68 FLRA No. 79

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 916
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
TINKER AIR FORCE BASE, OKLAHOMA
(Agency)

0-AR-5070

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DECISION

April 16, 2015

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

I. Statement of the Case

The Agency denied an employee's (the grievant's) sick-leave request for a medical examination related to an insurance policy (insurance examination). When the grievant failed to report to work, he was charged as absent without leave (AWOL) and, subsequently, suspended for seven days. Arbitrator Michael D. Gordon upheld the Agency's denial of the grievant's sick-leave request and the AWOL charge, but he reduced the seven-day suspension to three days.

The substantive question before us is whether the award is contrary to 5 C.F.R. § 630.401's requirement that "an agency must grant sick leave to an employee when he or she . . . [r]eceives [a] medical . . . examination."[1] The Union has not established that – regardless of circumstances – § 630.401 requires an agency to grant a non-incapacitated employee's request for a non-emergency medical examination on the particular day that the employee chooses. Therefore, the answer is no.

II. Background and Arbitrator's Award

Prior to the events at issue here, the grievant received: (1) a written reprimand for failure to comply with a directive, and (2) a three-day suspension. Subsequently, the grievant requested annual leave for an upcoming insurance examination. The grievant's supervisor denied the request because he needed the grievant to work on a time-sensitive project on the day of the proposed insurance examination. Nevertheless, on the day of the proposed insurance examination, the grievant called his supervisor and requested sick leave. After confirming that the grievant's sick-leave request was for the insurance examination – the same purpose for the previously denied annual-leave request – the grievant's supervisor denied the sick-leave request, and warned that he would mark the grievant as AWOL if he did not report for work. The grievant responded that he would not be at work, and went to the insurance examination rather than reporting for work. The grievant's supervisor marked the grievant as AWOL for the eight hours that he missed that day. The grievant provided documentation of his insurance examination, and then filed a grievance on the AWOL charge.

A few days later, the grievant's supervisor proposed a seven-day suspension, citing, as relevant here, the grievant's failure to follow the Agency's sick-leave procedures, as well as the grievant's two prior disciplines. The Agency then suspended the grievant for seven days. Subsequently, the grievant's previous, unrelated, three-day suspension was arbitrated and invalidated.

The grievance concerning the AWOL charge proceeded to arbitration, where the Union argued that the Agency lacked just cause to suspend the grievant because the Agency's denial of the grievant's sick-leave request violated § 630.401, Authority precedent interpreting that regulation, and a provision in the parties' collective-bargaining agreement incorporating that regulation. Specifically, the Union argued that § 630.401 required the Agency to grant the grievant's sick-leave request for the insurance examination. In making that argument, the Union relied on *U.S. Department of the Air Force, Robins Air Force Base, Warner Robins, Georgia* (*Warner Robins*).[2]

The Arbitrator concluded that neither § 630.401 nor the parties' collective-bargaining agreement required the Agency to grant sick leave for a "non-emergency medical examination[]" such as the grievant's insurance examination.[3] In this regard, the Arbitrator stated that the Agency had discretion to deny the grievant's leave request for the insurance examination, based on the Agency's need for the grievant's services that day. And the Arbitrator found, as a factual matter, that the Agency's staffing requirements necessitated the grievant's presence at work that day.

[1] 5 C.F.R. § 630.401.

[2] 41 FLRA 635 (1991).

[3] Award at 14.

Regarding the Union's reliance on *Warner Robins*, the Arbitrator noted that, in that decision, the Authority held that an agency could not charge an employee as AWOL if the employee provided administratively acceptable evidence of *incapacity*. Because, here, there was no allegation that the grievant was incapacitated, the Arbitrator concluded that *Warner Robins* was inapposite.

Based on the foregoing, the Arbitrator concluded that the Agency was justified in disciplining the grievant for his absence. However, because the Agency relied on the grievant's previous three-day suspension in determining a penalty, and that suspension was later overturned, the Arbitrator reduced, to three days, the grievant's seven-day suspension for the AWOL charge.

