

66 FLRA No. 140

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

and

UNITED STATES
DEPARTMENT OF LABOR
(Agency)

0-AR-4827

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DECISION

June 26, 2012

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

I. Statement of the Case

The Union filed an exception to an award of Arbitrator Ezio E. Borchini 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 found that the grievant's suspension was for just cause, but mitigated the grievant's suspension from ten days to five days. For the reasons set forth below, we deny the Union's exception.

II. Background and Arbitrator's Award

The grievant had a history of repeated absences and late arrivals while working for the Agency. Award at 11. The Agency previously had taken action against the grievant for his tardiness, including giving him an official reprimand, removing him from a flexible work schedule, placing him on leave restriction, and proposing a five-day suspension that ultimately was not imposed. *Id.* at 7-8, 11.

In August 2010, the Agency proposed a ten-day suspension for "failure to provide medical documentation" and "repeatedly arriving late while on leave restriction." *Id.* at 8. The grievant testified that his frequent absences and late arrivals were caused by a medical condition. *Id.* at 10. Although the grievant used

sick leave for his full-day absences – including 240 hours of advanced sick leave – he did not use sick leave for late arrivals. *Id.* at 8. The grievant's supervisor testified that the grievant's "suspension [wa]s not related to the days that he was out sick, but it [wa]s related to the days when he was tardy." *Id.* The grievant then was suspended for ten days. *Id.*

The Union presented a grievance challenging the grievant's ten-day suspension and requesting backpay, restored leave, and interest. *Id.* at 1. The matter was unresolved and was submitted to arbitration. The parties stipulated to the following issue: "Did the Agency violate the [a]greement, [Agency regulations], the Family and Medical Leave Act ("FMLA"), [d]ue [p]rocess, or other [f]ederal laws by imposing a [ten-]day suspension? If so, what shall be the remedy?" *Id.* at 2.

The Arbitrator found that, because the grievant had a history of attendance issues, the Agency reasonably requested medical documentation. *Id.* at 20. He also concluded that "this case focuses solely on the discipline administered for the grievant's repetitive late arrivals and not on other absences." *Id.* at 21. According to the Arbitrator, the grievant was tardy so extensively "the Agency could not rely on his being present to accomplish his duties and that this impeded the Agency's mission." *Id.*

Although the Arbitrator noted that the grievance did not raise any medical issues or FMLA claims, he found the supervisor had no obligation to inform the grievant of his FMLA rights because he never informed the supervisor that his tardiness was caused by his medical condition. *Id.* at 22-23. However, after considering the factors set forth in *Douglas v. Veterans Administration*, 5 MSPR 280, 305 (1981), the Arbitrator concluded that the grievant's suspension should be mitigated from ten days to five. *Id.* at 24-27.

III. Positions of the Parties**A. Union's Exception**

The Union argues that the Arbitrator "failed to abide" by the precedent of the U.S. Court of Appeals for the Federal Circuit because he did not take into account the fact that the grievant's illness caused him to miss work and receive disciplinary action. Exception at 4 (citing *Norris v. Sec. & Exch. Comm'n*, 675 F.3d 1349 (Fed. Cir. 2012); *Malloy v. U.S. Postal Serv.*, 578 F.3d 1351 (Fed. Cir. 2009)). According to the Union, because the grievant's illness was "reasonably substantiated," the Arbitrator should have considered it in determining whether to uphold the grievant's suspension. *Id.* at 4-5.

B. Agency's Opposition

The Agency argues that the Union is barred from raising the grievant's medical issues because they were not raised in the grievance originally. Opp'n at 6. The Agency also contends that the Arbitrator had no obligation to consider post-suspension medical evidence because, as the suspension was less than fourteen days, he was not bound by the decisions of the Federal Circuit. *Id.* at 7.

Further, the Agency claims that the Federal Circuit cases are distinguishable from the grievant's case because they relate to removals, not suspensions. *Id.* at 7-8. Finally, the Agency asserts that the grievant did not prove a link between his medical issues and his tardiness. *Id.* at 9-11.

IV. Analysis and Conclusion: The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See 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)). 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. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Union argues that the Arbitrator failed to abide by Federal Circuit and Merit Systems Protection Board (MSPB) precedent when he did not take into account the grievant's medical condition in upholding the grievant's suspension. Exception at 4-5. Although arbitrators considering suspensions of fourteen days or less may use and apply the legal principles established by the MSPB and the Federal Circuit in reviewing adverse actions under § 7703, such use is not mandatory. *AFGE, Local 522*, 66 FLRA 560, 563 (2012). Thus, a claim that an arbitrator failed to apply the same substantive standards as the Federal Circuit or MSPB in a case involving a suspension of fourteen days or less will not establish that an award is deficient. *See U.S. Dep't of Justice, Exec. Office for Immigration Review*, 66 FLRA 221, 224 (2011).

Here, because the grievant's suspension was for ten days, it is not an adverse action under § 7703. Therefore, the Union's argument that the Arbitrator failed to apply Federal Circuit precedent does not establish that the award is contrary to law. *See U.S. Dep't of Homeland*

Sec., U.S. Customs & Border Prot., 65 FLRA 160, 163 (2010) (finding that the agency's argument that the arbitrator failed to apply Federal Circuit precedent regarding the grievant's five-day suspension did not establish that the award was contrary to law). Accordingly, we deny the Union's exception.

V. Decision

The Union's exception is denied.