73 FLRA No. 152

CONSUMER FINANCIAL PROTECTION BUREAU
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 335
(Union)

0-AR-5756
(73 FLRA 670 (2023))

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DECISION

January 26, 2024

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

I. Statement of the Case

Arbitrator Roger D. Meade issued an award finding the Agency violated the parties' collective-bargaining agreement (CBA) by issuing an employee (the grievant) a letter of reprimand without first giving the grievant notice and an opportunity to respond. As remedies, the Arbitrator directed the Agency to, among other things, withdraw and destroy the letter of reprimand, and remove all relevant documentation from the grievant's official personnel folder and managers' formal files.

The Agency filed exceptions to the award. In *Consumer Financial Protection Bureau* (*CFPB*),[1] the Authority denied the Agency's exceeded-authority, essence, and due-process exceptions. However, the Authority reserved judgment on the Agency's exceptions alleging the award is contrary to public policy, and contrary to law, because it conflicts with management's right to discipline employees under § 7106(a)(2)(A) of the Federal Service Labor-Management Relations Statute (the Statute).[2] In that regard, the Authority revised the test it will apply to resolve management-rights exceptions in cases where arbitrators find CBA violations. The Authority also gave the parties an opportunity to submit supplemental briefs addressing the revised test.

Both parties submitted supplemental briefs. For the following reasons, we now: (1) reject any Agency arguments that either raise new exceptions or repeat arguments we rejected in *CFPB*; and (2) deny the public-policy and contrary-to-law exceptions regarding management rights.

II. Background and Arbitrator's Award

The facts, summarized here, are set forth in greater detail in *CFPB*.

The grievant's supervisor met with the grievant and presented him with a letter of reprimand without first giving him an opportunity to explain his behavior. The Union filed a grievance and the matter proceeded to arbitration.

The Arbitrator considered Article 37, Section 1 of the parties' CBA, which provides that "disciplinary actions will be taken only for such cause as will promote the efficiency of the federal service."[3] The Arbitrator interpreted that provision as requiring a "pre-disciplinary hearing . . . *before* the [Agency] has reached its disciplinary decision."[4] Thus, the Arbitrator determined, the Agency may not "hold a disciplinary meeting with an employee and, in [the] same meeting, present [the employee] with predetermined discipline."[5] According to the Arbitrator, "[a]t a minimum, [the Agency] should have provided the grievant notice and an opportunity to present his side of events and their context."[6] Further, the Arbitrator stated "there must be a decent interval following the investigatory meeting to permit the [Agency] to consider the employee's explanation or defense before any disciplinary meeting, if one is to be held."[7]

The Arbitrator concluded the Agency violated Article 37, Section 1 by "failing to afford [the grievant] the prior opportunity to be heard."[8] The Arbitrator then directed the Agency to, among other things, withdraw and destroy the letter of reprimand, and remove all relevant documentation from the grievant's official personnel folder and managers' formal files.

The Agency filed exceptions to the award, and the Union filed its opposition to the Agency's exceptions. On September 26, 2023, the Authority issued *CFPB*, denying some of the Agency's exceptions but reserving judgment on the Agency's exceptions regarding management rights. In the latter regard, the Authority revised the test it will apply to resolve management-rights exceptions to arbitration awards finding CBA violations.

[1] 73 FLRA 670 (2023).
[2] 5 U.S.C. § 7106(a)(2)(A).
[3] Award at 10 (emphasis omitted).
[4] *Id.* (emphasis added).
[5] *Id.* at 11.
[6] *Id.* at 10-11.
[7] *Id.* at 11.
[8] *Id.* at 10 (emphasis omitted).

The Authority also offered the parties an opportunity to file supplemental briefs addressing how the revised test applies in the instant dispute. The Agency and the Union both filed supplemental briefs on October 26, 2023.

III. Preliminary Matter

In its supplemental brief, the Agency argues the award is contrary to public policy because it allegedly conflicts with: (1) "the well-established principle that the parties to an agreement should be able to rely on the agreement being honored under its terms[,]"[9] and (2) the goals set forth in § 7101 of the Statute.[10] In addition, the Agency contends that statutory due-process rights do not apply to letters of reprimand,[11] and repeatedly argues the CBA does not require the Agency to comply with procedural requirements before it issues a letter of reprimand.[12]

In *CFPB*, the Authority gave the parties an opportunity to file additional briefs *only* to "address[] how the revised [management-rights] test applies in this case and whether there is any need to remand the case for further development of the record."[13] The two public-policy arguments above attempt to raise entirely new arguments, and the other two arguments effectively repeat the Agency's due-process and essence arguments that we rejected in *CFPB*.[14] Thus, all four arguments are beyond the limited scope of *CFPB*'s request for supplemental briefing, and we do not consider them.

