69 FLRA No. 25

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 2455
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
U.S. BORDER PATROL
LAREDO SECTOR
(Agency)

0-AR-5126

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DECISION

January 20, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

The grievant, a Border Patrol agent, admitted that local law enforcement had stopped him for traffic violations twenty-two times in three years. The grievant also admitted that during some of those stops, he was in uniform. As a consequence, the Agency suspended the grievant for two days. The Union filed a grievance challenging the suspension. Arbitrator Frederick P. Ahrens found that the grievant's off-duty conduct was connected to the efficiency of the federal service, and he denied the grievance. There are two substantive questions before us.

The first question is whether the award is based on nonfacts. Because the Union's nonfact arguments either challenge a matter that the parties disputed at arbitration or fail to demonstrate that the alleged nonfact is central to the award, the answer is no.

The second question is whether the award is contrary to law because the Arbitrator failed to apply the "appropriate burden of proof and standard of review" to determine whether the Agency implemented the suspension to promote the efficiency of the service.[1] The answer is no, because the Union failed to demonstrate that any law, rule, or regulation required the Arbitrator to apply a specific standard or burden of proof.

II. Background and Arbitrator's Award

Over the course of three years, local law enforcement pulled the grievant over at least twenty-two times while he was off duty. During some of the stops, however, the grievant identified himself as a Border Patrol agent; during others, he was wearing his work uniform. After conducting an investigation, the Agency suspended the grievant for two days. The Union filed a grievance, and the parties submitted the grievance to arbitration.

The Arbitrator framed the issue, in relevant part, as whether the suspension was "warranted and applied to promote the efficiency of the service."[2]

Before the Arbitrator, the Union contended that the Agency failed to establish a nexus between the traffic stops and the efficiency of the service. Relying on *Kruger v. DOJ*,[3] the Arbitrator explained that to satisfy the nexus requirement, the Agency must show that the grievant's "misconduct adversely affect[ed] the Agency's trust and confidence in the [grievant]'s job performance, or . . . interfered with or adversely affected the Agency's mission."[4] In the Arbitrator's view, the twenty-two "undisputed traffic stops [we]re sufficiently connected to the efficiency of the service."[5] The Arbitrator noted that the grievant served in a law-enforcement position, but that he had "blatant[ly] disregard[ed] . . . the law" by "repeatedly violat[ing] state and local laws."[6] The Arbitrator also found that, by arguing that "a lesser disciplinary action . . . would have been appropriate," the Union conceded the existence of a nexus.[7] Accordingly, the Arbitrator denied the grievance.

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

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[1] Exceptions Br. at 10.
[2] Award at 2.
[3] 32 M.S.P.R. 71 (1987) (describing three methods of establishing nexus for off-duty offenses).
[4] Award at 3-4 (citing *Kruger*, 32 M.S.P.R. at 74).
[5] *Id.* at 4.
[6] *Id.*
[7] *Id.*

III. Preliminary Matter: One of the Union's exceptions fails to raise a ground recognized in § 2425.6 of the Authority's Regulations.

Section 2425.6 of the Authority's Regulations enumerates specific grounds that the Authority recognizes for reviewing arbitration awards.[8] The Regulations further provide that a party may argue that an award is deficient based on private-sector grounds not currently recognized by the Authority, but "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions."[9] An exception that fails to raise a recognized ground, "or otherwise fails to demonstrate a legally recognized basis for setting aside the award," is subject to dismissal.[10]

The Union argues that "[d]e novo review warrants [that] the [suspension] not be sustained because the Agency's delay in furnishing [the grievant] the proposed disciplinary action violates Article 32.G of the parties' collective[-]bargaining agreement and operates as a waiver of its right to discipline in this matter."[11] This argument does not raise one of the enumerated grounds for reviewing arbitration awards in § 2425.6(a)-(b) of the Authority's Regulations.[12] And the Union does not cite legal authority to support a ground not currently recognized by the Authority. Therefore, we dismiss this exception under § 2425.6(e)(1) of the Authority's Regulations.

