

71 FLRA No. 206

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
NASHVILLE REGIONAL OFFICE
NASHVILLE, TENNESSEE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2470
(Union)

0-AR-5534

DECISION

October 29, 2020

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

I. Statement of the Case

The Union filed a grievance challenging the grievant's fourteen-day suspension for misconduct. Arbitrator Gayle A. Garvin found that the grievant's conduct warranted discipline, but that the Agency violated the parties' agreement by imposing the fourteen-day suspension without "just and sufficient cause."¹ Accordingly, she reduced the suspension to a letter of reprimand. The Agency filed exceptions on nonfact, contrary-to-law, and public policy grounds. Because the Agency merely attempts to relitigate the Arbitrator's evaluation of the evidence and does not demonstrate that the award is contrary to law or public policy, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant is a disabled veteran who assists other veterans via phone regarding their benefits issues in her position as a public contact representative. During a call with a veteran, the grievant used the term "crazy bastard."² Based on this alleged misconduct, the Agency proposed a fourteen-day suspension. The grievant subsequently admitted to the conduct, but stated

that it occurred because the call exacerbated her post-traumatic stress disorder (PTSD). The deciding official found merit to the misconduct charge. In determining the appropriate penalty, the deciding official considered the grievant's response and discipline imposed for similar misconduct by other employees, but found that the seriousness of the grievant's misconduct required the Agency to impose the fourteen-day suspension. The Union grieved the suspension, and the matter proceeded to arbitration.

At arbitration, the parties stipulated to the following issue, as relevant here: "Was the [fourteen]-day suspension of [the grievant] consistent with the [parties' collective-bargaining agreement], Article 14, Section 1, that no bargaining[-]unit member be subject to disciplinary action except for 'just and sufficient cause?' If not, what is the remedy?"³

The Arbitrator found that the grievant's misconduct warranted discipline. In assessing the discipline, the Arbitrator found that she:

is not condoning [the grievant's conduct]. Veterans who have served our country deserve the honor and respect of all citizens and should be treated accordingly, especially by the federal department charged with assisting them. However, the parties have negotiated provisions in their collective[-]bargaining agreements ensuring protections for federal employees covered by such agreements. These protections must be considered when assessing the proper discipline to be imposed.⁴

¹ Award at 18 (internal quotations omitted).

² *Id.* at 16.

³ *Id.* at 6.

⁴ *Id.* at 18.

Assessing whether the Agency imposed the proper discipline consistent with Article 14, Section 1 of the parties' agreement,⁵ she found that the fourteen-day suspension was "neither reasonable[,] nor proportionate to the [grievant's] violation."⁶ Drawing this conclusion, she found that the nature of the call "would be frustrating and could exacerbate" the grievant's military "service-connected disability of [PTSD]."⁷ She also found that the record did not demonstrate that the grievant was trained to handle the type of call during which the misconduct occurred. Moreover, the Arbitrator found that the grievant's conduct was not "severe and egregious" because other employees charged with the same violation received either a reprimand or a formal counseling.⁸ Accordingly, she reduced the suspension to a letter of reprimand.

On August 21, 2019, the Agency filed exceptions to the award, and on September 9, 2019, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency argues that the award is based on nonfacts.⁹ 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 result.¹⁰ However, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, provides no basis for finding that an award is based on a nonfact.¹¹

Specifically, the Agency contends that the Arbitrator based her decision to mitigate the fourteen-day suspension to a letter of reprimand on three nonfacts, that: (1) the nature of the call was "frustrating" and "could exacerbate [the grievant's] condition"¹²; (2) nothing in the record indicated that the grievant had received training for the call in dispute;¹³ and (3) other employees had been charged with the same violation.¹⁴ In support of its exception, the Agency asserts that the Union provided no evidence to support finding that the caller was "abusive," that the call was "unusual," or that the grievant was untrained to handle the call.¹⁵ Moreover, the Agency argues that it provided evidence that contradicted each of the Arbitrator's findings.¹⁶ However, these arguments are merely disagreement with the Arbitrator's evaluation of the evidence. As this provides no basis for finding that an award is based on a nonfact, we deny this exception.

B. The award is not contrary to law.

The Agency contends that the award is contrary to law.¹⁷ When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo.¹⁸ In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.¹⁹ In making this assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.²⁰

The Agency argues that one of the Arbitrator's findings supporting his decision to mitigate the grievant's discipline is contrary to the Agency's "ICARE values"²¹ – codified in 38 C.F.R. §§ 0.600, 0.601(d), and 0.602(b)-(c) – to treat veteran callers with professionalism and respect.²² Specifically, the Agency

⁵ Article 14, Section 1 states: "No bargaining[-]unit employees will be subject to disciplinary action except for just and sufficient cause. Disciplinary actions will be taken only for such cause as will promote the efficiency of the service." *Id.* at 4 (quoting Art. 14, § 1 of the parties' agreement).

⁶ *Id.* at 18.

⁷ *Id.* at 16.

⁸ *Id.* at 17-18.

⁹ Exceptions at 13, 15-17.

¹⁰ *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).

¹¹ *E.g., U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015).

¹² Exceptions at 15 (citing Award at 16); *see id.* at 16.

¹³ *Id.* at 16.

¹⁴ *Id.* at 16-17.

¹⁵ *Id.* at 15-16.

¹⁶ *Id.* at 15-17.

¹⁷ *Id.* at 5, 7-8.

¹⁸ *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)).

¹⁹ *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

²⁰ *E.g., AFGE, Nat'l INS Council*, 69 FLRA 549, 552 (2016).

