73 FLRA No. 169

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
LOMPOC, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 4397
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5866

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DECISION

May 6, 2024

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

I. Statement of the Case

Arbitrator David B. Hart issued an award finding the Agency violated the parties' collective-bargaining agreement (CBA) by suspending an employee (the grievant) without just cause, and by temporarily reassigning him without first taking certain actions. The Agency excepted, arguing the award: (1) is contrary to law because it conflicts with management rights under § 7106 of the Federal Service Labor-Management Relations Statute (the Statute);[1] (2) fails to draw its essence from the CBA; and (3) is based on a nonfact.

For the following reasons, we: (1) dismiss the management-rights exceptions to the extent they concern the grievant's suspension; (2) set aside the portion of the award concerning the reassignment because it conflicts with management's right to determine internal-security practices under § 7106(a)(1) of the Statute; and (3) find it unnecessary to resolve the remaining exceptions.

II. Background and Arbitrator's Award

On October 17, 2019, the grievant, a correctional officer, worked a shift in the Special Housing Unit (SHU) at one of the Agency's correctional facilities.[2] During that shift, the grievant failed to conduct, and failed to ensure other staff conducted, certain required "[thirty]-minute SHU rounds."[3] At some point in 2019, the Agency became aware of that situation and reassigned the grievant pending an investigation. Based on the investigation, on January 6, 2021, the Agency proposed to suspend the grievant for forty-five days. The grievant responded to the proposal on January 26, 2021. On February 19, 2021, the Agency issued a decision to suspend the grievant for fourteen days. The Union grieved the decision, alleging the suspension violated the CBA because it was untimely, was excessive, and was not taken for "just and sufficient cause."[4] The grievance proceeded to arbitration.

Opining that "suspension is recognized to be a[n] extreme industrial penalty," the Arbitrator first found that "industrial due process" requires employers to act in a timely manner and meet certain additional requirements before imposing discipline.[5] The Arbitrator further stated, "From 'just[-]cause' provisions of agreements *such as the one at issue in this case*, courts have inferred a due[-]process obligation,"[6] including the obligation to give an employee "an adequate opportunity to present his/her side of the story" before the employer imposes discipline.[7] The Arbitrator noted the grievant admitted to misconduct, but the Arbitrator nonetheless determined that "the evidence as presented and used by the [Agency] . . . was not timely and generally fails to satisfy the 'due[-]process' and 'just[-]cause' standard the Arbitrator is obligated to follow."[8]

Next, the Arbitrator found "the [g]rievant was actually 'demoted' by having his regular assignment taken away, which led to the [g]rievant losing overtime pay, night differential, holiday pay[,] and other benefits."[9] The Arbitrator noted the Agency did not contact the grievant until "some 200 . . . days" after the misconduct occurred.[10] The Arbitrator found there was "no logical excuse for that

[1] 5 U.S.C. § 7106.
[2] It is undisputed that the SHU is a "special security area where inmates are housed that need closer supervision." Exceptions, Attach. A, Agency's Post-Hr'g Br. at 9.
[3] Award at 5.
[4] *Id.* at 4.
[5] *Id.* at 8; *see also id.* (stating that "[p]rocedural fairness requires the [e]mployer to conduct a full and fair investigation of the circumstances surrounding an [e]mployee's conduct and to provide an opportunity for him/her to offer denials, explanations, or justifications that are relevant before the [e]mployer makes a decision").
[6] *Id.* at 8-9 (emphasis added).
[7] *Id.* at 9.
[8] *Id.*
[9] *Id.*; *see also id.* (finding that this "demot[ion]" itself amounted to "*discipline*").
[10] *Id.*

period of time violating the [grievant's] due process."[11] Further, the Arbitrator determined the Agency failed to meet its "obligation to gather information from available sources and to present such information to the [g]rievant[,] thereafter affording the [g]rievant an opportunity to respond before rendering a decision to discipline."[12]

The Arbitrator concluded the suspension was not for just cause. As remedies, the Arbitrator directed the Agency to make the grievant whole "back to and including his demotion," and to substitute his suspension with a non-disciplinary counseling letter.[13]

The Agency filed exceptions to the award on February 21, 2023,[14] and the Union filed an opposition to the Agency's exceptions on March 16, 2023. On September 26, 2023, the Authority issued *Consumer Financial Protection Bureau* (*CFPB*),[15] which revised the test the Authority will apply in cases where parties file management-rights exceptions to arbitration awards finding CBA violations. The Authority allowed the parties to file additional briefs concerning how the revised test should apply in this case. The Union filed a supplemental brief on October 24, 2023; the Agency did not file one.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's exceptions to the extent they concern the grievant's suspension, but not to the extent they concern the grievant's reassignment.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[16]

