65 FLRA No. 201

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1367
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
LACKLAND AIR FORCE BASE, TEXAS
(Agency)

0-AR-4737

_____

DECISION

June 29, 2011

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

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

The Arbitrator concluded that the grievant's five-day suspension was for just and sufficient cause. For the reasons set forth below, we deny the Union's exception.

II. Background and Arbitrator's Award

The Agency issued the grievant a notice of proposed suspension for five days, which alleged that the grievant was absent without leave (AWOL) on five days because he did not report to work and did not follow the established procedures for requesting leave. Award at 5. The resulting grievance was not resolved and was submitted to arbitration. *Id.* at 7. The parties stipulated to the following issue before the Arbitrator: "Did the Agency have just and sufficient cause to suspend the [g]rievant for five days based on the charges of unauthorized absence, failing to follow [a] supervisor's instructions and failure to request leave in accordance with established procedures? If not, what should the remedy be?" *Id.* at 5.

The Arbitrator found that prior to the absences at issue, the grievant's second-line supervisor (flight chief) instructed the grievant to request any unscheduled leave by calling the flight chief. *Id.* at 15. Over the next month and a half, the grievant was absent on five occasions, but the Arbitrator found that none of his leave requests for these days were approved. *Id.* at 16. On each of these occasions, the grievant either asked for leave from a supervisor other than the flight chief, or left answering machine messages at the office requesting leave without leaving a phone number where he could be reached (call-back number). *Id.* Whenever the grievant spoke to a supervisor to request unscheduled leave, the supervisor always instructed the grievant to contact the flight chief, but the grievant never did so. *Id.* After the first two absences, the flight chief again instructed the grievant to call him with any unscheduled leave requests, but the grievant continued not to do so. *Id.*

In her award, the Arbitrator cited several provisions of the parties' agreement including Article 13, Section 11 (Article 13),[2] which provides

1. Member Beck's separate opinion, concurring in the result, is set forth at the end of this decision.

2. Article 13, Section 11 of the parties' agreement pertinently provides:

> In case of illness or emergencies that cannot be foreseen, the following procedures apply in requesting sick or annual leave:
>
> A. The employee will personally telephone his/her supervisor or the designated alternate if it is possible to do so. Otherwise, he/she will have an immediate family member or other responsible individual call for him/her as specified below.
>
> . . . .
>
> C. If the supervisor is not on duty, the employee will make his/her leave request to the person designated to act in the supervisor's place.
>
> . . . .
>
> F. If the first-line supervisor or alternate is temporarily unavailable, the employee will

procedures for requesting unscheduled leave, and Article 21 (Article 21),[3] which provides the parties' obligations in relation to disciplinary actions. *Id.* at 2. Before the Arbitrator, the Union argued that the grievant followed the procedures established in Article 13, and that the Agency's requirement that the grievant request unscheduled leave only from the flight chief conflicted with that provision. *Id.* at 14.

The Arbitrator found that it was "clear and uncontroverted" that the grievant was repeatedly instructed to call the flight chief to request unscheduled leave. *Id.* at 15. The Arbitrator determined that, even if the Agency's instructions were not proper or violated the parties' agreement, the grievant did not have the authority to determine that an instruction violated the parties' agreement and need not be followed. *Id.* at 15-16. Therefore, the Arbitrator concluded that, because the grievant "failed to follow instructions, failed to request leave according to the procedure clearly established by his . . . supervisor, and, therefore, was AWOL . . . as charged[,]" the Agency had just and sufficient cause to issue a five-day suspension. *Id.* at 16.

III. Positions of the Parties

A. Union's Exception

The Union argues that the award fails to draw its essence from the parties' agreement. Exception at 1. According to the Union, the Arbitrator "refused to address or resolve" the allegation that the Agency violated the parties' agreement by unilaterally creating new leave procedures that "directly conflict" with those in Article 13. *See id.* at 1, 6.

B. Agency's Opposition

The Agency argues that the award does not fail to draw its essence from the parties' agreement. *See* Opp'n at 1. In this regard, the Agency argues that the Union does not explain how the Arbitrator failed to apply Article 13, and that she could have determined that the grievant failed to comply with Article 13 by, for example, failing to leave a call-back number. *Id.* at 4-5.

