

69 FLRA No. 66

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ENGLEWOOD, COLORADO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 709
(Union)

0-AR-5180

—
DECISION

July 11, 2016

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

I. Statement of the Case

The Agency filed exceptions to Arbitrator Christel Jorgensen's award, which found that the Agency violated the Americans with Disabilities Act¹ (ADA) and the Rehabilitation Act (the Act)² by discriminating against the grievant due to his disability. We must decide four substantive questions.

The first question is whether the award is contrary to law because the grievant was not a qualified individual with a disability under the meaning of the ADA and the Act. Because the undisputed evidence concerning the grievant's medical history, as well as a letter from a private physician addressing the grievant's injuries, support the Arbitrator's finding that the grievant was disabled within the meaning of the ADA and the Act, the answer to this question is no.

The second question is whether the award is contrary to the ADA and the Act because the Arbitrator failed to provide sufficient analysis to support her finding that the grievant was disabled. Because the Agency does not demonstrate that the ADA or the Act, or any other

legal authority, requires arbitrators to articulate their decisions to any further extent than the Arbitrator did in her award, and because we review only an arbitrator's legal *conclusions* when conducting de novo review, the answer to this question is no.

The third question is whether the award fails to draw its essence from the parties' agreement because the Arbitrator ignores the plain language of Article 22 of the parties' agreement. Because Article 22 requires the parties to prohibit all unlawful discrimination, and the Arbitrator found that the Agency violated the ADA and the Act, the Agency fails to demonstrate how the Arbitrator erred in interpreting this provision of the parties' agreement. Accordingly, the answer to this question is no.

The fourth question is whether the award fails to draw its essence from the parties' agreement because the Arbitrator misconstrued Article 31 of the parties' agreement. Because the Arbitrator's findings that the Agency violated the ADA, the Act, and Article 22 of the parties' agreement provide separate and independent grounds for the award, and because the Agency has not demonstrated that these findings are deficient, the answer to this question is no.

For the foregoing reasons, and for those set forth below, we dismiss, in part, and deny, in part, the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant is a correctional officer who suffered a workplace injury that restricted his ability to perform his regular job duties. After filing a claim for worker's compensation, he returned to duty and the Agency placed him on a temporary assignment as a phone monitor. Several months later, the Agency again moved the grievant to a less-strenuous temporary assignment as the front lobby officer. Neither position required the grievant to respond to emergency alerts. The Agency informed the grievant that this assignment was temporary and that he would be required to submit documentation of his ongoing medical condition.

Initially, the grievant submitted a physician's report detailing certain physical restrictions arising out of his injury and asserting that those restrictions would last two to three months. Approximately three months after submitting this report, the grievant submitted another report signed by a different physician who diagnosed the grievant with additional physical ailments that would restrict him from regular work duties for another six to twelve months. Because it believed this evidence was conflicting, the Agency requested more specific information from the grievant. Specifically, the Agency

¹ 42 U.S.C. § 12101.

² 29 U.S.C. § 701.

requested that the grievant provide an “assessment of the current clinical status” of his injury, “an estimate of the expected date of a full or partial recovery,” and “a narrative explanation of the medical basis for any conclusion that duty restrictions or accommodations are or are not warranted.”³

In response to this request, the Agency received a January letter from the same private physician who had provided the previous report stating that the grievant would be restricted for another six to twelve months. This letter stated that the physician had reviewed the position description for the grievant’s normal position of correctional officer and discussed the day-to-day activities of the position with the grievant. The physician stated he preferred that the grievant be restricted in order to facilitate his full recovery from the injuries, and expressed frustration that the grievant had not received more reasonable and necessary medical treatment throughout the workers’ compensation process. Nonetheless, the physician determined that the grievant was “capable of performing his duties” and did not pose “any danger to himself or other officers[] by continuing to work at his regular duty.”⁴ The physician concluded the letter by assuring the Agency that the grievant “will be able to perform the duties that are depicted in the position description” of a senior correctional officer.⁵

Shortly after receiving this January letter, the Agency informed the grievant that he would be required to either return to full-time duty as a senior correctional officer or submit a request for leave without pay. The grievant submitted a request for reconsideration of this decision and explicitly requested a reasonable accommodation. The Agency denied this request, and the grievant was placed on leave in an unpaid status. The Union then filed a grievance alleging that the Agency violated the ADA, the Act, and the parties’ agreement by discriminating against the grievant due to his disability. The Agency denied the grievance, and the parties proceeded to arbitration.

