71 FLRA No. 226

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

0-AR-5528

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DECISION

December 11, 2020

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

I. Statement of the Case

Arbitrator Ruth M. Robinson found that the Agency did not violate the parties' collective-bargaining agreement by allegedly failing to investigate acts of harassment and bullying by the Agency against the grievants. The Union filed exceptions to the award on nonfact, fair-hearing, and contrary-to-law grounds. Because the Union does not demonstrate that the award is deficient on any of these grounds, we deny the exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated several provisions of the parties' agreement by failing to investigate continuing acts of harassment and bullying by the Agency against the grievants. The Union also claimed that several grievants were removed from the Agency or voluntarily ended their employment because of the alleged discriminatory acts. The grievance was unresolved and the Union invoked arbitration.

In determining the issue before her, the Arbitrator stated that she relied on "the background and information provided at the hearing and through the post-hearing briefs."[1] She framed the issue as whether the Agency violated the parties' agreement "by the actions complained of in the [grievance], and as responded to by the Agency" in the third-step grievance response.[2]

As an initial matter, she agreed with the Agency's position that her review should be limited to Agency actions that occurred between thirty days before the Union filed the grievance and the date of the Agency's third-step grievance response.[3] In limiting the timeframe, she rejected the Union's argument that the grievance concerned acts of a "continuing nature" under Article 43 of the parties' agreement (Article 43).[4] Specifically, she found that Article 43 was not applicable because it concerns the time limits for filing a grievance and the Agency had not asserted that the grievance was untimely. Explaining how she reached her conclusion, the Arbitrator referenced a legal treatise on arbitration[5] and found that "a fundamental purpose of a grievance and arbitration process is effectively defeated if there are no limits on when, and for what[,] an employer can be expected to respond."[6]

Additionally, the Arbitrator noted her "significant concern [with] the [grievance's] . . . identification of the claimed wrong employees,"[7] and that "the grievance procedure is not a type of class action certification process."[8] She explained that the grievance form alleged the Agency's "failure to investigate 'bullying and harassment' of 'minorities[,] employees with disabilities, and harassment of union officials[,]'" but that it "neither specifies who those persons are, or may be, nor infers any way those persons *could be* identified."[9]

On the merits, the Arbitrator rejected the Union's argument that the Agency's "acts of harassment

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[1] Award at 4.
[2] *Id.* The Arbitrator noted that Art. 44, § 2(f) authorized her to frame the issue in the absence of a stipulation by the parties. *Id.* at 4 & n.15.
[3] Within that timeframe, the Arbitrator further limited her review to those actions that had not "been previously decided, whether through the [Equal Opportunity Employment Commission] or a previous grievance." *Id.* at 4.
[4] *Id.* at 7-8.
[5] *Id.* at 7 (citing Elkouri *and* Elkouri, *How Arbitration Works* 5-30, 31 (Kenneth May ed., 8th ed. 2016)).
[6] *Id.* at 8. The Arbitrator also explained that she limited the timeframe to the Agency's response date because the grievance "makes broad and vague claims" and that "[e]ven with the benefit of transcribed testimony running 298 pages, and two large volumes of hearing exhibits," she could not "determine and identify what specific acts are at issue." *Id.* at 4.
[7] *Id.* at 4-5.
[8] *Id.* at 5.
[9] *Id.*

and bullying must be assumed to be true by adverse inference" because the "Agency has not presented any evidence that these acts of retaliation did not occur."[10] On this point, she found that the Union had the burden of proving that the underlying acts of alleged harassment and bullying actually occurred and that the Union failed to meet its burden. The Arbitrator also declined to consider a federal court case cited by the Union, finding it unclear whether it controlled.[11] She therefore concluded that the Agency did not violate the parties' agreement.

On August 9, 2019, the Union filed exceptions to the award. The Agency did not file an opposition to the Union's exceptions.

III. Preliminary Matter: The Authority lacks jurisdiction to resolve the Union's exceptions, in part.

Pursuant to § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) the Authority lacks jurisdiction to review exceptions to an arbitration award "relating to a matter described in [§] 7121(f)" of the Statute.[12] The matters described in § 7121(f) include adverse actions, such as removals, which are covered under 5 U.S.C. §§ 4303 or 7512.[13] The Authority has also found that constructive removals are within the scope of §§ 4303 and 7512.[14] In determining whether an award resolves – or is inextricably intertwined with – a matter covered under §§ 4303 or 7512, the Authority looks not to the outcome of the award, but whether the claim advanced in arbitration is reviewable by the U.S. Merit Systems Protection Board (MSPB) and, on appeal, by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).[15] Arbitration awards resolving these matters are reviewable by the Federal Circuit, rather than the Authority.[16]