The Agency argues that the award is contrary to management's rights to determine the Agency's internal-security practice under § 7106(a)(1) of the Statute and to discipline employees under § 7106(a)(2)(A) of the Statute.[17] As an initial matter, the Agency appears to read the award as setting aside the grievant's suspension based solely on the Arbitrator's finding that the grievant was "demoted" when he was reassigned during the investigation.[18] We acknowledge that the award is somewhat unclear on this point. However, reading the Arbitrator's various statements in context,[19] we find the Arbitrator made two, separate determinations: (1) the grievant's *suspension* was without just cause because the delayed investigation deprived the grievant of due process; and (2) the grievant's *reassignment* during the pre-suspension investigation was itself discipline that deprived him of due process because the Agency failed to "gather information from available sources and to present such information to [him,] thereafter affording [him] an opportunity to respond," before deciding to reassign him.[20]

In its grievance and at arbitration, the Union expressly argued the grievant's suspension should be set aside because it was untimely.[21] Therefore, the Agency should have known to raise any responsive management-rights challenges regarding the suspension at arbitration. There is no evidence the Agency did so. Thus, to the extent the Agency's management-rights exceptions challenge the Arbitrator's findings regarding the

[11] *Id.* at 9-10.
[12] *Id.* at 10.
[13] *Id.*
[14] In its exceptions brief, the Agency stated that the Arbitrator served his award on the parties by email on January 17, 2023. Exceptions Br. at 2. The Authority's Office of Case Intake and Publication issued an order directing the Agency to show cause why its exceptions should not be dismissed as untimely because, if the award was served by email on January 17, then the Agency needed to file its exceptions by February 16. Order to Show Cause (Order) at 2. The Agency responded, asserting it had erroneously stated the award was served by email, and clarifying that the award was "exclusively served on the parties via United States mail." Resp. to Order at 2. As evidence, the Agency submitted a copy of the envelope, postmarked January 17, 2023. Resp. to Order, Attach. at 1. Other than the Agency's corrected misstatement about email service, nothing in the record indicates the Arbitrator also served the award by email. Thus, we find the award was served solely by U.S. mail on January 17. As such, the Agency had five additional days to file its exceptions, 5 C.F.R. § 2429.22(a); they were due no later than February 21; and, therefore, they were timely filed and we consider them.
[15] 73 FLRA 670 (2023).
[16] 5 C.F.R. §§ 2425.4(c), 2429.5.
[17] Exceptions Br. at 7-15.
[18] *Id.* at 13 (claiming the Arbitrator "says that because the Agency demoted him without just cause and an opportunity to respond, that the grievant's due[-]process rights were violated and [the] Arbitrator . . . set aside the suspension in its entirety and ordered the grievant be made whole"); *id.* at 13-14 (asserting that the Arbitrator "never even looks at the merits of the underlying [fourteen-]day suspension," and "simply states . . . that the reassignment was a 'demotion' and regardless of any merits of the actual suspension, he finds that it was not for just cause").
[19] *See, e.g.*, *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 420 (2023) (reading an arbitrator's statement in context of her other statements to ascertain award's meaning).
[20] Award at 10.
[21] *See id.* at 4 (noting the grievance asserted "[t]he investigation and/or discipline [were] untimely" and the suspension was "not taken for just and sufficient cause," and requesting "[c]ancellation of [the fourteen-]day[] suspension" as a remedy); *id.* at 7 (noting Union's arguments, at arbitration, that: the Arbitrator should find the "decision to issue a [fourteen-]day suspension . . . was not for just cause"; the Agency "ignore[d] the requirements of the [CBA]" and "missed its own established deadline for timely investigations and timely discipline"; and the "suspension should be canceled" or, alternatively, mitigated).

suspension, §§ 2425.4(c) and 2429.5 of the Regulations bar those exceptions, and we dismiss them.[22]

However, the record does not indicate that, at arbitration, the Union separately argued the pre-suspension *reassignment itself* constituted discipline, or that the Arbitrator should set it aside or grant remedies related to it. Consequently, the Agency would not have reasonably known to raise its arguments regarding the reassignment at arbitration. Thus, we consider the Agency's exceptions to the extent they challenge that aspect of the award.[23]

IV. Analysis and Conclusions: The portion of the award concerning the reassignment conflicts with management's right to determine internal-security practices.

As discussed above, the Agency argues the award conflicts with management's right to determine internal-security practices under § 7106(a)(1) of the Statute,[24] and the Authority allowed the parties to submit supplemental briefs addressing how the revised management-rights test set forth in *CFPB* should apply in this case.