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Union argues that the award is based on two nonfacts.[13] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[14] However, the Authority will not find an award deficient based on an arbitrator's determination regarding any factual matter that the parties disputed at arbitration.[15]

First, the Union alleges that the award is based on a nonfact because the Arbitrator erroneously asserted that the "nexus in this case is amply supported by the evidence."[16] In the Union's view, the Arbitrator's finding regarding a nexus between the traffic stops and the efficiency of the service was based on speculative testimony.[17] Even assuming that the Arbitrator's assertion concerning nexus is a factual finding, the existence of a nexus was disputed before the Arbitrator.[18] Further, there is no indication in the award that the Arbitrator relied on the particular testimony identified by the Union. And even if the Arbitrator credited that testimony, a challenge to the weight that an arbitrator gives to testimony does not provide a basis for finding an award deficient as based on a nonfact.[19] For these reasons, we deny this nonfact exception.

Second, the Union challenges as a nonfact the Arbitrator's finding that the Union – by arguing that a lesser form of discipline would have been appropriate – conceded the existence of a nexus between the traffic stops and the efficiency of the service.[20] However, before making the disputed finding, the Arbitrator – noting the grievant's "repeated[] violat[ions of] state and local laws" [21] – concluded that the grievant's "traffic stops [we]re sufficiently connected to the efficiency of the service."[22] Therefore, even assuming that the Arbitrator erred in finding that the Union conceded the existence of a nexus, there is no basis to conclude that, but for that error, the Arbitrator would have reached a

[8] *See* 5 C.F.R. § 2425.6(a)-(b).
[9] *Id.* § 2425.6(c).
[10] *Id.* § 2425.6(e)(1); *see also AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (*Local 3955*) (Member Beck dissenting in part) (citing 5 C.F.R. § 2425.6(e)).
[11] Exceptions Br. at 18.
[12] *Compare AFGE, Local 1738*, 65 FLRA 975, 976 (2011) (Member Beck concurring in the result) (exception that award was "contrary to the plain language of the negotiated agreement" did not raise a recognized ground for review), *and Local 3955*, 65 FLRA at 889 (exception that asserted that the arbitrator erred by "relying on Article 32 of the parties' agreement" did not raise a recognized ground for review), *with AFGE, Local 1858*, 67 FLRA 327, 328 (2014) (exception that arbitrator "did not interpret [a specific article] of the . . . [a]greement correctly" sufficient to raise an essence exception (third alteration in original)).
[13] Exceptions Br. at 15-18.
[14] *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015) (citing *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014); *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry*)).
[15] *Id.* (citing *Lowry*, 48 FLRA at 593-94).
[16] Exceptions Br. at 15 (quoting Award at 4) (internal quotation marks omitted).
[17] *Id.* at 16-17.
[18] Exceptions Br., Attach. 4 (Tr.) at 33, 44-45; Exceptions Br., Attach. 5 (Union's Hr'g Br.) at 20-24, 31; Exceptions Br., Attach 6 (Agency's Hr'g Br.) at 6-10, 17.
[19] *AFGE, Local 1395*, 64 FLRA 622, 626 (2010) (citing *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 63 FLRA 553, 556 (2009)).
[20] Exceptions Br. at 17-18.
[21] Award at 4.
[22] *Id.*

different result.[23] As such, we find that the Union has not shown that the award is based on a nonfact.

Based on the foregoing, we deny the Union's nonfact exceptions.

B. The award is not contrary to law.

The Union asserts that the award is contrary to law because the Arbitrator failed to apply the "appropriate burden of proof and standard of review."[24] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo, but defers to the arbitrator's underlying factual findings unless the excepting party establishes that they were based on nonfacts.[25]

The Union asserts that the Agency was required to prove, by a preponderance of the evidence,[26] that: (1) the charged conduct occurred; (2) a nexus existed between the conduct and the efficiency of the service; and (3) the particular penalty imposed was reasonable.[27] According to the Union, the Arbitrator misapplied *Kruger*[28] and failed to make factual findings consistent with the foregoing standard.[29]

