

**71 FLRA No. 132**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
JAMES A. HALEY VETERANS HOSPITAL  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 0547  
(Union)

0-AR-5546

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DECISION

April 17, 2020

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

Decision by Member Abbott for the Authority

**I. Statement of the Case**

In this case, Arbitrator Theresa M. Dowdy sustained only one of four specifications of alleged misconduct.<sup>1</sup> Consequently, she found that the Agency violated the parties’ agreement by suspending the grievant, and reduced the grievant’s three-day suspension to a “Letter of Warning.”<sup>2</sup> However, because a “Letter of Warning” is not listed in the provision of the parties’ agreement defining the types of discipline that the Agency may impose, the Agency argues that the award fails to draw its essence from the parties’ agreement and that it is impossible to implement.<sup>3</sup> Because the discipline imposed by the Arbitrator is not a form of discipline specified in the parties’ collective-bargaining agreement (agreement), we set aside the award’s remedy.

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

The grievant is a veteran outreach specialist who has worked for the Agency for eleven years. In 2018, the proposing official recommended that the grievant be suspended for five days based on six specifications of

misconduct. The Agency alleged that the grievant either yelled, responded aggressively, or cursed on various occasions. A specification also alleged that the grievant called another employee a spy (the “spy” incident), and displayed inappropriate images on his cellular phone. The deciding official found that only four of the specifications had merit. Consequently, the deciding official imposed a three-day suspension. The Union grieved the action, arguing that the deciding official did not have just and sufficient cause to suspend the grievant for three days, and the matter proceeded to arbitration.

The Arbitrator framed the issue as whether “the grievance [is] procedurally arbitrable” and determined that the grievance was procedurally arbitrable because the Union followed the parties’ agreement by filing the grievance at the appropriate steps.<sup>4</sup> The Arbitrator framed the second issue as whether the Agency had just and sufficient cause for suspending the grievant for three days. Based on the evidence and testimony submitted at arbitration, she determined that the Agency did not have just and sufficient cause because three of the specifications did not support the discipline. In particular, she noted that the “spy” incident involved a misunderstanding that had later been resolved by the grievant and the other party. The Arbitrator found that other specifications were not corroborated at the hearing. She also noted that some of the specifications had occurred over a year prior to the Agency imposing the three-day suspension.

The Arbitrator determined that because only one of the specifications was sustained,<sup>5</sup> the Agency did not have just and sufficient cause for imposing a three-day suspension and that the discipline was not imposed in a timely manner. Therefore, she found that the three-day suspension should be reduced to a “Letter of Warning” and the grievant should be awarded back pay and benefits lost as a result of the suspension.<sup>6</sup>

The Agency filed exceptions to the award on September 20, 2019. The Union filed an opposition to the Agency’s exceptions on October 18, 2019.

**III. Preliminary Matters: Section 2425.4 of the Authority’s Regulations bars some of the Agency’s exceptions.**

The Authority’s Regulations require a party to ensure that its exceptions are “self-contained and that [they] set[] forth, in full,” all arguments “in support of” its exceptions, “including specific references to the record

<sup>1</sup> To be consistent with the award, each instance of alleged misconduct shall be referred to as a specification.

<sup>2</sup> Award at 9.

<sup>3</sup> Exceptions at 8.

<sup>4</sup> Award at 1.

<sup>5</sup> The only sustained specification involved a matter where the grievant had to be removed from the office following a disagreement.

<sup>6</sup> Award at 9.

... and any other relevant documentation” and “[i]legible copies of any documents” that “the Authority cannot easily access.”<sup>7</sup>

The Agency argues that the Arbitrator was biased.<sup>8</sup> The Agency also argues that it was denied a full and fair hearing because the Arbitrator disregarded uncontroverted evidence and did not state in the award whether she relied on an unredacted submission concerning an investigation of the grievant conducted by the Administrative Investigation Board (AIB).<sup>9</sup> Finally, the Agency argues that the award is based on nonfacts because the Arbitrator confused the “spy” incident with an unrelated incident and she “erroneously” concluded that one of the specifications was not corroborated at the hearing.<sup>10</sup>

The Agency’s exceptions cite to the AIB report,<sup>11</sup> signed statements from the Agency’s witnesses regarding the grievant’s alleged misconduct,<sup>12</sup> and the transcript from the arbitration hearing,<sup>13</sup> but the Agency failed to provide the Authority with a copy of these documents to support its bias, fair hearing, and nonfact exceptions. Consequently, because the Agency failed to meet its obligation under the Authority’s regulations by supporting these exceptions with the necessary documents, we deny them as unsupported.<sup>14</sup>

#### IV. Analysis and Conclusions

- A. The Arbitrator did not exceed her authority.

