65 FLRA No. 92

UNITED STATES
DEPARTMENT OF THE ARMY
FORT HUACHUCA, ARIZONA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1662
(Union)

0-AR-4343

DECISION

January 28, 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 John Phillip Linn 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 concluded that there was a preponderance of evidence establishing that the grievants failed to carry out the instructions of the Agency, but that the decision to suspend the grievants for one day did not promote the efficiency of the service. For the reasons set forth below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievants are three firefighters at the Fort Huachuca Fire Department. The Fire Department implemented new Standard Operating Guidelines (SOGs) after failing an operational readiness inspection. Award at 3-4. The Union, including the grievants, helped develop the first twelve SOGs; the Agency subsequently created an additional seventy SOGs. *Id.* at 4.

The former fire chief sent a written communication to several management officials stating that all firefighters were required to review the SOGs, and that they would be given a month to initial that they had reviewed the SOGs. *Id.* In a subsequent communication, the former fire chief stressed the importance of having the employees read the SOGs and initial that they had done so. *Id.* at 5.

After a month had passed, eleven of the firefighters had not initialed stating that they had reviewed the SOGs. Five of the eleven had either forgotten to initial or needed a few more hours, but the other six, including the grievants, had refused to initial. *Id.*

The three grievants were each given a notice of proposed penalty, which stated that it was a critical safety issue that the firefighters read and understand the content of the SOGs. *Id.* at 6. Each grievant was then given a three-day suspension. *Id.* The Union presented a grievance challenging the suspensions. At the second step of the negotiated grievance procedure, the Director of Emergency Services mitigated the penalty to one-day suspensions. *Id.* at 6-7.

The matter was not resolved and was submitted to arbitration. The parties stipulated to the following issues:

1. Is the Agency's decision that [the grievants] failed to carry out the instructions of the Agency within the time required to review and initial the Fort Huachuca Fire Department [SOGs] supported by a preponderance of the evidence?

2. Is the Agency's decision to suspend [the grievants] for one (1) day a reasonable penalty, not excessive, for such cause as to promote the efficiency of the [f]ederal service, and consistent with the Douglas factors and the Army's table of penalties for various offenses?

Id. at 2-3.

According to the Arbitrator, the former fire chief believed that all of the firefighters were "[p]rofessional[s]" and, therefore, did not need training on the SOGs. *Id.* at 8. The Arbitrator found

that the fire chief did not make any effort to test the firefighters' understanding of the new SOGs, and that two of the grievants "might be said to have acted for a higher cause" by not initialing because some of the firefighters who read and signed the SOGs actually might not have understood them. *Id.* The Arbitrator then determined that the Fire Department should have trained the firefighters. *Id.* at 9.

The Arbitrator concluded that a preponderance of the evidence supported the conclusion that the grievants failed to carry out the instructions of the Agency by failing to review and initial the SOGs. *Id.* at 10. However, he also found that the instructions of the Agency did not "promote the efficiency of the [f]ederal service." *Id.* Therefore, he rescinded the grievants' suspensions, ordered the Agency to pay each grievant for the amount of pay lost as a result of the suspension, and ordered the Agency to remove all reference of the grievants' suspensions from their official personnel files. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the Arbitrator exceeded his authority by resolving an issue that was not before him. Exceptions at 6. The Agency contends that, after finding by a preponderance of the evidence that the grievants failed to carry out the Agency's instructions, the Arbitrator was charged with determining the reasonableness of the penalty. *Id.* at 5. Instead, the Agency asserts, the Arbitrator addressed the reasonableness of the Agency's *instructions*, an issue that was not before him. *Id.* at 4. In support of its argument, the Agency relies on *U.S. Department of Health and Human Services, Food & Drug Administration, New Orleans, Louisiana*, 54 FLRA 90, 95 (1998) (*FDA*), in which the Authority found that the Arbitrator exceeded his authority by "awarding a remedy concerning an issue not submitted to arbitration." Exceptions at 6. The Agency claims that the Arbitrator rescinded the grievants' discipline as a remedy for the Agency's faulty instructions, rather than because the suspension itself was unreasonable. *Id.* at 7.

The Agency also argues that the award fails to draw its essence from the parties' collective bargaining agreement (Agreement). *Id.* According to the Agency, the Arbitrator set aside the disciplinary action even though the Agency supported the charge by a preponderance of the evidence simply because he "did not like the directive issued to the grievants." *Id.* at 8. The Agency asserts that the award fails to draw its essence from Article 14, Section 7 of the Agreement and that the Arbitrator used the "just cause" standard in Article 14, Section 2 in a way unintended by the parties.[1] *Id.* at 8-9.