The Authority has repeatedly held that arbitrators are bound to apply the same substantive standards as the Merit Systems Protection Board (MSPB) only when resolving grievances concerning actions arising under 5 U.S.C. §§ 4303 and 7512.[30] Here, the grievance concerned a suspension of less than fourteen days. As a result, the Arbitrator was not required to apply MSPB standards,[31] and the Arbitrator's alleged misapplication of *Kruger* does not provide a basis for finding the award deficient.[32] While the Union also maintains that the award is contrary to 5 U.S.C. § 7503(a),[33] arbitrators are not required to apply "a particular standard or burden of proof" when reviewing disciplinary actions taken under that section.[34] Because the Union has not cited any law, rule, or regulation requiring the Arbitrator to apply a specific standard or burden of proof, we find no basis for finding the award deficient in this respect.[35]

Regarding the Union's claim that the Arbitrator's analysis lacked factual support, this argument is based on the Arbitrator's alleged failure to make findings consistent with MSPB standards. However, as established above, the Arbitrator was not required to apply MSPB authority, because the grievance did not arise under §§ 4303 or 7512. Moreover, upon reviewing the award, it is evident that the Arbitrator supported his conclusions with factual findings, to which we defer.[36] For instance, with regard to nexus, the Arbitrator specifically concluded that the "traffic stops [we]re sufficiently connected to the efficiency of the service."[37] In coming to that conclusion, the Arbitrator noted the grievant's twenty-two "undisputed traffic stops," and stated that the grievant, as a law-enforcement officer, demonstrated a "blatant disregard for the law."[38] Accordingly, we find that the Union has failed to establish that the award is contrary to law in this regard.

Based on the foregoing, we deny the Union's contrary-to-law exceptions.

V. Decision

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

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[23] *E.g.*, *AFGE, Local 3947*, 47 FLRA 1364, 1372 (1993) (citing *NFFE, Local 259*, 45 FLRA 773, 780 (1992)) (denying nonfact exception where the party failed to demonstrate that, but for the allegedly incorrect finding, the arbitrator would have reached a different result).

[24] Exceptions Br. at 10-15 (citing 5 U.S.C. §§ 7503, 7513, 7701; 5 C.F.R. §§ 752.403, 1201.56).

[25] *E.g.*, *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012) (*DHS*) (citing *U.S. DHS, U.S. CBP*, 66 FLRA 335, 340 (2011) (*CBP*)).

[26] Exceptions Br. at 11 (citing 5 U.S.C. § 7701(c)(1)(B)).

[27] *Id.* (citing *Booker v. Dep't of VA*, 110 M.S.P.R. 72, 78 (2008)).

[28] *Id.* at 14-15.

[29] *Id.* at 11-12, 14-15.

[30] *U.S. DOJ, Exec. Office for Immigration Review*, 66 FLRA 221, 224 (2011) (citing *SSA*, 65 FLRA 286, 288 (2010)).

[31] *See id.* (citing *SSA*, 65 FLRA at 288).

[32] *See NATCA, MEBA/NMU*, 52 FLRA 787, 792 (1996) (where a suspension of fourteen days or less is at issue, a party's contention that the arbitrator incorrectly applied MSPB authority does not provide a basis for finding the award deficient).

[33] Exceptions Br. at 10 (citing 5 U.S.C. § 7503(a)).

[34] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Cumberland, Md.*, 53 FLRA 278, 282 (1997) (citing *U.S. DOJ, INS, N.Y. Dist. Office*, 42 FLRA 650, 655 (1991)).

[35] *See SSA*, 66 FLRA 6, 8 (2011) (citing *U.S. Dep't of VA, Med. Ctr., Providence, R.I.*, 49 FLRA 110, 113 (1994); *U.S. Dep't of VA, Nat'l Mem'l Cemetery of the Pac.*, 45 FLRA 1164, 1171 (1992)).

[36] *DHS*, 66 FLRA at 567-68 (citing *CBP*, 66 FLRA at 340).

[37] Award at 4.

[38] *Id.*

Member Pizzella, concurring:

I generally agree with the Majority that the Union's nonfact and contrary-to-law exceptions are without merit and should be denied.

I would even agree with my colleagues that the Union's remaining exception, which I would characterize as a clear essence exception, is without merit and should also be denied. But I do not agree with the Majority insofar as they will not even consider the merits of that exception.

