65 FLRA No. 61

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3239
(Union)

0-AR-4633

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DECISION

November 30, 2010

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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 Margaret Nancy Johnson 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 did not file an opposition to the Agency's exceptions.

The Arbitrator sustained a grievance alleging that the Agency did not have just cause to suspend the grievant for fourteen days for improperly accessing Agency records and disclosing the information contained in the records to a third party. Accordingly, she ordered that the grievant's fourteen-day suspension be mitigated to a two-day suspension and that the grievant be made whole for the excess time that she was suspended. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant, a Title II Claims Representative, works at the Agency servicing those individuals with retirement, disability, Medicare, or supplemental income benefits. Award at 1. The personal information of individuals receiving such benefits is stored in a computer system, and employees are issued an individualized PIN and password to track each time an employee enters the system. *Id.* Each time an employee accesses the system, he or she agrees not to access the data without proper authorization; assumes responsibility for safeguarding the information; and acknowledges potential consequences for misuse of the governmental program. *Id.*

The grievant was asked by her father to determine whether a social security number that he had found was that of a deceased relative. *Id.* at 3. The grievant accessed the Agency's computer system, determined that the social security number was her brother's, and reported her discovery to her father. *Id.* Subsequently, the Agency discovered that the grievant had accessed personal information for an individual with the grievant's maiden name. *Id.* The grievant acknowledged that she had accessed the information for her father. *Id.*

The Agency concluded that the actions of the grievant "could not be condoned regardless of [her] reasons for doing so" and recommended that the grievant be suspended for fourteen days. *Id.* at 3-4. The Assistant Regional Commissioner determined that the proposal notice was supported by a "preponderance of evidence" and suspended the grievant for fourteen calendar days, concluding that "no less severe penalty would effectively deter such conduct in the future." *Id.* at 4. In support of her decision, the Assistant Regional Commissioner noted that the discipline was the minimum prescribed in the Agency's Uniform Sanctions for Unauthorized Systems Access Violations (Sanctions Policy). *Id*.

The grievant filed a grievance seeking to have her suspension rescinded, which was unresolved and submitted to arbitration. The Arbitrator stated that the following issue was before her: "[W]as the fourteen (14) day suspension of [the grievant] for just cause, and, if not, to what remedy, if any, is the aggrieved entitled?" *Id.* at 2.

According to the Arbitrator, the dispute before her concerned the reasonable application of the Sanctions Policy, and "whether or not the use of a fourteen[-]day suspension in this instance comports with the just cause mandate negotiated into the [a]greement between the parties." *Id.* at 4. The Arbitrator held that the just cause requirement of

Article 23[1] of the parties' agreement required the Agency "to consider employee misconduct in the context in which it occurred, taking into account factors such as employment record, length of service, intent, and consequences, if any." *Id.* at 5.

The Arbitrator found that the Agency failed properly to analyze these factors when applying the Sanctions Policy to the grievant's infraction. *Id.* In this regard, the Arbitrator found that the grievant had more than twenty-five years of service to the Agency without any prior disciplinary record. *Id*. at 5, 8. The Arbitrator determined that the Agency, however, had improperly applied the grievant's length of service as an aggravating factor, rather than as a mitigating factor. *Id.* at 5. The Arbitrator further determined that there was no evidence that employees in other "cases involving improper access and disclosure [had] been issued a two[-]week disciplinary suspension or that the rule infraction carries with it a mandatory two[-]week suspension, regardless of mitigating factors." *Id.* at 6. The Arbitrator also found that the Agency had failed to show that the grievant's infraction had affected adversely the Agency's mission. *Id.* Moreover, the Arbitrator found unpersuasive the Agency's claim that such discipline was required to deter such conduct in the future, given the grievant's twenty-five years of service without prior discipline and given that, in this case, the disclosure was "to allay anxiety of an elderly parent." *Id*. at 7.