IV. Analysis and Conclusions

The Agency argues the award conflicts with management's right to discipline employees under § 7106(a)(2)(A) of the Statute.[15] Accordingly, we apply the *CFPB* test. However, we first discuss two Agency arguments that are relevant to how we will apply that test in this case.

First, in arguing the award is contrary to management rights, the Agency repeatedly argues the CBA does not require the Agency to comply with procedural requirements before it issues a letter of reprimand.[16] To the extent the Agency is challenging the Arbitrator's CBA interpretation on management-rights grounds, under the *CFPB* test, the Authority defers to an arbitrator's CBA interpretation unless the excepting party demonstrates that the award fails to draw its essence from the agreement.[17] As discussed in Section III above, the Authority previously denied the Agency's essence exception, and we do not revisit that issue here. Therefore, the Agency's disagreement with the Arbitrator's CBA interpretation does not support setting aside the award on management-rights grounds.

Second, the Agency notes the Arbitrator's statement that, "*at a minimum*," the CBA required the Agency to give the grievant notice and an opportunity to respond before issuing the letter of reprimand.[18] According to the Agency, this interpretation "could afford employees *unlimited* procedural rights before management could issue even the lowest level of discipline, i.e., a letter of reprimand."[19] However, there is no basis for finding the Arbitrator was requiring the Agency to do anything more than the minimum steps he described. We note the Arbitrator stated that "there must be a decent interval" between a meeting to hear an employee's explanation and any meeting where discipline is imposed.[20] However, the Arbitrator did not specify that a "decent interval" would need to be any appreciable period of time. As such, we read the award as requiring only that there be some minimal amount of time – sufficient for the Agency to consider the employee's explanation – between the investigatory meeting and the Agency's imposition of discipline. For these reasons, contrary to the Agency, we do not read the award as giving employees "unlimited" procedural rights.[21]

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[9] Agency Supp. Br. at 13.
[10] *Id.* at 13-14.
[11] *Id.* at 5 n.1, 6-7.
[12] *Id.* at 3 (asserting the award "require[es] management to comply with procedural requirements that are not found in . . . the CBA before issuing a letter of reprimand"); *id.* at 5 n.1 (arguing there is "no provision in the CBA that requires an investigation or advance notice and an opportunity to respond before a letter of reprimand can be issued"); *id.* at 6 (claiming "due[-]process requirements before issuing a letter of reprimand . . . [are] not required by the CBA"); *id.* (arguing that under the Arbitrator's interpretation "just cause" includes "procedural requirements that are not required . . . under the CBA"); *id.* at 7 (arguing the CBA provision concerning letters of reprimand "does not entitle an employee to any due process before a letter of reprimand is issued"); *id.* at 11 (asserting managers could not be aware of the due-process requirements "because they are not required under the CBA").
[13] *CFPB*, 73 FLRA at 682.
[14] *See id.* at 672 (rejecting due-process argument as based on a misinterpretation of the award); *id.* at 672-73 (denying essence exception challenging Arbitrator's finding that CBA required Agency to comply with certain procedural requirements before issuing letter of reprimand).
[15] Exceptions at 8-9; Agency Supp. Br. at 4-5.
[16] *See* note 12, above.
[17] *CFPB*, 73 FLRA at 679.
[18] Agency Supp. Br. at 5 (emphasis added).
[19] *Id.* at 6 (emphasis added).
[20] Award at 11.
[21] Agency Supp. Br. at 5-6.

Turning to the *CFPB* test, the first question is whether the Agency demonstrates the Arbitrator's interpretation and application of the CBA and/or the awarded remedy affects the management right the Agency raises[22] – specifically, the right to discipline employees. As the Union "does not dispute that the Arbitrator's interpretation and application of the CBA affects management's right to discipline,"[23] we assume, without deciding, that the first part of the *CFPB* test is met.[24]

Under the second *CFPB* inquiry, we assess whether the Union demonstrates that Article 37, Section 1 – as interpreted and applied by the Arbitrator – is enforceable under § 7106(b) of the Statute.[25] The Union asserts Article 37, Section 1 is a procedure under § 7106(b)(2) of the Statute,[26] and the Agency disputes that claim.[27] As interpreted and applied by the Arbitrator, Article 37, Section 1 requires the Agency to give employees notice and an opportunity to be heard – and then wait some minimal amount of time to consider the employees' explanation – before the Agency imposes discipline. The Authority has found requirements that agencies conduct certain types of investigations, and/or give employees notice and an opportunity to respond, before imposing discipline, constitute procedures under § 7106(b)(2) of the Statute.[28] Consistent with that precedent, we find Article 37, Section 1 – as interpreted and applied by the Arbitrator – is enforceable under § 7106(b)(2).