As the parties did not stipulate to an issue, the Arbitrator framed the issue as follows: “Was the [g]rievant . . . denied a reasonable accommodation in violation of the [parties’ a]greement, [the ADA,] and the . . . Act when he was denied [the opportunity] to work a light duty assignment starting [the date the Agency instructed him to return to full-time duty as a senior correctional officer]? If so, what is the appropriate remedy?”⁶ The Arbitrator noted that the January letter

“should have raised questions for all parties,” particularly because the physician had expressed frustration that the grievant had not undergone more diagnostic testing to determine the full extent of his injuries.⁷ The Arbitrator also noted that, despite the fact that Article 31, Sections a. and b. of the parties’ agreement required both parties to make “a reasonable and concerted effort” to resolve grievances, there was no evidence to show that either party attempted to further clarify the January letter or the grievant’s medical condition.⁸ Then, the Arbitrator concluded that the grievant met the definition of “disab[led],” and determined that the Agency violated the ADA and the Act by failing to provide the grievant with a reasonable accommodation.⁹

As a remedy, the Arbitrator ordered the Agency to return the grievant to a position that accommodates his physical limitations, and ordered that the grievant be “made whole,” offset by any worker’s compensation that the grievant had received, as well as reasonable attorney fees.¹⁰

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

III. Preliminary Matters

- A. Sections 2425.4(c) and 2429.5 of the Authority’s Regulations do not bar the Agency’s argument that the grievant was not a qualified individual with a disability.

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.¹¹ In its opposition to the Agency’s exceptions, the Union argues that the Agency failed to argue at arbitration that the grievant was not a qualified individual with a disability.¹²

The Union misconstrues the Agency’s argument. The Union claims that the Agency is arguing that the grievant is not “qualified” to perform his duties.¹³ However, the Agency is not disputing that the grievant is a qualified individual; to the contrary, the Agency argues that the grievant was not a qualified individual *with a disability*, and that he was required to return to duty

³ Exceptions at 4 (quoting *id.*, Attach. I, Agency Eight-Point Letter, at 2).

⁴ *Id.*, Attach. J, January Letter from Private Physician (January Letter), at 1.

⁵ *Id.* at 2.

⁶ Award at 3.

⁷ *Id.* at 4.

⁸ *Id.* at 5.

⁹ *Id.* at 6.

¹⁰ *Id.*

¹¹ 5 C.F.R. §§ 2425.4(c), 2429.5; see also *AFGE, Local 3571*, 67 FLRA 218, 219 (2014) (*Local 3571*).

¹² Opp’n at 3.

¹³ See *id.*

because he was no longer disabled.¹⁴ This argument was raised by the Agency at arbitration.¹⁵ Accordingly, we reject the Union's claim that §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar this exception.

- B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's argument that the Arbitrator erred by finding that the Agency failed to provide the grievant with a reasonable accommodation.

The Agency asserts that the award is contrary to law because the Arbitrator erred in finding that the Agency failed to provide a reasonable accommodation for the grievant.¹⁶ Specifically, the Agency argues that, assuming *arguendo* that the grievant was disabled, the determination of a reasonable accommodation must be an "interactive process" between the employee and employer, and that the grievant failed to provide adequate information to the Agency to make such a determination.¹⁷

However, the Agency does not demonstrate that it raised this argument before the Arbitrator, nor is there any explanation as to why the Agency could not have done so. Although the Agency framed the issue in its post-hearing brief as whether the grievant was "denied a reasonable accommodation,"¹⁸ the Agency subsequently argues *only* that the grievant was not disabled within the meaning of the ADA and the Act.¹⁹ There is no indication that the Agency argued before the Arbitrator – as it does in its exceptions – that the grievant neglected his duty to provide adequate information to the Agency in order for the Agency to determine a reasonable accommodation.