The Agency argues that the Arbitrator exceeded her authority by failing to resolve a submitted issue.<sup>15</sup> In particular, the Agency claims that the Arbitrator was required to decide specifically whether the grievance was procedurally arbitrable despite its alleged failure to comply with a detail requirement in the parties’

agreement.<sup>16</sup> The Authority has found that arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration.<sup>17</sup> Although there are limits to the deference accorded arbitrators in federal-sector arbitrations,<sup>18</sup> absent a stipulation of the issues by the parties, arbitrators generally will be accorded substantial deference in the formulation of issues to be resolved in a grievance.<sup>19</sup>

While the Agency argues that there was a stipulation of the issues,<sup>20</sup> the record reveals that the parties did not agree to the issues that were before the Arbitrator, and the Arbitrator framed the arbitrability issue as whether “the [g]rievance [is] procedurally arbitrable.”<sup>21</sup> Moreover, even though the award does not expressly address the detail requirement issue, the Arbitrator found the grievance to be procedurally arbitrable.<sup>22</sup> Consequently, the award is directly responsive to the issues the Arbitrator framed and she was not required to address the detail requirement issue.<sup>23</sup> Accordingly, the Agency has failed to demonstrate that the Arbitrator exceeded her authority and we deny this exception.

- B. The award’s remedy does not draw its essence from the parties’ agreement.

The Agency argues that the award fails to draw its essence from the parties’ agreement because the remedy, a “Letter of Warning,” does not appear as a form of discipline in the parties’ agreement.<sup>24</sup> Consequently, the Agency also argues that the award is impossible to implement because a “Letter of Warning” is not a

<sup>7</sup> 5 C.F.R. § 2425.4(a)(2)-(3).

<sup>8</sup> Exceptions at 12.

<sup>9</sup> *Id.* at 10-12.

<sup>10</sup> *Id.* at 8-10.

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

<sup>12</sup> *Id.* at 11-12.

<sup>13</sup> *Id.* at 8-9, 11-12.

<sup>14</sup> *U.S. Dep’t of VA, John J. Pershing Veterans Admin.*, 71 FLRA 511, 512 (2020) (denying an agency’s arguments as unsupported when it failed to “provide a copy of the grievance, a transcript of the arbitration hearing, or any other documentary evidence, to support the alleged filing date”); *U.S. Dep’t of the Air Force, Pope Air Force Base, N.C.*, 71 FLRA 338, 340 (2019) (“The [a]gency disputes the [a]rbitrator’s findings, but has neglected to provide the Authority a copy of the billing records which it alleges were inadequate. Because the [a]gency’s exception is unsupported, we deny it.”).

<sup>15</sup> Exceptions at 7.

<sup>16</sup> *Id.*

<sup>17</sup> *Haw. Fed. Emps. Metal Trades Council*, 70 FLRA 324, 325 (2017) (*Haw. Trades Council*) (finding that an arbitrator did not exceed his authority because he resolved all the unstipulated issues as he framed them).

<sup>18</sup> *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 663-64 (2020) (Member Abbott concurring; Member DuBester dissenting).

<sup>19</sup> *Haw. Trades Council*, 70 FLRA at 325.

<sup>20</sup> Exceptions at 7.

<sup>21</sup> Award at 2; Exceptions, Ex. J, Agency’s Post-Hr’g Br. at 2.

<sup>22</sup> Award at 1-2.

<sup>23</sup> *Haw. Trades Council*, 70 FLRA at 325.

