

67 FLRA No. 99

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
XVIII AIRBORNE CORPS AND FORT BRAGG
WOMACK ARMY MEDICAL CENTER
FORT BRAGG, NORTH CAROLINA
(Agency)

0-AR-4905

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DECISION

April 29, 2014

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Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Union filed a grievance over the Agency's decision to suspend the grievant for five days for sexually harassing another employee. Arbitrator James E. Rimmel denied the grievance, finding that the grievant's actions violated the Agency's policy on preventing sexual harassment and that the five-day suspension "was not unreasonable or excessive."¹ We must address five issues that the Union raises in its exceptions to the Arbitrator's award.

First, we must determine whether the Arbitrator exceeded his authority by failing to address an issue, or by addressing an issue not submitted to him. Because the Arbitrator's findings directly responded to the issue before him, he did not exceed his authority.

Second, we must decide whether the award is based on the nonfact that the grievant "created a hostile [work] environment."² Even assuming that the Arbitrator's hostile-work-environment determination is a factual finding, the parties disputed that matter

at arbitration. Accordingly, the Arbitrator's resolution of that dispute provides no basis for finding the award deficient on this ground.

Third, we must determine whether the award is based on a nonfact because it "sustained [a] charge" against the grievant that differed from the Agency's charge.³ As the Union fails to establish that the Arbitrator addressed a charge other than the one for which the Agency suspended the grievant, this argument provides no reason to find that the award is based on a nonfact.

Fourth, we must resolve whether the award is contrary to law because it upheld the Agency's violation of the grievant's due-process right by suspending her without identifying the dates of her misconduct. Because the Arbitrator found that the Agency's disciplinary notice informed the grievant of the approximate dates of the alleged sexual harassment, this argument lacks merit.

Finally, we must determine whether the award is contrary to law because the Arbitrator violated the grievant's due-process right by upholding her suspension based on a charge other than the one for which the Agency suspended her. Because the grievant had no due-process right to a post-suspension proceeding, there are no constitutionally required due-process protections the Arbitrator must observe in conducting the post-suspension arbitration proceeding that occurred here. Thus, this argument lacks merit as well.

II. Background and Arbitrator's Award

The grievant's coworker filed a sexual-harassment complaint alleging – among other things – that the grievant repeatedly addressed him using "unwelcome pet names," such as "sweetie," "honey," and "hun,"⁴ even after he asked the grievant not to do so. The Agency notified the grievant (notice) that, due to her conduct toward her coworker on or about February 16, 2011, the Agency was charging her with violating its policy on preventing sexual harassment, and was proposing to suspend her for five days. In support of that charge, the notice quoted a portion of an Army regulation – which the policy incorporates by reference – stating that "[a]ny [s]oldier or civilian who make[s] deliberate or repeated unwelcome verbal comments . . . of a sexual nature is engaging in sexual harassment."⁵ After investigating the allegation, the

¹ Award at 16; *see also id.* at 12 (citing "[P]olicy Memorandum #5"); Exceptions, Attach. C ("Policy Memorandum #5 – Prevention of Sexual Harassment").

² Exceptions at 3.

³ *Id.* at 4.

⁴ Award at 2 (internal quotation marks omitted); *see also id.* at 3-5.

⁵ *Id.* at 12 (internal quotation marks omitted); *accord* Exceptions, Attach. B (Notice) at 1 (quoting "Army Command Policy 600-20"); Exceptions, Attach. C (the Policy), Section 1.

Agency determined that the grievant “verbally sexually harassed” her coworker as charged,⁶ and it affirmed the grievant’s five-day suspension. The Union grieved the suspension, and the parties submitted the matter to arbitration. As relevant here, the issue before the Arbitrator was whether there was just cause to suspend the grievant.

