

63 FLRA No. 117

UNITED STATES DEPARTMENT OF JUSTICE
 FEDERAL BUREAU OF PRISONS
 FEDERAL CORRECTIONAL COMPLEX
 COLEMAN, FLORIDA
 (Agency)

and

AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES
 COUNCIL OF PRISON LOCALS
 LOCAL 506
 (Union)
 0-AR-4262

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 DECISION

May 21, 2009

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

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator James J. Sherman 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 exception.

The Arbitrator sustained a grievance alleging that the Agency had improperly denied the grievant's request for Union representation at a fitness-for-duty examination. For the reasons that follow, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further action consistent with this decision.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency had inappropriately denied the grievant's request for Union representation at a fitness-for-duty examination.¹ The grievance was not resolved and was submitted to arbitration. The Arbitrator stated the relevant issue as: "[w]hether the Agency violated the [g]rievant's rights when it refused her request for Union representation at her fitness[-]for[-]duty examination. If so, what is the proper remedy?"² Award at 1.

In his award, the Arbitrator set forth the parties' post-hearing briefs in their entirety, which reveal that both the Union and the Agency framed their arguments in terms of § 7114(a)(2)(B) of the Statute and Article 6 of the parties' agreement.³ *See id.* at 16-22, 36-37. The Arbitrator set forth the relevant "contract language and the law" and found that the language in each was "similar[.]" Award at 47.

Upon his initial consideration of the parties' arguments, the Arbitrator found that the Agency had presented "persuasive argument that a fitness[-]for[-]dut[y] exam[ination] is not an 'investigation' within the meaning of that term in the contract or the law." *Id.* at 45. The Arbitrator also found that the Union argued, "not very persuasively[.], that there is no reason to differentiate between an[] investigation that might lead to discipline and a fitness[-]for[-]duty exam[ination] that might lead to discharge." *Id.* Further, the Arbitrator determined that, in many situations, an employer would be justified in its refusal to grant union representation at a fitness-for-duty examination, but found that a union representative should be present "if an employee has reason to fear that the person providing the exam will not follow standard procedures whether due to lack of understanding of the employee's duties or possibly even bias." *Id.* at 48.

1. Although the Arbitrator made no specific findings in this regard, the Union argued in its post-hearing brief, and the Agency does not dispute, that the fitness-for-duty examination consisted of three different parts held on two separate days: (1) a physical examination; (2) a firearms examination; and (3) a psychological examination. *See* Award at 7-15.

2. The Arbitrator also addressed whether the grievance was arbitrable, however, as the Agency does not challenge the Arbitrator's finding that it was, we do not address this matter further.

3. 5 U.S.C. § 7114(a)(2)(B) provides:

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at --

....

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if --

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
 (ii) the employee requests representation.

Article 6, section f, of the parties' agreement provides:

Unit employees, including probationary employees, have the right to a Union representative during any examination by, or prior to submission of any written report to, a representative of the Employer in connection with an investigation if:

1. the employee reasonably believes that the examination may result in disciplinary action against the employee; and
 2. the employee requests representation.

Award at 37 (emphasis omitted); *see also id.* at 47.

Based on the hearing testimony and the evidence submitted, the Arbitrator found that the grievant “had reason to believe [that] the fitness-for-duty exam [in this case] was to be used as an excuse to terminate her employment.”⁴ *Id.* at 53. As such, he determined that, “regardless of whether or not the Agency calls it an ‘investigation,’ [he] must rule in favor of the Union.” *Id.* The Arbitrator found that the fitness-for-duty examination was “completely inappropriate” and that those conducting the examination lacked knowledge of the grievant’s job duties and the types of tests that should have been performed. *Id.* According to the Arbitrator, if the grievant had been allowed to have Union representation, then she would not have had to endure “a worthless examination.” *Id.*

The Arbitrator sustained the grievance and directed the Agency “to permit a Union [r]epresentative to accompany an employee, if the employee requests it, when the employee is sent for a fitness-for-duty examination.” *Id.* at 54. The Arbitrator stated that he could not award damages and other specified relief requested by the Union “without further information” and retained jurisdiction for six months in the event that the parties were unable to reach agreement.⁵ *Id.*

