65 FLRA No. 91

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3310
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
UNITED STATES
ARMY CORPS OF ENGINEERS
ENGINEER RESEARCH &
DEVELOPMENT CENTER
WATERWAYS EXPERIMENT STATION
VICKSBURG, MISSISSIPPI
(Agency)

0-AR-4259

_____

DECISION

January 27, 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 William J. McGinnis 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 did not file an opposition to the Union's exceptions.

The grievant was accused of stealing wire from the Agency and was suspended for fourteen days. The Union grieved the discipline. The Arbitrator denied the grievance, finding that the Agency had just cause to suspend the grievant.

For the reasons set forth below, the Union's exceptions are dismissed in part and denied in part.

II. Background and Arbitrator's Award

This case concerns the suspension of the grievant, an electrician, while a criminal charge was pending against him. An Agency surveillance camera recorded the grievant's truck exiting his place of employment with what the Agency alleged were two spools of wire that belonged to the Agency. The Agency contacted the police and the grievant was later arrested for criminal embezzlement. Award at 3.

The Agency conducted an investigation into the grievant's conduct. The Union requested that the Agency delay the administrative disciplinary proceeding until after final disposition of the criminal charge. The Agency refused. Two months after the alleged offense occurred, while the criminal charge was still pending, the grievant's supervisor issued a notice proposing that the grievant be suspended for fourteen days for the unauthorized possession of government property. The Agency subsequently imposed the suspension. *Id.* at 7-8.

The Union filed a grievance over the suspension. When the grievance was not resolved, it was submitted to arbitration. The Arbitrator framed the issues as: "Did the Agency have [j]ust [c]ause to suspend the [g]rievant for 14 days under the [c]ollective [b]argaining [a]greement [CBA]? If not, what shall the remedy be?" [1] *Id.* at 1. The Union requested that the Agency delay the arbitration hearing until after final disposition of the criminal charge. Once again, the Agency refused. The arbitration hearing was held while the criminal charge was still pending. *Id.* at 2-3.

Before the Arbitrator, the Union contended that the grievant's Fifth Amendment privilege against self-incrimination was violated because the Agency failed to delay the administrative disciplinary proceeding and the arbitration hearing until after final disposition of the criminal matter. *Id.* at 8.

Based on a preponderance of the record evidence, the Arbitrator concluded that the Agency established just cause for the grievant's suspension under the CBA.[2] *Id.* at 12-13, 15. The Arbitrator applied "Seven Tests" of just cause that, as the Arbitrator noted, "were developed by the renown[ed] Arbitrator Carroll R. Daugherty[.]" *Id.* at 10-11. The Arbitrator applied the "Seven Tests" because he found that "they have been acknowledged as the fair and equitable method to determine if the just cause

1. The relevant contract provisions are set forth in the attached appendix.

2. In his award, the Arbitrator determined that the burden was on the Agency to prove by a preponderance of the evidence that the grievant was suspended for just cause. Award at 10.

standard has been met by an employer." *Id.* at 11. As applied, the Seven Tests are: "Notice, Reasonableness of Rule or order, Investigation, Fair Investigation, Proof, Equal Treatment and Penalty." *Id.*

First, the Arbitrator found that the grievant had prior notice that the unauthorized possession of government property was an offense under Agency regulations. *Id.* Second, he found that the Agency regulation is reasonable. Third, the Arbitrator found that the Agency conducted a "thorough and extensive" investigation of the alleged offense prior to the imposition of the discipline. *Id.* He added that the administrative investigation was "relevant to the alleged offense" and produced sufficient evidence to make a determination as to whether the grievant committed an offense. *Id.* Fourth, the Arbitrator found that the Agency's investigation of the alleged offense was conducted objectively and without bias towards the grievant. *Id.* at 11-12. Fifth, the Arbitrator found that the evidence the Agency gathered during the investigation, including identification of the truck on the surveillance camera tape, constituted sufficient proof that the grievant should be disciplined. *Id.* at 12. Sixth, the Arbitrator found that there was no evidence that the Agency provided the grievant unequal treatment during the investigation. The Arbitrator stated that the Agency conducted the investigation fairly and without discrimination. *Id.* Seventh, the Arbitrator found the discipline reasonably related to the seriousness of the grievant's offense and the grievant's past record. *Id.*