Finally, the Agency argues that the award is contrary to 5 U.S.C. § 7106 because it violates management's rights to assign work and to discipline. *Id.* at 9-10. The Agency contends that the Arbitrator's "prohibition on requiring the reading of the SOGs and initialing as having read them" interferes with the Agency's right to assign work. *Id.* at 10. Similarly, the Agency asserts that the Arbitrator's "refusal to allow discipline" violates management's right to discipline. *Id.*

B. Union's Opposition

The Union contends that the Arbitrator did not exceed his authority because, when taken as a whole, it is clear that he found that the Agency's decision to suspend the grievants was not a reasonable penalty. Opp'n at 7. According to the Union, the Arbitrator found the penalty to be unjust because "it was not possible for the grievants to fully understand the SOGs on their own" without training. *Id.* Further, the Union argues that the grievants' failure to follow the Agency's instructions was justified because the Arbitrator found the instructions were not safe. *Id.* at 8. However, the "Arbitrator's opinion that the order was unreasonable and potentially dangerous ha[d] no impact on anything or anyone other than the determination of the reasonableness of the penalties imposed on the grievants," which was one of the issues submitted to the Arbitrator. *Id.* at 11.

The Union also argues that the award draws its essence from the Agreement. The Union contends that the Arbitrator's finding that failing to follow instructions did not justify a suspension when all of the circumstances were considered is consistent with Article 14, Section 7 of the Agreement. *Id.* at 13. The Union asserts that the award draws its essence from Article 14, Section 2 of the Agreement because the Arbitrator failed to find "just cause" for the disciplinary action. *Id.* at 13-14.

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

Finally, the Union argues that the Arbitrator's award does not interfere with management's rights. *Id.* at 14-15. According to the Union, the award does not interfere with the Agency's right to assign work in the future or its right to discipline and, therefore, does not violate § 7106. *Id.*

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

Arbitrators exceed their authority when they resolve an issue not submitted to arbitration. *See U.S. Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, S.F., Cal.*, 55 FLRA 193, 194 (1999). However, arbitrators do not exceed their authority by addressing a matter that is necessary to decide a stipulated issue, *NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996), or by addressing a matter that necessarily arises from issues specifically included in a stipulation. *See Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 519 (1986). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *See U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999).

An arbitrator has broad discretion to "fashion a remedy that the arbitrator considers to be appropriate." *U.S. Dep't of the Air Force, 72nd Mission Support Group, Tinker Air Force Base, Okla.*, 60 FLRA 432, 434 (2004). Arbitrators routinely resolve whether disciplinary action was warranted, and, if so, whether the penalty imposed was appropriate. *See AFGE, Local 2382*, 58 FLRA 270, 271 (2002) (Chairman Cabaniss concurring) (finding that the arbitrator's reduction of a one-day suspension was within his authority even though he found the grievant did not conduct himself in an appropriate manner); *AFGE, Local 22*, 51 FLRA 1496, 1498-99 (1996) (denying an exception where the arbitrator found the grievant's behavior to be improper, but nonetheless reduced the grievant's suspension).

The issue submitted to the Arbitrator was whether the grievants' one-day suspensions promoted the efficiency of the federal service. Award at 2-3. In answering that question, the Arbitrator concluded that the Agency's "instructions" did not promote the efficiency of the federal service and, thus, rescinded the suspensions. *Id.* at 10. Accordingly, the issue of whether the instructions were proper necessarily arose from the stipulated issue of whether the suspensions for failing to follow those instructions promoted the efficiency of the service. *See U.S. Dep't of the Navy, Navy Inventory Control Point, Mechanicsburg, Pa.*, 59 FLRA 698, 698-99 (2004) (denying an exception that the arbitrator exceeded his authority where the remedy was directly responsive to the issue).

The Agency, relying on *FDA*, argues that the Arbitrator exceeded his authority by "awarding a remedy concerning an issue not submitted to arbitration." Exceptions at 7. However, in *FDA*, the arbitrator, after considering whether it was improper for the union to hold meetings off-site, also found a violation of a different provision of the parties' agreement, and ordered the agency to provide permanent office space to the union. *FDA*, 54 FLRA at 92. Because the issue of office space was not before the arbitrator, and was only "tangentially related" to the submitted issue, the Authority found that the remedy ordering the agency to provide office space exceeded his authority. *Id.* at 95. *FDA* is inapposite to the case at hand because the Arbitrator here decided a matter that necessarily arose from the stipulated issue, rather than one that was only tangentially related.

Therefore, we find that the Arbitrator did not exceed his authority in considering whether the Agency's instructions promoted the efficiency of the federal service and deny this exception.

B. The award draws its essence from the Agreement.

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.

