73 FLRA No. 100

UNITED STATES
DEPARTMENT OF ENERGY
OFFICE OF RIVER PROTECTION/RICHLAND
OPERATIONS OFFICE
HANFORD, WASHINGTON
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 788
(Union)

0-AR-5850

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DECISION

May 8, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Susan J.M. Bauman found that the Agency violated the parties' collective-bargaining agreement and failed to properly consider the factors established in *Douglas v. Veterans Administration* (*Douglas*)[1] when it suspended the grievant. The Arbitrator reduced the grievant's suspension to a written reprimand. The Agency filed exceptions on nonfact, essence, and exceeded-authority grounds. For the following reasons, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant is a nuclear engineer whose job duties include the development of safety documents with a contractor, scheduling Safety Review Board meetings, and ensuring compliance with applicable safety-review procedures.

In 2019, the Agency proposed suspending the grievant for conduct unbecoming a federal employee. Instead of effectuating the suspension, the Agency and the grievant executed an alternative-discipline agreement (discipline agreement) in which the grievant received a two-day "paper" suspension, with no loss of duty time or pay.[2] The discipline agreement provides that "[i]n exchange for agreeing to alternative discipline," the grievant "agrees that this two[-]calendar day 'paper suspension,' will be equivalent to a two[-]calendar day suspension from duty and pay for use in progressive discipline, should further misconduct occur."[3]

In July 2021, the grievant emailed a contractor regarding a safety-strategy document and courtesy copied his own direct supervisor. The grievant's supervisor responded with comments, added several recipients to the email, and directed the grievant to schedule a meeting with the Safety Review Board within the next two days. The grievant replied by quoting the safety-review procedure requiring three-business-days' notice for Safety Review Board meetings, stating that an expedited timeline requires approval from the Board's chairperson, and questioning his supervisor's scheduling instruction. After several emails, including an email from the chairperson approving the expedited timeline, the grievant scheduled the meeting.

Subsequently, the grievant's supervisor proposed suspending the grievant for seven days for "disrespectful response to [a] supervisor's direction."[4] The two specifications of the charged misconduct consisted of several statements from the grievant's emails. The deciding official sustained the proposed suspension.

The Union grieved the suspension, and the grievance proceeded to arbitration. As relevant here, the parties stipulated to the following issues:

> 1. Did the Agency violate . . . Section 1.02A [of the parties' agreement], which provides "In order to determine the appropriate penalty for an employee in a disciplinary or adverse action, the [Agency] will, subject to applicable law, rule, and regulation, consider the relevant factors as determined by governing law (e.g., applying the factors articulated . . . in *Douglas* . . .)?"
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> 2. Did the Agency properly adhere to the *Douglas* [f]actors?
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> 3. Did the Agency violate . . . Section 1.02B [of the parties' agreement (Section 1.02B)]? It provides: "The [p]arties recognize that discipline may

[1] 5 M.S.P.R. 280 (1981).
[2] Exceptions, Attach. D, Alternative Discipline Decision at 1.
[3] Exceptions, Attach. F, Alternative Discipline Agreement (Discipline Agreement) at 1.
[4] Award at 3.

> be progressive in nature, but is not required. . . ."
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> 5. If the Agency violated any of these sections of the [parties' agreement], should [the grievant's] August 27, 2021, seven-day suspension be revoked or reduced?[5]

The Arbitrator explained that, as a threshold matter, the Agency must demonstrate that the grievant's behavior constituted a disrespectful response to the supervisor's direction. After reviewing the evidence, the Arbitrator dismissed one specification entirely and the second specification, in part. However, she found that one of the grievant's statements – that he wanted to ensure the Safety Review Board did not "blindly go along with whatever [the supervisor] says" – was "inappropriate."[6]

