70 FLRA No. 33

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
GULF COAST MEDICAL CENTER
BILOXI, MISSISSIPPI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1045
(Union)

0-AR-5221

_____

DECISION

February 7, 2017

_____

Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Agency filed exceptions to Arbitrator Patrick Hardin's award, which sustained the Union's grievance and rescinded the Agency's fourteen-day suspension of the grievant without pay following a failed drug test. We must decide four questions.

First, we must decide whether the award is contrary to law because it violates the Agency's right to discipline its employees under § 7106(a)(2) of the Federal Service Labor-Management Relations Statute[1] (the Statute). Because the Agency fails to support this exception with any arguments, the answer to this question is no.

Second, we must decide whether the award is contrary to law, rule, or regulation because it violates an Agency-wide handbook (Handbook 5383) which addresses employee-discipline procedures following instances of illegal drug use. Because the parties' collective-bargaining agreement addresses this exact subject matter, and because collective-bargaining agreements – rather than agency regulations – govern matters to which they both apply, the answer to this question is no.

Third, we must decide whether the award fails to draw its essence from the parties' agreement because the Arbitrator found that the grievant's conduct did not rise to the level of serious, egregious or criminal conduct, and because the Arbitrator's interpretation of the agreement is inconsistent with the aforementioned Agency-wide policy. Because the Agency does not demonstrate that the Arbitrator's interpretation of the parties' agreement conflicts with the express provisions of the agreement, or that the Arbitrator's interpretation is otherwise irrational, unfounded, or implausible, the answer to this question is no.

Fourth, we must decide whether the award is contrary to public policy because the Arbitrator's interpretation of the parties' agreement would give employees "a free pass to use drugs" and is "completely contrary to the mission of the [Agency]."[2] Because the Agency does not demonstrate that the award conflicts with any public policies that are grounded in law or legal precedent, the answer to this question is no.

For the aforementioned reasons, as well as for those explained below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant is a clinical psychologist employed by the Agency. The grievant was selected by the Agency for a random drug screening and provided a urine sample for testing. Immediately thereafter, the grievant informed his supervisor that the test results would come back positive for marijuana use. The following month, the results of the test confirmed the grievant's admission, and the Agency removed him from patient-care responsibilities because the sample tested positive for marijuana.

Only then did the grievant apply to the Agency's Employee Assistance Program (EAP), which, among other services, offers treatment to employees struggling with health issues (such as drug use) that may result in conduct or performance deficiencies.

The grievant was admitted to an EAP rehabilitation program, which he completed successfully and then returned to his normal clinical duties two weeks later. The grievant passed several random drug screenings thereafter.

Following the grievant's return to clinical duties, the Agency proposed and decided to suspend the grievant for fourteen days without pay as discipline for his illegal drug use, despite the fact that he had successfully completed the treatment. The Union filed a grievance

[1] 5 U.S.C. § 7106(a)(2).

[2] Exceptions at 11.

contesting the suspension, which was unresolved, and the parties proceeded to arbitration.

At arbitration, the Arbitrator framed the issue before him as "[w]hether the Agency violated Article 15, Section 5, of the [parties' agreement] . . . by failing to rescind the proposed corrective action of a [fourteen]-day suspension."[3] Under Article 15, Section 5 of the parties' agreement, if an employee participates in the EAP, completes the rehabilitation to which he is referred through the EAP, and does not engage in new instances of misconduct, the Agency will rescind any proposed corrective action resulting from the employee's misconduct. However, this provision does not apply to instances which involve "egregious[] or criminal misconduct."[4]

The Agency argued before the Arbitrator that Agency-wide policy, as set forth in Handbook 5383, requires that an employee must voluntarily identify himself as a user of illegal drugs *before* being selected for a random drug screening in order to be shielded from discipline after completing the EAP. As such, the Agency argued that the suspension was proper because the grievant did not confess to his use of illegal drugs until after being selected for a drug screening.

In rejecting this argument, the Arbitrator noted that the plain language of Article 15, Section 5 contained no requirement that an employee self-identify prior to being selected for a drug test, and concluded that the Agency "appear[ed] to conflate" Article 15, Section 5 with Handbook 5383. The Arbitrator determined that the grievant had satisfied the necessary criteria set forth in Article 15, Section 5 in order to have the proposed corrective action against him rescinded – that is, he participated in the EAP, did not engage in any new instances of misconduct, and completed the treatment to which he was referred. The Arbitrator also rejected the Agency's argument that the grievant's actions rose to the level of criminal or egregious conduct, and therefore was not covered by Article 15, Section 5.

