

63 FLRA No. 186

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES
LOCAL 3509
(Union)
0-AR-4112

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DECISION

August 14, 2009

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Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Stephen D. Owens filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator found that the Agency violated the parties' National Agreement (agreement) by failing to timely accommodate the grievant's request for transfer to an office closer to her home. He ordered the Agency to grant the grievant administrative leave in lieu of the annual leave, sick leave, and credit hours she used during the period while she was waiting for the transfer to be effectuated.

For the following reasons, we dismiss the Agency's exception that the award is contrary to the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. § 791 *et seq.*, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and 29 C.F.R. § 1630.2 as barred by § 2429.5 of the Authority's Regulations and deny the Agency's remaining exception.

II. Background and Arbitrator's Award

The grievant's permanent duty station was the Agency's Lumberton, North Carolina office, which is approximately an hour and ten minute drive from her home. The grievant developed health problems affecting her ability to drive and requested that her manager

arrange a temporary detail to the Agency's Whiteville office, which was close to her home.

While the grievant's request was pending before higher level management, she continued to report for work at the Lumberton office for several weeks, until one day she "had to leave after about two hours on account of her fatigue." Award at 4. At this point, her medical provider indicated that she would "not be able to return to work until further notice." *Id.* The grievant stated, in this regard, that her medical provider determined "that it would be better for her not to make the 50-mile drive to Lumberton and for her to stay out until she was able to work in Whiteville." *Id.*

The grievant subsequently was permitted to report to work in Whiteville. She later learned that she had been charged with sick leave, annual leave, and credit hours for the period between the day she stopped work in Lumberton and the day she started work at the Whiteville office. She requested that the charged sick leave be changed to administrative leave and the Agency denied the request.

The grievant filed a grievance challenging the denial of her request for administrative leave. When the grievance was not resolved, it was submitted to arbitration. The Arbitrator stated the issue as follows:

Did the Agency violate the National Agreement when it denied the grievant's request for administrative leave . . . ? If so, what shall be the proper remedy?

Award at 2.

At the outset, the Arbitrator rejected the Agency's claim that only Article 31, Section 4 of the agreement was at issue in the grievance, finding that "the reasonable accommodation issue under Article 18" was also a part of the grievance. *Id.* at 10. Applying Article 18, the Arbitrator found that "[t]he crux of [the grievant's] request -- as documented by her medical provider -- was a change in her work site location that was closer to her home in Whiteville so that she would not have to drive herself to work." *Id.* According to the Arbitrator, the grievant's supervisor at Lumberton stated that if the grievant continued to come to Lumberton, "her concentration would be impeded, and her work performance would suffer." *Id.* at 11. The Arbitrator found that the grievant's request for a temporary relocation to the Whitesville office in order to "eliminate" the risks to herself and others constituted a "legitimate and justifiable and a reasonable accommodation." *Id.* (citing Article 18, Section 10, Part C of the parties' agreement.)¹ The Arbitrator also found that the grievant was able to

“perform all the essential duties of her job . . . as well as several other duties of an administrative nature.” *Id.* at 10.

The Arbitrator further found that the grievant’s “unrebutted description of her work activities demonstrates that there was work available at Whitesville that she could have performed” prior to the date she began work at that office. *Id.* at 11. Moreover, according to the Arbitrator, to the extent that her ability to work at Whitesville depended on the availability of files sent from Lumberton, management at Lumberton forgot to send those files, delaying her start at Whitesville. In this regard, the Arbitrator found that, “[b]ut for” the delay, the grievant would have reported to Whiteville sooner. *Id.* at 12. He concluded that, under these circumstances, the grievant’s request to have her leave restored as administrative leave was “not unreasonable.” *Id.* at 11. Consequently, he ordered the Agency to change the grievant’s leave record to reflect the use of administrative leave for the period of the Agency’s delay.

III. Positions of the Parties

A. Agency’s Exceptions

The Agency contends that the Arbitrator’s award is contrary to law and regulation.² According to the Agency, the Arbitrator implicitly “found that the Agency had discriminated against the grievant by denying her reasonable accommodation for a disability.” Exceptions at 4. The Agency asserts, in this regard, that without a finding that the grievant is an individual with a disability that substantially limits a major life activity, as a matter of law “there can be no finding of disability discrimination and therefore, no remedy.” *Id.* at 7. Moreover, the Agency asserts that the grievant failed to produce evidence that a vacant position existed at Whiteville at the time of her request and, as a matter of law, “[a]bsent a finding that the Agency failed to provide a reassignment to a vacant position, there can be no finding of disability discrimination.” *Id.* at 9. Finally, the Agency argues that, under Office of Personnel Man-

agement (OPM) regulations,³ the award of administrative leave is deficient because the grievant, during the period covered by that award, was not ready, willing, and able to work. *Id.* (citing 5 C.F.R. § 550.805(c) (§ 550.805(c))

B. Union’s Opposition

The Union argues that “[e]ven if the [A]rbitrator does not set out specific findings and rationale for each issue, this does not mean that [relevant] factors were not considered.” Opposition at 3. According to the Union, “[t]here is absolutely no evidence to indicate that the Arbitrator’s legal conclusions regarding Article 31, Article 18, Section 10 of the [parties’ agreement], and 42 U.S.C. § 12102 were in err[or] or misapplied.” *Id.* at 4. The Union asserts that the Arbitrator found that, had the Agency provided the grievant with a reassignment as a reasonable accommodation, the reassignment would have enabled her to perform her work at an acceptable level. Finally, according to the Union, the Arbitrator rejected the Agency’s claim that the grievant was not ready, willing, and able to work at Whiteville. The Union maintains that the Arbitrator remedied the Agency’s dilatory tactics which forced the grievant to deplete her sick leave, annual leave, and credit hours.