The Arbitrator also reviewed the Agency's analysis of the *Douglas* factors, focusing on the statement she found supported the charge. She found most of the *Douglas* factors were either mitigating factors or not aggravating. Analyzing the grievant's past disciplinary record, the Arbitrator found that the two-day paper suspension was "[t]he only blemish on the [g]rievant's long history as a [f]ederal employee," and she rejected the "Agency['s] analysis indicat[ing] this to be an aggravating factor."[7] Instead, she found that "the behaviors in question are unrelated and the prior disciplinary record cannot be considered to be aggravating."[8]

Regarding the consistency of the seven-day suspension with any applicable agency table of penalties, the Arbitrator stated that the Agency "attempted to link the prior offense . . . to this alleged offense," but she found the 2019 and 2021 misconduct were unrelated.[9] The Arbitrator reviewed the Table of Offenses and Penalties (table of penalties) in the Agency's disciplinary policy.[10] She found that for the 2021 misconduct, the Agency chose a category of offense, "disrespectful response to directions," from category nine on the table of penalties, while the 2019 offense was "conduct unbecoming a federal employee" from category sixteen.[11] On this basis, she concluded that the 2021 misconduct "was not a second offense" and that a first offense "calls for a penalty of a reprimand to a [seven]-day suspension."[12]

Based on the *Douglas* mitigating factors, the Arbitrator found the Agency failed to consider the entirety of the circumstances when deciding the appropriate discipline. Specifically, she found that an appropriate sanction should reflect that the grievant's supervisor: (1) "responded to an email which was not addressed to him, one that had been sent to him as a courtesy"; (2) copied "many higher[-]level managers" in his response;[13] (3) addressed the grievant using "a name he knows the [g]rievant does not like";[14] and (4) directed the grievant to take an action "counter to the policies and procedures without providing sufficient information."[15] The Arbitrator found that, under these circumstances, the grievant "[p]roperly . . . questioned his supervisor's direction."[16] The Arbitrator also credited the grievant's testimony that, in the six years he served in his position, there had never been a deviation in the procedural-review timeline and that he would not have questioned the expedited timeline had his direct supervisor informed him that he previously discussed the matter with the Safety-Review-Board chairperson.[17] On these grounds, the Arbitrator concluded that the Agency did not properly analyze the *Douglas* factors, which violated Section 1.02A of the parties' agreement.

The Arbitrator also considered Section 1.02B, which concerns progressive discipline. She rejected the Agency's contention that a seven-day suspension was progressive because it followed the 2019 suspension. Referencing her earlier finding that the 2019 and 2021 offenses were unrelated, she found the July 2021 statement was a first offense of disrespectful response to direction from a supervisor. Therefore, she concluded the Agency violated Section 1.02B and "the spirit of progressive discipline by considering this incident as a second offense."[18]

Applying these findings, the Arbitrator determined that a seven-day suspension was not appropriate for a first-offense "disrespectful response to

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[5] *Id.* at 2.
[6] *Id.* at 13.
[7] *Id.* at 15.
[8] *Id.*; *see also id.* at 14 n.2 ("The current situation is totally unrelated to the events of 2019.").
[9] *Id.* at 16.
[10] *See* Exceptions, Attach. C, Order 331.1 "Administering Work Force Discipline, Adverse and Performance Based Actions," App. B (Table of Penalties).
[11] Award at 16 (citing Table of Penalties at B-3, B-4 to B-5).
[12] *Id.*
[13] *Id.* at 17.
[14] *Id.* The Arbitrator credited a Union representative's testimony that everyone at the facility, including the grievant's direct supervisor, knew that he does not use a nickname. *Id.* at 12. She found the direct supervisor's use of a nickname was "rude or condescending, certainly not necessary and conceivably set the tone for the remainder of the exchange." *Id.* at 13.
[15] *Id.* at 17.
[16] *Id.*
[17] *Id.* at 12.
[18] *Id.* at 18.

direction," but that "some discipline is appropriate."[19] Under the circumstances, she found that a written reprimand – the lowest penalty for a first offense – was "fitting."[20] Accordingly, she reduced the seven-day suspension to a written reprimand and ordered a make-whole remedy.

The Agency filed exceptions to the award on December 7, 2022. The Union filed an opposition to the Agency's exceptions on January 5, 2023.