The Authority's Office of Case Intake and Publication issued an order directing the Union to show cause why the Authority should not dismiss its exceptions for lack of jurisdiction because the Union appears to be "seeking redress for multiple grievants" who were removed or voluntarily resigned because of the Agency's allegedly discriminatory conduct.[17]

In a timely response to the order, the Union argues that the issue advanced at arbitration – the harassment and bullying of employees and the Agency's failure to investigate – presents a claim distinct from the removals of certain employees.[18] In support of this premise, the Union claims that it seeks monetary compensation for harassment and bullying suffered by the grievants, rather than reinstatement or another remedy more directly related to the removals.[19] Alternatively, the Union requests that the Authority review the Arbitrator's decision involving the claims of the grievants still employed at the Agency if the Authority finds that it lacks jurisdiction over the claims relating to removals.[20]

Here, several grievants were removed from the Agency or voluntarily ended their employment *because* of the Agency's alleged discriminatory acts.[21] Although the Union raises discrimination claims on behalf of these grievants, such claims do not vest the Authority with jurisdiction because they are inextricably intertwined with a matter covered under § 4303 or § 7512.[22] Accordingly, we dismiss the exceptions as they pertain to these claims.

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[10] *Id.* at 7.

[11] *Id.* at 8 (explaining that the Union's post-hearing brief cited *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006)); *see also* Exceptions, Attach. 1, Union's Post-Hr'g Br. (Union's Br.) at 17.

[12] 5 U.S.C. § 7122(a).

[13] *AFGE, Local 2206*, 71 FLRA 938, 938 (2020) (*Local 2206*) (citing *AFGE, Local 933*, 71 FLRA 521, 521 (2020) (*Local 933*); *AFGE, Local 491*, 63 FLRA 307, 308 (2009) (*Local 491*)).

[14] *See U.S. DOT, FAA, Miami, Fla.*, 66 FLRA 876, 878 (2012) (recognizing that the U.S. Merit Systems Protection Board has jurisdiction over constructive removals).

[15] *Local 2206*, 71 FLRA at 938 (citing *U.S. Dep't of HUD*, 71 FLRA 720, 721 (2020) (Member DuBester concurring); *U.S. Dep't of the Air Force, 37th Mission Support Group, 37th Servs. Div., Lackland Air Force Base*, 68 FLRA 392, 393 (2015); *U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project*, 65 FLRA 5, 6 (2010) (Member Beck dissenting); *Local 491*, 63 FLRA at 308).

[16] *Id.* (citing *Local 933*, 71 FLRA at 521; *Local 491*, 63 FLRA at 308).

[17] Order to Show Cause (Order) at 2 (citing Award at 6 (identifying individuals that either "ended employment" or "stopped working" for the Agency); Union's Br. at 10-11, 13, 15, 19-22).

[18] Resp. to Order at 2-3.

[19] *Id.* at 2.

[20] *Id.*

[21] *E.g.*, Award at 6; Exceptions, Attach. 5, Ex. 12, Email from Ten Haaf at 3 (employee forced to retire or risk being terminated based on allegedly false allegations that amount to harassment and bullying); Exceptions, Attach. 5, Ex. 18, Email from Kevin Ellis at 2 (employee terminated allegedly in retaliation for his activities as a whistleblower); Union's Br. at 9 (employee ended her employment after allegedly being subjected to bullying and retaliation).

[22] *AFGE, Local 171*, 49 FLRA 1520, 1521 (finding Authority lacked jurisdiction where claim of reprisal discrimination was based on grievant's removal); *see U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 61 FLRA 476, 478 (2006) (finding Authority lacked jurisdiction where removal for unacceptable performance under § 4303 and grievant's affirmative defense of disability discrimination inextricably intertwined).

However, certain grievants alleged harassment and bullying that did *not* lead to the end of their employment at the Agency. We find that those grievants' claims are not inextricably intertwined with a matter covered under § 4303 or § 7512, and we have jurisdiction over the exceptions as they relate to those grievants.

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Union argues that the award is based on nonfacts.[23] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[24] However, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, provides no basis for finding that an award is based on a nonfact.[25]

The Union argues that the Arbitrator erred by "us[ing] an arbitration manual . . . to determine issues" and relying on the Agency's opening statement "as evidence."[26] The Union asserts that her reliance on those sources resulted in the nonfact that the Agency's actions were "not continuing in nature."[27] However, the Arbitrator explained that her determination of the issue was based not only on the statements made by Agency counsel, but also on "the background and information provided at the hearing and through the post-hearing briefs."[28] And her citation to the "arbitration manual" was related to her rejection of the Union's argument that Article 43 was applicable.[29] The Union's argument merely challenges the Arbitrator's evaluation of the evidence and does not demonstrate that a central fact underlying the award is clearly erroneous.

