70 FLRA No. 109

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 247
(Union)

0-AR-5322

_____

DECISION

May 4, 2018

_____

Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

Decision by Member Abbott for the Authority

I. Statement of the Case

The Agency suspended the grievant for fourteen days for fighting with another employee. On September 17, 2017, Arbitrator Norman Bennett issued an award, denying and granting the grievance in part, and found that a suspension was appropriate. However, he reduced it to seven days because the Agency had improperly considered an expired letter of reprimand as an aggravating factor.

The Agency filed exceptions and argues that the award is contrary to an Agency-wide regulation, the Internal Revenue Manual (IRM), and to Merit Systems Protection Board (MSPB) precedent. As none of the Agency's arguments demonstrate that the award is contrary to the IRM or to MSPB precedent, we deny these exceptions.

The Agency also argues that the award fails to draw its essence from the parties' agreement. Because the Agency fails to demonstrate how the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, we deny this exception.

II. Background and Arbitrator's Award

The grievant works as a lead customer service representative. He is responsible for assisting lower-grade-level representatives and answering their questions. On July 12, 2012, he received a letter of reprimand for failing to follow computer security policies. The letter stated that, after two years, it would no longer be a matter of record.

On December 12, 2013, "JJ," a lower-level representative, approached the grievant and asked why the grievant had refused to approve a manual refund for a taxpayer. The grievant explained that a refund was not allowed under Agency policy. JJ became upset and threw a file at the grievant. JJ then spoke with a manager who confirmed that a refund was not allowed under the policy. JJ also asked if he could leave work because he was so angry. The manager granted his leave request, but JJ returned to the grievant's cubicle, and their disagreement escalated to the point that JJ and the grievant were swearing, pushing, and hitting each other.

On May 9, 2014, the Agency issued the grievant a notice of a proposed fourteen-day suspension. While the letter discussed three *Douglas* factors,[1] it did not mention the letter of reprimand or the consideration of past discipline. On July 10, 2014, the Agency issued a supplemental letter, stating that it would consider the letter of reprimand as prior discipline. On July 22, 2014, the grievant and his Union representative gave an oral reply addressing the consideration of the letter of reprimand. On July 30, 2014, the Agency decided to suspend the grievant for fourteen days. The suspension decision letter discussed four aggravating factors, including the letter of reprimand as prior discipline, and two mitigating factors.

The Union grieved the suspension, and the grievance proceeded to arbitration. The relevant question before the Arbitrator was whether the length of the suspension was reasonable and appropriate. And more specifically, whether the letter of reprimand had expired or could be considered to determine the length of the suspension.

The Union argued that the Agency could not consider the letter of reprimand in its decision because the letter had expired and was no longer a matter of record. The Agency argued that its actions were appropriate because the letter had not expired when the fight occurred, or alternatively, when it proposed the suspension on May 9, 2014. For support, the Agency

[1] *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 305 (1981) (enumerating twelve relevant factors to consider when deciding the appropriateness of a penalty, including consideration of "the employee's past disciplinary record").

cited two MSPB cases: *Lewis v. Department of the Air Force*[2] and *Reed v. Department of VA*.[3]

The Arbitrator found that the grievant admitted he engaged in a fight with JJ; therefore, the Arbitrator found there was misconduct and determined a suspension was appropriate. However, he also determined that the Agency failed to demonstrate that the date of either the incident or the proposal letter were the "appropriate citable date[s]" for the letter of reprimand because neither the IRM nor the parties' agreement supported that interpretation.[4] He also found that the Agency's cited cases, *Lewis* and *Reed*, were inapplicable. Instead, the Arbitrator determined that the July 30, 2014 suspension decision was the relevant date, as it was the only action that could be grieved. He further found that the letter of reprimand had expired by that point and therefore the Agency could not rely on it as a *Douglas* factor. The Arbitrator concluded that the Agency violated the parties' agreement and the IRM when it relied on the expired reprimand letter. As a remedy, he reduced the suspension to seven days and awarded backpay to the grievant.

The Agency filed exceptions to the award on October 16, 2017,[5] and the Union filed an opposition on November 20, 2017.

