65 FLRA No. 117

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2923
(Union)

and

UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES
NATIONAL INSTITUTE OF ENVIRONMENTAL
HEALTH SCIENCES
RESEARCH TRIANGLE PARK,
NORTH CAROLINA
(Agency)

0-AR-4443

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DECISION

February 25, 2011

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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 Rochelle K. Kaplan 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 filed an opposition to the Union's exceptions.

The Arbitrator found that the Agency had just cause to suspend the grievant based on an e-mail that he sent to several individuals, including individuals who were not Agency employees. For the reasons that follow, we dismiss in part, and deny in part, the Union's exceptions.

II. Background and Arbitrator's Award

When the Agency notified an employee (the employee) that it was terminating her, the employee notified the grievant, who is the Union Vice President. *See* Award at 2. Subsequently, the grievant e-mailed several individuals, including individuals who were not Agency employees. *See id.* The e-mail stated, in pertinent part, that "[t]here has seemingly been a long[,] continuous road of retaliation, discrimination, and injury against [the employee] by her current supervisor," *id.*, and described an exchange between the employee and her supervisor as a "blatantly and purposely humbling, racist, and unkind event[,]" *id.* at 3. The grievant signed the e-mail with his name and Union title. *See id.*

Based on this e-mail, the Agency suspended the grievant for fourteen days for "Making False and/or Malicious Statements Which Harm or Destroy the Reputation, Authority or Official Standing of an [Agency] Official." *Id.* A grievance was filed, and when the grievance was unresolved, it was submitted to arbitration. *See id.*

At arbitration, the Agency agreed to the Union's proposed issue statement, which the Arbitrator set forth as follows: "Whether the [fourteen]-day suspension of the [g]rievant was for just and sufficient cause? If not[,] what shall be the remedy?" *Id.* at 4. The Arbitrator noted that the grievance alleged that the suspension "violated various contractual and statutory provisions[,]" *id.* at 3, and then stated:

> Since the Union proffered and the Agency accepted the statement of the issue as simply just and sufficient cause for the suspension, the various statutory and contractual claims will not be addressed as they are deemed waived by the Union. To the extent that the Union has raised certain affirmative defenses to the discipline, among them being that the [g]rievant was acting as a [U]nion official when he sent out the e-mail, the Arbitrator will address the affirmative defenses.

Id. at 3 n.3.

The Arbitrator found that the e-mail "contain[ed] false or incorrect statements and/or statements made with reckless indifference to whether they were true or not." *Id.* at 28. The Arbitrator also found that "[t]he distribution of the e-mail to [several] individuals who had no need to know is evidence of his intention to harm the reputation of [the employee's supervisor] and the Agency[,]" and that the grievant "offered no other plausible explanation for broadcasting the e-mail to them." *Id.* The Arbitrator determined that the Agency proved its charges against the grievant. *See id.* at 29.

Next, the Arbitrator addressed the Union's affirmative defenses, including the Union's claim that the grievant was acting in his official Union capacity when he sent the e-mail. *See id.* at 32. The Arbitrator acknowledged that the grievant signed the e-mail by his name and Union title, but found that "merely signing it in that manner does not make it Union business or protected Union activity." *Id.* In this regard, the Arbitrator determined that "[t]he e-mail was not sent as a result of any ongoing labor/management dispute over the termination procedures[,]" and concluded that "the [g]rievant did not send the e-mail to [several outside] individuals for a valid Union purpose." *Id.* In addition, the Arbitrator stated that "Union [c]ounsel conceded at the hearing" that the Authority's "flagrant misconduct" test set forth in *Department of the Air Force, Grissom Air Force Base, Indiana*, 51 FLRA 7 (1995), "was not the standard to be used in assessing the [g]rievant's conduct, but then argued that it was the standard in her brief." Award at 32 & n.7. The Arbitrator then stated that "[e]ven using" that standard, "the [g]rievant's e-mail does not pass muster as proper Union conduct." *Id.* at 32. Thus, the Arbitrator rejected the Union's affirmative defenses, but concluded that, based on the nature of the offense, the grievant's years of service, and consistency with the Agency's Table of Penalties and other, similar offenses, the fourteen-day suspension was excessive and should be reduced to a seven-day suspension. *See id.* at 34.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the grievant's e-mail was protected speech under the First Amendment to the United States Constitution and that the Arbitrator erred by not applying the analysis set forth in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (*Pickering*), for assessing whether a government employer has violated an employee's free-speech rights. *See* Exceptions at 9-13. The Union also argues that the Arbitrator's finding that the grievant engaged in flagrant misconduct is contrary to law. *See id.* at 15-19.