<sup>24</sup> Exceptions at 6-7. The Authority will find that an arbitration award is deficient as failing to draw its essence from a 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 obligations of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *U.S. Dep’t of the Treasury, IRS, Office of Chief Counsel*, 70 FLRA 783, 785 n.31 (2018) (Member DuBester dissenting).

cognizable disciplinary action.<sup>25</sup> As relevant here, the parties' agreement provides for two forms of discipline below a suspension: an admonishment or a reprimand.<sup>26</sup> While the Arbitrator references the Union's position that the grievant's suspension should be mitigated to a reprimand, she specifically awards the grievant a "Letter of Warning."<sup>27</sup>

The Authority has held that an award's remedy must comport with the parties' agreement when that agreement defines the actions an agency can take in disciplinary matters.<sup>28</sup> In the instant case, a "Letter of Warning" is not a form of discipline defined in the parties' agreement.<sup>29</sup> Moreover, the Arbitrator's award does not provide a sufficient basis for concluding that a "Letter of Warning" is equivalent to a reprimand or an admonishment.<sup>30</sup> Consequently, we grant the Agency's essence exception and set aside the award's remedy because it does not draw its essence from the parties' agreement.<sup>31</sup>

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<sup>25</sup> Exceptions at 8. To demonstrate that an award is deficient for being impossible to implement, the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain. *AFGE, Local 1415*, 69 FLRA 386, 389 (2016).

While the Agency failed to attach a copy of the parties' agreement to its exceptions, it provided a link to the agreement and, therefore, complied with § 2425.4 of the Authority's Regulations by making the parties' agreement readily accessible. 5 C.F.R. § 2425.4(a)(3).

<sup>26</sup> Exceptions, Ex. B, Collective-Bargaining Agreement (CBA) at 50. The only difference between an admonishment and a reprimand in the parties' agreement is that "an admonishment should be removed from an employee's file after two years and a reprimand will be removed after three years." *Id.*

<sup>27</sup> Award at 9.

<sup>28</sup> *SSA*, 59 FLRA 257, 258 (2003) (Member Pope dissenting in part) (holding that the remedial portion of the award failed to draw its essence from the parties' contractual discipline provision when "the remedy directed by the [a]rbitrator [d]id not comport with any of the disciplinary actions that the parties agreed the [a]gency could take under" the parties' agreement); *see also SSA*, 64 FLRA 1119, 1122 (2010) (Member DuBester concurring; Chairman Pope dissenting) ("When an arbitrator's award is clearly inconsistent with the terms of the parties' agreement, such as the arbitrator's award here, the award cannot be said to "draw its essence" from the agreement."); *SSA Region 1, Bos., Mass.*, 59 FLRA 614, 617 (2004) (*Region 1*) (Member Pope dissenting) (holding that "the remedial portion of the award is deficient because it fails to draw its essence from the parties' collective bargaining agreement").

<sup>29</sup> Exceptions, Ex. B, CBA at 50.

<sup>30</sup> *See* Award at 8-9.

<sup>31</sup> *See U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 70 FLRA 680, 683-84 (2018) (Member DuBester dissenting) (setting aside an award's remedy in a disciplinary grievance because the remedy did not draw its essence from the parties' agreement); *U.S. DHS, CBP, El Paso, Tex.*, 70 FLRA 623, 625 (2018) (Concurring Opinion of Member Abbott) (noting that an ambiguity in the arbitrator's award does not necessitate a

## V. Decision

We deny the Agency's exceptions in part. We also grant the Agency's exceptions in part and set aside the award's remedy.

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remand); *see also Region 1*, 59 FLRA at 617 (finding that "the [a]gency retains the right to discipline the grievant for the misconduct, but has effectively made no decision on the penalty because both the [a]gency's original choice of penalty as well as the [a]rbitrator's deficient substitution of a written warning have been found improper.").

**Member DuBester, dissenting:**

I agree with the majority's decision to deny the Agency's bias, nonfact, and fair-hearing exceptions as unsupported. I also agree with the majority's decision to deny the Agency's exceeded-authority exception.