III. Analysis and Conclusions

A. The award is not contrary to law.

1. The award is not contrary to IRM §§ 6.751.1.16.3 and 6.751.1-1.

The Agency argues that the award is contrary to law, specifically IRM §§ 6.751.1.16.3 and 6.751.1-1.[6] The Agency argues that the IRM functions as an Agency regulation.[7] IRM § 6.751.1.16.3 provides that, "[a] written reprimand or reasons therefore can only be cited in a subsequent disciplinary or adverse action if the activity takes place within the appropriate retention time."[8] IRM § 6.751.1-1 provides, in part, that:

> The employee's past disciplinary record.
> . . .
> - Management may not cite disciplinary actions that have expired in accordance with IRS retention standards.
> - Management's intent to consider the past disciplinary record must be stated in the proposal letter.[9]

The Agency argues that "activity" in § 6.751.1.16.3 refers to misconduct and means that letters

[2] 51 M.S.P.R. 475, 485 (1991).
[3] 2013 WL 9668800 (2013) (nonprecedential).
[4] Award at 5.
[5] In its exceptions, the Agency argues that the award is contrary to *NTEU*, 53 FLRA 539, 547 (1997). Exceptions at 10-11. However, under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator. Since the Agency failed to present this case to the Arbitrator, and could have done so, we dismiss it. *See* 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 343 (2017); *AFGE, Local 2302*, 70 FLRA 259, 260 (2017).
[6] In the resolution of grievances under the Federal Service Labor-Management Relations Statute, arbitrators are empowered to interpret and apply agency rules and regulations. *U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Operating Div.*, 65 FLRA 23, 25 (2010) (*Small Bus.*). The Authority has defined rule or regulation to include governing agency rules and regulations. *AFGE, Local 1203*, 55 FLRA 528, 530 (1999) (citing *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 191-92 (1990)). An agency's prior interpretation of its own regulation is controlling unless it is "plainly erroneous or inconsistent" with the language of the regulation. *Small Bus.*, 65 FLRA at 25 (quoting *US DOJ, Fed. BOP, Med. Facility for Fed. Prisons*, 51 FLRA 1126, 1136 (1996)). However, the Authority declines to defer to an agency's "litigative positions." *Id.* Accordingly, for an agency's interpretation to be entitled to deference, the interpretation asserted in exceptions must have been publicly articulated prior to "litigation." *Id.* In circumstances where an agency fails to establish that deference is due to its interpretation of its regulation, the Authority independently assesses whether the arbitrator's interpretation of the regulation is consistent with its provisions. *Id.*
[7] Exceptions at 7; *see also NTEU, Chapter 83*, 68 FLRA 945, 950-51 (2015) (treating the IRM as an internal Agency rule or regulation); *U.S. Dep't of the Treasury, IRS*, 68 FLRA 145, 147 (2014) (same).
[8] Exceptions, Attach. 2, Agency Ex. 10 at 3.
[9] Exceptions, Attach. 2, Agency Ex. 7 at 28.

of reprimand must be unexpired at the time of the misconduct.[10] Alternatively, the Agency argues that § 6.751.1-1's reference to the proposal letter means that past discipline must be of record at the time of the proposal letter.[11] The Agency does not cite, and the relevant parts of the IRM do not contain, a definition of "activity." Further, the Agency does not provide evidence that it formally promulgated or otherwise publicly announced these interpretations prior to the instant dispute. Therefore, the Agency's interpretations are not entitled to deference.[12]

The Arbitrator disagreed with the Agency's interpretations; he found that nothing in the IRM or the parties' agreement suggested that the date of the misconduct is the relevant date.[13] He found that the proposal letter could not be the relevant date because the Agency did not cite the letter of reprimand in its proposal letter.[14] He also found that the supplemental letter mentioning the letter of reprimand was not the relevant date because it was not a final action that could be grieved and further, it provided the grievant with a period of time in which to respond, during which the letter of reprimand expired.[15]

Thus, in accordance with Authority precedent on de novo regulatory interpretation, we independently assess whether the Arbitrator's interpretation is consistent with the relevant IRM provisions.[16] As mentioned above, the IRM does not define "activity." Additionally, reviewing the language of § 6.751.1-1, we note that the Agency must communicate in the proposal letter its intention to consider an employee's past disciplinary record (a due process consideration) thereby providing an employee notice and an opportunity to respond. This notification does not serve to toll the expiration deadline for a letter of reprimand.[17] It also states that "[m]anagement may not cite disciplinary actions that have expired in accordance with IRS retention standards," and the parties agreed that the letter of reprimand had expired by the time the suspension decision issued on July 30, 2014.[18] In these circumstances, we find no inconsistency between the text of the IRM and the Arbitrator's conclusion that the suspension decision was the relevant date. Thus, we deny the Agency's exception.[19]

