.

The Agency contends that the Arbitrator's backpay remedy is deficient because the Arbitrator failed to find that the Agency committed an unjustified or unwarranted personnel action, as required by the Act.²⁵ To justify an award of backpay under the Act, an arbitrator must find that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of any employee's pay,

¹¹ *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

¹² *Id.* at 306-07 (citing *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998)).

¹³ *NTEU*, 72 FLRA 182, 186 (2021) (*NTEU*) (citing *AFGE, Nat'l INS Council*, 69 FLRA 549, 552 (2016)).

¹⁴ Exceptions Br. at 16-21; 5 U.S.C. § 7106(a)(1).

¹⁵ 70 FLRA 398, 405 (2018) (then-Member DuBester dissenting).

¹⁶ *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 323, 325 (2021) (Chairman DuBester concurring) (quoting *U.S. Dep't of the Treasury, Off. of the Comptroller of the Currency*, 71 FLRA 387, 390 (2019) (then-Member DuBester dissenting in part)).

¹⁷ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 443-44 (2018) (then-Member DuBester concurring) (citing *SSA, Balt., Md.*, 55 FLRA 498, 502 (1999)).

¹⁸ *U.S. Dep't of Transp., FAA*, 68 FLRA 402, 404 (2015) (*FAA*) (citing *AFGE, Loc. 2076*, 47 FLRA 1379, 1381-82 (1993); *NFFE, Loc. 2050*, 36 FLRA 618, 639-40 (1990)).

¹⁹ Exceptions Br. at 17 (quoting *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Fed. Satellite Low, La Tuna, Tex.*, 59 FLRA 374, 377 (2003) (Member Pope concurring)).

²⁰ *Id.* at 21.

²¹ Award at 17-18.

²² *Id.* at 19.

²³ See *NTEU*, 72 FLRA at 186 (Authority defers to arbitrator's factual findings in resolving contrary-to-law exceptions).

²⁴ See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Tallahassee, Fla.*, 71 FLRA 622, 623-24 (2020) (then-Member DuBester concurring) (award did not interfere with management's right to determine internal security practices where the agency did not challenge the arbitrator's dispositive factual finding as a nonfact); *FAA*, 68 FLRA at 404-05 (denying exception arguing that the award interfered with management's right to determine internal security practices because the agency did not challenge the arbitrator's factual findings as nonfacts).

²⁵ Exceptions Br. at 9-13.

allowances, or differentials.²⁶ With respect to the first requirement, the Authority has consistently held that a violation of a governing agency regulation constitutes an unjustified or unwarranted personnel action.²⁷

Here, the Arbitrator found that the Agency violated PS 3720.03 when it denied the grievant's reasonable-accommodation request without engaging in the required interactive process.²⁸ It is undisputed that PS 3720.03 is a regulation that governs the Agency's reasonable-accommodation program. Consistent with the principles stated above, a violation of this governing agency regulation constitutes an unjustified or unwarranted personnel action under the Act.²⁹ As the Agency does not challenge the Arbitrator's finding of a violation, the Agency's exception provides no basis for finding the award deficient. Therefore, we deny this exception.³⁰

IV. Decision

We deny the Agency's exceptions.

²⁶ *AFGE, Loc. 2338*, 71 FLRA 343, 344 (2019) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Beckley, W. Va.*, 64 FLRA 775, 776 (2010)).

²⁷ *E.g., NTEU, Chapter 231*, 66 FLRA 1024, 1026 (2012) (*Chapter 231*); *U.S. Dep't of Transp., FAA*, 64 FLRA 922, 923 (2010); *U.S. Dep't of Transp., FAA, Airways Facility Serv., Nat'l Airway Sys., Eng'g Div., Okla. City, Okla.*, 60 FLRA 565, 569 (2005).

²⁸ Award at 18.

²⁹ *See Chapter 231*, 66 FLRA at 1026 (arbitrator's finding that the agency violated its own regulation governing overtime assignments constituted an unjustified or unwarranted personnel action under the Act).

³⁰ The Agency bases its exceeded-authority and essence exceptions on the same argument – that the award is deficient because the Arbitrator awarded backpay without finding that the Agency violated any law, rule, regulation, or contractual provision. Exceptions Br. at 14-16, 21-23. Because, as noted above, the Arbitrator *did* find that the Agency violated a governing regulation, Award at 18, we also deny the Agency's exceeded-authority and essence exceptions. *See U.S. DHS, U.S. CBP, Savannah, Ga.*, 68 FLRA 319, 322-23 (2015) (denying exceeded-authority exception premised on the same argument raised in a denied contrary-to-law exception); *NFFE, Loc. 376*, 67 FLRA 134, 136 (2013) (denying essence claim that reiterated a previously denied contrary-to-law claim).

Chairman DuBester, concurring:

I agree that the Agency's exceptions are properly denied. While I continue to disagree with the three-part test created by the majority in *U.S. DOJ, Federal BOP*¹ for assessing whether arbitration awards are contrary to § 7106(a) of the Federal Service Labor-Management Relations Statute, I agree that this test need not be applied to resolve the Agency's management-rights exception because the award does not affect management's right to determine internal security.²

Accordingly, I concur.

¹ 70 FLRA 398, 405-06, 409 (2018) (*DOJ*) (then-Member DuBester dissenting).

² See *U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 933 (2018) (then-Member DuBester dissenting) ("*DOJ* only applies in cases where the awards or remedies affected a management right.>").

Member Abbott, concurring:

A basic tenet of judicial or administrative review is that “specific complaints are best left to the jurisdictional body with the most expertise.”¹ Without a doubt, the grievant here had an unfettered right to choose to pursue the instant matter as an Equal Employment Opportunity (EEO) complaint or under the parties’ negotiated grievance procedure. Nonetheless, the circumstances surrounding this case clearly demonstrate that its issues would have been best pursued through EEO channels.

The Arbitrator’s conclusions here demonstrate an unfamiliarity with the Rehabilitation Act’s “burden-shifting framework”² for reasonable-accommodation requests. On this point, the Arbitrator found that the Agency failed to “meet” with the grievant and request specific medical information even though the Arbitrator found that the Agency continued to meet with the grievant and raised a litany of concerns, that the grievant never resolved during the interactive process.³ Additionally, despite the Agency’s repeated requests for more medical documentation, the grievant never provided any post-pregnancy medical documentation.⁴

While I am sympathetic to the grievant’s condition, the question here is not whether the grievant was entitled to some form of reasonable accommodation. The pertinent questions concerned what duties the grievant could reasonably be expected to perform as an accommodation. But, by placing all of the onus on the Agency, the Arbitrator did not properly apply the aforementioned shifting burden analysis.

Thus, it is quite apparent that this dispute would have been resolved more appropriately through the EEO process because the Equal Employment Opportunity Commission (EEOC) is the jurisdictional body with the most expertise in such matters.⁵ The choice of forum, however, belongs to the grievant.

I believe the Arbitrator did not properly apply the requirements of the Rehabilitation Act and is not consistent with EEOC precedent. Therefore, I would conclude that his finding that the Agency violated its own reasonable-accommodation policy by failing to engage in the required interactive process with the grievant is in error.⁶ However, because the Agency does not challenge

those findings, I am constrained to find that the Agency fails to establish that the award is contrary to law.

¹ *AFGE, Loc. 1992*, 69 FLRA 567, 571 (2016) (*Loc. 1992*) (Concurring Opinion of Member Pizzella).

² *Id.*

³ Award at 18.

⁴ *Id.* at 19.

⁵ *Loc. 1992*, 69 FLRA at 571.

⁶ Award at 18.