But I disagree with the majority's conclusion that the award's remedy fails to draw its essence from the parties' collective-bargaining agreement. The issue before the Arbitrator was whether there was "just cause for the disciplinary action taken against [the] grievant" and, "[i]f not, what shall the remedy be?"<sup>1</sup> The Arbitrator concluded that the Agency had sustained only one of several specifications upon which it relied to suspend the grievant for three days. Accordingly, she found that the grievant "should receive a Letter of Warning" with respect to the sustained specification.<sup>2</sup>

The majority concludes that the award does not draw its essence from the parties' agreement because a letter of warning "is not a form of discipline defined in the parties' agreement."<sup>3</sup> The parties' agreement, however, defines a "disciplinary action" as an "admonishment, reprimand, or suspension of 14 calendar days or less."<sup>4</sup> And the verb "to admonish" is commonly defined as meaning "to say (something) as advice or a warning."<sup>5</sup> Applying the deferential standard governing essence exceptions, I would conclude that the Arbitrator's remedy is consistent with a plausible interpretation of the agreement's definition of "disciplinary action."<sup>6</sup>

In reaching a contrary conclusion, the majority primarily relies upon Authority decisions that are clearly distinguishable from the case before us.<sup>7</sup> For instance, in both of the decisions involving the Social Security Administration, the arbitrators – as in the case before us – found that the agency was warranted in disciplining the grievants, but they reduced the grievants' suspensions to written warnings. Unlike the case before us, however, in the cases relied upon by the majority the specific provision governing warnings in the parties' agreement

"provide[d] that *such warnings do not constitute discipline.*"<sup>8</sup>

In other words, "the [a]rbitrator, *after finding that discipline was warranted* under the just cause standard of [the parties' agreement], in effect *imposed no discipline at all* within the meaning of the parties' agreement."<sup>9</sup> Based upon this record, the Authority set aside the remedies in both cases because the awards – "by not providing *any discipline*" for the grievant even after finding that some discipline was warranted – did not represent a plausible interpretation of the agreement.<sup>10</sup>

The same is not true in the case before us. The Arbitrator's remedy essentially reduces the grievant's suspension to an admonishment, which constitutes a form of discipline recognized by the parties' agreement. And this remedy is entirely consistent with the Arbitrator's finding that the Agency sustained only one of the specifications against the grievant.

By discarding the Arbitrator's plausible interpretation of the parties' agreement – and by consequently inviting the Agency to re-institute a new disciplinary action against the grievant,<sup>11</sup> an action that could generate an entirely new grievance – the majority's decision misapplies the well-established standard governing essence exceptions, and needlessly prolongs this case. Accordingly, I dissent.

<sup>1</sup> Award at 2.

<sup>2</sup> *Id.* at 9.

<sup>3</sup> Majority at 5.

<sup>4</sup> Exceptions, Ex. B, Collective-Bargaining Agreement (CBA) at 50.

<sup>5</sup> *Admonish*, Merriam-Webster.com Dictionary, Merriam-Webster, <http://www.merriam-webster.com/dictionary/admonish> (last visited April 16, 2020).

<sup>6</sup> CBA at 50.

<sup>7</sup> Majority at 5 n.28 (citing *SSA*, 64 FLRA 1119 (2010) (Member DuBester concurring; Chairman Pope dissenting); *SSA Region I, Bos., Mass.*, 59 FLRA 614, 617 (2004) (*SSA, Region I*) (Member Pope dissenting); *SSA*, 59 FLRA 257, 258 (2003) (*SSA*) (Member Pope dissenting in part)).

<sup>8</sup> *SSA*, 59 FLRA at 258 (emphasis added); *see also SSA, Region I*, 59 FLRA at 616 (same).

<sup>9</sup> *SSA*, 59 FLRA at 258 (emphasis added); *see also SSA, Region I*, 59 FLRA at 616-17 (same).

<sup>10</sup> *SSA*, 57 FLRA at 258 (emphasis added); *see also SSA, Region I*, 59 FLRA at 617 (same). In the third case upon which the majority relies – *SSA*, 64 FLRA 1119 – the Authority set aside the award because the arbitrator's interpretation of the agreement "as precluding the [a]gency from imposing [the grievant's] two-day suspension" manifestly disregarded the agreement's progressive discipline provision. *Id.* at 1121. The Arbitrator in the case before us did no such thing.

<sup>11</sup> *See* Majority at 5 n.31.