Accordingly, the Arbitrator sustained the grievance and ordered the Agency to make the grievant whole for all loss of pay and benefits resulting from the grievant's suspension. The Arbitrator also ordered the Agency to expunge from the grievant's personnel records all references to the disciplinary action.

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

[3] Award at 2.

[4] *Id.* (quoting Article 15, Section 5 of the parties' agreement (Article 15, Section 5)).

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any argument that could have been, but was not, presented to the arbitrator.[5]

The Agency argues that the award is contrary to law because it is contrary to Executive Order 12,564, which shields employees from disciplinary action for drug use only if they admit to such misconduct before being identified through other means.[6] However, there is no evidence that the Agency advanced this argument before the Arbitrator.[7] The Agency asserts that, at arbitration, it entered into evidence Handbook 5383, which contains "citations to Executive Order 12,564 and its implementing legislation."[8] However, merely citing a law or regulation before an arbitrator does not thereby raise related arguments.[9] Accordingly, we find that the Agency failed to sufficiently raise its argument regarding Executive Order 12,564 before the Arbitrator, and we dismiss this exception under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.

IV. Analysis and Conclusions

A. The Agency fails to support one of its exceptions.

Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c).[10] Consistent with § 2425.6(e)(1), when a party does not provide any arguments to support its exception, the Authority will deny the exception.[11]

Here, the Agency argues that the award is contrary to law because it violates the Agency's right to discipline employees under § 7106(a)(2) of the Statute.[12] However, the Agency fails to support this exception with

[5] 5 C.F.R. §§ 2425.4(c), 2429.5; *e.g.*, *AFGE, Local 3571*, 67 FLRA 218, 219 (2014).

[6] Exceptions at 5 (citing Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 15, 1986)).

[7] *See, e.g.*, Award; Exceptions, Ex. D, Agency's Post-Hr'g Br.

[8] Exceptions at 5 (citing Joint Ex. 16).

[9] *Indep. Union of Pension Emps. for Democracy & Justice*, 69 FLRA 158, 160 (2016) (citing *U.S. DHS, U.S. CBP*, 68 FLRA 829, 832 (2015); *U.S. Dep't of VA, Bos. Healthcare Sys., Bos., Mass.*, 68 FLRA 116, 117 (2014)).

[10] 5 C.F.R. § 2425.6(e)(1).

[11] *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014) (citing *AFGE, Nat'l Border Patrol Council, Local 2595*, 67 FLRA 361, 366 (2014)).

[12] Exceptions at 7 (citing 5 U.S.C. § 7106(a)(2)).

any arguments. Accordingly, we deny this exception as unsupported under § 2425.6(e)(1) of the Authority's Regulations.[13]

B. The award is not contrary to law.

The Agency argues that the award is contrary to Handbook 5383.[14] 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.[15] 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.[16] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[17]

In his award, the Arbitrator found that there is no requirement in Article 15, Section 5 of the parties' agreement "that the employee must seek EAP assistance *before* the Agency learns of the employee's need for assistance."[18] The Agency argues that this conclusion is contrary to Handbook 5383, which states that protection from discipline "will not be available to an employee who is asked to provide a urine sample when required . . . and who thereafter requests protection under [the EAP]."[19]

However, it is well-established that collective-bargaining agreements, rather than agency regulations, govern the disposition of matters to which they both apply.[20] Here, both Handbook 5383 and Article 15, Section 5 of the parties' agreement cover instances of illegal drug use amongst employees, subsequent enrollment in the EAP, and the Agency's ability to discipline employees upon their completion of the EAP. Accordingly, Article 15, Section 5 – and not Handbook 5383 or any other Agency regulation – governs such matters. Therefore, because Handbook 5383 does not govern in this circumstance, the Agency's argument that the award is contrary to Handbook 5383 does not provide a basis for setting aside the award. Accordingly, we deny this exception.

