65 FLRA No. 131

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VA MARYLAND HEALTHCARE SYSTEM
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 331
(Union)

0-AR-4655

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DECISION

March 17, 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 Janet M. Spencer 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.[1]

The Arbitrator sustained a grievance alleging that the Agency suspended the grievant without just cause. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

This dispute involves an altercation, discussed in further detail below, between the grievant, a Union president who is on 100 percent official time and works in the Union office, and another employee. As a result of the altercation, the Agency charged the grievant with "conduct unbecoming a federal employee based on physical intimidation and wrongful touching of another employee" and suspended the grievant for seven days. Award at 2 (emphasis omitted). The Union filed a grievance challenging the suspension, which was unresolved and submitted to arbitration. As stipulated by the parties, the issues at arbitration were: "Was the suspension of [the grievant] for just cause? If not, what should be the remedy?" *Id.*

The Arbitrator found that the altercation underlying the suspension arose after the Union prevailed in an arbitration case brought on behalf of two employees who later decided to withdraw from the Union. *Id.* at 3. When the employees went to the grievant's office to obtain his signature on dues deduction withdrawal forms, the grievant expressed his frustration that the employees were withdrawing despite the Union's efforts on their behalf, and accused the employees of being ungrateful. *Id.* The Arbitrator found that when one of the employees (the firefighter) said that the Union had not done anything for him, the grievant responded, "Well, if the Union didn't do anything for you, then don't call me," "or words to this effect[,]" to which the firefighter responded "If I call you anything, I'll call you an asshole." *Id.* at 4. The Arbitrator also found that, in response, the grievant became "irate and red-faced," approached the firefighter, and said, "Don't come down here acting all bad, I'm not afraid of you big boy" "or words to that effect[.]"[2] *Id.* at 12.

Before the Arbitrator, the firefighter testified that the grievant bumped him with his chest several times; the grievant denied that he physically touched the firefighter in any way. *Id.* at 10. The Agency submitted to the Arbitrator the statements of several individuals who had allegedly witnessed all or part of the altercation (witness statements), but those

1. The Authority ordered the Union to show cause why its opposition should not be considered untimely. The Union's response states that the opposition was timely filed based on the date of the Union's *receipt* of the exceptions. Response to Show Cause Order at 2. However, as the Authority's Regulations determine timeliness from the *date of service*, rather than receipt, and the Union does not allege "extraordinary circumstances" justifying a waiver of the expired time limit, *see* 5 C.F.R. § 2429.23(b), we do not consider the Union's opposition. *See U.S. Gen. Servs. Admin.*, 62 FLRA 341, 341 n.1 (2008).

2. With respect to the Arbitrator's finding that the grievant made the statement alleged by the Agency "or words to that effect," Award at 12, the only other version of the statement that appears in the award is the Arbitrator's quotation of the grievant's testimony that he said: "You're not going to come up here acting all big and bad because if you do, I will call the police[.]" *Id.* at 4.

individuals did not testify at the hearing, and the Arbitrator gave "no weight to their statements." *Id.* The Arbitrator also declined to "defer to the conclusions reached by the Agency's investigators based on their interviews with individuals who did not testify[.]" *Id.* In this regard, the Arbitrator stated that "[t]he right to cross-examine witnesses is fundamental to the fairness of the arbitration process" and that "[i]n a de novo proceeding such as this, the determination of credibility and weight must be made de novo by me." *Id.* The Arbitrator found that although the grievant may have been "closer to [the firefighter] than he says" and that the firefighter may have been "discomfited as a result[,]" the evidence was "inadequate . . . to establish that [the grievant] bumped against [the firefighter] with his chest or otherwise touched him[,]" and she credited the grievant's testimony that he did not do so. *Id.* at 11. In addition, the Arbitrator found that the firefighter could not "reasonably have *believed* that [the grievant] was contemplating a fight" or that the grievant "presented an ongoing danger to him." *Id.* at 11-12. The Arbitrator concluded that "the seriousness of the episode was exaggerated in the retelling, causing the escalation of an altercation into an unfounded charge of physical intimidation." *Id.* at 15.

The Arbitrator found that the Agency had not met its burden to prove that the misconduct underlying the suspension occurred. *Id.* at 9. In this regard, the Arbitrator found that, "[s]tanding alone," the grievant's statement, "Don't come down here acting all bad, I'm not afraid of you big boy" "or words to that effect[,]" was merely a defensive response to the firefighter's "hostile words[.]" *Id.*

The Arbitrator went on to state that "[b]ased on the Agency's analysis, it is possible the Agency would have found [the grievant] guilty of 'conduct unbecoming a federal employee based on physical intimidation' even in the absence of any finding of a physical touching." *Id.* at 12. However, the Arbitrator found that "the Agency's analysis . . . was flawed in several critical respects." *Id.* In this regard, the Arbitrator rejected the Agency's arguments that it could hold the grievant to a higher standard of conduct because he was a police officer and because, as Union President, he was in a leadership role akin to that of a supervisor. *Id.* at 12-13.

In addition, the Arbitrator found that "the altercation, properly evaluated, involved a matter of internal [U]nion affairs." *Id.* at 15. In this connection, she stated that the behavior of an employee acting in his or her capacity as a union official must be "significantly more egregious to justify discipline" "because representational interests of the employees are implicated." *Id.* at 13-14 (citing *Dep't of the Air Force, Grissom Air Force Base, Ind.*, 51 FLRA 7, 11 (1995)). The Arbitrator further found that: (1) there was no evidence that the altercation "disturbed employees performing their regular duties . . . or otherwise disrupted order in the workplace or interfered with the efficiency or mission of the Agency[;]" and (2) "[t]o the extent that the Agency's legitimate concern with violence in the work place was implicated, I have found there was no violence[.]" *Id.* at 14-15.

