66 FLRA No. 22

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
NORTH FLORIDA/SOUTH GEORGIA
VETERANS HEALTH SYSTEM
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1976
(Union)

0-AR-4450

_____

DECISION

September 15, 2011

_____

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Lloyd L. Byars filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the 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 did not have just cause to suspend the grievant for fourteen days. For the reasons set forth below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant is an employee and a Union steward. Award at 2. While in her capacity as Union steward, the grievant attended a meeting and allegedly demonstrated "insolent and abusive behavior" toward the Chief of Food Production and Service (Chief). *Id.* Based on the grievant's conduct at that meeting, the Agency suspended the grievant for fourteen days. *Id.* at 4.

The Union filed a grievance alleging that the suspension was not for just cause, as required by Article 13, Section 1 of the collective bargaining agreement (CBA).[1] The grievance was unresolved and submitted to arbitration, where the parties stipulated to the following issues:

> 1. Did the Agency have just cause to issue a [fourteen]-day suspension to [the grievant]? If not, what shall be the remedy?
>
> 2. Does the Union have the right to present an unfair labor practice [(ULP)] charge before the Arbitrator, and if so did the Agency commit [a ULP] when it disciplined [the grievant]?

Id. at 4-5.

Addressing the contractual "just cause" issue, the Arbitrator found that although the grievant's conduct was "aggressive," "rude, and disrespectful" toward the Chief, the grievant did not use vulgar or profane language and did not touch or threaten the Chief. *Id.* at 5, 8. The Arbitrator also found that the grievant was provoked by the Chief's "intemperate manners" towards her. *Id.* at 9. Moreover, the Arbitrator determined that the Chief failed to appreciate that the grievant was acting in her official Union capacity, with equal status to the Chief, and that this had contributed to the grievant's tone. *Id.* at 6-8. He also determined that the record failed to demonstrate that the grievant's behavior constituted "flagrant misconduct" as charged by the Agency, or that her actions became "designed" once the Chief entered the room. *Id.* at 9.

In addition, in assessing the reasonableness of the suspension, the Arbitrator considered that, in a prior incident where a management official "probably" exhibited more egregious behavior than that of the grievant, the Agency had not disciplined that management official. *Id.* at 10. Further, the Arbitrator found that the grievant's prior suspensions did not support a finding that this suspension was reasonable because the prior suspensions: (1) had occurred more than eight years prior to the conduct at issue here; and (2) were for conduct unrelated to Union activity. *Id.* at 10-11. The Arbitrator concluded that the Agency did not have just cause for the suspension as required by the CBA. *Id.* Consequently, he found it

[1] Article 13, Section 1, of the CBA states, in pertinent part: "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." Joint Ex. C-1 at 36 (Master Agreement between the Department of Veterans Affairs and AFGE (1997)).

unnecessary to decide the second stipulated issue regarding a ULP. *Id*.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is based on nonfacts in four respects. First, the Agency claims that the Arbitrator mistakenly found that the grievant was engaged in activity that is protected under the Statute. Exceptions at 3-6. Second, the Agency contends that even if the grievant was generally engaged in protected activity, the Arbitrator incorrectly found that the grievant's behavior did not constitute "flagrant misconduct" that exceeds the bounds of protected activity. *Id.* at 6-14. Third, the Agency asserts that the Arbitrator erroneously evaluated the reasonableness of the suspension by contrasting it to the Agency's actions with regard to a prior incident concerning a management official's conduct. *Id.* at 14-16. Fourth, the Agency alleges that the Arbitrator erred in finding that the Chief disregarded the grievant's status as a Union steward and provoked the grievant. *Id.* at 16-18.

The Agency also contends that the Arbitrator failed to conduct a fair hearing. In support of this claim, the Agency asserts that the Arbitrator erred by not permitting the Agency to submit evidence regarding prior suspensions issued against the grievant, written evidence that had been presented to the Agency's deciding official, and the Agency's Table of Penalties. *Id.* at 18-23. The Agency further argues that the Arbitrator erroneously found that the prior suspensions were irrelevant to the Agency's assessment of the penalty and that this finding "is unsupported by the . . . [CBA], the evidence, and by the facts." *Id*. at 23-24.