Accordingly, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations²⁰ bar this exception.

IV. Analysis and Conclusions

- A. The award is not contrary to the ADA or the Act.

The Agency argues that the award is contrary to the ADA and the Act.²¹ 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*.²² 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.²³ In making that assessment, the Authority defers to the arbitrator's underlying factual findings.²⁴

1. The Arbitrator did not err in finding that the grievant was disabled within the meaning of the ADA and the Act.

In resolving exceptions pertaining to disability discrimination, the Authority applies the Act, which addresses disability discrimination in federal employment.²⁵ However, in resolving whether an award is contrary to the Act, the Authority applies the standards of the ADA because Congress has specifically adopted the standards of the ADA for determining whether there has been disability discrimination in violation of the Act.²⁶ Applying these ADA standards, to show a *prima facie* case of discrimination under the Act, a grievant must show that he or she: (1) has a disability within the meaning of the Act; (2) is qualified to perform the essential functions of the position in question, with or without a reasonable accommodation; and (3) was discriminated against because of his or her disability.²⁷

Here, the Agency argues that the grievant has failed to show a *prima facie* case of discrimination because he did not have a disability within the meaning

¹⁴ See Exceptions at 8-10.

¹⁵ See *id.*, Attach. B, Agency's Post-Hr'g Br., at 8-9.

¹⁶ Exceptions at 10-14.

¹⁷ Exceptions at 11 (quoting *Billman v. Principi*, EEOC Appeal No. 01A21619, 2003 WL 21997673, at *3 (2003) (citing 29 C.F.R. § 1630.9; *Enforcement Guidance: Reasonable Accommodation & Undue Hardship Under the Americans with Disabilities Act*, EEOC Notice No. 915.002 (Oct. 17, 2002))).

¹⁸ Agency's Post-Hr'g Br. at 1.

¹⁹ See *id.* at 7-10.

²⁰ 5 C.F.R. §§ 2425.4(c), 2429.5; see also *Local 3571*, 67 FLRA at 219.

²¹ Exceptions at 7-10.

²² *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (*Local 3506*) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)); *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994) (citing 5 U.S.C. § 7122(a)(1)).

²³ *Local 3506*, 65 FLRA at 123 (citing *U.S. DOD, Dep'ts of the Army & the A.F., Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).

²⁴ *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (citation omitted).

²⁵ *OPM*, 61 FLRA 358, 361 (2005).

²⁶ *Id.* (citing 29 U.S.C. § 791(f); *U.S. DOJ, INS*, 57 FLRA 254, 255 (2001)).

²⁷ *U.S. Dep't of the Army, Corps of Eng'rs, Huntington Dist. Huntington, W. Va.*, 59 FLRA 793, 797 (2004) (citing *U.S. Dep't of the Treasury, IRS, Austin Serv. Ctr.*, 58 FLRA 546, 547-48 (2003)).

of the Act at the time the Agency instructed the grievant to return to full-time duty as a senior correctional officer.²⁸ The Act defines an “individual with a disability” as, in pertinent part, any individual who has “a physical or mental impairment that substantially limits one or more major life activities of such individual,” or any individual who has “a record of such an impairment.”²⁹ Congress passed the ADA Amendments Act of 2008 (ADAAA), which significantly expanded the definition of “disability” under the ADA to ensure that the law “shall be construed in favor of broad coverage.”³⁰ Accordingly, regulations issued pursuant to the ADAAA provide that the language of the ADA “shall not be interpreted strictly to create a demanding standard for disability.”³¹

