73 FLRA No. 129

CONSUMER FINANCIAL
PROTECTION BUREAU
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 335
(Union)

0-AR-5873

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DECISION

September 20, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Laurence M. Evans issued an award, partially sustaining the Union's grievance and reducing an employee's (the grievant's) two-day suspension to a letter of reprimand. The Agency filed an exception to the award on essence grounds. Because the Agency does not demonstrate the award is deficient, we deny the exception.

II. Background and Arbitrator's Award

The Agency requires its employees who are bank examiners (examiners) to complete a commissioning program within five years of their date of hire. A memorandum of understanding (MOU) exempts examiners hired before October 10, 2014 from the commissioning requirement. However, exempt examiners may still request to take the commissioning program's multiple-choice exam.

The grievant is an examiner hired before October 10, 2014. The grievant requested to take the exam, and the Agency approved the request and provided the grievant forty hours of duty time for exam preparation. The grievant, who is based in Dallas, Texas, was scheduled to travel to Washington, D.C. on October 9, 2018,[1] and take the exam on October 10.

The grievant requested to schedule his return travel for October 11 so he could travel during his regular duty hours. On Friday, October 5, the grievant's supervisor instructed the grievant to schedule his return travel for October 10, but also gave him the option to cancel the trip. The grievant decided to cancel the trip. However, reversing course on Saturday, October 6, the grievant's supervisor emailed the grievant instructing him to travel and take the exam. On October 9, the same supervisor left the grievant a voicemail reminding him that she was directing him to take the exam. Ultimately, the grievant did not travel or take the exam.

The grievant's supervisor proposed a five-day suspension based on three charges. The first charge was failure to follow supervisory instructions, based on the grievant's conduct related to the exam (charge one). The second and third charges were for failure to follow travel policy and disrespectful conduct in separate incidents unrelated to the exam. The Agency's reviewing official sustained the proposed suspension, but mitigated the penalty to a two-day suspension. The Union then grieved the two-day suspension, and the grievance advanced to arbitration.

The Arbitrator framed the issue as whether the Agency disciplined the grievant for "such cause as will promote the efficiency of the [f]ederal service . . . [and i]f not, what should the appropriate remedy be?"[2]

The Agency argued that charge one was appropriate because the grievant violated the well-established principle of "obey first, grieve later," which is reflected in Article 3 of the parties' collective-bargaining agreement (Article 3).[3] This provision states, in relevant part, that an employee "must follow supervisory orders," and it provides a procedure by which an employee may "dispute[] the legality of his or her supervisor's order . . . based on the employee's belief that it violates a law, rule, regulation or published Code of Ethics/Professional Responsibility."[4] The Agency asserted that Article 3

[1] Unless otherwise noted, all dates hereafter occurred in 2018.
[2] Award at 13.
[3] *Id.* at 8.
[4] Exception, Ex. 12, Parties' Collective-Bargaining Agreement at 14. Under this procedure, employees are expected to discuss the dispute with their supervisor, and if the dispute remains unresolved, to "seek review of the dispute by [their] next level supervisor." *Id.* If the dispute still remains unresolved, the employee may "request that the decision be put in writing." *Id.* at 15. The provision further states that, upon complying with the supervisor's direction, the employee "may file a grievance, complaint or appeal, as appropriate, to seek a remedy to any alleged violation of his or her rights." *Id.*

governed the grievant's conduct, notwithstanding the grievant's reliance on the MOU. The Agency also argued that the other two charges were undisputed misconduct, which warranted disciplinary action.