²¹ Exceptions at 7. In its opposition, the Union asserts that the Agency failed to raise these regulations before the Arbitrator. Opp'n at 4. However, the record demonstrates that the Agency raised "ICARE" multiple times. Because "ICARE" is an acronym for the first letters of the core values created by the regulations, we find that the Agency sufficiently raised the matter below.

²² Exceptions at 5, 7-8.

challenges the Arbitrator's finding that the conduct was not "severe and egregious" because she erroneously relied on evidence that other employees had been charged with the same violation as the grievant.²³

The cited regulations set forth general principles of core values, characteristics, and customer service that serve as guidelines for employees of the Agency.²⁴ However, the regulations neither establish a minimum level of discipline for an employee charged with misconduct, nor establish that certain misconduct be deemed severe and egregious. Moreover, because the Agency has not established that the Arbitrator's finding that other employees charged with the same violation received lesser discipline is a nonfact,²⁵ we defer to it. And that finding supports the Arbitrator's conclusion that the misconduct was not "severe and egregious."²⁶ Finally, the Arbitrator was cognizant of the principles articulated in the regulations when she found that the grievant's conduct warranted discipline.²⁷

Therefore, the Agency has not otherwise shown that the Arbitrator's mitigation of the discipline is contrary to these regulations. Accordingly, we deny this exception.

C. The award is not contrary to public policy.

Referencing "ICARE values,"²⁸ the Agency argues that the award is contrary to its "public policy of treating misconduct in relation to veterans and their dependents as particularly severe and egregious misconduct."²⁹ But the Agency premises this exception

on its contrary-to-law exception.³⁰ As we deny that exception in Section III.B., above, we likewise deny the Agency's public policy exception.³¹

IV. Decision

We deny the Agency's exceptions.³²

²³ *Id.* at 7-8.

²⁴ See 38 C.F.R. § 0.600 ("General" section explaining that regulations "describe[] the Core Values, Characteristics, and Customer Experience Principles that serve as internal guidelines for employees of the [Agency]"); *id.* at § 0.601(d) ("Respect. VA employees will treat all those they serve and with whom they work with dignity and respect, and they will show respect to earn it."); *id.* at § 0.602(b) (Accessible. VA engages and welcomes veterans and other beneficiaries, facilitating their use of the entire array of its services. Each interaction will be positive and productive."); *id.* at § 0.602(c) ("Quality. VA provides the highest standard of care and services to veterans and beneficiaries while managing the cost of its programs and being efficient stewards of all resources entrusted to it by the American people. VA is a model of unrivalled excellence due to employees who are empowered, trusted by their leaders, and respected for their competence and dedication.").

²⁵ Award at 17-18.

²⁶ *Id.*

²⁷ *Id.* at 18 ("Veterans who have served our country deserve the honor and respect of all citizens and should be treated accordingly, especially by the federal department charged with assisting them.").

²⁸ Exceptions at 11.

²⁹ *Id.* at 9; see also *id.* at 11-12.

³⁰ *Id.*

³¹ *AFGE, Local 1698*, 70 FLRA 96, 99 (2016) (denying public-policy exceptions premised on contrary-to-law exception).

³² In reaching this decision, it should go without saying that we share our concurring colleague's view that veterans deserve to be treated with dignity and respect. Indeed, this view was clearly shared by the Arbitrator in rendering her award, who – contrary to our colleague's assertion – gave more than a "generic nod" to this principle. See Award at 18. However, as mentioned, the grievant herself "was a disabled veteran who had a 70% service-connected disability of Post-Traumatic Stress Disorder." *Id.* at 16. And we find no basis in the record to conclude that the Arbitrator found that enforcement of the parties' agreement was "more important" than the rights of the veteran who sought assistance from the Agency. Rather, the Arbitrator was simply performing the task assigned to her by the parties, which was to apply the provision in their agreement requiring "just and sufficient cause" for disciplinary actions. *Id.* at 4, 6.

Member Abbott, concurring:

I agree with my colleagues that the Agency's exceptions are properly denied. Although I disagree with the Arbitrator's assessment as to what degree of discipline is warranted under the vague "just and sufficient cause standard,"¹ the Arbitrator's determination passes muster even under the less deferential standard we have adopted in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida*.²

I write separately to highlight one disturbing aspect of this case.

While I agree with my colleagues that the service-connected disability of the grievant is a relevant consideration in factoring an appropriate penalty, my concern is that the effect of the grievant's verbal tirade on the veteran is largely ignored by the Arbitrator and minimized by the majority. The record does not establish – because the parties do not talk about it – how long the veteran had been waiting to have his benefits issue resolved; how long he had waited to speak with a representative either before that day or during that day; we also do not know if his issue was ever resolved; or whether the veteran suffers from a service-related disability. Rather, the focus of this case (and the numerous hours of official time, agency time, and costs of arbitration) has been on the grievant who, no one disputes, went far beyond the bounds of civility when she called the veteran a "crazy bastard."³

The best the Arbitrator can do is to give a generic nod to *all* veterans – but not to *this* veteran who was the victim of the grievant's tirade – "deserv[ing] the honor and respect of all citizens . . . especially by the federal department charged with assisting them."⁴ According to the Arbitrator and the majority, the protections for the grievant found in the parties' CBA⁵ are more important than the rights and expectations of the veteran who sought the service of the local Veterans Affairs service center.

That is one way to balance the competing interests here. It is not, however, how I would set the scales.

¹ Award at 4.

² 71 FLRA 660, 664 (2020) (Member Abbott concurring; Member DuBester dissenting).

³ Award at 16.

⁴ *Id.* at 18.

⁵ *Id.*