C. 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. 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.[21] 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.[22] 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."[23]

The Agency argues that the Arbitrator misinterpreted Article 15, Section 5 of the parties' agreement for three reasons. First, the Agency notes that this provision does not apply if "egregious" misconduct is involved, and argues that the grievant's misconduct was

[13] 5 C.F.R. § 2425.6(e)(1); *see NAGE, Local R3-10, SEIU*, 69 FLRA 510, 510 n.11 (2016) (citing *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 450 (2014); *Fraternal Order of Police, Pentagon Police Labor Comm.*, 65 FLRA 781, 784-85 (2011)) (exceptions are subject to denial under § 2425.6(e)(1) of the Authority's Regulations if they fail to support arguments that raise recognized grounds for review).
[14] Exceptions at 5-6.
[15] *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995); *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[16] *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) (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[17] *E.g.*, *AFGE, Nat'l INS Council*, 69 FLRA 549, 552 (2016).
[18] Award at 6.
[19] Exceptions at 6 (quoting Handbook 5383, Section 8.f).
[20] *U.S. Dep't of VA, Harry S. Truman Mem'l Veterans Hosp., Columbia, Mo.*, 66 FLRA 856, 857 (2012) (citing *U.S. Dep't of the Treasury, IRS*, 64 FLRA 720, 722 (2010) (*IRS*)); *Broad. Bd. of Governors*, 66 FLRA 380, 385 (2011) (*BBG*); *U.S. Dep't of VA, Med. Ctr., Hampton, Va.*, 65 FLRA 125, 127 (2010) (citing *U.S. Dep't of the Navy, Naval Training Ctr., Orlando, Fla.*, 53 FLRA 103, 108-109 (1997); *U.S. Dep't of the Treasury, U.S. Customs Serv., N.Y.C., N.Y.*, 51 FLRA 743, 746 (1996); *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 194 (1990)).
[21] *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[22] *U.S. DOD, Def. Contract Audit Agency, Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*DOL*)).
[23] *Id.* (quoting *DOL*, 34 FLRA at 576).

"unquestionably egregious."[24] In particular, the Agency asserts that the grievant is the head of the hospital ethics committee, treats the Agency's most vulnerable patients, and was nominated for a national ethics award, and therefore "should be held to the highest ethical standard."[25]

In his award, the Arbitrator "adopt[ed] the Agency['s] list of drug offenses that justify discharge on first offense as a rough working definition of 'egregious.'"[26] Because the off-duty, off-premises consumption of marijuana is not on this list, the Arbitrator concluded that the grievant's behavior was not "egregious" within the meaning of Article 15, Section 5.[27]

The Agency has not demonstrated that this conclusion is unreasonable or irrational. Unlike previous awards which the Authority has found deficient because they failed to draw their essence from the parties' agreement, the Agency fails to establish that the Arbitrator's interpretation of Article 15, Section 5 conflicts with the express provisions of the agreement.[28] Consequently, the Agency has not shown that the Arbitrator's interpretation of the meaning of "egregious" cannot in any rational way be derived from the agreement; is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the Arbitrator; does not represent a plausible interpretation of the agreement; or evidences a manifest disregard for the agreement.[29]

Next, the Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator concluded that "there is no specific requirement [in Article 15, Section 5] that an employee submit to the EAP program *before*" being identified through other means.[30] The Agency argues that Handbook 5383 requires employees to self-identify before being identified through other means, and argues that "[i]t is not plausible that [Article 15, Section 5] be interpreted so entirely contrary to [Agency] policy."[31] However, as explained above, it is well established that collective-bargaining agreements, rather than agency regulations, govern the disposition of matters to which they both apply.[32] And, as the Agency concedes in its exceptions,[33] Article 15, Section 5 does not contain any requirement that employees must self-identify before being identified through other means in order to remain eligible for protection from discipline under the EAP. Accordingly, the Agency's claim that the Arbitrator's interpretation of the agreement is contrary to Handbook 5383 does not provide a basis for finding that the award fails to draw its essence from the parties' agreement.

Finally, the Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator ignored or misinterpreted Article 15, Section 5's provision that the EAP will not shield an employee from corrective action if "criminal misconduct is involved."[34] In this regard, the Agency argues that the grievant's conduct was "per se criminal" because he violated a Mississippi statute that prohibits driving a motor vehicle if there is "any amount of marijuana . . . in the driver's blood or urine."[35] According to the Agency, the grievant purportedly violated this statute by driving to work on the day he tested positive for marijuana.[36]

However, that statute does not contain the language quoted by the Agency regarding driving under the influence of marijuana,[37] nor is such language codified anywhere else in Mississippi state law. Although the statute cited by the Agency prohibits driving "under the influence of any drug or controlled substance,"[38] it does not state, as the Agency claims, that "any amount of marijuana . . . in the driver's blood or urine" is sufficient to establish that an individual was driving under the influence.[39] As this argument is based on a misstatement of the law, it does not provide a basis for concluding that the Arbitrator's award is irrational, unfounded, implausible, or in manifest disregard of the agreement.

