

63 FLRA No. 123

SOCIAL SECURITY ADMINISTRATION
HUNTINGTON PARK DISTRICT OFFICE
HUNTINGTON PARK, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
COUNCIL 2452
(Union)

0-AR-4270

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DECISION

May 29, 2009

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Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator John D. Perone filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator sustained the grievance over the grievant's 14-day suspension. He concluded that the suspension was not for just cause and ordered it revoked. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant was suspended for 14 days "for alleged inappropriate access of official records at the request of a co-worker." Award at 1-2. The Agency alleged that the access violated the Agency's policy statement on "Sanctions for Unauthorized System Access Violations" (sanctions policy). *Id.* A grievance filed over the suspension was submitted to arbitration under the expedited arbitration provisions of the parties' collective bargaining agreement. *Id.* at 2. The Arbitrator stated that, in accordance with those provisions, an expedited hearing was held without a transcript, closing arguments were oral, and his award contained only a "brief explanation for the decision." *Id.* (quoting collective bargaining agreement).

The Arbitrator concluded that the grievant was not disciplined for just cause. *Id.* In this regard, the Arbitrator found that the "unrebutted testimony of [a witness for the Union] shows [that the] [g]rievant was treated differently from other bargaining unit members through incomplete investigation of the [Agency]." *Id.* at 3. In particular, he found that the witness "testified quite convincingly that what [the] [g]rievant was disciplined for was common practice" in the local office and that the Agency failed to investigate the alleged practice. *Id.* The Arbitrator also stated that the "[g]rievant ha[d] advised investigators . . . that it was common practice for an employee of the [local office] to access records for another employee in order to assist each other in their workloads." *Id.* On this basis, the Arbitrator concluded that the suspension was disparate and, therefore, unreasonable. Accordingly, as his award, he sustained the grievance and revoked the suspension. *Id.* at 2.

III. Positions of the Parties**A. Exceptions**

The Agency contends that the award: (1) fails to draw its essence from the parties agreement; (2) is contrary to management's right to discipline employees; and (3) is based on nonfacts. The Agency also contends that the Arbitrator exceeded his authority by disregarding its right to discipline.

As to essence, the Agency claims that the Arbitrator essentially found that the grievant committed acts that warranted discipline. Consequently, the Agency argues that the award is deficient based on *Social Security Administration, Office of Labor Management Relations*, 60 FLRA 66 (2004) (*SSA*) and *Social Security Administration, Lansing, Michigan*, 58 FLRA 93 (2002) (then-Member Pope dissenting) (*SSA, Lansing*). As to the right to discipline, the Agency asserts that the Arbitrator exceeded his authority because the award "renders it impossible" for the Agency to exercise its right under the Statute to discipline employees for violations of the sanctions policy. *Id.* at 7. The Agency asserts that the award is based on nonfacts because the Arbitrator: (1) twice referred to the discipline as a removal, rather than a 14-day suspension; and (2) found that the grievant told investigators that computer access for fellow employees was a common practice and stated that the testimony of the Union witness on the practice was unrebutted. *Id.* at 7-8. The Agency argues that, as documented in the report of investigation, the grievant told investigators that he did *not* know of anyone else who had accessed records for another employee. *Id.* at 8.

B. Opposition

As to essence, the Union contends that the Arbitrator properly found no just cause for discipline on the basis of disparate treatment and that *SSA* and *SSA, Lansing* are distinguishable. Opposition at 8. As to management's right to discipline, the Union contends that the award merely requires fair treatment in disciplinary actions and does not prevent the Agency from disciplining employees for violations of the sanctions policy. *Id.* at 9. As to nonfact, the Union concedes that the Arbitrator twice misstated the discipline as a removal, but argues that the error is immaterial. *Id.* at 10. The Union argues that the other asserted nonfacts were disputed by the parties at the hearing and that the Agency fails to establish that, but for any error, the result would have been different. *Id.* at 10-11.

IV. Analysis and Conclusions

A. The Agency fails to establish that the award fails to draw its essence from the agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *E.g., United States Dep't of Homeland Security, United States Customs and Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 129, 132 (2007). Under this standard, the Authority will find an award deficient as failing to draw its essence from the 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 obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *Id.* at 133.

In asserting that the award is deficient because the Arbitrator essentially found that the grievant engaged in misconduct that warranted discipline, the Agency misconstrues the award. In this regard, the Arbitrator specifically found that the discipline was "disparate in nature" and "therefore, unreasonable." Award at 3. The Agency fails to establish that it is irrational, unfounded, implausible, or in disregard of the agreement for the Arbitrator to find no just cause on the basis of disparate treatment. Moreover, the Agency's reliance on *SSA* and *SSA, Lansing* is misplaced because those cases did not involve awards where the arbitrators found no just cause for discipline. Accordingly, we deny the exception.¹

B. The Agency fails to establish that the award is contrary to the Statute.

We construe the Agency's claim that the Arbitrator exceeded his authority by "disregarding" its right to discipline employees under the Statute as a claim that the award is contrary to the Statute. Exceptions at 7. When an exception contends that an arbitration award is contrary to law, the Authority reviews *de novo* the question of law raised by the exception and the award. *E.g., NTEU Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *E.g., NFFE Local 1437*, 53 FLRA 1703, 1710 (1998).