Accordingly, applying the Seven Tests, the Arbitrator concluded that the Agency had established just cause under the CBA for the grievant's suspension. *Id.* at 12-13. In so concluding, the Arbitrator found that "[t]he grievant was given every opportunity to rebut the allegations against him[,]" but that he failed to do so. *Id.* at 13. In the Arbitrator's opinion, the grievant's "testimony on direct was significantly limited and failed to address the numerous issues raised during management's presentation of [its] case against him." *Id.* This was so despite "[a]ny alleged restraint on [the grievant's] ability to testify during the arbitration hearing was removed" based on "notice from his legal counsel . . . that he would not be indicted for embezzlement[.]" *Id.*

III. Union's Exceptions

The Union contends that the award violates the grievant's Fifth Amendment privilege against self-incrimination because the Agency failed to delay the administrative disciplinary proceeding and the arbitration hearing until after final disposition of the criminal matter. Exceptions at 7-8. The Union also argues that the Arbitrator erred in finding that any chilling effect on the grievant's ability to exercise his Fifth Amendment privilege was removed because, before the hearing, the grievant had been advised by his attorney that he would not be indicted. *Id.* at 7-8. The Union asserts that the grievant's concerns over his rights were not removed because the attorney's advice constituted merely "opinion." *Id.* at 7.

In addition, the Union contends that the award fails to draw its essence from Article 21 of the CBA on three grounds. *Id.* at 10-14. First, the Union argues that the award fails to comply with Article 21, Sections 2, 3, and 5, which require that disciplinary actions be timely imposed after the offense is committed. *Id.* at 10-11. The Union asserts that the award erroneously fails to find that the Agency did not timely impose the disciplinary action. *Id.* The Union states that the Agency imposed the proposed suspension approximately two months after the Agency completed the investigation. *Id.*

Second, the Union argues that the award fails to comply with Article 21, Section 2, which requires that discipline be for just cause. *Id.* at 11. The Union argues that the award is deficient because it fails to find that the Agency conducted the administrative investigation inconsistent with due process. *Id.* at 11, 12. The Union asserts, among other things, that the Agency did not provide the grievant an opportunity to confront his accusers. *Id.* at 11-12.

Third, the Union argues that the award fails to comply with Article 21, Sections 4 and 5, which require that the Agency attempt to ascertain all the pertinent facts both for and against the grievant before the imposition of disciplinary action. *Id.* at 13. The Union argues that the award erroneously finds that the Agency conducted a thorough and fair administrative investigation. The Union states that, in the course of the investigation, the Agency failed to gather evidence that supported the grievant's innocence such as statements from the grievant and employees who discovered the property missing. *Id.* at 12, 14.

Furthermore, the Union contends that the Arbitrator applied the incorrect burden of proof in this case. *Id.* at 14. The Union asserts that the correct burden is "beyond a reasonable doubt." *Id.* at 14-15.

Next, the Union contends that the award violates the Fourth and Fourteenth Amendments because the Agency conducted an unreasonable search and seizure by means of the surveillance camera tape. *Id.* at 4-7. Finally, the Union contends that the award is inconsistent with Agency rules and regulations concerning the administration of Agency property. *Id*. at 8-10.

IV. Preliminary Matters

The Authority's Regulations that were in effect when the Union filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5.[3]

There is no indication in the record that the Union argued before the Arbitrator, as it does in its exceptions, that the Agency violated the Fourth and Fourteenth Amendments by conducting an unreasonable search and seizure by means of the surveillance camera tape. Exceptions at 4-7. In addition, there is no evidence in the record that the Union ever argued to the Arbitrator, as it does in its exceptions, that the Agency's investigation of the alleged offense was inconsistent with Agency rules and regulations concerning the administration of Agency property. *Id.* at 8-10. The Union could have presented these arguments to the Arbitrator but failed to do so. We therefore dismiss these exceptions as barred by § 2429.5 of the Authority's Regulations. *See U.S. DOD, Def. Distrib. Depot, Anniston, Ala.*, 61 FLRA 108, 109 (2005) (Authority will not consider arguments raised for the first time on appeal).