4. Whether the grievant was actually involuntarily terminated was disputed by the parties but was not resolved by the Arbitrator. The Union asserted in its post-hearing brief that the grievant received a “proposal for termination” that was “partly based” on the final report of the psychiatrist who conducted the psychological portion of the fitness-for-duty examination, but did not state whether the grievant was ultimately terminated. Award at 7. The Agency argued in its post-hearing brief that the grievant testified that she had submitted disability retirement paperwork, indicating that her doctor had placed her in a non-duty status. *Id.* at 35 n.2. The Arbitrator stated that “it is important to understand why [the grievant] is no longer employed.” *Id.* at 46. He found that the grievant was placed on “enforced leave status” prior to the fitness-for-duty examination, but never stated when or if her employment with the Agency terminated. *Id.* at 44.

5. Member Beck notes that, in support of his finding that the grievant had a reasonable fear of discipline, the Arbitrator discussed at some length the Agency’s treatment of the grievant prior to the fitness-for-duty examination. For example, he credited the grievant’s testimony that: (1) a fellow employee had locked her in a room for over two hours; (2) that this event “caused her to panic and her emotional system has never completely recovered”; and, (3) approximately one year later, the same employee again locked the grievant in a room and the grievant again panicked. Award at 43-44. The Arbitrator concluded that, “[o]n the face of it, what happened to [the grievant] appears to be ‘sexual harassment.’ And more serious, it was condoned by [the Agency].” *Id.* at 47. In a step that is inconsistent with these individualized findings, the Arbitrator did not award specific relief to the grievant but, instead, ordered prospective relief to unidentified employees who may be subject to fitness-for-duty examinations in the future.

III. Positions of the Parties

A. Agency’s Exception

The Agency argues that the award is contrary to 5 U.S.C. § 7114(a)(2)(B). According to the Agency, in order to “trigger” the right to union representation, four elements must be satisfied: (1) there must be an examination of the employee; (2) the examination must occur in connection with an investigation; (3) the employee must reasonably believe that the examination may result in discipline; and (4) the employee must request union representation. Exceptions at 5 (citing *AFGE, Local 1941 v. FLRA*, 837 F.2d 495, 498 (D.C. Cir. 1988); *Dep’t of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal.*, 29 FLRA 594, 602 (1987)).

According to the Agency, fitness-for-duty examinations do not qualify as investigatory interviews under § 7114(a)(2)(B). The Agency asserts that it is authorized to order its employees, all of whom are law enforcement officers, for fitness-for-duty examinations when necessary and that, here, it had a “legitimate basis” for ordering the fitness-for-duty exam because it had questions regarding the grievant’s physical and mental ability to perform her assigned duties. *Id.* at 5-6. The Agency claims that it was not investigating the grievant for any sort of conduct, but, rather, was attempting to determine whether the grievant was fit to work in the “unique and rigorous environment of a correctional institution.” *Id.* at 6.

In support of its claim that the award is contrary to § 7114(a)(2)(B), the Agency cites National Labor Relations Board (NLRB) precedent, which it claims the Authority has held is an appropriate source for determining whether an agency has complied with § 7114(a)(2)(B). *Id.* at 4-5. The Agency asserts that the NLRB has previously held that an employee is not entitled to union representation during an employer-ordered fitness-for-duty exam. *Id.* at 6 (citing *United States Postal Service*, 252 NLRB 61 (1980) (*Postal Service*)). According to the Agency, in *Postal Service*, the NLRB held that an employer-ordered doctor’s examination of an employee who had absentee problems was not covered by *Weingarten* because no questions of an investigatory nature were asked of the employee during the examination and there was no evidence that the examination was intended by management to form the basis of disciplinary action against the employee.⁶ Further, the Agency argues that the NLRB subsequently stated that “a physical examination or a ‘fitness[-]for[-]duty’ examination” is not “within the purview of *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).” *Id.* at 6-7 (quoting

System 99, 289 NLRB 723 n.2 (1988) (citing *Postal Service*, 252 NLRB 61)).