Finally, the Agency contends that the award is deficient because the Arbitrator did not make specific credibility findings necessary to support his findings of fact and conclusions of law. *Id.* at 24-25. In particular, the Agency argues that without specific credibility findings with regard to witnesses' testimony involving the prior incident of the management official or the grievant's alleged misconduct, the Arbitrator's conclusion that there was no "just and sufficient cause" to suspend the grievant is unsupported. *Id.* at 25.

B. Union's Opposition

The Union argues that the award is not based on nonfacts. Opp'n at 6-9. Contrary to the Agency's position, the Union contends that the Agency failed to establish that the grievant's conduct constituted flagrant misconduct or otherwise exceeded the bounds of protected activity. *Id*. at 11-18. The Union also asserts that the Arbitrator properly compared the grievant's conduct with a prior incident involving a management official's conduct. *Id*. at 23-25.

In addition, the Union asserts that the Arbitrator did not deny the Agency a fair hearing. *Id*. at 25-27. In this connection, the Union disputes the Agency's claim that the Arbitrator did not permit the Agency to submit pertinent evidence. *Id*. at 26. The Union explains that the Arbitrator had determined that any evidentiary exhibits the Agency wished to be made part of the record would be presented as needed by Agency witnesses at the hearing. *Id.; see also* Tr. at 14-15. The Union argues, therefore, that the Arbitrator did not refuse to hear certain evidence, but rather did not consider evidence that was not introduced at the hearing by Agency witnesses in compliance with the Arbitrator's "established . . . procedure."[2] *Id.* Further, the Union argues that the Arbitrator properly found that the grievant's prior suspensions were not relevant. *Id*. at 27. Finally, with regard to the Agency's claim that the award did not contain sufficient findings of fact and conclusions of law, the Union argues that this claim does not support setting aside the award because it merely challenges the Arbitrator's credibility determinations and evaluation of the testimony. *Id*. at 27-28.

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency argues that the award is deficient because it is based on nonfacts in four respects. To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, 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. *See id.* In addition, the Authority has found that an exception challenging an arbitrator's legal conclusions will not demonstrate that an award is based on a nonfact. *See, e, g., U.S. Dep't of Health & Human Servs., Nat'l Insts. of Health*, 64 FLRA 266, 269 (2009). Further, where the premise of a nonfact exception is erroneous, the Authority denies the exception. *See AFGE, Local 2923*, 65 FLRA 561, 563 (2011).

The Agency's first two nonfact arguments allege that the Arbitrator erred in finding that: (1) the grievant was generally engaged in a protected activity at the time of the alleged misconduct; and (2) even if the grievant

[2] The Union states that during the hearing, the Agency neglected to introduce its exhibits with regard to the grievant's prior discipline or its Table of Penalties. Opp'n at 26.

was generally engaged in protected activity, her alleged misconduct did not constitute "flagrant misconduct" that exceeded the bounds of this protected activity. The Authority has held that the flagrant misconduct standard applies in cases where an agency is alleged to have violated § 7116 of the Statute by taking actions against an individual based on that individual's actions during the course of protected activity.[3] *See AFGE, Local 2923*, 65 FLRA at 563. By contrast, where an arbitrator resolves a disciplinary-action claim exclusively under a collective bargaining agreement, an arbitrator may establish and apply whatever burden the arbitrator considers appropriate unless a specific burden of proof is required. *See, e.g., U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, St. Louis Dist., St. Louis, Mo.*, 65 FLRA 642, 645 (2011). In this regard, the Authority distinguishes allegations that an agency lacked just cause for discipline under a CBA from allegations of unlawful interference with protected rights under the Statute. *See U.S. Dep't of Veterans Affairs, VA Md. Healthcare Sys.*, 65 FLRA 619, 621-22 (2011). In addition, when an arbitrator is not required to apply a statutory standard, alleged misapplications of that standard do not provide a basis for finding the arbitrator's award deficient. *See Soc. Sec. Admin.*, 65 FLRA 286, 288 (2010).