We note the Union also claims that Article 37, Section 1 is an appropriate arrangement under § 7106(b)(3) of the Statute,[29] and the Agency disputes that claim.[30] However, the second *CFPB* inquiry "only requires the opposing party to demonstrate that *one* of the subsections of § 7106(b) applies."[31] As the Union has demonstrated that § 7106(b)(2) applies, we find it unnecessary to address the Union's and the Agency's respective arguments about § 7106(b)(3).

Turning to the third *CFPB* inquiry, we ask whether the Agency challenges the remedy separate and apart from the underlying CBA violation.[32] The Agency expressly states it is not doing so.[33] Under *CFPB*, if the excepting party does not challenge the remedy separate and apart from the underlying CBA violation, "then the Authority will deny the [management-rights] exception."[34] Therefore, we deny the Agency's public-policy and contrary-to-law exceptions regarding management rights.

V. Decision

We deny the Agency's remaining exceptions.

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[22] *CFPB*, 73 FLRA at 681.

[23] Union Supp. Br. at 3.

[24] *See CFPB*, 73 FLRA at 681 n.123 (noting that the "Authority will not necessarily apply all of the steps of [the four-question] test," and, where appropriate, "may assume, without deciding, that the interpretation and application of the CBA and/or the awarded remedy 'affects' a management right").

[25] *Id.* at 681.

[26] Opp'n at 9 (stating that "management rights . . . are subject to any procedures . . . negotiated by the parties under 5 U.S.C. [§] 7106(b)(2)," contending that "Article 37 . . . includes procedures . . . that apply when the [A]gency seeks to discipline employees," and discussing Article 37, Section 1).

[27] *See* Agency Supp. Br. at 6 (arguing the Arbitrator's "interpretation and application of Article 37, Section 1 . . . is not enforceable under § 7106(b)").

[28] *See, e.g.*, *NFFE, Council of Veterans Admin. Locs.*, 31 FLRA 360, 399-402 (1988) (proposal requiring, among other things, that an employee who is alleged to have committed an offense is to be questioned; signed statements are to be obtained; and the employee will have the right to be represented by a union representative at any discussion with the supervisor who conducted the preliminary investigation when the employee is given a letter of admonishment or reprimand); *NAGE, Loc. R4-75*, 24 FLRA 56, 58-60 (1986) (provision providing employees with advance notice and an opportunity to answer the charges against them before certain disciplinary or adverse actions were taken against them); *Joint Council of Unions, GPO*, 10 FLRA 448, 448-49 (1982) (proposal requiring that, when an employee receives a letter proposing certain forms of discipline, the employee has the right to answer and provide supporting evidence, and may (through the union) request that a specified fact-finding procedure be invoked; and agency must review the fact-finder's report before imposing discipline). *Cf. AFGE, Dep't of Educ. Council of Locs.*, 36 FLRA 130, 131-34 (1990) (proposal requiring that, except in certain circumstances, particular types of disciplinary or adverse actions be stayed until the review procedures in the CBA were exhausted); *AFGE, AFL-CIO, Loc. 1858*, 27 FLRA 69, 80-82 (1987) (assessing provision that stated, "Prior to deciding whether or not a disciplinary action is warranted, the immediate supervisor shall undertake a preliminary investigation," and finding that it would have been a procedure if it had not specified that the functions be performed by supervisors).

[29] Opp'n at 9; Union Supp. Br. at 3-4.

[30] Agency Supp. Br. at 7-8.

[31] *CFPB*, 73 FLRA at 679.

[32] *Id.* at 681.

[33] Agency Supp. Br. at 12 ("The [Agency] does not challenge the remedy separate and apart from the underlying CBA violation."). In its supplemental brief, the Union argues that the "Agency did not challenge the remedy in this case separate and apart from the underlying CBA violations," Union Supp. Br. at 5, but that "[a]lternatively," even if the Agency were to raise – and the Authority were to consider – a separate challenge to the remedy, such a remedial challenge would be moot. *Id.* at 6-7. Because the Agency concedes that it is *not* separately challenging the remedy, we need not address the Union's mootness argument.

[34] *CFPB*, 73 FLRA at 681.