70 FLRA No. 39

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2052
COUNCIL OF PRISON LOCALS
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
PETERSBURG, VIRGINIA
(Agency)

0-AR-5242

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DECISION

April 5, 2017

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

I. Statement of the Case

The employee at issue here (the grievant) is the Union's Executive Vice President. When she requested compensatory time off for work-related travel (comp-time request), the Agency asked her to submit a flight itinerary to support her request. In response, the grievant filed a grievance alleging that the Agency discriminated against her based on her race, and retaliated against her based on her participation in protected Equal Employment Opportunity (EEO) and Union activities, in violation of law and the parties' collective-bargaining agreement.

Arbitrator Hyman Cohen found that there was no evidence that the Agency discriminated or retaliated against the grievant. He also found that the grievance was moot because, after the grievance was filed, the Agency granted the grievant's comp-time request. There are three questions before us.

The first question is whether the award is contrary to law because the Arbitrator did not hold a hearing and determined that the grievance is moot. The Union does not demonstrate that any of the authorities that it cites required the Arbitrator to hold a hearing, or that the Arbitrator's mootness determination is deficient. Accordingly, the answer is no.

The second question is whether the award is based on a nonfact. Because the Union's nonfact arguments fail to show that a central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different result, the answer is no.

The third question is whether the Arbitrator exceeded his authority by failing to address the retaliation issue. Because the Arbitrator addressed that issue, the answer is no.

II. Background and Arbitrator's Award

In connection with work-related travel, the grievant submitted a comp-time request to the Agency, and the Agency asked for her flight itinerary before it would grant her request. In response, the grievant filed a grievance alleging, in pertinent part, that the Agency discriminated against her based on her race and retaliated against her based on her participation in protected EEO and Union activities.

Before the grievance went to arbitration, the Agency granted the grievant's comp-time request. The Agency then filed, with the Arbitrator, a motion to dismiss the grievance as moot. The Union filed an opposition to the Agency's motion.

The Arbitrator stated that the parties agreed to submit to him their respective positons in writing. The Arbitrator did not note any stipulated issues, but he addressed whether: (1) the Agency discriminated against the grievant based on her race; (2) the Agency retaliated against the grievant for protected EEO and Union activities; and (3) the grievance was moot.

The Agency's guide that governs compensatory time off for travel requires supervisors to review comp-time requests and accompanying travel vouchers to certify that the hours requested comply with regulations and policy. The Arbitrator found that the guide gives the Agency the discretion to determine when a flight itinerary is needed to support an employee's comp-time request. The Arbitrator also found that the Union did not establish that the grievant's travel voucher adequately supported her comp-time request in this instance, and he concluded that the Agency did not abuse its discretion by requesting her flight itinerary.

As to the Union's discrimination claim, the Arbitrator found that the Union had the burden of establishing that the Agency treated the grievant differently than a similarly situated employee who is not in her protected class, but that the Union did not satisfy

that burden. Specifically, the Arbitrator found that the general allegation that the Agency did not require an unspecified "[w]hite female" or "others" to submit flight itineraries was insufficient to establish disparate treatment.[1]

Regarding the allegation of retaliation on the bases of the grievant's EEO and Union activities, the Arbitrator found that the Union had the burden to show that: (1) "she was engaged in an activity protected under federal law;"[2] (2) "the Agency subjected her to an adverse employment action;"[3] and (3) "she was subjected to the adverse employment action because of her participation in protected activity."[4] The Arbitrator found that the Agency did not subject the grievant to an adverse employment action, because the Agency ultimately granted her comp-time request.

In sum, the Arbitrator concluded that the Union's "vague and ambiguous" allegations were insufficient to raise "actionable" claims of discrimination or retaliation.[5]

Considering the mootness issue, the Arbitrator found that the "underlying reason" for the grievance "no longer exist[ed]" after the Agency granted the grievant's comp-time request.[6] Therefore, he found that the grievance was moot and that he did not have jurisdiction to hold a hearing.

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

III. Analysis and Conclusions

A. The award is not contrary to law.

The Union argues that the award is contrary to law.[7] 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.[8]

First, the Union argues that the award conflicts with "the Union's [r]ights to a hearing" as provided for in Article 31(a) of the parties' agreement, which pertinently provides employees with "a fair and expeditious procedure covering all grievances properly grievable under . . . [§] 7121" of the Federal Service Labor-Management Relations Statute.[9] The Union also contends – without further elaboration – that "the Agency did not have ground[s] for not following the . . . process as described in Article[s] 6, 7, 31[, and] 32" of the parties' agreement.[10] Additionally, the Union argues that "[t]he Arbitrator's conclusion that the Agency's actions were not willful" violates Rule 56 summary judgment procedures;[11] the Equal Employment Opportunity Commission's Management Directive 110, Chapter 7; and 29 C.F.R. § 1614.109.[12] Because the Union does not explain why these cited authorities required the Arbitrator to hold a hearing, the Union's arguments provide no basis for finding the award contrary to law.

Second, the Union challenges the Arbitrator's conclusion that the grievance is now moot,[13] but does not explain how the Arbitrator erred in making that finding. Accordingly, again, the Union's arguments provide no basis for finding the award contrary to law.

Therefore, we deny the Union's contrary-to-law exception.

B. The award is not based on nonfacts.

The Union contends that the award is based on nonfacts.[14] 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.[15]

First, the Union challenges the Arbitrator's finding that that the Agency did not abuse its discretion by requesting the grievant's flight itinerary.[16] According to the Union, "[t]he f[l]ight itinerary was sent to the Agency" within five days of the grievant's travel, as required by the Federal Travel Regulation.[17] On this point, however, the Arbitrator simply found that the guide gives the Agency this discretion. Therefore, this argument provides no basis for finding the award is based on a nonfact.

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[1] Award at 13 (quoting the grievance).
[2] *Id.* at 19.
[3] *Id.* at 19-20.
[4] *Id.* at 20.
[5] *Id.* at 21.
[6] *Id.* at 22.
[7] Exceptions at 5.
[8] *AFGE, Local 2152*, 69 FLRA 149, 151 (2015) (citing *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012)).
[9] Exceptions, Ex. 7 at 71.
[10] Exceptions at 10.
[11] *Id.* at 6 (citing Fed. R. Civ. P. 56); *but see id.* at 8 (stating that the case was before the Arbitrator on a motion to dismiss).
[12] *Id.* at 9.
[13] *Id.*
[14] *Id.* at 5.
[15] *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015).
[16] Exceptions at 5.
[17] *Id.* (citing 41 C.F.R. § 301-52.7).

Second, the Union argues that the grievant suffered "retaliation" when her supervisor asked her to submit the itinerary after she had already submitted it to the business office,[18] but does not explain how that fact is central to the award or is clearly erroneous. Therefore, this argument does not establish that the award is based on a nonfact.

Accordingly, we deny the Union's nonfact exception.

C. The Arbitrator did not exceed his authority.

The Union argues that the Arbitrator exceeded his authority because he did not address whether the Agency retaliated against the grievant on the basis of her EEO and Union activities.[19] Arbitrators exceed their authority when, as relevant here, they fail to resolve an issue submitted to arbitration.[20]

The Arbitrator specifically found that the Agency did not subject the grievant to any adverse employment action and rejected the retaliation claim.[21] Consequently, the Arbitrator did not fail to address an issue that was before him, and we deny this exception.

IV. Decision

We deny the Union's exceptions.

[18] *Id.* at 6.
[19] *Id.* at 10.
[20] *NAGE, SEIU, Local 551*, 68 FLRA 285, 286 (2015) (citing *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996)).
[21] Award at 21.