

**71 FLRA No. 21**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
NATIONAL CITIZENSHIP AND IMMIGRATION  
SERVICES COUNCIL  
LOCAL 2076  
(Union)

and

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
U.S. CITIZENSHIP AND IMMIGRATION SERVICE  
(Agency)

0-AR-5361

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DECISION

May 1, 2019

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

**I. Statement of the Case**

In this case, the Agency issued memoranda to employees to notify them of misconduct investigations, and to suspend certain workplace privileges during the course of those investigations. Arbitrator John M. Donoghue found that issuing these memoranda prior to the completion of investigations by the Office of Security and Integrity (OSI) was not prohibited by the Agency's regulations or the parties' collective-bargaining agreement. We agree. Accordingly, we deny the Union's exceptions arguing that the award (1) is contrary to the Agency's disciplinary regulation and (2) fails to draw its essence from Article 29 of the parties' agreement (Article 29).

**II. Background and Arbitrator's Award**

As relevant here, this dispute concerns three immigration services officers (officers). In response to individual incidents, the Agency issued to each of the three officers memoranda informing them of investigations of their conduct. The memoranda also advised the officers that, during the investigations, they were temporarily restricted from certain work-related activities, such as telework, overtime, credit-hour accretion, holiday work, and detail assignments.

Although the incidents that prompted the memoranda involved potential misconduct, the Agency issued the memoranda before management or the OSI fully investigated or reported on the incidents.

The Union filed a grievance on behalf of the officers, alleging that the issuance of memoranda prior to completing investigations was illegal under an Agency regulation that purportedly restricted the Agency to three types of corrective letters: (1) a letter of admonishment, caution, or warning; (2) a letter of reprimand; or (3) a letter regarding suspension, furlough, reduction, or removal.

The grievance went to arbitration, where the parties stipulated to the following issues: (1) whether it was legal to issue the memoranda before completing OSI investigations, and (2) whether employees were "afforded due process as it relates to the length of time from issuance of the [memoranda] to decision[s]."<sup>1</sup>

The Arbitrator concluded that there was no evidence to support the Union's argument that the Agency could not issue memoranda before finishing investigations. The Union alleged due-process violations based on the amount of time between the issuance of memoranda and eventual disciplinary decisions, but the Arbitrator found that Article 29 required the Union to prove harmful error in order to show that the length of time taken to initiate discipline violated the agreement. He concluded that the processing of the matters involving the three officers did not take "an unusually long time,"<sup>2</sup> and that the Union had not established any harm. Moreover, he found that the Agency regulation did not prohibit the issuance of the memoranda. Therefore, the Arbitrator denied the grievance.

On March 27, 2018, the Union filed exceptions to the award, and on April 27, 2018, the Agency filed an opposition to the Union's exceptions.

**III. Analysis and Conclusions**

A. The award is not contrary to the Agency's regulation.

The Union argues that the award conflicts with an Agency disciplinary regulation. Section 7122(a)(1) of the Federal Service Labor-Management Relations Statute provides that an arbitration award will be found deficient if it conflicts with any law, rule, or regulation.<sup>3</sup> For

<sup>1</sup> Award at 1.

<sup>2</sup> *Id.* at 5.

<sup>3</sup> 5 U.S.C. § 7122(a)(1).

purposes of § 7122(a)(1), rule or regulation includes governing agency regulations.<sup>4</sup>

First, the Union argues that the memoranda do not fall within the three categories of corrective letters authorized by the regulation. But we see no basis to conclude that the regulation *prohibits* issuing corrective letters beyond the three types it mentions.

Next, the Union argues that the memoranda violate the Agency's regulation because the memoranda lead to restrictions on certain workplace activities, and such restrictions can only be imposed as discipline after the completion of an investigation.<sup>5</sup> Although temporary restrictions on certain work-related privileges, such as telework, overtime and credit hours, and details, may adversely affect employees in some ways, we fail to see how some adverse effects alone demonstrate that the memoranda were disciplinary measures. Moreover, the parties did not ask the Arbitrator to determine whether the temporary restrictions amounted to disciplinary actions.<sup>6</sup>

Nonetheless, it is important to clarify that the Agency does not have an unfettered right to impose such temporary restrictions *anytime* any employee is subjected to *any* investigation which may ultimately result in *any* form of discipline. To be sure, the Agency's prerogative in such circumstances is quite broad, but there are limits.