The *CFPB* test applies "only in cases where an arbitrator is enforcing a CBA provision" – not "in cases where an arbitrator is enforcing an 'applicable law.'"[25] In its supplemental brief, the Union argues "the discipline was not in accordance with applicable laws," and "[a]s a result, no further analysis is required under *CFPB*."[26] Additionally, in its exceptions brief, the Agency argues the Arbitrator "did not find a violation of any contract provision at all."[27] However, the Arbitrator did not state that he was enforcing any applicable laws. Rather, he discussed "'just[-]cause' provisions of *agreements* such as the one at issue in this case."[28] Therefore, we conclude the Arbitrator found a CBA violation – not a violation of applicable law – and the *CFPB* test applies.

Applying that 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 cited management right.[29] Management's right to determine internal-security practices under § 7106(a)(1) of the Statute includes the authority to determine the policies and practices that are part of an agency's plan to secure or safeguard its personnel, physical property, or operations against internal and external risks.[30] The Authority has held that the term "safeguarding," within the meaning of this test, "encompasses actions taken by an agency to prevent misconduct or threats to personnel, property[,] or operations, including an agency's choice of the investigative techniques that it will use to obtain probative evidence regarding misconduct."[31] Relatedly, the Authority has found that an agency's right to determine internal-security practices "include[s] the policing of its own employees."[32]

Where management shows a link or reasonable connection between its objective of safeguarding its personnel, physical property, or operations, and an investigative technique designed to implement that objective, the Authority will find that an arbitration award that conflicts with the policy or practice affects management's right to determine internal-security practices.[33] Additionally, the Authority has recognized that federal correctional facilities have special security concerns that may not be present at other work locations[34] and that, at a correctional facility, internal-security concerns are of "paramount importance."[35]

The Agency asserts, "Upon learning the grievant was alleged to have skipped crucial counts and other duties of his SHU post assignment, management made the internal[-]security decision to reassign [him] temporarily[,] pending the outcome of the investigation[,] pursuant to Article 30(g)" of the CBA.[36] Article 30(g) provides:

> The [Agency] retains the right to respond to an alleged offense by an employee which may adversely affect the [Agency's] confidence in the employee or the security or orderly operation of the institution. The [Agency] may elect to reassign the employee to another job within the institution or remove the employee from the institution pending

[22] *See, e.g.*, *SSA*, 73 FLRA 708, 712 (2023).
[23] *See, e.g.*, *U.S. Dep't of State, Passport Servs.*, 73 FLRA 631, 633 (2023) (finding §§ 2425.4(c) and 2429.5 of the Authority's Regulations did not bar exceptions where the excepting party could not have known to raise its arguments at arbitration).
[24] Exceptions Br. at 7-14.
[25] 73 FLRA at 676.
[26] Union Supp. Br. at 6 (citing 5 U.S.C. § 7503).
[27] Exceptions Br. at 10.
[28] Award at 8-9 (emphasis added).
[29] *CFPB*, 73 FLRA at 681.
[30] *AFGE, Council of Prison Locs. 33, Loc. 506*, 66 FLRA 929, 931 (2012) (*Local 506*).
[31] *Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 56 FLRA 398, 403 (2000) (Chairman Wasserman concurring).
[32] *Id.*
[33] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 730, 732 (2011).
[34] *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 714 (1999) (*Leavenworth*) (Chairman Cabaniss dissenting in part on other grounds) (citing *AFGE, AFL-CIO, Loc. 683*, 30 FLRA 497, 500 (1987)).
[35] *Id.* (quoting *AFGE, Council of Prison Locs., Loc. 919*, 42 FLRA 1295, 1301 (1991)); *see also Local 506*, 66 FLRA at 931.
[36] Exceptions Br. at 12.

> investigation and resolution of the matter, in accordance with applicable laws, rules, and regulations.[37]

The Agency contends it has "made a security determination that employees who are being investigated for misconduct will be placed in positions with no, or limited, inmate conduct, often during morning watch when more supervisors are present."[38] The Agency argues the "policy" in Article 30(g) is "linked to management's security objective of limiting" those employees' access "to inmates and particular parts of the institution."[39] According to the Agency, by finding the grievant's reassignment was improper and directing a make-whole remedy, the Arbitrator issued an award that conflicts with management's internal-security right.[40]

We find the Agency has adequately established a link between its internal-security objectives and its policy of reassigning employees while they are investigated for misconduct. The Arbitrator interpreted the CBA as requiring the Agency to "gather information from available sources and to present such information to the [g]rievant[,] thereafter affording the [g]rievant an opportunity to respond," before reassigning him.[41] The Arbitrator's finding that the Agency violated the CBA by failing to comply with that requirement interferes with the Agency's internal-security practice and, thus, affects management's right to determine internal-security practices under § 7106(a)(1) of the Statute.[42] Accordingly, the answer to the first question under the *CFPB* test is yes.