Consequently, we deny the Union's nonfact exception.

B. The Arbitrator conducted a fair hearing.

The Union argues that the Arbitrator denied it a fair hearing because she refused to consider "evidence of the continuing nature of the [Agency's] actions . . . limiting her consideration to only what occurred in a thirty[-]day period."[30] The Authority will find an award deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.[31] It is well established that an arbitrator has considerable latitude in conducting a hearing and an arbitrator's limitation on the submission of evidence does not, by itself, demonstrate that the arbitrator failed to provide a fair hearing.[32]

In support of its exception, the Union asserts that the Arbitrator ignored the "continuing nature" of the Agency's acts of discrimination, in violation of Article 43 of the parties' agreement, which discusses the timeframe for filing a grievance.[33] Because the Arbitrator found that the grievance's timeliness was not at issue, she rejected the Union's arguments related to Article 43.[34] The Union's repetition of an argument that the Arbitrator considered, and rejected, does not demonstrate that she prevented the Union from submitting evidence to demonstrate the "Agency's failure to investigate the continuing atmosphere" of discrimination.[35]

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[23] Exceptions at 8-12. The Union argues that the Arbitrator erred in her factual findings because she describes the grievance "as some type of class action," and found that the grievance "neither specifies who those persons are, or may be, nor infers any way those persons could be identified." *Id.* at 11 (quoting Award at 5). According to the Union, the third-step grievance "has specific names of individuals." *Id.* However, the Union did not submit a copy of the its grievance with its exceptions. Therefore, we find the Union's argument is unsupported, and we deny it. *See* 5 C.F.R. § 2425.6(e)(1); *AFGE, Local 1594*, 71 FLRA 878, 880 & n.27 (2020).

[24] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (citing U*.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).

[25] *E.g.*, *U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015) (Member Pizzella dissenting).

[26] Exceptions at 8.

[27] *Id.* at 9.

[28] Award at 4.

[29] *Id.* at 7-8.

[30] Exceptions at 7; *see id.* at 6, 8.

[31] *AFGE, Local 1668*, 50 FLRA 124, 126 (1995).

[32] *AFGE, Council of Prison Locals, Local 3828*, 66 FLRA 504, 505 (2012) (*Local 3828*) (denying fair-hearing exception where arbitrator limited consideration of evidence to particular time period, but did not prevent union from submitting relevant evidence); *U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 60 FLRA 869, 879 (2005).

[33] Exceptions at 7. To the extent that the Union is challenging the Arbitrator's framing of the issue, the Union has not shown that the Arbitrator refused to hear or consider pertinent and material evidence in framing the issue, or that she framed the issue in a manner that so prejudiced the Union as to affect the fairness of the proceeding as a whole. *See, e.g.*, *AFGE, Local 3254*, 70 FLRA 577, 579 (2018) (citing *Local 3828*, 66 FLRA at 505).

[34] Award at 7-8.

[35] Union's Br. at 16. The Union also alleges that it presented extensive testimony as to the continuing nature of the Agency's actions, but the transcript submitted with the Union's exceptions concerned a different arbitration. *See* Exceptions, Attach. 11, Tr.; *see also* 5 C.F.R. § 2425.4(a)(3) (requiring an excepting party to provide "copies of any documents . . . that you reference in the arguments . . . and that the Authority cannot easily access").

Accordingly, the Union's argument does not provide a basis for finding that the Arbitrator denied it a fair hearing and we deny this exception.

C. The award is not contrary to law.

The Union argues that the award is contrary to law because the Arbitrator failed to "understand how to apply and follow" a federal case cited by the Union that "stood for the proposition that 'once discrimination of some status is raised, a failure to investigate is a retaliatory action.'"[36] When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.[37] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[38] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the appealing party establishes that those findings are nonfacts.[39]

Here, the Arbitrator found that it was "not clear" that the cited case was controlling in the jurisdiction where the parties are located.[40] The Union claims that if the Arbitrator had considered the case, "she would have reached a different decision based on the exhibits and testimony of the witnesses."[41] However, the Arbitrator found, based on the evidence, that the Union failed to prove that the Agency had committed the alleged acts.[42] The Union does not explain how the cited case required the Arbitrator to reach a different result.[43] Thus, the Union's disagreement with the Arbitrator's finding, which it does not challenge as a nonfact, does not establish that the award is contrary to law.[44]

Accordingly, we deny this exception.