Noting that one of the issues before her was whether the decision to bypass progressive discipline was reasonable and proper, the Arbitrator concluded that, because the infraction was inadvertent and not calculated, "the purposes of the Agency could have readily been accomplished with a less onerous discipline." *Id*. at 7-8. Accordingly, the Arbitrator held that the two-week suspension "was excessively severe" and that a lesser penalty was proper. *Id*. at 8. As a result, she ordered that the grievant's two-week suspension be reduced to a two-day suspension and that the grievant be made whole for the excess suspension time. *Id.* at 8, 9.

III. Agency's Exceptions

The Agency contends that the Arbitrator misapplied the *Douglas* factors in determining that the penalty was not for just cause.[2] Exceptions at 6.

The Agency also contends that the Arbitrator's award fails to draw its essence from the parties' agreement because the Arbitrator ignored the Agency's contractual right to bypass progressive discipline where the grievant's conduct was a "serious violation[] of Agency policy." *Id.* at 1. According to the Agency, Article 23, Section 1 grants management the "discretion to bypass earlier steps of progressive discipline where it determines that misconduct is so serious that lesser penalties would not be appropriate." *Id*. at 4. The Agency asserts that the Arbitrator substituted her judgment for that of management and that her decision, accordingly, reflects a manifest disregard of the parties' agreement. *Id*. at 7.

The Agency further contends that the award is inconsistent with Authority precedent. According to the Agency, the Authority previously has found that Article 23, Section 1 provides management the discretion to bypass steps in progressive discipline for matters involving systems access. *Id.* at 4-5 (citing *Soc. Sec. Admin., St. Paul, Minn.*, 61 FLRA 92 (2005) (then-Member Pope dissenting) (*SSA*); *AFGE, Local 3342*, 58 FLRA 448 (2003)).

1. Article 2, Section 1 provides, in pertinent part:

> Section1: Statement of Purpose and Policy
>
> The parties agree that the objective of discipline is to correct and improve employee behavior so as to promote the efficiency of the service. The parties agree to the concept of progressive discipline which is designed primarily to correct and improve employee behavior. A common pattern of progressive discipline is reprimand, short term suspension, long term suspension and removal. Any of these steps may be bypassed where management determines by the severe nature of the behavior that a lesser form of discipline would not be appropriate.
>
> The parties further agree that normally, discipline would be preceded by counseling and assistance including oral warnings which are informal in nature and not recorded. Counseling and warnings will be conducted privately and in such a manner so as to avoid embarrassment to the employee. Bargaining unit employees will be subject to disciplinary or adverse action only for just cause.

Award at 2.

2. In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), the Merit Systems Protection Board established thirteen factors to assist a deciding official in determining an appropriate penalty. These factors govern adverse actions under 5 U.S.C. §§ 4303 and 7512. *See, e.g., U.S. Gen. Servs. Admin., Ne. & Caribbean Region, N.Y., N.Y.*, 61 FLRA 68, 68 n.2 (2005).

Finally, the Agency asserts that, in the event that the award is found to be contrary to law, the record is sufficient to enable the Authority to assess the reasonableness of the Agency's decision to suspend the grievant for fourteen days, without remanding to the Arbitrator. *Id* at 8-9.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Authority has repeatedly held that arbitrators are bound by the same substantive standards as the Merit Systems Protection Board (MSPB) only when resolving grievances concerning actions covered by 5 U.S.C. §§ 4303 and 7512. *See IFPTE, Local 11*, 46 FLRA 893, 902 (1992). Suspensions of fourteen days or less are not covered under 5 U.S.C. §§ 4303 or 7512. *See AFGE, Local 1770,* 51 FLRA 1302 (1996); *U.S. Dep't of the Air Force, Air Force Logistics Command, Hill Air Force Base, Utah*, 34 FLRA 986, 991 (1990); *see also U.S. Dep't of Justice, Immigration & Naturalization Serv., Jacksonville, Fla.*, 36 FLRA 928 (1990) (in a case involving a five-day suspension, the arbitrator was not bound to follow the same substantive standards of the Federal Circuit and the MSPB).