III. Analysis and Conclusions

A. The award does not fail to draw its essence from the discipline agreement.

The Agency argues that the award fails to draw its essence from the discipline agreement.[21] The Authority will find an award fails to draw its essence from an agreement when the excepting party establishes 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.[22]

The Agency asserts that the award shows a manifest disregard for the discipline agreement because that agreement "required the two[-]calendar[-]day paper suspension to . . . be used for progressive discipline" if the grievant engaged in any further misconduct, but the Arbitrator treated the 2021 misconduct as a first offense.[23] Section 2.c. of the discipline agreement states that the "'paper suspension' will be equivalent to a two (2) calendar day suspension from duty and pay for use in progressive discipline, should further misconduct occur."[24] However, this wording does not specify that *any* misconduct *must* be treated as related, and therefore constitute a second offense, for purposes of applying progressive discipline. The Agency's assertion merely disagrees with the Arbitrator's interpretation of the discipline agreement, which does not demonstrate that her award evidences a manifest disregard of that agreement.[25]

The Agency also asserts that in addition to the discipline agreement, the Arbitrator should have considered "the Agency's disciplinary policy."[26] However, in reaching her conclusion that a seven-day suspension was not appropriate because the 2021 misconduct was not a "second offense," the Arbitrator relied on the table of penalties, which is part of the Agency's disciplinary policy.[27] Specifically, the Arbitrator determined that under the table of penalties, the 2021 discipline was a first offense of "disrespectful response to directions" from a supervisor, which "calls for a penalty of a [r]eprimand to a [seven]-day suspension."[28] She also noted that the table of penalties states that "[w]hen appropriate, a penalty may be less than the minimum . . . suggested in the table and the organizational/administration mission and sensitivities of the mission will also be considered in determining the appropriate penalties, notwithstanding the table of penalties."[29] Consistent with that language, and applying her findings regarding the mitigating *Douglas* factors, the Arbitrator determined that a written reprimand was appropriate.[30] Thus, contrary to the Agency's assertion, the Arbitrator did not fail to consider the Agency's disciplinary policy.

The Agency's arguments do not demonstrate that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement. Therefore, we deny the Agency's essence exception.[31]

B. The award is not based on a nonfact.

The Agency argues that the award is based on a nonfact because the Arbitrator cannot "ignore [the disciplinary agreement's] existence" or "fail to implement its requirements."[32] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different

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[19] *Id.*
[20] *Id.*
[21] Exceptions Br. at 4-5.
[22] *NTEU, Chapter 149*, 73 FLRA 413, 416 (2023) (citing *NTEU, Chapter 149*, 73 FLRA 133, 136 (2022); *U.S. Dep't of HHS*, 72 FLRA 522, 524 n.19 (2021) (Chairman DuBester concurring); *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1167 n.11 (2020) (Member DuBester concurring)).
[23] Exceptions Br. at 5.
[24] Discipline Agreement at 1.
[25] *SSA*, 65 FLRA 286, 288-89 (2010); *U.S. Dep't of HHS, Food & Drug Admin., San Antonio, Tex.*, 72 FLRA 179, 180 (2021) (Chairman DuBester concurring) (citing *Bremerton Metal Trades Council, Int'l Bhd. of Boilermakers, Loc. 290*, 71 FLRA 1033, 1035 (2020)) (mere disagreement with arbitrator's interpretation is not grounds for finding award fails to draw its essence from parties' agreement); *see also Bremerton Metal Trades Council*, 73 FLRA 212, 214 (2022) (*Bremerton*) (denying essence exception where arbitrator's interpretation of disciplinary abeyance agreement was not contrary to its plain wording).
[26] Exceptions Br. at 5.
[27] Award at 16.
[28] *Id.*
[29] *Id.* (quoting Table of Penalties).
[30] *Id.* at 18.
[31] *SSA*, 65 FLRA at 288-89; *Bremerton*, 73 FLRA at 214.
[32] Exceptions Br. at 3-4.

result.[33] Neither legal conclusions nor conclusions based on the interpretation of an agreement may be challenged as nonfacts.[34] Additionally, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[35]