The Arbitrator rejected the Agency's reliance on Article 3 to support charge one because he found the MOU dispositive.[5] In support of this conclusion, the Arbitrator found that Article 3's "obey first, grieve later" principle did not apply to the dispute because the supervisor "had no contractual basis to order the [g]rievant to [travel to Washington, D.C.] and take the test," as the grievant "could not be compelled to do so under the" MOU.[6] Moreover, the Arbitrator found that even if Article 3 "were relevant to this dispute," the Agency failed to provide the grievant "sufficient time to invoke" its provisions "in the time frame given, thus making any invocation of Article 3 futile."[7] Applying these findings, the Arbitrator concluded the grievant's status as an examiner exempted from the commissioning requirement under the MOU "trump[ed] [the supervisor's] improper and contractually illegal" order.[8]

In further support of this conclusion, the Arbitrator reasoned that if he adopted the Agency's position that the supervisor's order was proper, this would violate Article 44, Section 4(F) of the parties' agreement (Article 44), which prohibits an arbitrator from "add[ing] to, subtract[ing] from, or modify[ing] the terms of [the parties'] agreement."[9] Accordingly, the Arbitrator dismissed charge one entirely, finding that the Agency lacked just cause to discipline the grievant for failure to follow supervisory instructions because the instructions were improper and an abuse of supervisory authority.

Additionally, the Arbitrator partially dismissed the second charge and sustained the third charge. Applying the factors established in *Douglas v. Veterans Administration*,[10] the Arbitrator mitigated the discipline to a letter of reprimand based on: (1) the grievant's eleven years of Agency experience; (2) the absence of disciplinary issues for the past two years; (3) the grievant's good performance appraisals; and (4) charge one lacking merit entirely.

On March 6, 2023, the Agency filed an exception to the award, and the Union filed an opposition to the Agency's exception on April 3, 2023.

III. Analysis and Conclusion: The award does not fail to draw its essence from the parties' agreement or the MOU.

The Agency argues the Arbitrator's dismissal of charge one fails to draw its essence from the parties' agreement and the MOU.[11] The Authority will find an award fails to draw its essence from the parties' agreement when the excepting party establishes 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.[12]

First, the Agency argues the award is deficient because the Arbitrator "completely ignored" the provision in Article 3 requiring employees to "first follow supervisory orders and, if unhappy about those orders, subsequently complain about such orders."[13] The Agency contends that by doing so, the Arbitrator failed to consider "the established case law on 'obey first, grieve later,'" and instead "merely dismissed" this principle, as incorporated into the parties' agreement and applied by the Merit Systems Protection Board (MSPB).[14] The Agency also argues the award is not a plausible interpretation of the MOU because "there is nothing in the MOU that allows an employee to not follow a supervisory instruction."[15]

Contrary to the Agency's assertions, the Arbitrator did not ignore Article 3, case law applying its principle of "obey first, grieve later," or the MOU. Rather, the Arbitrator concluded Article 3 did not apply to the grievant's situation, and dismissed charge one, because the

[5] Award at 14 ("Had there been no MOU, this dispute would have, as the Agency argues, turned into an 'obey first, grieve later' matter, that is, the [g]rievant would have had to [travel], take the test, [return] on the day of the test and grieve the matter later.").
[6] *Id.*; *see also id.* at 13-14 (finding that the supervisor "abused her supervisory powers" by ordering the grievant to travel and take the test because she "knew full well" the grievant had no contractual obligation under the MOU to take the test).
[7] *Id.* at 14 n.11.
[8] *Id.* at 15.
[9] *Id.* (quoting Art. 44, § 4(F)).
[10] 5 M.S.P.R. 280 (1981).
[11] Exception Br. at 5-8.
[12] *NTEU, Chapter 149*, 73 FLRA 413, 416 (2023) (citing *NTEU, Chapter 149*, 73 FLRA 133, 136 (2022); *U.S. Dep't of HHS*, 72 FLRA 522, 524 n.19 (2021) (Chairman DuBester concurring); *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1167 n.11 (2020) (Member DuBester concurring)).
[13] Exception Br. at 5-6.
[14] *Id.* at 7. The Agency also argues that "[i]n doing so, the Arbitrator completely disregarded management's right to assign work." *Id.* at 6. However, the Agency does not allege the award is contrary to law, *see* Exception Form at 3, and provides no explanation as to how the award conflicts with 5 U.S.C. § 7106(a)(2)(B). Therefore, we deny this argument as unsupported. *See* 5 C.F.R. § 2425.6(e)(1) (exceptions may be subject to denial if the excepting party fails to support a ground as required by 5 C.F.R. § 2425.6(a)).
[15] Exception Br. at 7.