The Agency argues that the Arbitrator misapplied the *Douglas* factors in determining that the penalty was not for just cause. Exceptions at 6-7. As noted, the use of principles established by the MSPB for suspensions of less than fourteen days is not mandatory. Although the Arbitrator considered the *Douglas* factors when he was not required to do so, the Agency's contention that he incorrectly applied them does not provide a basis for finding the award deficient. *See NATCA MEBA/MNU*, 52 FLRA 787, 792 (1996) (arbitrator's misapplication of factor when he was not required to apply that factor constituted, among other things, the arbitrator's reasoning and did not provide a basis for finding the award deficient); *see also AFGE, Local 3947*, 47 FLRA 1364, 1371 (1993) (award not deficient because arbitrator failed to apply *Douglas* factors where grievant received a fourteen-day suspension).

Accordingly, we reject the Agency's assertion that the award is contrary to law because the Arbitrator failed to apply correctly the *Douglas* factors and deny this exception.

B. The award does not fail to draw its essence from the parties' 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, e.g., 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 parties' 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 arbitration; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See, e.g., 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 asserts that this case is similar to *SSA*, in which the Authority found an arbitrator's interpretation of the same provision of the parties' agreement failed to draw its essence from the agreement. Exceptions at 4 (citing *SSA*, 61 FLRA 92). The Agency contends that, in that case, like the case here, the agency bypassed the minimum sanction provided for in Article 23 and imposed a penalty that was consistent with the Sanctions Policy. *Id.*

In *SSA*, the Authority determined that the language of the parties' agreement provided the agency with the ultimate authority to determine the appropriate penalty for the grievant's infraction because the agreement provided the agency with the right to "bypass" lesser forms of discipline for "severe" infractions. *SSA*, 61 FLRA at 94 (then-Member Pope dissenting). The Authority found that, under Article 23, Section 1, the agency was "solely authorized" to determine the "degree of discipline" for "severe" behavior and held that, when serious conduct is involved, an arbitrator must uphold the agency's choice of discipline. *Id*. This interpretation, however, ignores that Article 23 also provides that all disciplinary action – including those assessed pursuant to management's right to bypass progressive discipline – must be for just cause. Moreover, this interpretation also ignores that "the Agency's

exercise of authority under Article 23, like its exercise of authority under other contract provisions, is subject to arbitral scrutiny." *SSA*, 61 FLRA at 96 (dissenting opinion of then-Member Pope). Accordingly, we find that *SSA* was wrongly decided and overturn that decision.[3]

The Arbitrator here held that the just cause requirement of Article 23, Section 1 required the Agency to consider employee misconduct in the context in which it occurred, "taking into account factors such as employment record, length of service, intent, and consequences, if any." Award at 5. The Arbitrator further considered the Agency's ability to bypass progressive discipline, and concluded that, because the infraction was inadvertent and not calculated, the purposes of the Agency could have readily been accomplished with less severe discipline. *Id*. at 7-8. Such an interpretation is consistent with the express wording of the provision and gives full meaning to both parts of Article 23 at issue here – i.e., that "management may bypass progressive discipline when it determines, by the severe nature of the behavior, that a lesser form of discipline would not be appropriate" and that "bargaining unit employees will be subject to disciplinary or adverse action only for just cause." *Id*. at 2. Indeed, the Arbitrator herself ultimately determined that the violation was severe enough to bypass the initial step of progressive discipline provided for in Article 23, ordering that the grievant serve a two-day suspension, rather than simply receive a reprimand.

Accordingly, we find that the Arbitrator's interpretation is not implausible or unfounded and does not evidence a manifest disregard of the parties' agreement and deny this exception.

V. Decision

The Agency's exceptions are denied.

3. The Agency also argues that the Arbitrator's award is inconsistent with *AFGE, Local 3342*. We reject that contention. In *AFGE, Local 3342*, the Authority determined that the arbitrator's interpretation of the parties' agreement as permitting the agency to "skip counseling and warning" was not a manifest disregard of the agreement. *AFGE, Local 3342*, 58 FLRA at 450. Contrary to the Agency's assertion, however, the Authority did not hold that the provision of the parties' agreement — which is similar, but not identical to the provision at issue here — eliminates the arbitrator's authority to determine whether the penalty assessed was for just cause. *Id*. Accordingly, that case is inapposite.