The Agency argues that the award is contrary to the Act because the Arbitrator erred in finding that the grievant was disabled.³² Specifically, the Agency claims that the grievant failed to demonstrate that he was substantially limited in any major life activity at the time the Agency ordered him to return to full duty.³³ The Agency bases this on the January letter from the private physician, who stated that the grievant was “able to perform the duties of his position” and “reassur[ed] the Agency] that [the grievant] will be able to perform the duties” of his position.³⁴ According to the Agency, because this letter “did not indicate that the grievant was substantially limited in any major life activity,” the grievant has failed to establish a prima facie case of discrimination under the Act.³⁵

However, the Arbitrator based her finding that the grievant was disabled on the ample evidence presented at the hearing – which the Agency does not dispute³⁶ – demonstrating that the grievant has a history of impairment that substantially limited his ability to work. The Arbitrator begins her award with a thorough description of the grievant’s injuries, and finds that the pain resulting from those injuries “still continues and has increased over time.”³⁷ Additionally, the evidence considered by the Arbitrator includes three separate medical evaluations establishing that the grievant

suffered from a significant physical impairment.³⁸ The Arbitrator also emphasized that the January letter from the private physician did not unequivocally resolve the questions surrounding the grievant’s medical status.³⁹ For example, the Arbitrator observed that the private physician expressed concern over the lack of diagnostic testing to determine the full extent of the grievant’s injuries, and took issue with the complex form of the Agency’s inquiry into the grievant’s medical history.⁴⁰ The January letter also expressed frustration that the grievant had not received all of the medical treatment that was necessary to address his injuries throughout the workers’ compensation process.⁴¹

Given the grievant’s undisputed recent history of medical impairment and the ambiguous nature of the January letter from the private physician, as well as the expansive coverage of the term “disability” following the enactment of the ADAAA, we conclude the Arbitrator did not err in finding that the grievant was a qualified individual with a disability under the ADA and the Act. This conclusion is reinforced by the fact that Congress “intended to provide for more generous coverage and application of the ADA’s prohibition on discrimination” when passing the ADAAA.⁴²

Accordingly, the award is not contrary to the ADA or the Act insofar as it found that the grievant was a qualified individual with a disability, and we deny this exception.

2. The award is not contrary to the ADA or the Act because the Arbitrator failed to provide sufficient analysis of her findings.

The Agency also argues that the award is contrary to the ADA and the Act because the Arbitrator “provide[d] absolutely no analysis in support of her conclusion” that the grievant was disabled.⁴³ According to the Agency, because “[t]he Arbitrator never determined any of the factors necessary to establish a prima facie case of discrimination,” the award must be set aside.⁴⁴ However, the Agency does not demonstrate that the ADA or the Act, or any other legal authority, requires arbitrators to articulate their decisions to any further extent than the Arbitrator did in her award.

²⁸ Exceptions at 7-10.

²⁹ 29 U.S.C. § 705(20)(B) (cross-referencing 42 U.S.C. § 12102(1)(A) & (B)); *see also* 29 C.F.R. § 1630.2(k)(1).

³⁰ 42 U.S.C. § 12102(4)(A).

³¹ 29 C.F.R. § 1630.2(i)(2).

³² Exceptions at 8-10.

³³ *Id.* at 9-10.

³⁴ January Letter at 1-2.

³⁵ Exceptions at 9-10.

³⁶ *See id.* at 9 (discussing grievant’s prior medical diagnoses and acknowledging that the grievant had “medical restrictions on his ability to work”).

³⁷ Award at 1.

³⁸ *See* Exceptions, Attachs. G, July 17, 2014 Medical Documentation, & H, Oct. 3, 2014 & Dec. 30, 2014 Medical Documentation.

³⁹ *See* Award at 4-5.

⁴⁰ *Id.*

⁴¹ January Letter at 2.

⁴² 29 C.F.R. § 1630.2(j)(3)(i).

⁴³ Exceptions at 14.

⁴⁴ *Id.*

Furthermore, in applying a standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law, based on the arbitrator's underlying factual findings.⁴⁵ An arbitrator's failure to apply a particular legal analysis does not render an award deficient because, in applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with law.⁴⁶ Accordingly, the Agency fails to show that the award is contrary to law in this respect, and we deny this exception.