With respect to the four factors set forth above, the Agency contends that there is no evidence in the record that the fitness-for-duty examination was an “examination in connection with an investigation” within the meaning of § 7114(a)(2)(B) of the Statute. In this regard, the Agency asserts that the Arbitrator simply found that the fitness-for-duty examination was “inappropriate” and that whether or not the Agency was conducting an investigation, he “must rule in favor of the Union.” *Id.* at 7 (quoting Award at 53). According to the Agency, the record is clear that “the Agency was not conducting an ‘investigation’ and that there was no ‘examination.’” *Id.* at 8. The Agency claims that there is no record that the medical professional conducting the examination was asking questions intended to elicit information from the grievant about an ongoing investigation, or that there was an ongoing investigation. Accordingly, the Agency asserts that two of the four elements required under § 7114(a)(2)(B) are not satisfied and the award must be set aside.

B. Union’s Opposition

The Union asserts that the grievant had a right to Union representation at her fitness-for-duty examination under § 7114(a)(2)(B) of the Statute and the parties’ agreement. Opposition at 7-8. The Union claims that the Arbitrator’s ruling in its favor is supported by law and fact. In this respect, the Union rejects the Agency’s assertion that the fitness-for-duty examination was not an examination under § 7114(a)(2)(B), arguing that a fitness-for-duty examination is an examination “under the very definition of the word examination.” *Id.* at 10. The Union also rejects the Agency’s argument that *Postal Service* stands for the blanket proposition that employee’s are not entitled to Union representation at fitness-for-duty examinations and, instead, notes that the NLRB found that the findings and conclusions therein “were based on, and implicitly limited to, ‘the facts in the instant case.’” *Id.* (quoting *Postal Service*, 252 NLRB at 63-64). In contrast to *Postal Service*, the Union asserts that, here, a Union representative could have assisted the grievant in challenging the “gross improprieties” to which she was subjected, as found by the Arbitrator. *Id.* at 11.

6. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), the model for § 7114(a)(2)(B) of the Statute, sets forth the rights of bargaining unit employees to be given the opportunity to have union representation at investigative examinations under certain circumstances.

The Union also asserts that the Authority should reject the Agency’s assertion that the fitness-for-duty examination was not conducted in connection with an investigation. According to the Union, it is undisputed that the facility conducting the fitness-for-duty examination was expected to write a final and formal report regarding the state of the grievant’s fitness and submit that report to the Agency, which could be used by the Agency to terminate the grievant’s employment or otherwise discipline her. *Id.* at 12. According to the Union, the grievant’s fitness-for-duty examination did not arise out of “any legitimate and fairly raised question about her job competency, but arose . . . in retaliation for her [Equal Employment Opportunity (EEO)] complaint.” *Id.* The Union further asserts that the Agency “cannot deny” that it terminated the grievant based on the report submitted by the psychiatrist who examined the grievant as part of the fitness-for-duty examination. *Id.* at 13. Further, the Union argues that the Agency’s conduct was “investigative in nature” because it acted in a “confrontational manner” and the grievant was repeatedly reminded that her failure to comply with the fitness-for-duty examination would be used against her for disciplinary purposes. *Id.*

The Union also argues that the fitness-for-duty examination to which the grievant was subjected were not “standard fitness[-]for[-]duty examinations” of the type described in *Postal Service*. *Id.* at 13. According to the Union, the Agency did not approach the grievant with concerns about her physical or mental health and send her to her physician for a standard fitness-for-duty examination. *Id.* at 15. The Union asserts that the orders for the fitness-for-duty examination were given under circumstances that “undoubtedly” indicated that the grievant being investigated[.]” *Id.*

Finally, the Union notes that the Agency does not dispute the Arbitrator’s finding that the grievant had reason to believe that the fitness-for-duty examination could result in discipline. *Id.* at 16.