V. Decision

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

[36] Exceptions at 5.
[37] *U.S. Dep't of State, Bureau of Consular Affairs, Passport Servs. Directorate*, 70 FLRA 918, 919 (2018) (citing *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (*NOAA*)).
[38] *Id.* (citing *NOAA*, 67 FLRA at 358).
[39] *Id.* (citing *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring)).
[40] Award at 8.
[41] Exceptions at 5.
[42] Award at 7, 9.
[43] The Arbitrator noted that the cited case was issued by the U.S. Court of Appeals for the District of Columbia Circuit while the parties are located in Missouri. *Id.* at 8. We note that Missouri is located in the Seventh Circuit. *See* U.S. Courts, *U.S. Federal Courts Circuit Map*, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited December 9, 2020). Therefore, her finding that it was "not clear" whether a D.C. Circuit case "controls" is not legal error, as the federal circuits often disagree on how to apply federal law. Award at 8; *see Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61 (2006) (granting review to resolve differences in the way various federal circuits applied Title VII's retaliation provisions).
[44] *U.S. Dep't of Air Force, 47th Flying Training Wing, Laughlin Air Force Base, Del Rio, Tex.*, 69 FLRA 639, 640 (2016) (Member DuBester concurring, in part, and dissenting, in part) (denying contrary-to-law exceptions where union did not explain arbitrator's legal error, but merely reargued its claim based on facts of case); *see also NTEU, Chapter 32*, 67 FLRA 174, 176 (2014) (Member Pizzella concurring) (denying contrary-to-law claim where union merely challenges arbitrator's underlying reasoning).

Member Abbott, concurring:

I agree that the Union's exceptions should be denied.

I write separately because if ever there was a grievance that carried the characteristics of a purported continuing violation – this is it. As noted by the Arbitrator, the issue in the case concerned the Agency's "*failure to investigate* 'bullying and harassment' of 'minorities[,] employees with disabilities, and harassment of union officials'" and the Agency's subsequent "*failure to investigate*" the Union's claims.[1] Therefore, the whole notion of who carried the burden is irrelevant. It could be that an investigation or investigations may demonstrate that the charges are with no merit whatsoever or it could show merit. It is well established in Title VII case law that the failure to take actions concerning allegations and claims may constitute a separate violation whether or not the underlying claim is found to have merit or no merit.[2]

The problem, though, and why I agree with the decision, is that the Union does not raise an exception based upon the award failing to draw its essence from the collective-bargaining agreement (CBA) or possibly contrary to law under Title VII. Essentially, the Union did not argue how the Agency's failure to investigate violated the CBA or Title VII. Because the Union did not argue to us how the Agency's failure to investigate violated either the CBA or Title VII, we may not consider them.

[1] Award at 5 (emphasis added). It is telling indeed that my colleagues do not defer to the Arbitrator's framing of the issue. In *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 663-64 (2020) (Member Abbott concurring; Member DuBester dissenting), we held that our deference to an Arbitrator's framing of the issues or findings of fact does not require blind obeisance. Nonetheless, the Majority has repeatedly ignored our precedent on this point and advocated for absolute deference to any issue framed by or factual finding made by an arbitrator. *Id.* at 676 (Dissenting Opinion of Member DuBester) ("Congress could not have been clearer that this is not the role it intended the Authority to play in federal sector bargaining. And to the extent that my colleagues believe they are obligated to step into the shoes of arbitrators to ensure 'an effective and efficient Government,' they need only read our Statute to see that Congress has already provided the Authority with the tools necessary to accomplish this important statutory purpose."); *U.S. EPA, Region 5*, 70 FLRA 1033, 1038 (2018) (Dissenting Opinion of Member DuBester) ("Contrary to the [a]rbitrator's unchallenged framing of the issue as purely contractual, the majority erroneously conducts a de novo review of the award."); *U.S. DOD Educ. Activity*, 70 FLRA 863, 866 (2018) (Dissenting Opinion of Member DuBester) ("As the [a]rbitrator made clear, the issue before him 'relate[s] solely to the [a]gency's procedural claim that [the grievance] is not arbitrable.' That should be the end of the story."). As I have noted before, we create confusion for the Federal labor-management community when we fail to explain these inconsistencies. *U.S. Dep't of VA, Veterans Benefits Admin.*, 71 FLRA 1113, 1115 n.24 (2020) (Chairman Kiko dissenting in part) ("Member Abbott notes that it is important for the Authority to distinguish cases in order to provide clarity to the federal labor relations community."); *see NTEU*, 70 FLRA 701, 701 n.4 (2018) ("The Authority's decisions do not help to avoid and resolve future disputes when they are difficult to understand.").

[2] *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 67-68 (2006) ("In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (internal quotation marks omitted)); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 348 (6th Cir. 2008) ("The brewery never bothered to investigate the incident, monitor Robinson, or create a safe environment for harassment complaints. A jury could find that, given what management knew about the fire, the brewery had an obligation to investigate the incident."); *Howard v. Winter*, 446 F.3d 559, 570-71 (4th Cir. 2006) (finding an employer negligent where a human resources officer did not investigate the allegations).