The Union filed an exception to the Arbitrator's award, and the Agency filed an opposition to the Union's exception.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Union's exception.

In its exception, the Union argues that the award is contrary to § 630.401.[4] The Agency contends that we should dismiss this exception under §§ 2425.4(c) and 2429.5 of the Authority's Regulations because the Union did not make this argument before the Arbitrator.[5]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[6] It is clear from the award that the Arbitrator considered a Union argument that the Agency's denial of the grievant's sick-leave request was contrary to § 630.401.[7] Thus, there is no basis for finding that the Union failed to make its § 630.401 argument below. Accordingly, we find that §§ 2425.4(c) and 2429.5 do not bar the argument.

IV. Analysis and Conclusion: The award is not contrary to law.

As stated previously, the Union argues that the award is contrary to § 630.401.[8] Specifically, the Union interprets § 630.401 to require agencies to grant sick-leave requests for medical examinations such as the grievant's insurance examination.[9] Additionally, the Union asserts that the Authority's decision in *Warner Robins* supports the Union's interpretation of § 630.401.[10]

When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[11] In conducting de novo review, the Authority assesses whether the arbitrator's legal conclusion – not his or her underlying reasoning – is consistent with the relevant legal standard.[12]

Section 630.401(a) provides, in pertinent part, that "an agency must grant sick leave to an employee when he or she . . . [r]eceives [a] medical . . . examination."[13] In his award, the Arbitrator concluded that § 630.401 did not require the Agency to grant sick leave for a "non-emergency medical examination[]" such as the grievant's insurance examination.[14] In particular, the Arbitrator found that the Agency's staffing requirements necessitated the grievant's presence at work that day, and that the Agency's denial of the grievant's sick-leave request fell within the Agency's discretion under § 630.401.[15]

Although § 630.401 identifies a "medical . . . examination" as a purpose for which sick leave must be granted, that regulation does not provide that – regardless of circumstances – an agency must grant sick leave for a medical examination on the *particular day* that an employee chooses. In this regard, taken to its logical extreme, the Union's interpretation of § 630.401 would create an absolute, unlimited entitlement to sick leave for any non-emergency medical, dental, or optical examination, at the day and time of the employee's choosing, without regard for the employing agency's staffing needs. Like the Arbitrator, we do not read § 630.401 as sweeping so broadly.

Warner Robins does not support a contrary conclusion. In *Warner Robins*, the Authority interpreted § 630.401 and related regulations to find that an agency could not charge an employee as AWOL if the employee had provided administratively acceptable evidence of *incapacity* for duty.[16] But where, as here, there is no claim that an employee was incapacitated, nothing in the Authority's analysis in *Warner Robins* prohibits an agency from charging an employee with AWOL for failing to report to work as directed when: the agency

[4] Exception Br. at 1-3.
[5] Opp'n Br. at 4.
[6] 5 C.F.R. §§ 2429.5, 2425.4(c).
[7] Award at 11, 14, 15-16.
[8] Exception Br. at 1- 3.
[9] *Id.*
[10] *Id.* at 2.
[11] *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)).
[12] *SSA*, 67 FLRA 534, 538 (2014).
[13] 5 C.F.R. § 630.401(a).
[14] Award at 14.
[15] *See id.* at 14-16.
[16] 41 FLRA at 639-40.

previously denied a request for annual leave for the day at issue; the agency had staffing needs that required the employee to work that day; the agency communicated those needs to the employee; the agency denied the employee's sick-leave request for that day; and the employee ignored that denial and failed to report for work as directed. Accordingly, the Union's reliance on *Warner Robins* is misplaced.

Based on the foregoing, we find that the award is not contrary to law. We note that the Union also claims that a provision of the parties' collective-bargaining agreement "mirrors" § 630.401(a), so that "even in the absence of . . . § 630.401, the [agreement] mandates the grant of sick leave for medical examinations."[17] The Union's claim is premised on the notion that the award conflicts with the requirements in § 630.401(a). Because we have found to the contrary, the Union's claim provides no basis for finding the award deficient.

V. Decision

We deny the Union's exception.

[17] Exception Br. at 3.