68 FLRA No. 19

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
BOSTON HEALTHCARE SYSTEM
BOSTON, MASSACHUSETTS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 221
(Union)

0-AR-4969

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DECISION

December 4, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Margery E. Williams determined that the Agency acted improperly when it suspended the grievant for fourteen days, reassigned him, removed him from three committee positions, and revoked his sex-therapist privilege. As a remedy, the Arbitrator ordered the Agency to rescind the grievant's suspension and make him whole for all lost compensation and benefits; restore him to his original position; reinstate him to the committee positions from which he was removed; and restore his sex-therapy privileges.

In its exceptions, the Agency asks the Authority to review the award on three grounds. First, the Agency alleges that the remedy is contrary to law as it violates its management rights under § 7106 of the Federal Service Labor-Management Relations Statute (the Statute).[1] As the Agency fails to demonstrate that the remedy impermissibly interferes with its management rights, we deny this exception.

Second, the Agency alleges that the Arbitrator failed to conduct a fair hearing by not fully addressing the Agency's arguments. As the Agency does not demonstrate that the Arbitrator failed to conduct a fair hearing, we deny this exception.

Finally, the Agency argues that the Arbitrator exceeded her authority by issuing an award that is contrary to law. As this exception raises the same issues as the contrary-to-law exception, we likewise deny this exception.

II. Background and Arbitrator's Award

The grievant was a licensed clinical psychologist assigned to the Spinal Cord Injury Program (SCI program), holding a special privilege in sex therapy. In this position he oversaw psychologists-in-training, including both doctoral candidates and post-doctoral fellows. At a certain point, one such post-doctoral fellow told the director of the program that she had heard of inappropriate behavior by the grievant. An Administrative Board of Investigation (ABI) investigated these allegations. The ABI held a hearing and subsequently issued a report indicating that all of the allegations against the grievant were true. After receiving the ABI's report, the Chief of Psychology Service (chief) proposed a fourteen-day suspension. On the same day that the chief proposed this suspension, she also informed the grievant that she was reassigning him from the SCI program and that his sex-therapy privilege was "under review."[2] The privilege was later revoked. Additionally, the grievant was removed or asked to resign from three committees: the Ethics Advisory Committee, the Professional Standards Board, and a committee on palliative care.

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement, specifically Article 13, which states that "[r]eassignments shall not be used as punishment, harassment, or reprisal," and Article 14, which states that "[n]o bargaining[-]unit employees will be subject to disciplinary action except for just and sufficient cause."[3]

The grievance was unresolved, and the parties submitted the matter to arbitration. The parties stipulated to one issue: whether "there [was] just and sufficient cause for the fourteen-day suspension of the grievant."[4] The Agency proposed a second issue: whether "the reassignment of the grievant [was] substantively arbitrable."[5] In support of its proposed issue, the Agency argued that the grievance was not substantively arbitrable because the grievant was a "'hybrid employee' hired pursuant to [T]itle 38 [of the U.S. Code]"[6] and, therefore, the Union's requested relief "may not be considered by th[e] Arbitrator."[7] Because the parties could not agree

[1] 5 U.S.C. § 7106.

[2] Award at 12.
[3] *Id.* at 2.
[4] *Id.* at 1.
[5] *Id.*
[6] Exceptions, Attach. 8 at 25.
[7] *Id.* at 26.

upon this second issue, the Arbitrator framed it. Noting that the Agency's proposed issue "is a question of remedy, rather than arbitrability," the Arbitrator framed the second issue as what, if any, "shall the remedy be, consistent with the collective[-]bargaining agreement and applicable statutes and precedent."[8]

The Arbitrator determined that the allegations against the grievant were unsubstantiated as she "simply [did] not credit the [accusers'] version of the facts."[9] Furthermore, the Arbitrator found that the reassignments were punitive as "there is no doubt that the grievant would not have been reassigned but for the Agency's belief that he was guilty of misconduct. It was part and parcel of the disciplinary measures taken against him, and in that sense was literally punishment."[10]

Having found that the allegations lacked any credible factual basis, the Arbitrator "carefully read the arguments, statutes[,] and precedent that the parties submitted in connection with the Agency's argument that [the Arbitrator] lack[ed] authority to order" the requested remedy.[11] The Arbitrator determined that "[n]othing in [the submitted] material gives the Agency the management right to reassign an individual because he ha[d] been wrongly found guilty of misconduct[] that in fact did not occur. Congress could not have intended to confer a management right to exercise authority in such an arbitrary fashion."[12]

The Arbitrator concluded that "[t]here was not just and sufficient cause for the fourteen-day suspension of the grievant" and that "[t]he grievance [was] allowed."[13] As a remedy, the Arbitrator ordered that "the Agency shall rescind the suspension and make the grievant whole[;] . . . reassign the grievant to his former assignment[;] . . . restore his sex[-]therapy privileges[;] and reinstate him to the committees from which he was removed."[14] The Agency filed exceptions to the award, and the Union filed an opposition to those exceptions.