Additionally, the Union contends that the Arbitrator's finding that the e-mail constituted flagrant misconduct is based on a nonfact. *See id.* at 14. In this connection, the Union asserts that it argued to the Arbitrator that "the flagrant misconduct standard was not applicable in this case, and that, even if it was, the [g]rievant's e-mail did not rise to the level of flagrant misconduct." *Id.* Further, the Union asserts that, at arbitration, "the Agency conceded" that the grievant did not engage in flagrant misconduct, and that the award is based on a nonfact because "the Arbitrator created a dispute of fact where there was none." *Id.*

B. Agency's Opposition

The Agency argues that, under 5 C.F.R. § 2429.5,[1] the Authority should dismiss the Union's exception regarding *Pickering* because the Union did not argue, before the Arbitrator, that the grievant's speech was protected under the First Amendment. *See* Opp'n at 5-6. Alternatively, the Agency argues that the exception should be denied on the merits. *See id.* at 7. In addition, the Agency contends that the Arbitrator's finding of flagrant misconduct is not contrary to law. *See id.* at 10-11. Further, the Agency asserts that the finding of flagrant misconduct is not based on a nonfact, and disputes the Union's claim that it conceded, before the Arbitrator, that the grievant had not engaged in flagrant misconduct. *See id.* at 8-9.

IV. Preliminary Issue

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 (§ 2429.5).[2] Under § 2429.5, the Authority will not consider any issue that could have been, but was not, presented to the arbitrator. *E.g.*, *U.S. DHS, U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008).

There is no evidence that the Union argued before the Arbitrator that the grievant's speech was protected under the First Amendment, or that the Arbitrator was required to apply a *Pickering* analysis. The Union could have done so. Therefore, consistent with § 2429.5, we dismiss the Union's exception regarding the *Pickering* analysis.

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1. The pertinent wording of 5 C.F.R. § 2429.5 is set forth below.

2. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Union's exceptions were filed before that date, we apply the earlier Regulations.

V. Analysis and Conclusions

A. The award is not contrary to law.

The Union alleges that the Arbitrator's finding of flagrant misconduct is contrary to law. The Authority reviews questions of law 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 a standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*Local 1437*). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

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 U.S. Dep't of Transp., FAA*, 64 FLRA 365, 369 (2009) (Member Beck concurring). Specifically, where an agency is alleged to have committed an unfair labor practice (ULP) on this basis, "a necessary part of the [agency's] defense" against the ULP allegation is that the individual's actions constituted flagrant misconduct or otherwise exceeded the bounds of protected activity. *Id.*

The Authority has held that arbitrators are required to apply statutory burdens of proof when resolving an alleged ULP. *E.g., U.S. GSA, Ne. & Caribbean Region, N.Y., N.Y.*, 60 FLRA 864, 866 (2005). By contrast, where an arbitrator resolves a claim under a collective bargaining agreement (CBA) rather than a statutory claim, "unless a specific burden of proof is required, an arbitrator may establish and apply whatever burden the arbitrator considers appropriate . . . ." *Id.* In this connection, 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 NAGE, Local R3-32*, 59 FLRA 458, 459 (2003) (Chairman Cabaniss concurring) (where parties stipulated a just-cause issue, Authority declined to consider claim of alleged violation of § 7102(a) of the Statute that was not raised before arbitrator). 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. *E.g., SSA*, 65 FLRA 286, 288 (2010).

Here, the Arbitrator found, and there is no dispute, that the Union "waived" any statutory claims, Award at 3 n.3, and that the issue before the Arbitrator was whether there was "just and sufficient cause" for the suspension, *id.* at 4 -- not whether the suspension violated § 7116 of the Statute. As such, the Arbitrator was not required to apply statutory standards, and the Arbitrator's alleged misapplication of the flagrant misconduct standard does not provide a basis for setting aside the award. *See SSA*, 65 FLRA at 288. Accordingly, we deny the exception.

B. The award is not based on a nonfact.

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. *E.g., U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). 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. *Id.* at 594. Further, where the premise of a nonfact exception is erroneous, the Authority denies the exception. *See U.S. DHS, Customs & Border Prot. Agency, N.Y., N.Y.*, 60 FLRA 813, 817 (2005) (*CBP NY*).

The Union's nonfact exception is premised on the Union's claim that the Agency conceded at arbitration that the grievant did not engage in flagrant misconduct. For support, the Union cites the transcript of the arbitration hearing, at which the Agency asserted that it was "not in agreement" that the flagrant misconduct standard was "applicable in this case." Exceptions, Attach., Tr. at 7. As the Agency argues in its opposition, and contrary to the Union's claim, the cited portions of the transcript do not demonstrate that the Agency conceded that the grievant's actions were not flagrant misconduct. As such, the premise of the Union's nonfact exception is erroneous, and we deny the exception. *See CBP NY*, 60 FLRA at 817.

VI. Decision

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

3. Section 7116(a)(2) of the Statute provides, in pertinent part, that it is an unfair labor practice 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[.]"