The Arbitrator found that the Agency did not have just cause to suspend the grievant for fourteen days as required by Article 13, Section 1 of the CBA. As a result, the Arbitrator specifically found it unnecessary to decide whether the Agency committed a ULP. *See* Award at 4, 11. Because the Arbitrator resolved only a contractual just cause issue, he was not required to apply statutory standards, and his alleged misapplication of those standards does not provide a basis to find the award deficient. *See AFGE, Local 2923*, 65 FLRA at 563. Thus, the Agency's first two nonfact exceptions -- which challenge the Arbitrator's alleged misapplication of statutory standards -- provide no basis for finding the award deficient. *Id.*

The Agency's third nonfact exception alleges that the Arbitrator erred in contrasting the incident leading to the grievant's suspension with a prior incident involving a management official. The Agency's fourth nonfact exception challenges the Arbitrator's findings that the Chief disregarded the grievant's status as a Union steward and provoked the grievant. Even assuming that these two exceptions concern factual findings, the parties disputed both of these matters before the Arbitrator. *See* Award at 10 (parties disputed whether grievant's behavior was more egregious than the behavior of the management official in the prior incident); *id.* at 7 (parties disputed whether Chief's behavior provoked grievant's conduct). Because these matters were disputed during arbitration, they do not provide a basis for finding the award deficient based on a nonfact. *See NFFE, Local 1984*, 56 FLRA at 41.

Based on the foregoing, we find that the Agency has not demonstrated that the award was based on nonfacts, and we deny the Agency's exceptions in this respect.

B. The Arbitrator conducted a fair hearing.

The Agency contends that the Arbitrator failed to conduct a fair hearing. An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995). It is well established that an arbitrator has considerable latitude in conducting a hearing and the fact that an arbitrator conducts a hearing in a manner that a party finds objectionable does not, by itself, provide a basis for finding an award deficient. *See AFGE, Local 22*, 51 FLRA 1496, 1497-98 (1996). In addition, the Authority has held that disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding an award deficient. *U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 72 (2009) (*VAMC Louisville*).

With regard to the Agency's claim that the Arbitrator failed to conduct a fair hearing by refusing to accept into the record Agency exhibits relating to prior suspensions, its Table of Penalties, and written evidence used by the deciding official, *see* Exceptions at 18-21, 24, the Agency does not establish that the Arbitrator refused to hear or consider this evidence. Instead, the record shows that the Arbitrator ruled that the Agency should present its relevant exhibits into evidence as needed in conjunction with a witness's testimony, *see* Tr. at 14-15, but that the Agency failed to do so.[4] That the Agency did not introduce this evidence does not establish that the Arbitrator denied the Agency a fair hearing.

Finally, we construe the Agency's claim that the Arbitrator made no sufficient findings of fact and conclusions of law or specific findings of the credibility

[3] Section 7116(a)(2) of the Statute provides, in pertinent part, that it is a ULP for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]"

[4] Although the Agency introduced, and the Arbitrator accepted, three exhibits in conjunction with Agency witnesses' testimony, *see* Tr. at 36-37, 67, & 111, the Agency did not produce exhibits relating to the Table of Penalties, the grievant's prior disciplinary record and documents used by the deciding official. These exhibits, therefore, did not become part of the record.

of various witnesses, *see* Exceptions at 24-25, as a claim that the Arbitrator failed to provide a fair hearing.[5] *See VAMC Louisville*, 64 FLRA at 72 (construing claim that the arbitrator should have credited the testimony of agency witnesses over that of the grievant as a fair hearing exception). A claim that an arbitrator erred in the weight that he or she accorded evidence does not establish that the arbitrator denied a party a fair hearing. *Id*. Thus, the Agency's claim does not demonstrate that the Arbitrator denied it a fair hearing.

For the foregoing reasons, we find that the Arbitrator did not deny the Agency a fair hearing, and we deny the Agency's fair-hearing exception.

V. Decision

The Agency's exceptions are denied.

[5] In doing so, we note that the Agency's exceptions were filed prior to the October 1, 2010, effective date of the Authority's revised arbitration Regulations. We also note that, to the extent that the Agency's claim can alternatively be construed as a nonfact exception, an agency's disagreement with an arbitrator's interpretation of a "just cause" provision in a CBA does not provide a basis for finding the award is based on a nonfact. *See U.S. Dep't of the Navy, Naval Training Ctr., Orlando, Fla.*, 53 FLRA 103, 106 (1997). Finally, to the extent that this exception can be construed as a "contrary to law" exception, as discussed previously, the Arbitrator found a contractual violation, not a statutory one; thus, this exception does not provide a basis for finding the award contrary to law.