V. Analysis and Conclusions

A. The award is not contrary to the Fifth Amendment.

As noted above, the Union contends that the award violates the grievant's Fifth Amendment privilege against self-incrimination because the Agency failed to delay the administrative disciplinary proceeding and the arbitration hearing until after final disposition of the criminal matter. Exceptions at 7-8. When a party's exceptions challenge an award's consistency with law, the Authority reviews the exceptions 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 NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. The privilege not only applies to a criminal prosecution but also applies to "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (*Turley*). The Supreme Court extended this Fifth Amendment protection to public employment situations. *Garrity v. New Jersey*, 385 U.S. 493, 497-98 (1967) (*Garrity*) (Fifth Amendment extends to public employees). Based on the foregoing, the privilege could apply to an agency investigation and arbitration proceeding in the federal sector.

The Fifth Amendment privilege against self-incrimination is violated when an agency compels an employee to testify and the testimony could incriminate the employee. *Hoover v. Knight*, 678 F.2d 578, 581 (5th Cir. 1982) (*Hoover*) (citing *Turley*, 414 U.S. 70). Similarly, the Fifth Amendment is violated when an agency imposes a penalty upon an employee who elects to assert his or her Fifth Amendment privilege. *Id.* (citing *Garrity*, 358 U.S. 493).

Here, there is no evidence that, in the course of the administrative investigation, the Agency compelled the grievant to make statements on matters that could incriminate him. To the contrary, the record indicates that, during the investigation, the Agency contacted the grievant for a statement but that the grievant refused to provide one, on the advice of counsel. Tr. at 67.

Similarly, there is no evidence of any Fifth Amendment violation during the arbitration hearing. The grievant was not compelled to testify. Further, as found by the Arbitrator, the record reflects that the grievant was provided "every opportunity" to rebut the allegations against him, but failed to do so. Award at 13; *see also* Tr. at 214-16. Rather than assert a Fifth Amendment privilege, the grievant

3. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including 5 C.F.R. § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Union's exceptions in this case were filed before that date, we apply the prior Regulations.

chose to provide testimony that was "limited" and that "failed to address the numerous issues raised during management's presentation of [its] case against him." Award at 13. In these circumstances, the Union's claim that the award violates the Fifth Amendment lacks a foundation. *See Hoover*, 678 F.2d at 581 (as long as an employee is not required to surrender the constitutional privilege against self-incrimination, having to defend in two parallel proceedings does not raise constitutional questions).

Accordingly, we deny this exception.

B. The award does not fail to draw its essence from the CBA.

The Union contends that the award fails to draw its essence from Article 21 of the CBA on three grounds. Exceptions at 10-14. 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.

First, as noted, the Union argues that the award fails to comply with Article 21, Sections 2, 3, and 5, which require that disciplinary actions be timely imposed after the offense is committed. Exceptions at 10-11. The Union asserts that the award erroneously fails to find that the Agency did not timely impose the disciplinary action. *Id.* The Union states that the Agency imposed the proposed suspension approximately two months after the Agency completed the investigation. *Id.*

It is undisputed that the suspension of the grievant constitutes a formal disciplinary action and not an informal one. *See* Exceptions at 10. Article 21, Section 5 provides that an informal disciplinary action will be initiated within ten workdays. On the other hand, Article 21, Sections 2, 3, and 5 do not provide a time period for the initiation of a formal disciplinary action such as here. Thus, the Arbitrator's failure to find that the Agency did not timely impose the proposed suspension because the suspension was imposed approximately two months after the Agency completed the investigation provides no basis for finding that the Arbitrator's interpretation of Article 21, Sections 2, 3, and 5 is irrational, unfounded, implausible, or in manifest disregard of the agreement.

Second, the Union argues that the award fails to comply with Article 21, Section 2, which requires that discipline be for just cause. *Id.* at 11. However, the Arbitrator concluded, under the Seven Tests developed by arbitrator Carroll R. Daugherty, that the Agency had established just cause for the grievant's suspension under the CBA. Award at 11, 12-13. The Arbitrator found, among other things, that the Agency conducted a "thorough and extensive" investigation of the alleged offense prior to the imposition of the discipline. *Id.* at 11. He also found that the administrative investigation was "relevant to the alleged offense" and produced sufficient evidence to make a determination as to whether the grievant committed an offense. *Id.* In view of these findings by the Arbitrator, the Union provides no basis for finding that the Arbitrator's interpretation of Article 21, Section 2 is irrational, unfounded, implausible, or in manifest disregard of the agreement.