Before reviewing the merits of the charge, the Arbitrator discussed the Union’s argument that the disciplinary notice was so “woefully inadequate” that it denied the grievant due process.⁷ The Arbitrator found that the notice identified the approximate dates on which the alleged misconduct occurred, and that it quoted the specific regulatory prohibition underlying the charge. Moreover, the Arbitrator found that the grievant admitted certain allegations – specifically, that she repeatedly addressed her coworker as “hon,” even after he asked her not to do so.⁸ Under those circumstances, the Arbitrator did not find a violation of due process.

Turning to the merits, the Arbitrator first noted that Title VII of the Civil Rights Act of 1964⁹ prohibits certain forms of sex discrimination. He then discussed how regulations and judicial decisions had established that sexual harassment may constitute sex discrimination. The Arbitrator stated that, because sexual harassment “can create a hostile work environment” if “[l]eft unchecked,”¹⁰ employers create workplace-conduct policies like the Agency’s to prevent and combat sexual harassment.

Applying those general concepts to the grievant’s actions, the Arbitrator found that the grievant made “repeated, unwelcome use” of terms like “hon” to address her coworker.¹¹ And, after finding that the grievant continued making such unwelcome comments despite requests that she change her behavior, the Arbitrator concluded that the grievant acted “contrary to [the] . . . policy” and “created a hostile work environment” for her coworker.¹² In addition, he determined that a five-day suspension for such misconduct “was not unreasonable or excessive”¹³ and, accordingly, denied the grievance.

The Union filed exceptions to the award. We address the arguments raised in those exceptions below.

(“Reference”) (citing “Army Regulation 600-20, Army Command Policy”).

⁶ Award at 4 (quoting “Notice of Decision to Suspend”).

⁷ *Id.* at 12.

⁸ *Id.* at 13.

⁹ 42 U.S.C. §§ 2000e to 2000e-17.

¹⁰ Award at 11.

¹¹ *Id.* at 14.

¹² *Id.*

¹³ *Id.* at 16.

III. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Union asserts that the Arbitrator exceeded his authority by finding that the grievant’s conduct was “[in]appropriate . . . under . . . statutes” prohibiting sex discrimination,¹⁴ rather than assessing whether the grievant engaged in sexual harassment as the Agency’s policy on preventing sexual harassment defines it. As relevant here, the Authority has found that arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration or resolve an issue not submitted to arbitration.¹⁵

The Arbitrator quoted the prohibition on verbal sexual harassment from the policy and expressly found that the grievant violated that prohibition. Thus, he did not fail to resolve an issue submitted to him. And, although the Union alleges that the Arbitrator’s references to statutes indicate that he decided an issue not before him, the policy explicitly states that it relies on the definition of sexual harassment “*in law* and regulation.”¹⁶ Because the policy expressly indicates that it relies on sexual-harassment prohibitions created by “federal laws,”¹⁷ the Arbitrator did not exceed his authority by referring to statutory sources.

B. The award is not based on nonfacts.

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.¹⁸

First, the Union argues that the award is based on the nonfact that the grievant “created a hostile [work] environment.”¹⁹ 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.²⁰ Even assuming that the Arbitrator’s determination that the grievant created a hostile environment is a factual finding,²¹ because the

¹⁴ Exceptions at 3.

¹⁵ *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

¹⁶ Exceptions, Attach. C, Section 4.a. (emphasis added).

¹⁷ *Id.*, Section 4.b.

¹⁸ *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*NFFE*).

¹⁹ Exceptions at 3; *see also id.* at 5.

²⁰ *NFFE*, 56 FLRA at 41.

²¹ *See AFGE, Local 1770*, 67 FLRA 93, 94 (2012) (*Local 1770*) (after “[a]ssuming without deciding” that an arbitral finding concerned a factual matter, Authority denied nonfact exception challenging that finding).

parties disputed that matter before the Arbitrator,²² his resolution of that dispute provides no basis for finding the award deficient.²³

Second, the Union asserts that the award is based on a nonfact because it “sustained [a] charge” against the grievant that differed from the Agency’s charge.²⁴ Contrary to the Union’s assertion, the Arbitrator explicitly found that the grievant violated the Agency’s policy on preventing sexual harassment, and that is the exact charge for which the Agency suspended her. Accordingly, the Union’s argument provides no reason to find that the award is based on a nonfact.