MOU divested the grievant's supervisor of authority to instruct the grievant to take the exam.[16] Notably, the Agency has neither explained how the supervisor's order can be reconciled with the plain language of the MOU, nor challenged the Arbitrator's finding that the Agency's failure to provide the grievant sufficient time to invoke Article 3's procedures rendered any invocation of those procedures futile. Additionally, it is well-established that arbitrators are not required to apply the same substantive standards as the MSPB when resolving grievances over actions, such as the two-day suspension at issue in this case, that are not covered by 5 U.S.C. §§ 4303 and 7512.[17] In this regard, the Arbitrator's conclusion that the MOU superseded Article 3 provides an exception to the "obey first, grieve later" principle not present in the MSPB decisions relied upon by the Agency.[18]

Further, the Arbitrator's application of the MOU to excuse the grievant from compliance with Article 3 is not rendered implausible, irrational, or unfounded merely because the MOU does not *also* contain a provision specifically allowing employees to disregard such orders.[19] Under these circumstances, the Agency's mere disagreement with the Arbitrator's findings does not demonstrate that his interpretation of the parties' agreement or MOU are irrational, unfounded, implausible, or in manifest disregard of either agreement.[20]

The Agency further contends the Arbitrator erroneously relied on Article 44 to reject the Agency's argument in support of charge one. Specifically, the Agency asserts the Arbitrator violated Article 44 by "subtracting" Article 3 from the parties' agreement and "by adding a prohibition . . . against any discipline under these facts" to the MOU.[21] As explained previously, the Arbitrator found that Article 3 did not take precedence over the MOU in the grievant's circumstances, and the Agency has not demonstrated that conclusion is deficient. Thus, the Agency's argument does not demonstrate that the award fails to draw its essence from Article 44.[22]

Accordingly, the Agency's arguments do not demonstrate that the award fails to draw its essence from the parties' agreement or the MOU.

IV. Decision

We deny the Agency's exception.

[16] *See* Award at 14 (finding the MOU's exemption of the grievant from the certification requirement rendered Article 3 inapplicable in this instance, but "[h]ad there been no MOU, this dispute would have . . . turned into an 'obey first, grieve later' matter").

[17] *U.S. Dep't of the Air Force, Seymour Johnson Air Force Base, N.C.*, 56 FLRA 249, 252 (2000) (*Seymour Johnson AFB*) (Chairman Wasserman concurring) (rejecting agency's reliance on MSPB case law applying "obey now, grieve later" principle to argue arbitrator misapplied parties' agreement to grievance concerning grievant's placement on absence without leave status).

[18] *See* Exceptions Br. at 7; *see also Seymour Johnson AFB*, 56 FLRA at 252 (noting that arbitrator found parties' agreement gave grievant "special protections" that operated as an exception to the "obey now, grieve later" principle and that the MSPB decisions cited by the agency did not "concern, or apply, [that] exception to the 'obey now, grieve later' rule").

[19] *See Fed. Educ. Ass'n, Stateside Reg.*, 73 FLRA 32, 34 (2022) (denying essence exception that failed to identify any wording in the parties' agreement that was contrary to the arbitrator's findings); *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (an agreement's silence on a matter does not demonstrate that an arbitrator's interpretation of the agreement as to that matter is irrational, unfounded, implausible, or in manifest disregard of the agreement).

[20] *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine, Hyattsville, Md.*, 38 FLRA 1291, 1298-99 (1991) (denying exception as mere disagreement where excepting party argued award was deficient because arbitrator declined to apply "work first, grieve later" rule (citing *U.S. Dep't of HHS, SSA, Balt., Md.*, 37 FLRA 766, 774 (1990))); *see also Seymour Johnson AFB*, 56 FLRA at 252 (finding that the arbitrator did not err by refusing to apply the "obey now, grieve later" principle where arbitrator determined that grievant was acting within contractual rights in refusing to return to work).

[21] Exception Br. at 8.

[22] *Seymour Johnson AFB*, 56 FLRA at 251 (rejecting argument that arbitrator disregarded contractual provision prohibiting arbitrators from modifying the contract's terms where argument merely reiterated previously denied essence exception).