The Agency first argues that the award fails to draw its essence from Article 14, Section 7 of the Agreement because the Arbitrator rescinded "discipline stemming from the grievants' proven failure to follow a lawful order[.]" Exceptions at 8. However, while Section 7 provides that "employees are expected to obey lawful orders[,]" it also states that failure to do so "*may* result in disciplinary or adverse action." *Id.*, Attach. 3 at 13 (emphasis added). Discipline is not required for every failure to follow lawful instructions because, as listed in other sections of Article 14, the discipline must: "be based on just and sufficient cause[;]" "be in accordance with law, rule, regulation, and [the] Agreement[;]" "be processed in a timely manner[;]" and "promote the efficiency of the [f]ederal service." *Id.* at 12-13. Because discipline is not required for every failure to obey lawful orders, we find that the award draws its essence from Article 14, Section 7 of the Agreement. *See Soc. Sec. Admin.*, 65 FLRA 286, 288-89 (2010) (citation omitted) (finding that the agency's choice of discipline was subject to "arbitral scrutiny").

The Agency also argues that the Arbitrator used the "just cause" standard in a way unintended by Article 14, Section 2 of the Agreement because he "improperly applied the just cause standard to the directive itself and not [to] the discipline." Exceptions at 8-9. For the reasons stated above concerning whether the Arbitrator exceeded his authority, the Arbitrator found that the penalty was not imposed for just cause because the instructions failed to promote the efficiency of the service. The requirement that discipline be for the efficiency of the service is "functionally identical" to the requirement that discipline be for "just cause." *U.S. Dep't of Transp., Fed. Aviation Admin.*, 63 FLRA 383, 385 (2009) (*FAA*). Therefore, the requirement in Article 14, Section 2 of the Agreement that discipline be for "just and sufficient cause" is functionally identical to the requirement in Article 14, Section 4 of the Agreement that discipline will be "taken for such cause as will promote the efficiency of the [f]ederal service." Exceptions, Attach. 3 at 12-13. Therefore, we find that the award draws its essence from Article 14, Section 2 of the Agreement.

For the foregoing reasons, we deny this exception.

C. The award is not contrary to § 7106.

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 Authority recently revised the analysis that it will apply when reviewing management rights exceptions to arbitration awards, previously found in *U.S. Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C.*, 53 FLRA 146, 154 (1997) (*BEP*). *See U.S. Envtl. Prot. Agency*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *Fed. Deposit Ins. Corp., Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102 (2010) (Chairman Pope concurring) (*FDIC, S.F. Region*). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b). *Id.* Also, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority, under the revised analysis, assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *See id.* at 116-18. In concluding that it would apply an abrogation standard, the Authority rejected continued application of an excessive interference standard. *Id.* at 118.

It is not necessary to determine whether Section 14, as interpreted and applied by the Arbitrator, affects management's rights to assign work and to discipline because, even if it does, the Agency has not shown that the award is deficient. *See U.S. Dep't of Transp., Fed. Aviation Admin., Alaskan Region*, 62 FLRA 90, 92 (2007). In this regard, the Authority has found that provisions requiring that discipline be for just cause, or to

promote the efficiency of the federal service, constitute appropriate arrangements within the meaning of § 7106(b)(3) of the Statute. *See FAA*, 63 FLRA at 385 (citing *Soc. Sec. Admin., Balt., Md.*, 53 FLRA 1751, 1754 (1998)). Because the Arbitrator was enforcing a provision that constituted an appropriate arrangement, the Agency has failed to show that the award is contrary to § 7106. Therefore, we deny this exception.[2]

V. Decision

The Agency's exceptions are denied.

2. Member Beck does not believe that it is necessary to evaluate whether the contract provision at issue constitutes an appropriate arrangement. For the reasons discussed in his concurring opinion in *EPA*, 65 FLRA 113, Member Beck concludes that where, as here, the Arbitrator is enforcing a contract provision that has been accepted by the Agency as a permissible limitation on its management's rights, it is inappropriate to assess whether the provision itself is an appropriate arrangement or whether it abrogates a § 7106(a) right. *Id.* at 120 (Concurring Opinion of Member Beck). The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *Id.*; *see also FDIC, S.F. Region,* 65 FLRA at 107. Member Beck concludes that the Arbitrator's award is a plausible interpretation of the Agreement. Accordingly, Member Beck agrees that the Agency's contrary to law exceptions should be denied.

APPENDIX

Article 14, Section 2 provides:

> Disciplinary action is a responsibility of the Employer. Disciplinary actions must be based on just and sufficient cause, with emphasis on sound employee-management relations. The Employer recognizes that the prime objective of disciplinary action is generally rehabilitation. Discipline and adverse actions, when applied, will be in accordance with law, rule, regulation, and this Agreement.

Exceptions, Attach. 3 at 12-13.

Article 14, Section 4 provides:

> The Employer agrees that disciplinary actions will be processed in a timely manner and taken for such cause as will promote the efficiency of the Federal service.

Id. at 13.

Article 14, Section 6 provides, in pertinent part:

> The Employer agrees that supervisors will refer to the Table of Penalties for various offenses before deciding the appropriate penalty in a disciplinary action, and such actions will be administered in accordance with appropriate Douglas Factors . . . .

Id.

Article 14, Section 7 provides:

> All employees are expected to obey lawful orders. Failure to do so may result in disciplinary or adverse action.
>
> *Id.*