B. The award does not fail to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement.⁴⁷ When 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.⁴⁸ Under this standard, the appealing party must establish 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 arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.⁴⁹ 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."⁵⁰

The Agency argues that the award fails to draw its essence from the parties' agreement for two reasons. First, the Agency argues that the Arbitrator ignored the plain language of Article 22 of the parties' agreement.⁵¹ The Arbitrator found that the Agency violated Article 22 insofar as it "prohibit[s] unlawful discrimination in accordance with federal anti-discrimination laws and executive orders."⁵² According to the Agency, this finding was in error because "Article 22 incorporates federal anti-discrimination laws but has little independent force," and the Arbitrator's reliance on Article 22 is

"disconnected from the plain meaning of the contract provision."⁵³

Article 22 instructs the parties to "prohibit unlawful discrimination,"⁵⁴ and the parties agreed at arbitration that Article 22 incorporates the ADA and the Act into the parties' agreement.⁵⁵ Thus, the Arbitrator's finding that the Agency violated the ADA and the Act supports a finding that the Agency also violated this portion of Article 22, and the Agency fails to show how the Arbitrator's construction of Article 22 does not represent a plausible interpretation of the agreement.⁵⁶

Second, the Agency argues that the Arbitrator improperly relied on Article 31 of the parties' agreement, which requires the parties to make "a reasonable and concerted effort" to informally resolve disputes.⁵⁷ The Agency claims that the Arbitrator unfairly interpreted this language to "impose a duty on the Agency, even in the face of Union inaction," to make additional efforts to resolve the grievance.⁵⁸

An arbitration award is based on separate and independent grounds when more than one ground would independently support the remedy that the arbitrator awards.⁵⁹ When an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to have the Authority find the award deficient.⁶⁰ In those circumstances, if the excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the arbitrator, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other ground.⁶¹

Here, as explained above, the Arbitrator found that the Agency violated the ADA, the Act, and Article 22 of the parties' agreement. This finding provides a separate and independent ground for the award. As we deny the Agency's contrary-to-law exceptions and its other essence exception, the Agency's

⁴⁵ *U.S. Dep't of the A.F., Seymour Johnson A.F. Base, N.C.*, 55 FLRA 163, 165 (1999) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).

⁴⁶ *Id.* (quoting *AFGE, Nat'l Border Patrol Council*, 54 FLRA 905, 910 n.6 (1998)).

⁴⁷ Exceptions at 15-17.

⁴⁸ *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

⁴⁹ *U.S. DOD, Def. Contract Audit Agency, Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004) (*DOD Irving*) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*DOL*)).

⁵⁰ *Id.* (quoting *DOL*, 34 FLRA at 576).

⁵¹ Exceptions at 17.

⁵² Award at 5.

⁵³ Exceptions at 17.

⁵⁴ *Id.*, Attach. R, Master Agreement, Art. 22.

⁵⁵ Exceptions at 17 (quoting *id.*, Attach. C, Hr'g Tr. at 5).

⁵⁶ See *DOD Irving*, 60 FLRA at 30 (citing *DOL*, 34 FLRA at 575).

⁵⁷ Exceptions at 16.

⁵⁸ *Id.*

⁵⁹ *SSA*, 69 FLRA 208, 210 (2016) (citing *NTEU, Chapter 83*, 68 FLRA 945, 951 (2015) (*Chapter 83*) (Member Pizzella dissenting) (citing *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 86 (2011))).

⁶⁰ *Id.* at 210-11 (citing *Chapter 83*, 68 FLRA at 951).

⁶¹ *Id.* at 211 (citing *Chapter 83*, 68 FLRA at 951 (citing *U.S. Dep't of VA Med. Ctr., Hampton, Va.*, 65 FLRA 125, 129 (2010); *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 892 (2010))).

argument that the Arbitrator misconstrued Article 31 of the parties' agreement provides no basis for finding the award deficient.

Accordingly, we deny the Agency's essence exceptions.

V. Decision

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