IV. Analysis and Conclusion

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that 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 collective bargaining 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. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Arbitrator found that the Agency had just cause to suspend the grievant for his recurring failure to follow the repeated instruction that he should direct unscheduled leave requests to the flight chief. Award at 15-16. According to the Arbitrator, the Agency's alleged violation of Article 13 is irrelevant to this determination because the grievant did not have the authority to determine that an instruction violated the parties' agreement and need not be followed. *Id.* In this regard, the Union does not explain how the grievant's alleged compliance with Article 13 is inconsistent with the Arbitrator's finding that the Agency had just cause to suspend an employee who repeatedly refused to follow his supervisor's express instructions.[4] Furthermore, in

> leave a phone number where he/she can be contacted if circumstances permit. The supervisor will call the employee back in a short time and give a decision on the request. Otherwise, the employee should again contact the supervisor as soon as feasible.

Award at 2.

3. Article 21, Section 1 provides, in pertinent part, that "[e]mployees are expected to . . . respect the administrative authority of those directing their work . . . ." *Id.* Article 21, Section 2 provides: "It is the responsibility of the [e]mployer to take disciplinary action against an employee for just cause." *Id.*

4. Moreover, in light of the Arbitrator's finding that the grievant twice failed to leave a call-back number when leaving a message requesting unscheduled leave, *id.* at 16, it is not clear from the record that the grievant followed the

addition to Article 13, the Arbitrator cited Article 21 as a relevant provision of the parties' agreement, which requires that employees "respect the administrative authority of those directing their work[.]" *Id.* at 2. Accordingly, the Arbitrator interpreted the parties' agreement to find that the Agency had just cause to suspend an employee who repeatedly failed to follow his supervisor's instructions for requesting unscheduled leave, and, thus, was AWOL on five days. *Id.* at 16. As the Union has not established that this interpretation is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, the Union does not demonstrate that the award fails to draw its essence from the parties' agreement, and we deny this exception.[5]

V. Decision

The Union's exception is denied.

Member Beck, Concurring:

I join in my colleagues' decision to deny the Union's exception arguing that the Arbitrator's award fails to draw it essence from the parties' agreement. However, I believe my colleagues err when they fail to acknowledge and address the Union's additional contention that the Arbitrator exceeded her authority.

In its exceptions, the Union asserts that "the Arbitrator has refused to address or resolve the matter of the Agency's violation of the [parties' agreement]." Exceptions at 2. According to the Union, the Arbitrator "glosses over" the fact that the grievant was in compliance with the parties' agreement. *Id.* at 7, 9. Further, the Union argues that the Arbitrator found the propriety of the supervisor's instructions to be "completely irrelevant." *Id.* at 7; *see also id.* (noting that the Arbitrator stated that "it does not matter whether . . . [the] instructions were proper" or violated the parties' agreement or established procedure). In my view, these assertions constitute a separate and distinct argument that the Arbitrator exceeded her authority. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996) ("[a]rbitrators exceed their authority when they fail to resolve an issue submitted to arbitration").

Applying Authority precedent, I would find that the Arbitrator did not exceed her authority. The parties stipulated to the following issue: "[d]id the Agency have just and sufficient cause to suspend the [g]rievant . . . ." Award at 5. The Arbitrator resolved this issue when she determined that the grievant's failure to follow the Agency's clear instructions constituted just and sufficient cause to suspend the grievant for five days. *Id.* at 16. The issue of whether the Agency's instructions were in conflict with the parties' agreement and, thus, whether the Agency violated the agreement, was not included in the stipulated issue. As a result, the Arbitrator was not required to address this issue and did not fail to resolve an issue submitted to arbitration by not doing so. *See AFGE, Local 3911*, 64 FLRA 686, 688 (2010) (finding that the arbitrator did not exceed his authority when he failed to resolve a "predicate legal issue" that was not one of the stipulated issues); *U.S. Dep't of Veterans Affairs, Med. Ctr., Richmond, Va.*, 63 FLRA 553, 557 (2009) (finding that the arbitrator did not exceed his authority where the issue was whether there was just cause to suspend the grievant and did not include whether the agency violated the parties' agreement). Accordingly, I would deny this exception.

leave procedures prescribed by Article 13 in every instance. *See id.* at 2 (Article 13 requires an employee requesting leave to "leave a phone number where he/she can be contacted . . . .").

5. The Union does not argue that the Arbitrator exceeded her authority, and the Authority has held that "for cases that are processed under the [Authority's Regulations as revised effective October 1, 2010], we will no longer construe parties' exceptions as raising grounds that the exceptions do not raise." *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting in part). Accordingly, we do not address whether the Arbitrator exceeded her authority.