For example, the Civil Service Reform Act permits an agency to indefinitely suspend (without pay) an employee if the agency "has reasonable cause to believe an employee has committed a crime for which imprisonment may be imposed."<sup>7</sup> But that prerogative is limited in several notable respects – by duration (only as long as required to complete the investigation) and reasonable relationship between the interim action and jeopardy to legitimate government interests (such as when an "employee's . . . presence in the workplace . . .

may pose a threat to the employee or others, result in loss of or damage to [g]overnment property, or otherwise jeopardize legitimate [g]overnment interests").<sup>8</sup>

In this case, there are legitimate government interests<sup>9</sup> that support and connect the restrictions imposed by the Agency and the nature of the investigated charges. Specifically, the Agency restricted the grievants' ability to telework, earn overtime or credit hours, and work detail assignments for charges concerning: an arrest for drugs at a federal facility;<sup>10</sup> rendering a final adjudication without first completing required security checks;<sup>11</sup> and unreasonably delaying work and incorrectly self-reporting work production.<sup>12</sup> Each of these charges could reasonably cause the Agency to "question [the grievants'] judgment and trustworthiness."<sup>13</sup> In other words, there is a reasonable connection between the investigated charges and the interim restrictions.

For these reasons, the Union has not shown that the award is contrary to the Agency's regulation, and we deny the Union's contrary-to-law exception.

B. The award draws its essence from Article 29 of the parties' agreement.<sup>14</sup>

The Union argues that the award fails to draw its essence from Article 29 because the issuance of memoranda before completing investigations conflicts with that Article.<sup>15</sup>

<sup>4</sup> *U.S. Dept. of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 195 (1990) (*Fort Campbell*). 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. *U.S. DHS, CBP*, 69 FLRA 579, 581 (2016). In making that determination, the Authority defers to the arbitrator's underlying findings of fact, unless a party demonstrates the existence of a nonfact. *AFGE, Local 2152*, 69 FLRA 149, 151 (2015) (citing *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012)).

<sup>5</sup> Exceptions at 5-6.

<sup>6</sup> We also note that the Union did not file an exceeded-authority exception regarding the Arbitrator's resolution of the stipulated issues.

<sup>7</sup> *Canevari v. Dep't of the Treasury*, 50 M.S.P.R. 311, 315 (1991) (citing *Johnson v. U.S. Postal Serv.*, 37 M.S.P.R. 388, 393 (1988)).

<sup>8</sup> 5 C.F.R. § 752.404(b)(3); *see also Dawson v. Dep't of Agric.*, 121 M.S.P.R. 495, 500-01 (2014).

<sup>9</sup> *E.g.*, Award at 2-3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 2.

<sup>14</sup> Although collective-bargaining agreements, and not agency rules or regulations, govern the disposition of matters to which they both apply *when there is a conflict* between the agreement and the rule or regulation, *e.g.*, *U.S. Dep't of the Army, Blue Grass Army Depot, Lexington, Ky.*, 41 FLRA 1206, 1209-10 (1991) (citing *Fort Campbell*, 37 FLRA at 192), neither party contends, and the Arbitrator did not find, that the parties' agreement and the Agency's regulation conflict regarding the disposition of this dispute. Therefore, we analyze the Union's contrary-to-law and essence exceptions separately.

<sup>15</sup> Exceptions at 7-8. The Authority will find that an arbitration award fails to draw its essence from a collective-bargaining agreement when the excepting 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. *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*).

Like the Agency's regulation, Article 29 covers disciplinary and adverse actions.<sup>16</sup> Because that article contains no reference to the issuance of memoranda, the Union contends that Article 29 prohibits memoranda. However, as with the Agency's regulation, the Arbitrator found nothing in Article 29 that *precludes* issuing memoranda. Further, the issuance of memoranda to inform employees of an investigation is consistent with Article 29's requirement that employees receive notice "of any proposed disciplinary or adverse action" at "an early and practical time" during the pendency of the investigation.<sup>17</sup>

The Union also contends that the memoranda denied the grievants due process under Article 29. But Article 29 provides that "any assertion that too much time elapsed between the alleged offense and [a disciplinary decision] must be supported by proof of harmful error."<sup>18</sup> And the Arbitrator found that the Union failed to show harmful error regarding the length of time between the issuance of the memoranda and the completion of investigations.<sup>19</sup>

For the foregoing reasons, the Union has not shown that the Arbitrator's interpretation of Article 29 is irrational, unfounded, implausible, or in manifest disregard of the agreement,<sup>20</sup> so we deny the Union's essence exception.

#### **IV. Decision**

We deny the Union's exceptions.

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<sup>16</sup> Exceptions, Attach. 1, Collective-Bargaining Agreement Art. 29 at 75.

<sup>17</sup> *Id.*

<sup>18</sup> Award at 3 (quoting Art. 29).

<sup>19</sup> *Id.* at 4-5.

<sup>20</sup> See *OSHA*, 34 FLRA at 575.

**Member DuBester, concurring:**

I concur in the determination to deny the Union's contrary-to-law and essence exceptions.

While I am concerned that restrictions placed on employees' contractual rights during an investigation into alleged misconduct can violate the parties' collective-bargaining agreement, I agree with the Arbitrator that this question must be decided on a case-by-case basis. And given the Arbitrator's conclusion that the record does not support a finding that the restrictions placed on the grievants were improper in this case, I concur that the Union did not demonstrate that the award fails to draw its essence from the parties' agreement.