The Agency asserts that "a central fact [underlying the award] is that the parties in 2019 entered into a binding alternative discipline agreement that required the grievant to comply with all Agency rules and refrain from engaging in any misconduct."[36] The Agency concedes that the parties disputed the applicability of the discipline agreement at the arbitration hearing, but argues that the Arbitrator's interpretation of the discipline agreement is erroneous.[37] Because the Agency's nonfact exception challenges the Arbitrator's interpretation of the discipline agreement and a matter disputed at arbitration, we deny this exception.[38]

C. The Arbitrator did not exceed her authority.

The Agency argues that the Arbitrator exceeded her authority by finding that it violated Section 1.02B and by reducing the discipline to a written reprimand.[39] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed by the grievance.[40] However, the Authority has held that arbitrators have broad discretion to fashion remedies they consider appropriate.[41]

One of the parties' stipulated issues was whether the Agency violated Section 1.02B.[42] Thus, by resolving that issue, the Arbitrator neither failed to resolve a submitted issue nor resolved an unsubmitted issue. Although the Agency disagrees with the awarded remedy,[43] the Agency does not demonstrate that the Arbitrator, in reducing the discipline to a written reprimand, disregarded a specific limit on her authority or awarded relief to a person not encompassed by the grievance. Therefore, the Agency's argument does not demonstrate that the Arbitrator exceeded her authority.[44]

Additionally, to support its exceeded-authority exception, the Agency cites U.S. Merit Systems Protection Board (MSPB) precedent to establish that it could consider the grievant's prior unrelated discipline in determining the penalty for the current misconduct.[45] Where, as here, a suspension of fourteen days or less is at issue, a party's contention that the arbitrator incorrectly applied MSPB precedent does not provide a basis for finding the award deficient.[46] Thus, the Agency's citation to MSPB precedent does not demonstrate that the Arbitrator exceeded her authority.

Accordingly, we deny the Agency's exceeded-authority exception.

IV. Decision

We deny the Agency's exceptions.

[33] *Laborers Int'l Union of N. Am., Loc. 1776*, 73 FLRA 215, 217 (2022) (*Local 1776*) (Member Kiko dissenting on other grounds) (citing *U.S. Dep't of VA, Nashville Reg'l Off., VA Benefits Admin.*, 72 FLRA 371, 374 (2021) (Member Abbott concurring)).

[34] *Id.* (citing *U.S. Dep't of VA*, 72 FLRA 518, 520 (2021) (Chairman DuBester concurring); *U.S. Dep't of HHS, Off. of Medicare Hearings & Appeals*, 71 FLRA 677, 679 (2020) (Member Abbott concurring; Chairman Kiko dissenting on other grounds)).

[35] *AFGE, Loc. 1770*, 67 FLRA 93, 94 (2012) (*Local 1770*) (citing *AFGE, Loc. 2382*, 66 FLRA 664, 668 (2012)).

[36] Exceptions Br. at 4.

[37] *Id.* at 4 n.18.

[38] *Local 1776*, 73 FLRA at 217; *Local 1770*, 67 FLRA at 94.

[39] Exceptions Br. at 5-6.

[40] *AFGE, Loc. 3954*, 73 FLRA 39, 42 (2022) (citing *AFGE, Council of Prisons Locs. #33, Loc. 0922*, 69 FLRA 351, 352 (2016)).

[41] *NTEU*, 73 FLRA 431, 433 (2023) (*NTEU*) (citing *U.S. Dep't of the Navy, Naval Med. Ctr., Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 141 (2022)).

[42] Award at 2.

[43] Exceptions Br. at 6.

[44] *NTEU*, 73 FLRA at 433-34.

[45] Exceptions Br. at 6 n.34.

[46] *AFGE, Nat'l Border Patrol Council, Loc. 2455*, 69 FLRA 171, 173 (2016) (Member Pizzella concurring) (citing *NATCA, MEBA/NMU*, 52 FLRA 787, 792 (1996)).