IV. Preliminary Issue

The Authority has consistently held that it will not consider issues that could have been, but were not, presented to the arbitrator. *See* 5 C.F.R. § 2429.5; *see also United States Dep’t of the Treasury, IRS, Kan. City Field Compliance Serv.*, 60 FLRA 401, 403 (2004); *IAFF, Local F-89*, 50 FLRA 327, 328 (1995). There is no indication in the award or the record of this case that the Agency argued to the Arbitrator that the grievant was not entitled to reasonable accommodation under the Rehabilitation Act, the ADA, or 29 C.F.R. § 1630.2. To the contrary, the Arbitrator framed the issue as whether the Agency improperly denied the grievant administrative leave and the Agency argued that such leave was inconsistent with only the parties’ agreement and OPM

1. Article 18, Section 10, Part C provides, in relevant part, as follows:

[I]ndividual accommodations will be determined on a case-by-case basis, taking into consideration the employee’s specific disability, existing limitations, the work environment and any undue hardship imposed on the operation of SSA’s program. . . . Qualified employees with disabilities may request specific accommodations.

Award at 11.

2. The Agency cites the Rehabilitation Act, 29 U.S.C. § 791 *et seq.*; the ADA, 42 U.S.C. § 12101 *et seq.*; 29 C.F.R. § 1630.2; and 5 C.F.R. § 550.805(c).

3. 5 C.F.R. § 550.805(c) provides as follows:

Except as provided in paragraph (d) of this section, in computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency may not include—

(1) Any period during which an employee was not ready, willing, and able to perform his or her duties because of an incapacitating illness or injury; or

(2) Any period during which an employee was unavailable for the performance of his or her duties for reasons other than those related to, or caused by, the unjustified or unwarranted personnel action.

regulations. Award at 9. As the grievant's right to an accommodation was before the Arbitrator in this case, the Agency clearly could have, and should have, raised any arguments concerning accommodation under the Rehabilitation Act, the ADA, and 29 C.F.R. § 1630.2 to the Arbitrator. *See id.*; *see also United States Dep't of Labor, Mine Safety & Health Admin.*, 61 FLRA 232, 235 (2005); *IRS*, 60 FLRA at 403. Accordingly, we dismiss the Agency's exception that the award is contrary to the Rehabilitation Act, the ADA, and 29 C.F.R. § 1630.2 as barred by § 2429.5 of the Authority's Regulations.

V. The award of administrative leave is not contrary to law.

When a party's exception involves an award's consistency with a government-wide regulation, the Authority reviews any question of law raised by the award and the exception *de novo*. *See, e.g., United States Dep't of the Navy, Navy Public Works Ctr., Norfolk, Va.*, 60 FLRA 513, 514 (2004) (citing *Tidewater Va. Fed. Employees Metal Trades Council*, 60 FLRA 10, 11 (2004); *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995); *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). Under the *de novo* standard, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See id.* (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

Restoration of leave is an appropriate remedy when an employee has incurred the use of leave as a result of, or for reasons related to, an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596 (§ 5596). *See NTEU, Chapter 51*, 40 FLRA 614, 627-29 (1991) (*Chapter 51*); *see also United States Dep't of the Treasury, IRS, Philadelphia Serv. Ctr., Philadelphia, Pa.*, 41 FLRA 710, 718-23 (1991) (*IRS*) (administrative leave appropriate remedy for contract violation). The Arbitrator found that the Agency violated Article 18 by failing to accommodate the grievant's disability and by delaying the grievant's reassignment to the Whiteville office. Specifically, he found that if the Agency had accommodated the grievant's request to work at Whiteville, then the grievant would have performed at an acceptable level and would not then have used leave during the period July 15 to July 31. The Agency's violation of Article 18 constitutes an unjustified or unwarranted personnel action under § 5596. *See, e.g., Chapter 51*, 40 FLRA at 628

The Agency argues that the award is contrary to law because 5 C.F.R. § 550.805(c) provides that an employee is not entitled to back pay for any period during which she was not ready, willing, and able to perform her duties due an incapacitating illness or injury, or for other reasons unrelated to the unjustified personnel action. However, the Authority has held that § 550.805(c) does not preclude restoration of leave when an employee has incurred the use of leave for reasons related to an unjustified or unwarranted personnel action. *See United States Dep't of Health and Human Services, Gallup Indian Medical Ctr., Navajo Area Indian Health Serv.*, 60 FLRA 202, 211 (2004) (citing *United States Dep't of Educ.*, 50 FLRA 34, 37 (1994)) (*Navajo Area*) (then Member Pope dissenting as to other matters). *Accord Ghannam v. Natsios*, EEOC Appeal No. 01990574 (June 22, 2004) (employee entitled to back pay for period in which she was unavailable for performance of her duties due to unlawful discrimination); 63 Comp. Gen. 20 (1983) (same). The Authority has stated in this regard that an agency remedying an unjustified and unwarranted personnel action by restoring leave "generally must record the absence as administrative leave[.]" *IRS*, 41 FLRA at 719.

Consistent with the above precedent, because the grievant used the leave as a result of the Agency's contract violation, the Arbitrator's award of administrative leave for the period of the violation is not contrary to § 550.805(c). The Agency has therefore failed to demonstrate that the award is deficient. Accordingly, we deny the Agency's exception that the award is contrary to § 550.805(c).

VI. Decision

The Agency's exception that the award is contrary to the Rehabilitation Act, the ADA, and 29 C.F.R. § 1630.2 is dismissed as barred by § 2429.5 of the Authority's Regulations. The Agency's remaining exception is denied.