We therefore deny the Agency's exception that the award fails to draw its essence from the parties' agreement.

---

[24] Exceptions at 9.
[25] *Id.*
[26] Award at 7 (quoting Article 15, Section 5).
[27] *Id.*
[28] *See SSA*, 63 FLRA 691, 693 (2009) (citing *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993); *U.S. Dep't of the Air Force, Hill Air Force Base, Utah*, 39 FLRA 103, 108 (1991)).
[29] *Id.* (citing *DOL,* 34 FLRA at 575).
[30] Exceptions at 10.
[31] *Id.* at 11.
[32] *BBG*, 66 FLRA at 385 (citing *IRS*, 64 FLRA at 722).
[33] *See* Exceptions at 10 (acknowledging that Article 15, Section 5 "didn't speak to the order" of events in which a drug user must self-identify).
[34] *Id.* at 7-8 (quoting Article 15, Section 5).
[35] *Id.* at 9 (citing Miss. Code Ann. § 63-11-30(1)).
[36] *Id.*
[37] *See* Miss. Code. Ann. § 63-11-30.
[38] *See id.* § 63-11-30(1)(c).
[39] Exceptions at 9.

D. The award is not contrary to public policy.

The Agency argues that the award is contrary to public policy. For an award to be found deficient as contrary to public policy, the asserted public policy must be "explicit," "well defined," and "dominant," and a violation of the policy "must be clearly shown."[40] The appealing party must also identify the policy "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[41]

The Agency argues that the award is contrary to public policy because the Arbitrator's interpretation of Article 15, Section 5 "means that there is no incentive to self-identify" as a drug user and strips the Agency of its "ability to take corrective action when employees violate [Agency] policy."[42] The Agency further argues that the award is "contrary to the mission of the [Agency]" because the Agency "must be able to discipline its employees who potentially endanger[] veterans by coming to work under the influence of drugs."[43]

Few would dispute that ensuring a drug-free workplace within the federal government is a well-established public policy that is enshrined in official language. For example, in addition to Executive Order 12,564 – which the Agency raises in an argument that we are dismissing above – the U.S. Office of Personnel Management has issued official guidance on prohibiting drug use amongst the federal workforce.[44] Moreover, the Agency's concerns regarding the negative impact of drug use on workplace performance are supported by a wealth of scientific studies[45] and are consistent with findings made by other components of the federal government.[46] In addition to these sources, we are confident that there exists a wealth of other supporting documents to bolster the Agency's argument that the award is contrary to public policy.

Despite this, the Agency fails to support its argument with a single citation to any sources that would support the existence of a public policy that is violated by the award. As stated above, our precedent requires an excepting party to identify which laws, regulations, or legal precedent provide a basis for its argument that an award violates public policy.[47] Because the Agency fails to provide any support for its argument, it fails to meet the aforementioned standard.

Consequently, we deny the Agency's exception that the award is contrary to public policy.

V. Decision

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

---

[40] *AFGE, Local 1415*, 69 FLRA 386, 392 (2016) (*Local 1415*) (quoting *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 174 (2015) (*VA*)).
[41] *Id*. (quoting *VA*, 68 FLRA at 174).
[42] Exceptions at 11.
[43] *Id*.
[44] U.S. OPM, Memorandum for Heads of Executive Departments and Agencies, Federal Laws and Policies Prohibiting Marijuana Use (2015), http://www.chococ.gov/content/federal-laws-and-policies-prohibiting-marijuana-use.
[45] *See, e.g.*, Genevra Pittman, *For Optimal Work Commitment, Skip the Pot?*, Reuters, Feb. 23, 2012, http://www.reuters.com/article/us-work-pot-idUSTRE81M1Y020120223.
[46] *See generally* Robert S. Goldsmith et. al., *Medical Marijuana in the Workplace: Challenges and Management Options for Occupational Physicians*, 57 J. Occupational & Envtl. Med. 518, 518 (2015) (citing U.S. DOL, OSHA Letter of Interpretation (May 2, 1998), www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22577).
[47] *Local 1415*, 69 FLRA at 392.