Third, the Union argues that the award fails to comply with Article 21, Sections 4 and 5, which require that the Agency attempt to ascertain all the pertinent facts both for and against the grievant before the imposition of disciplinary action. Exceptions. at 13. The Union argues that the award erroneously finds that the Agency conducted a thorough and fair administrative investigation. The Union states that, in the course of the investigation, the Agency failed to gather evidence that supported the grievant's innocence such as statements from the grievant and employees who discovered the property missing. *Id.* at 12, 14. However, as noted, the Arbitrator found that the Agency conducted a "thorough and extensive" investigation of the alleged offense prior to the imposition of the discipline. Award at 11. He also found that the Agency conducted a fair investigation. *Id.* at 12. In view of

these determinations by the Arbitrator, the Union provides no basis for finding that the Arbitrator's interpretation of Article 21, Sections 4 and 5 is irrational, unfounded, implausible, or in manifest disregard of the agreement.[4]

Accordingly, we deny this exception.

C. The Arbitrator did not apply an incorrect burden of proof.

The Union contends that the Arbitrator applied the incorrect burden proof. Exceptions at 14. The Union asserts that the correct burden is "beyond a reasonable doubt." *Id.* at 14-15. If a burden of proof is set forth in applicable law, rule, or regulation, or in the parties' collective bargaining agreement, then an arbitrator must apply the prescribed burden. *AFGE, Local 2250*, 52 FLRA 320, 323-24 (1996). However, when no burden of proof is laid out, an arbitrator is empowered to prescribe whatever burden of proof he or she considers appropriate, and the award will not be found deficient on the basis that the arbitrator applied an incorrect burden of proof. *See id*. at 324. Moreover, unless otherwise provided, prescribing the burden of proof encompasses specifying which party has the burden of proof under the prescribed standard. *See id*.

In this case, the Union fails to establish that applicable law, rule, or regulation, or the CBA prescribed the burden of proof. Consequently, the Arbitrator was free to apply any appropriate burden, which he did when he found that the Agency had to prove by a preponderance of the evidence that the grievant was suspended for just cause. Therefore, as the Union fails to establish a prescribed burden of proof, the Union's claim that the Arbitrator applied an incorrect burden of proof provides no basis for finding the award deficient. *See id; see also* Elkouri & Elkouri, *How Arbitration Works*, 949 (Alan Miles Ruben, ed., BNA Books 6th ed. 2003) ("quantum of proof required to support a decision to discipline . . . is unsettled").

Accordingly, we deny this exception.

VI. Decision

The Union's exceptions are dismissed in part and denied in part.

APPENDIX

ARTICLE 21
DISCIPLINE AND ADVERSE ACTIONS

SECTION 2. TIMELINESS OF DISCIPLINE.
If the Employer has just cause for disciplinary or adverse action, such action will be initiated timely after the offense was committed or made known to the Employer.

SECTION 3. INFORMAL DISCIPLINARY ACTIONS.
Oral admonitions and written warnings, if utilized, will be done in a timely manner, normally within ten (10) workdays in order to strengthen the relationship between the offending behavior and the discipline imposed. Informal disciplinary actions will be retained for a maximum period of twelve (12) months. The employee has the right to respond orally or in writing within 10 (ten) workdays. The Activity will consider the facts and the employee's response in determining the action to be taken. Normally, oral admonitions or written warnings shall not be given during the course of discussion between a supervisor and employee where the meeting is not specifically initiated for that purpose.

SECTION 4.
Before proposing and/or effecting disciplinary action against an employee of the bargaining unit, management officials shall attempt to ascertain all pertinent facts both for and against the employee.

SECTION 5.
When all the facts have been gathered and disciplinary action appears to be in order, discipline or a proposed notice thereof, as applicable, will be given promptly to the employee in accordance with the procedures set forth in the Code of Federal Regulation and this Contract. Subsequent to issuance, the employee will not be questioned further about the incident until he/she has been advised of their right to union representation. If representation is desired, no further discussion concerning this matter will take place with the employee until the representative is present.

Exceptions, Attach. 12.

4. To the extent the Union's exceptions may be construed as challenging as a nonfact the Arbitrator' finding that the Agency conducted a thorough and fair investigation of the alleged offense prior to the imposition of discipline, the parties disputed this issue before the Arbitrator. Award at 4, 7. The Authority will not find an award deficient as based on a nonfact where the alleged nonfact was disputed by the parties at arbitration. *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 594 (1993). Accordingly, the exceptions do not identify any basis for finding the award deficient as based on a nonfact.