The Agency argues that the award "renders it impossible" for the Agency to discipline employees for violations of the sanctions policy. Exceptions at 7. However, the Agency has not shown how the Arbitrator's nonprecedential award would apply to decisions to discipline other employees for violations of the sanctions policy. As the Agency fails to specify how the award is contrary to § 7106(a)(2)(A), we deny this exception as a bare assertion. *See United States Dep't of the Interior, Nat'l Park Serv., Women's Rights Nat'l Historical Park, Northeast Region, Seneca Falls, N.Y.*, 62 FLRA 378, 381 (2008).

C. The Agency fails to establish that the award is deficient as based on nonfacts.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *E.g., NFFE Local 1984*, 56 FLRA 38, 41 (2000). The Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *Id.* In addition, we note that, as set forth above, the award resulted from an "expedited" proceeding, which has resulted in a both an abbreviated award and an abbreviated record. *See Award at 2.*

The Agency notes, and the Union concedes, that the Arbitrator twice referred to the discipline of the

1. Chairman Pope notes her dissent in *SSA, Lansing*, 58 FLRA at 96-97. Chairman Pope also notes her agreement that *SSA, Lansing* is distinguishable from the situation in this case because in that case, unlike this one, the arbitrator found that discipline was warranted. Nevertheless, for the reasons set forth in the dissent, Member Pope affirms that, in her view, *SSA, Lansing* was wrongly decided. *See United States Dep't of the Air Force, David-Monthan AFB, Tucson, AZ.*, 63 FLRA 241, 244 n.4 (2009).

grievant as a termination. Exceptions at 7; Opposition at 10. However, the Agency fails to establish that these erroneous references were material to the outcome of the award. We note that, in his actual "Award," the Arbitrator correctly describes the discipline as a 14-day suspension. Award at 2. Consequently, the Arbitrator's erroneous references provide no basis for finding the award deficient as based on a nonfact. *United States Dep't of the Army, Corps of Engineers, Walla Walla Dist., Pasco, Wash.*, 63 FLRA 161, 163 (2009) (nonfact exception denied where appealing party failed to show that arbitrator's confusion over the names of supervisors was material to the outcome of the award).

The Agency also objects to the Arbitrator's statement that the grievant "advised investigators . . . that it was common practice for an employee of the [local office] to access records for another employee in order to assist each other in their workloads." Award at 3. In this regard, as shown by the record of investigation submitted by the Agency with its exceptions, the grievant actually advised investigators that he was "not aware" of other agency employees making unauthorized queries into the database. Exceptions, Exh. 5. However, the Agency fails to establish that, but for the Arbitrator's mischaracterization of the grievant's statement, he would not have revoked the suspension. As the Arbitrator specifically explained, he was persuaded that the grievant was treated disparately by the union witness, who "testified quite convincingly that what [the] [g]rievant was disciplined for was common practice" in the local office. Award at 3. As the Agency does not dispute this testimony on which the Arbitrator expressly relied in finding that the suspension was not for just cause, the Arbitrator's mischaracterization of the grievant's statement provides no basis on which to find the award deficient as based on a nonfact. *See AFGE Council 236 of GSA Locals*, 63 FLRA 210, 211-12 (*Council 236*)(Authority denied nonfact exception because, even if the disputed findings of the arbitrator were clearly erroneous, appealing party failed to establish that the arbitrator would have reached a different result but for the disputed findings).

Finally, the Agency has not established that, as a result of the Arbitrator's error regarding the grievant's statement to investigators, the Arbitrator's statement that the testimony of the Union witness was un rebutted is a nonfact. In this connection, according to the Arbitrator and not disputed by the Agency, the Union witness testified that it was a common practice in the local office for an employee to access records for another employee in order to assist each other in their workloads. *See* Award at 3. On the other hand, as noted

above, the grievant's statement to investigators was merely that he was "not aware" of such practice. Exceptions, Exh.5. Thus, the grievant's statement does not necessarily rebut the Union witness testimony such that the Arbitrator's finding on this point is clearly erroneous. Moreover, the Agency fails to establish that, but for the Arbitrator's mischaracterization of the grievant's statement to investigators, the Arbitrator would not have found the testimony of the Union witness convincing and would have reached a different result. Consequently, the Agency provides no basis for finding the award deficient as based on a nonfact. *See Council 236*, 63 FLRA at 211-12; *NATCA, Local R3-35*, 52 FLRA 866, 869 (1997) (nonfact exception denied because appealing party failed to establish that alleged nonfact was clearly erroneous).

Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.