IV. Analysis and Conclusions

The Agency argues that the award is contrary to § 7114(a)(2)(B). 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 *United States 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 *United States Dep’t of Def., Dep’ts of the Army and 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 Arbitrator did not frame the issue either in terms of a contract violation or a statutory violation: he framed it only as “[w]hether the Agency violated the [g]rievant's rights when it refused her request for Union representation at her fitness[-]for[-]duty examination.” Award at 1. The Authority has applied statutory standards in assessing the application of contract provisions that mirror, or are intended to be interpreted in the same manner as, the Statute. *See, e.g., NLRB*, 61 FLRA 197, 199 (2005); *AFGE*, 59 FLRA 767, 769-70 (2004). Here, the contract provision relied on by the Arbitrator, Article 6, section f, is identical to § 7114(a)(2)(B) of the Statute in all relevant aspects. In addition, the Union specifically argued to the Arbitrator that the Agency had violated both the Statute and the parties' agreement, the Agency framed its arguments to the Arbitrator in terms of both the Statute and the parties' agreement, and the Arbitrator set forth both the relevant statutory language and the contractual language. Thus, whether the Arbitrator found a violation of the parties' agreement, the Statute, or both, we review the award under the statutory principles applicable to § 7114(a)(2)(B) cases. *See id.*

Section § 7114(a)(2)(B) of the Statute sets forth an exclusive representative's right, commonly referred to as the *Weingarten* right, to be represented at investigative examinations of bargaining unit employees. In order for this right to be triggered, the following criteria must be met: (1) the meeting must be an examination of an employee by a representative of the agency; (2) in connection with an investigation; (3) the employee must reasonably believe that the examination may result in disciplinary action against the employee; and (4) the employee must request representation.⁷ *AFGE, Local 1941 v. FLRA*, 837 F.2d at 498.

Here, the award contains no factual findings relating to the Arbitrator's application of the first and second factors set forth above. With respect to the first factor, the Arbitrator made no findings regarding whether the fitness-for-duty examination was an “examination” within the meaning of § 7114(a)(2)(B) or whether it was conducted by individuals who were representatives for the Agency. In this regard, the Arbitrator failed to make *any* factual findings regarding the nature of the fitness-for-duty examination at issue in this case. That is, there

are no findings regarding when it took place, where it took place, who conducted it, or what sorts of questions the grievant was asked. As stated previously, the Arbitrator set forth the parties' briefs in their entirety in his award; however, apart from setting forth the facts as submitted by the parties, the Arbitrator made no factual findings of his own regarding what took place at the fitness-for-duty examination.

With respect to the second factor, although the Arbitrator stated, generally, that the Agency had presented “persuasive argument that a fitness[-]for[-]dut[y] exam[ination] is not an ‘investigation’ within the meaning of that term in the contract or the law[,]” award at 45 (emphasis added), he did not make any factual findings relating to whether the specific fitness-for-duty examination *in this case* was conducted in connection with an investigation. In this respect, the Arbitrator stated only that, “regardless of whether or not the Agency calls it an ‘investigation,’ [he] must rule in favor of the Union.” *Id.* at 53. In addition, the Arbitrator made no factual findings concerning the nature of the questions asked during the fitness-for-duty examination that would allow the Authority to determine whether they were investigatory in nature. *See, e.g., Postal Serv.*, 252 NLRB at 61 (in finding that the fitness-for-duty examinations in question were not covered by *Weingarten*, the NLRB found it “[n]oteworthy” that there was an “absence of evidence that questions of an investigatory nature were in fact asked at the[] examinations.”). Based on the foregoing, the record does not contain sufficient findings of fact to determine whether the fitness-for-duty examination constituted an investigative interview under § 7114(a)(2)(B) to which the grievant had a right to Union representation.

In these circumstances, we are unable to assess, based on the record, whether the award is deficient under § 7114(a)(2)(B) of the Statute as the Agency claims. Where an arbitrator has not made sufficient factual findings for the Authority to assess or determine an arbitrator's legal conclusions, and those findings cannot be derived from the record, the Authority will remand the award to the parties for further action. *See, e.g., AFGE, Local 2054*, 63 FLRA 169, 173 (2009); *United States Dep't of Transp., Maritime Admin.*, 61 FLRA 816, 822 (2006); *NFFE, Local 1437*, 53 FLRA 1703, 1710-11 (1998).

Accordingly, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for clarification of the basis of his award consistent with the foregoing standards.

7. As the Agency does not except to the Arbitrator's finding that the grievant had a reasonable fear of discipline, Award at 48, and as there is no dispute that the employee requested Union representation, we do not address these factors further.

V. Decision

The case is remanded to the parties for resubmission to the Arbitrator, absent settlement, for further action consistent with this decision.