2. The award is not contrary to MSPB precedent.

The Agency argues that the award is contrary to MSPB case law, specifically *Lewis* and *Reed*, that supports the Agency's interpretation that past discipline need only be unexpired at the time of the proposal letter, not the suspension decision, and that the employee bears the burden of identifying an agency rule or regulation that prevents consideration of the prior offense.[20]

Lewis and *Reed* do not provide a basis for finding the award deficient.[21] Here, the Union argued that the letter of reprimand expired based on its language, which states "[a]fter two years, this letter will be removed from your [official personnel file] and will no longer be a matter of record."[22] Both *Lewis* and *Reed* are distinguishable from this case because in neither decision does the Board even mention, let alone discuss, the ramifications of a letter of reprimand that expired by its own terms prior to the oral reply of the employee and prior to the consideration by the deciding official. Consequently, we deny the Agency's exception that the award is contrary to MSPB precedent.[23]

[10] Exceptions at 8-9. The Union argues that "activity" means the disciplinary or adverse action. *See* Opp'n at 7-8.
[11] Exceptions at 7-9.
[12] *Small Bus.*, 65 FLRA at 26.
[13] Award at 4.
[14] *Id.* at 5.
[15] *Id.* at 6.
[16] *Small Bus.*, 65 FLRA at 26.
[17] *See* Opp'n at 6-7.
[18] Award at 4 ("The parties agree that the reprimand expired by its terms on July 12, 2014.").
[19] *Small Bus.*, 65 FLRA at 26.
[20] Exceptions at 11-12.
[21] In *Lewis*, the MSPB considered whether an administrative law judge had erred in not considering a prior suspension that was still in effect at the time of both the proposal letter and the removal. 51 M.S.P.R. at 478, 485 (parties' collective-bargaining agreement provided the agency a three-year window to consider past discipline). In *Reed*, a nonprecedential order, the MSPB found that where the appellant argued that the past discipline had expired but failed to identify an agency regulation or rule that would prevent consideration of his previous suspensions, there was no reason to alter the penalty determined below. 2013 WL 9668800, at *3.
[22] Award at 4. *See also* Opp'n at 7 & n.7 (IRM § 6.751.1.21 states that written reprimands for non-tax-related offenses will be a matter of record for two years.).
[23] *See POPA*, 66 FLRA 247, 252-53 (2011) (exception denied where arbitrator and the Authority distinguished union's cited MSPB cases); *AFGE, Local 1151*, 54 FLRA 20, 26 (1998).

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[24] from Articles 38 and 43 of the parties' agreement because the agreement requires that the Agency consider past discipline.[25] Article 38, § 1.F.3 provides that

> In deciding what disciplinary action may be appropriate, the [Agency] will give due consideration to the relevance of any mitigating and/or aggravating circumstances. The following factors, included herein for purposes of illustration, are neither meant to be exhausted nor intended to be applied mechanically, but rather to outline the tolerable limits of reasonableness: . . . the employee's past disciplinary record.[26]

Article 43 states that an arbitrator cannot modify or alter the parties' agreement.

The Arbitrator found that the Agency should not have considered the letter of reprimand as an aggravating circumstance because it had expired by the time of the suspension.[27] The language of Article 38 indicates that the Agency is not required to consider any of the listed *Douglas* factors but instead that they are included as illustrative factors to consider. Additionally, the IRM emphasizes this discretion and the broad contours of "reasonableness."[28] The Arbitrator's interpretation accords with the parties' agreement. The Agency has failed to demonstrate how the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.[29] Hence, we deny the Agency's exception.

IV. Decision

We deny the Agency's exceptions.

[24] 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. 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." Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes 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 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. *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (*Bremerton*) (citing 5 U.S.C. § 7122(a)(2)); *AFGE, Council 220*, 54 FLRA 156, 159 (1998); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

[25] Exceptions at 12-14.

[26] Exceptions, Attach. 2, Joint Ex. 1.

[27] Award at 4-6.

[28] Exceptions, Attach. 2, Agency Ex. 7 (The first page of the *IRS Manager's Guide to Penalty Determinations—For use with IRM § 6.751.1* states "[t]he range of penalties should serve as a guide ONLY, not a rigid standard. Deviations from the guide are permissible and greater or lesser penalties than suggested may be imposed.").

[29] *Bremerton*, 68 FLRA at 155.

Member DuBester, concurring:

I concur in the determination to deny the Agency's exceptions to the Arbitrator's award that reduced the grievant's suspension to seven days, and awarded the grievant backpay.