The second question under the *CFPB* test is whether the arbitrator correctly found, or the opposing party demonstrates, that the CBA provision – as interpreted and applied by the arbitrator – is enforceable under § 7106(b) of the Statute.[43] The Arbitrator – who issued his award before the Authority issued *CFPB* – did not discuss § 7106(b)'s applicability. Neither party argues there is any need to remand the case for further development of the record. Absent any arbitral analysis of § 7106(b), *CFPB* provides that "the opposing party" – the Union in this instance – "ha[s] the burden to demonstrate that the [contract] provision at issue . . . is enforceable under § 7106(b)."[44] However, the Union does not argue – in either its opposition or its supplemental brief – that the CBA, as interpreted and applied by the Arbitrator, is enforceable under § 7106(b). Therefore, the Union does not meet its burden under the second *CFPB* question.

As a consequence, we find the Agency "successfully challenges the [Arbitrator's] underlying finding of a CBA violation" regarding the reassignment.[45] Therefore, we set aside both the finding of a CBA violation, and the related remedies, regarding the reassignment.[46] With particular regard to remedies, we read the Arbitrator's direction that the Agency make the grievant whole "back to and including [the] *demotion*" – which the Arbitrator equated with the *reassignment* – as including remedies linked specifically to the reassignment.[47] Those remedies would include any lost "overtime pay, night differential, holiday pay[,] and other benefits" the Arbitrator found the reassignment caused the grievant to lose.[48] Although we set aside those remedies, any remedies linked to the suspension itself – including make-whole relief and the direction to substitute the suspension with a non-disciplinary counseling letter – remain.

Having set aside the reassignment portion of the award at step two of the *CFPB* test, we find it unnecessary to address the remaining steps of that test.[49] The Agency also argues that the reassignment portion of the award: (1) interferes with management's right to discipline employees under § 7106(a)(2)(A) of the Statute;[50] (2) fails to draw its essence from the CBA;[51] and (3) is based on a nonfact.[52] Because we have set aside that portion of the award as contrary to management's right to determine

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[37] Exceptions, Attach. B at 70.
[38] Exceptions Br. at 12.
[39] *Id.*
[40] *Id.* at 13-14.
[41] Award at 10.
[42] *See AFSCME, Loc. 2830*, 60 FLRA 671, 673 (2005) (proposal requiring agency to get agency-head approval before searching employees' personal work spaces affected internal-security right); *AFGE, AFL-CIO, Loc. 446*, 43 FLRA 836, 896 (1991) (Member Talkin dissenting in part on other grounds) (proposal affected internal-security right where it would require the agency to return employees with positive drug tests to sensitive positions after completion of rehabilitation, irrespective of any agency determination that doing so would compromise the agency's internal security). *Cf. Leavenworth*, 55 FLRA at 714 (considering security concerns specific to correctional institutions when finding agency lawfully placed union president on home duty for allegedly making "inflammatory statements" during "a period of acute security risk at the penitentiary").
[43] 73 FLRA at 681.
[44] *Id.* at 679.
[45] *Id.* at 681.
[46] *Id.* at 681.
[47] Award at 10 (emphasis added).
[48] *Id.* at 9.
[49] *See CFPB*, 73 FLRA at 680 (recognizing that it is unnecessary to address the third and fourth *CFPB* questions unless "the answer to the [second] question is yes").
[50] Exceptions Br. at 14-15.
[51] *Id.* at 16, 6 (contending the award "[r]eads out [the CBA] provision allowing employees to be reassigned during investigation").
[52] *Id.* at 15-16 (arguing the award is based on an erroneous finding that the grievant was "demoted" and that the demotion was "discipline," and, therefore, that a make-whole remedy was appropriate).

internal-security practices, we need not address the Agency's additional arguments.[53]

IV. Decision

We dismiss the Agency's management-rights exceptions that challenge the portion of the award concerning the suspension. We grant the Agency's exception alleging the reassignment portion of the award is contrary to management's right to determine internal-security practices. Accordingly, we set aside the Arbitrator's finding that the reassignment violated the CBA, along with any remedies based on that finding, including any lost overtime pay, night differential, holiday pay, and other benefits the Arbitrator found the reassignment caused the grievant to lose. However, as the Agency does not demonstrate that the Arbitrator erred in setting aside the suspension, any remedies linked to the suspension itself – including make-whole relief and the direction to substitute the suspension with a non-disciplinary counseling letter – remain.

[53] *See, e.g.*, *U.S. Dep't of the Army, Ariz. Dep't of Emergency & Mil. Affs., Ariz. Army Nat'l Guard*, 73 FLRA 617, 619 n.22 (2023) (vacating award and finding it unnecessary to resolve remaining exceptions).