III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar certain of the Agency's arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[15]

The Agency argues that the award, by ordering the grievant's sex-therapy privilege be restored, violates certain agency rules and regulations, specifically the Agency's Handbook 1100.19 and the VA Boston Healthcare System Medical Bylaws and Rules. The Agency argues that, by restoring the grievant's privilege, the Arbitrator is "bypassing the prescribed agency[-]wide and facility procedures for granting such privileges" contained in these rules and regulations.[16] The record, however, contains no evidence that the Agency raised this argument before the Arbitrator, despite the Agency's recognition in its post-hearing brief that "[t]he remedial relief requested by the Union" included "approving [the grievant's] continued sex[-]therapy clinical privileges."[17]

The Agency posits that it raised this argument below by submitting both the Handbook and the VA Boston Healthcare Medical Bylaws and Rules "in its entirety" and by mentioning in its post-hearing brief that "the authority to grant clinical privileges rests with the Under Secretary of Health."[18] However, merely submitting rules and regulations as part of the record without further explanation is not an argument. Furthermore, the Agency's post-hearing brief only mentions these submitted rules and regulations as containing "the appeal process" of a denial of privileges, which does not address either the argument raised here or how the rules and regulations specifically relate to the Arbitrator's remedial powers.[19] Because the Agency could have made this argument to the Arbitrator but did not, it may not do so now.[20] We therefore find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's contrary-to-rule exception.

The Agency also argues, in part, that the Arbitrator "exceeded her remedial authority when she ordered that the Agency restore the grievant's delineated sex[-]therapy privileges[,] bypassing prescribed agency[-]wide and facility procedures for granting clinical privileges."[21] Because this claim raises the same argument as the contrary-to-rule exception dismissed

[8] Award at 2.
[9] *Id.* at 28.
[10] *Id.* at 29.
[11] *Id.* at 30.
[12] *Id.* (emphasis omitted).
[13] *Id.* at 32.
[14] *Id.*

[15] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).
[16] Exceptions at 13.
[17] *Id.*, Attach. 8 at 28.
[18] Exceptions at 14.
[19] *Id.*, Attach. 8 at 24.
[20] *AFGE, Local 1164*, 66 FLRA 74, 77 (2011).
[21] Exceptions at 21.

above, we also dismiss this exception for the same reason.[22]

Under § 2429.5 of the Authority's Regulations, the Authority will not consider arguments offered in support of an exception if those arguments differ from, or are inconsistent with, a party's arguments to the arbitrator.[23] To support its claim that the award is contrary to law, the Agency argues that the parties' "agreement cannot be used as a means to subvert" its management rights under § 7106 of the Statute and that "[a] contract clause cannot abrogate management's right to assign work."[24] However, the Agency did not dispute before the Arbitrator that Article 13 – a limit on the Agency's right to use reassignments as punishment – was enforceable. Specifically, after presenting the argument that "the Union's requested remedy . . . runs afoul of . . . well[-]established principles"[25] concerning management rights generally, the Agency argued at arbitration that there was no violation of Article 13[26] or, in the alternative, that "the only appropriate remedial order even if a violation were to be determined, would be to consider such violation in terms of mitigating the length of the suspension action."[27] In so arguing, the Agency acknowledged that the Arbitrator could enforce Article 13. Thus, it is inconsistent for the Agency to now argue that the provision is unenforceable. Therefore, we find that § 2429.5 of the Authority's Regulations bars consideration of any argument regarding the unenforceability of Article 13 in support of the Agency's exceptions.[28]

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that it has an absolute right to reassign employees and that that right is "a statutorily protected management right that cannot be subverted by the collective[-]bargaining process, including grievances."[29] In support, the Agency argues that "[m]anagement's decision to reassign the grievant cannot be disturbed because it was an exercise of management's right"[30] and that the award "directly interferes with management's right to assign work" [31] under § 7106(a)(2)(B) of the Statute and management's right to assign employees under § 7106(a)(2)(A) of the Statute.[32]

When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception de novo.[33] 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.[34] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[35] Furthermore, the legal framework that the Authority applies when reviewing exceptions alleging that awards are inconsistent with management rights is well established.[36] Under this framework, the Authority first assesses whether the award affects the exercise of the asserted management right.[37] If so, then the Authority examines, as relevant here, whether the arbitrator applied an enforceable contract provision negotiated under § 7106(b) of the Statute.[38] To the extent that the Agency argues that management rights are absolute, an exercise of a management right is subject the limitations presented in § 7106(b) of the Statute. An award enforcing a contract provision negotiated under § 7106(b) of the Statute will not be found deficient as contrary to a management right.[39]