The Arbitrator concluded that the charge of "conduct unbecoming a federal employee based on physical intimidation" had not been "substantiated[,]" and that the suspension of the grievant was "not for just cause."[3] *Id.* at 12, 15, 16. Consequently, the Arbitrator awarded backpay and directed the Agency to remove all references to the suspension from the grievant's personnel records. *Id.* at 16.

III. Agency's Exceptions

The Agency contends that the Arbitrator erred by refusing to consider the witness statements. Exceptions at 10-11. In this regard, the Agency argues that because the statements were recorded at the time of the altercation, they were admissible despite the fact that the Union did not have an opportunity to cross-examine the witnesses. *Id.* at 10.

In addition, the Agency argues that the Arbitrator erred in two respects by improperly applying the protections of § 7102 of the Statute (§ 7102)[4] to the altercation between the grievant and the firefighter. First, the Agency argues that the grievant was "not representing his [U]nion or any employee" during the altercation. *Id.* at 4. Second, the Agency argues that the grievant's conduct exceeded the bounds of protected activity. *Id.* at 5-9 (citing *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192

3. The Arbitrator also found that there was no evidence that the Agency disciplined the grievant "in retaliation for his pursuing actions on behalf of the Union[.]" Award at 15. As there are no exceptions filed to this finding, we do not discuss it further.

4. In pertinent part, § 7102 protects an employee's "right to form, join, or assist any labor organization[] . . . freely and without fear of penalty or reprisal[.]" 5 U.S.C. § 7102.

(D.C. Cir. 2002); *AFGE, Local 987*, 63 FLRA 362 (2009) (*Local 987*)).[5]

IV. Analysis and Conclusions

A. The Arbitrator did not deny the Agency a fair hearing.

We construe the Agency's claim that the Arbitrator erred by refusing to consider the witness statements as a claim that the Arbitrator failed to provide a fair hearing. The Authority will find an award deficient on the ground that an arbitrator failed to conduct a fair hearing when it is demonstrated that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding prejudiced a party so as to affect the fairness of the proceeding as a whole. *AFGE, Local 1668*, 50 FLRA 124, 126 (1995). However, an arbitrator has considerable latitude in the conduct of a hearing and the fact that an arbitrator conducted a hearing in a manner that one party finds objectionable does not provide a basis for finding an award deficient. *AFGE, Local 22*, 51 FLRA 1496, 1497-98 (1996). In this regard, disputes over an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provide no basis for finding an award deficient. *U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 72 (2009) (*Veterans Affairs*).

As an initial matter, although the Agency asserts that the Arbitrator "refused to consider" the witness statements, Exceptions at 11, the Arbitrator's award indicates that she considered the statements, but gave them "no weight[.]" Award at 10 (giving "no weight" to the written statements of witnesses who did not testify and declining to "defer to the conclusions reached by the Agency's investigators based on their interviews with individuals who did not testify[.]") To the extent that the Agency's arguments supporting the admissibility of the statements challenge the Arbitrator's discretion to evaluate evidence and determine the weight to be accorded such evidence, the arguments do not provide a basis for finding that the Arbitrator denied the Agency a fair hearing. *See Veterans Affairs*, 64 FLRA at 72. Consequently, we deny the exception.

B. The award is not contrary to law, rule, or regulation.

In reviewing arbitration awards for consistency with law, rule, or regulation, the Authority reviews questions of law raised by exceptions to an award de novo. *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 determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Agency alleges that the Arbitrator improperly applied the protections of § 7102 to the conduct underlying the grievant's suspension. The scope of § 7102's protection and the Authority's standard for determining whether otherwise protected activity exceeds the boundaries of protected activity apply in cases where an agency is alleged to have violated § 7116 of the Statute (§ 7116),[6] thereby committing an unfair labor practice (ULP), by taking actions against an individual based on that individual's actions during the course of protected activity. *See, e.g., Local 987*, 63 FLRA at 363.

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 regard, the Authority distinguishes allegations that an agency lacked just cause for discipline under a CBA from allegations of unlawful interference with protected

5. In addition, the Agency states that the award is "contrary to the parties' agreement" without providing any further explanation. Exceptions at 3. To the extent that the Agency is arguing that the award fails to draw its essence from the agreement, we deny the exception as a bare assertion. *See, e.g., IFPTE, Local 4*, 65 FLRA 167, 169 (2010) ("Where a party fails to support its claim that an award fails to draw its essence from a collective bargaining agreement, the Authority denies the exceptions as a bare assertion.").

6. Section 7116 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[.]" 5 U.S.C. § 7116(a).

rights under the Statute. *See NAGE, Local R3-32*, 59 FLRA 458, 459 (2003) (Chairman Cabaniss concurring). In addition, where 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 record reflects, and there is no dispute, that the parties stipulated that the issue before the Arbitrator was whether there was "just cause" for the suspension of the grievant, Award at 2, not whether the suspension violated § 7116, and the Arbitrator found that "[t]he suspension of [the grievant] [was] not for just cause." *Id.* at 16. Because the issue before the Arbitrator was a contractual claim, the Arbitrator was not required to apply statutory standards, and the Arbitrator's alleged misapplication of the statutory standard concerning protected activity under § 7102 does not provide a basis for setting aside the award. *See SSA*, 65 FLRA at 288. Accordingly, we deny the exception.

V. Decision

The Agency's exceptions are denied.