In what has now become an all too familiar refrain in far too many Authority cases, I have noted time[1] and again[2] that:

> I do not believe that the Authority should go out of its way to catch parties in technical trapfalls and summarily dismiss otherwise meritorious arguments. To do so, most certainly does not "utilize the Statute to create positive working relationships and resolve good-faith disputes" or to promote "the effective conduct of government business." The United States Circuit Court of Appeals for the District of Columbia Circuit apparently shares the same sentiment. In a recent decision, the [c]ourt criticized the Authority for arguing that the union had "waived" an argument simply because the union failed to use the right combination of words in the exceptions it had previously filed with the Authority. The [c]ourt noted that "a party is not required to invoke 'magic words' in order to adequately raise an argument before the Authority. Instead, an argument is preserved if the party has *fairly brought* the argument 'to the Authority's attention.'"[3]

Once again, however, the Majority summarily declares that the Union's exception – "the Agency's delay in furnishing [the grievant] the proposed disciplinary action violates Article 32.G of the parties' collective[-]bargaining agreement"[4] – "does not raise one of the enumerated grounds for reviewing arbitration awards in § 2425.6(a)-(b) of the Authority's Regulations."[5] That sure sounds like an essence exception to me.

However, the Majority apparently believes that, because the Union prefaced this essence exception with the innocuous phrase "[d]e novo review warrants the discipline not be sustained because . . . ,"[6] they need not even consider the Union's argument and dismiss it summarily.

Once again, I believe this is just the situation about which the court criticized the Authority for refusing to hear an argument simply because the Union did not use "the right combination of words" or state its argument in the exact parlance that is preferred by the Majority.[7]

It is clear to me that the Union articulates an essence exception.

Put another way, the Union is simply arguing that the Arbitrator's award is not a plausible interpretation of *Article 32.G's* requirement that the Agency issue a disciplinary action in a timely manner. In support, the Union devotes seven of twenty-two pages of its exceptions brief to this argument.[8] Specifically, the Union argues that "the timeliness provision . . . found *at Article 32.G*"[9] has been interpreted by perhaps as many as eight different arbitrators (over a twenty-five-year timeframe) as requiring the Agency to serve a disciplinary action in a timely manner.[10] The Union then argues that "[t]he Agency [d]id [n]ot [t]imely [p]ropose the [d]isciplinary [a]ction" even though the Agency "clearly understands what is at stake with an *Article 32.G* defense"[11] and therefore "the Agency's disciplinary action is barred as a result of the Agency's violation of *Article 32.G*."[12]

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[1] *See SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 607 (2014) (*SSA*) (Dissenting Opinion of Member Pizzella).

[2] *See U.S. DOJ, Fed. BOP Fed. Med. Ctr., Lexington, Ky.*, 69 FLRA 10, 17 (2015) (*FMC Lexington*) (Dissenting Opinion of Member Pizzella) (citing *SSA*, 67 FLRA at 607 (Dissenting Opinion of Member Pizzella)).

[3] *SSA*, 67 FLRA at 607 (footnotes omitted) (quoting *NTEU v. FLRA*, 754 F.3d 1031, 1039 (D.C. Cir. 2014); *U.S. DHS, CBP*, 67 FLRA 107, 113 (2013) (Concurring Opinion of Member Pizzella)) (citing *AFGE, Local 1897*, 67 FLRA 239, 240 (2014) (Member Pizzella concurring); *AFGE, Local 1738*, 65 FLRA 975, 977 (2011) (Member Beck concurring); *AFGE, Local 3955, Council of Prison Local 33*, 65 FLRA 887, 889 (2011) (Member Beck concurring)).

[4] Majority at 3 (quoting Exceptions Br. at 18) (alterations in original).

[5] *Id.*

[6] *Id.* (alteration in original).

[7] *FMC Lexington*, 69 FLRA at 17 (citing *NTEU*, 754 F.3d at 1039).

[8] *See* Exceptions Br. at 18-24.

[9] *Id.* at 18.

[10] *Id.* at 18-21.

[11] *Id.* at 21 (emphasis added).

[12] *Id*. at 24 (emphasis added).

Nonetheless, I would conclude that the Arbitrator's interpretation of Article 32.G was a plausible interpretation and thereby deny the Union's essence exception. But I cannot, as my colleagues are so wont to do, just decline to consider the merits of the Union's arguments.

Thank you.