Assuming, without deciding, that the award affects the specific management rights as alleged by the Agency, the Authority must examine whether the Arbitrator applied an enforceable contract provision negotiated under § 7106(b) of the Statute. However, as noted above, § 2429.5 of the Authority's Regulations bars the Agency's argument that Article 13, the article applied in the award, is unenforceable. Consequently, the Agency has failed to demonstrate that the award

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[22] *AFGE, Local 3627*, 64 FLRA 547, 550 n.3 (2010) (declining to separately address agency's essence claims, which did nothing more than restate its exceeds-authority claim).
[23] *AFGE, Council of Prison Locals, Local 405*, 67 FLRA 395, 396 (2014).
[24] Exceptions at 6-7 (citations omitted).
[25] Exceptions, Attach. 8 at 24.
[26] The Agency refers to Article 12 in its post-hearing brief. However, this appears to be an error as the text quoted by the Agency is identical to the language that the Arbitrator identifies as Article 13 in the award. *Compare* Exceptions at 28, *with* Award at 2.
[27] Exceptions, Attach. 8 at 28-29.
[28] *U.S. DHS, U.S. CBP*, 66 FLRA 335, 338 (2011).
[29] Exceptions at 8.
[30] *Id.* at 6.
[31] *Id.* at 8.
[32] *Id.* at 7.
[33] *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)).
[34] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citations omitted).
[35] *Id.*
[36] *U.S. EPA*, 65 FLRA 113, 115 (2010) (*EPA*) (Member Beck concurring); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102 (2010) (Chairman Pope concurring).
[37] *EPA*, 65 FLRA at 115.
[38] *Id.* at 116-18.
[39] *NAGE, Local R3-77*, 59 FLRA 937, 941 (2004) (Chairman Cabaniss dissenting).

impermissibly interferes with its management rights, and we deny this exception.[40]

B. The Arbitrator did not fail to conduct a fair hearing.

The Agency claims that the Arbitrator denied it a fair hearing by failing to adequately address, "cogently explain[,] or rebut the Agency's theory" concerning substantive arbitrability.[41] An award will be found deficient on the grounds that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or conducted the proceeding in a manner that so prejudiced a party as to affect the fairness of the proceeding as a whole.[42]

In support of its fair-hearing exception, the Agency alleges that the Arbitrator failed to "adequately respond [to] and resolve the Agency's substantive[-]arbitrability pleading."[43] According to the Agency, the Arbitrator "fail[ed] to adequately explain why the legal arguments" the Agency presented "do not limit her remedial authority as it relates to assignment of work, assignment to boards and committees, and granting of clinical privileges."[44] However, this argument does not demonstrate how the Arbitrator refused to hear or consider pertinent and material evidence, or conducted the proceeding in a manner that so prejudiced the Agency so as to affect the fairness of the proceeding as a whole.[45] In fact, rather than refusing to hear or consider pertinent and material evidence, the Arbitrator "carefully read the arguments, statutes[,] and precedent that the parties submitted in connection with the Agency's argument that [the Arbitrator] lack[ed] authority to order" the requested remedy.[46] Consequently, the Agency has failed to show that the Arbitrator did not conduct a fair hearing, and we deny this exception.

C. The Arbitrator did not exceed her authority.

The Agency alleges that the Arbitrator exceeded her authority when she "interfered with management's right . . . to assign work and collateral duties by ordering that the grievant be reassigned" to his former medical position, as well as be restored to his former committee positions.[47] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[48]

Because this claim raises the same issues as the contrary-to-law exception that we denied above, the Authority need not address the merits of this exception separately.[49] Accordingly, we deny this exception.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[40] Member Pizzella notes that, although management holds certain management rights, this does not give it leave to utilize these rights with absolute incompetence. Here, the Arbitrator found that the allegations against the grievant were completely spurious and were the direct cause of his reassignments. Knowing this, and admittedly bound by Article 13, the Agency still attempts to invoke management rights as an impenetrable shield sanctioning it to ignore the direct and foreseeable consequences of a properly negotiated limitation. The Statute acknowledges certain management rights, but also implicitly acknowledges that such rights should be used to "contribute[] to the effective conduct of public business." § 7101(a)(1)(B). The Agency here has shown a complete disregard for that aim.

[41] Exceptions at 17.

[42] *AFGE, Local 1668*, 50 FLRA 124, 126 (1995) (*Local 1668*).

[43] Exceptions at 18.

[44] *Id.* at 17-18.

[45] *Local 1668*, 50 FLRA at 126.

[46] Award at 30.

[47] Exceptions at 21.

[48] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

[49] *AFGE, Local 3627*, 64 FLRA at 550 n.3.