C. The award is not contrary to law.

The Union argues that the grievant was denied due process in two ways. First, the Union contends that the Agency denied the grievant due process by suspending her without identifying the dates of her misconduct. Second, the Union maintains that the Arbitrator denied the grievant due process by upholding her suspension based on a charge not advanced by the Agency.

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.²⁵ 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.²⁶ When conducting a de novo review of an arbitrator’s legal conclusions,²⁷ the Authority defers to the arbitrator’s underlying factual findings, unless the excepting party establishes that they are nonfacts.²⁸

In considering exceptions alleging denials of due process, the Authority has distinguished between an agency’s pre-decisional actions in the disciplinary process and an arbitrator’s conduct during a post-suspension arbitration proceeding.²⁹ Regarding

pre-decisional actions, the Authority has held that an award is not contrary to an employee’s due-process rights unless it deprives the employee of notice of the agency’s charges, an explanation of the agency’s evidence, or an opportunity to reply.³⁰ Regarding post-suspension actions, the Authority has held that federal employees who are suspended for fourteen days or less do not have particular constitutionally required post-suspension due-process protections.³¹ That is, there are no constitutionally required due-process protections that arbitrators must observe in conducting those proceedings.³² Consequently, the Authority has denied due-process exceptions that challenge the way an arbitrator conducts a post-suspension arbitration proceeding.

Applying the pre-decisional due-process principles set forth above, as the Arbitrator found that the disciplinary notice informed the grievant of the approximate dates of the alleged sexual harassment, and the Union does not allege that this finding is a nonfact, the Union’s argument that the Agency denied the grievant due process lacks merit.³³

Regarding the Union’s contention that the Arbitrator denied the grievant due process, we note initially that the Union’s claim that the Arbitrator upheld a charge not advanced by the Agency is inaccurate. The Agency alleged, and the Arbitrator found, that the grievant violated the policy. But even if the Union’s claim were accurate, applying the post-suspension due-process principles set forth above, there are no constitutionally required due-process protections the Arbitrator must observe in conducting the arbitration proceeding. Thus, the contention that the conduct of the arbitration proceeding denied the grievant due process fails.³⁴ For these reasons, we deny the Union’s contrary-to-law exception.

IV. Decision

We deny the Union’s exceptions.

²² Award at 6 (Agency argued that because it proved “the facts of the charge . . . , [the Arbitrator] may . . . presume[] the misconduct . . . created a hostile work environment”); *id.* at 7 (Union contended that “no evidence” supported finding that the grievant created a hostile environment).

²³ See *NFFE*, 56 FLRA at 41.

²⁴ Exceptions at 4.

²⁵ *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)).

²⁶ *U.S. DOD, Dep’t of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*Ala. Nat’l Guard*).

²⁷ See *Ala. Nat’l Guard*, 55 FLRA at 40.

²⁸ See *SSA, Balt., Md.*, 64 FLRA 516, 518 (2010) (*SSA*).

²⁹ Compare *id.*, with *NTEU*, Chapter 45, 52 FLRA 1458, 1465-66 (1997) (*Chapter 45*).

³⁰ *SSA*, 64 FLRA at 518 (citing *AFGE, Local 1151*, 54 FLRA 20, 26-27 (1998)).

³¹ Chapter 45, 52 FLRA at 1463-66 & n.8 (citing *U.S. Dep’t of VA, Nat’l Mem’l Cemetery of the Pac.*, 45 FLRA 1164 (1992)); accord *AFGE, Local 3911*, 66 FLRA 59, 61 (2011) (applying Chapter 45 to deny due-process exception).

³² Chapter 45, 52 FLRA at 1465.

³³ See *Local 1770*, 67 FLRA at 65 (denying exception that raised similar due-process argument).

³⁴ See Chapter 45, 52 FLRA at 1464-65.