

64 FLRA No. 85

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1923
(Union)

0-AR-4310

DECISION

February 23, 2010

Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

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

The Arbitrator found that the grievant's three-day suspension was consistent with the seriousness of his offense but sustained the grievance, setting aside the suspension and instructing the grievant to write an apology letter instead. The award stated that if the grievant did not write the letter, then the three-day suspension would stand.

For the reasons that follow, we deny the Union's exceptions and remand the award for clarification in connection with the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency's Office of the General Counsel (OGC) includes an Office of Program Law (OPL) and an Office of General Law (OGL). The grievant is a senior attorney in OPL.

An OGL employee mistakenly emailed documents intended only for OGL staff to everyone at OGC headquarters. The grievant and one of his OPL colleagues received the email with the documents attached. The email's subject stated: "Corrected Version of Arbitration Litigation Plan and Training Outline — CONFIDENTIAL."¹ Agency's Exceptions, Ex. B.2. Although the colleague had also received the email, the grievant forwarded it to him along with the comment, "I don't think he was supposed to send us this! Cool!!!" *Id.* at Ex. B.3. The colleague read the email forwarded by the grievant, typed "Fyi Management strategy in arbitrations" above the grievant's comments, and then forwarded it to a Union attorney. *Id.* at Ex. B.4.

The Agency proposed suspending the grievant for three days for unbecoming and unprofessional conduct, specifically, forwarding confidential information that he knew he should not have received or transmitted further. A grievance was filed, and when unresolved, it proceeded to an expedited arbitration hearing.

At arbitration, the parties did not stipulate the issues for resolution, and the Arbitrator did not frame any particular issue. He stated: (1) the grievant was protesting his three-day suspension for unbecoming and unprofessional conduct; (2) the Agency has a right to expect employees to be trustworthy, and the grievant's action violated that trust; (3) the three-day suspension "appears consistent with the seriousness of the offense and the grievant's unblemished record of the past"; and (4) "the Arbitrator agrees with the Agency's interpretation of the facts presented into evidence." Nevertheless, "the Arbitrator believe[d] that the grievant should have one last chance to redeem himself and to maintain a clean disciplinary record[.]" so the Arbitrator "sus-

1. The bottom of the email contained a disclaimer:

THE INFORMATION CONTAINED IN THIS TRANSMITTAL MAY BE CONFIDENTIAL AND MAY BE PROTECTED FROM DISCLOSURE UNDER ATTORNEY-CLIENT AND/OR ATTORNEY WORK PRODUCT PRIVILEGES. . . IF YOU RECEIVED THIS TRANSMITTAL IN ERROR, ANY DISSEMINATION, DISTRIBUTION[,] OR COPYING OF THIS TRANSMITTAL IS PROHIBITED. . . . PLEASE NOTIFY THE SENDER VIA A RETURN E-MAIL TRANSMISSION FOR INSTRUCTIONS AS TO THE DISPOSAL OF THE TRANSMITTAL.

Agency's Exceptions, Ex. B.2.

The bottom of each page of the documents attached to the email also contained a notice:

CONFIDENTIAL: ATTORNEY WORK PRODUCT FOR USE BY OGC AND/OR REPRESENTATIVES OF SSA MANAGEMENT ONLY.

Id.

tained” the grievance and set aside the suspension on the condition that the grievant write an apology letter to appropriate Agency officials. *See* Award at 1-2. The Arbitrator added that if the grievant failed to write the letter as required, then the grievance would be “denied[,]” and the suspension would stand. *Id.* at 2.

III. Positions of the Parties

A. Union’s Exceptions

The Union asserts that, because the Arbitrator failed to “address the legal issue of whether [t]he [g]rievant actually violated Rule 8.4” of the Maryland Lawyer’s Rules of Professional Conduct (hereinafter, Rule 8.4), “it [was] impossible to make a finding of any wrongdoing[.]” Union’s Exceptions at 1, 6. In this regard, the Union asserts that the Agency cited only Rule 8.4 in disciplining the grievant, and, therefore, the Arbitrator was required to determine whether the grievant violated Rule 8.4. *Id.* at 7. According to the Union, the grievant did not violate Rule 8.4. In addition, the Union asserts that the Agency misapplied the “*Douglas* factors” in deciding to suspend the grievant, and the Arbitrator’s failure to address directly whether the grievant engaged in wrongdoing prevented the Arbitrator from “properly apply[ing]” the *Douglas* factors to evaluate the appropriateness of the grievant’s suspension.² *Id.* at 2, 6, 11-13.

Finally, the Union argues that the Agency’s discipline of the grievant is “inconsistent with law because the Government must first establish that there is . . . a rule . . . written where the [g]rievant would be expected to know about it, or that the Agency has specifically expressed [a] rule to the [g]rievant,” before the Agency may impose discipline for violating that rule. The Union contends that, because the Agency never established a rule that the grievant could have violated, any punishment of the grievant cannot withstand “due process challenges.” *Id.* at 10.

B. Agency’s Opposition

The Agency argues that, in absence of a stipulated issue, the Arbitrator was not required to decide whether the grievant violated Rule 8.4. Agency’s Opp’n at 1-2.

In addition, the Agency asserts that the Arbitrator was not required to consider the *Douglas* factors. *Id.* at 8.

C. Agency’s Exceptions

The Agency asserts that the remedy – setting aside the suspension conditioned on the grievant writing an apology letter – fails to draw its essence from the parties’ agreement and that the Arbitrator exceeded his authority by granting that remedy. *See* Agency’s Exceptions at 1. The Agency notes the Arbitrator’s findings that: (1) the Agency conducted a thorough and fair investigation; (2) the Agency has the right to expect its employees to be trustworthy; (3) the grievant violated that trust; and (4) the suspension appeared to be consistent with the seriousness of the offense and grievant’s disciplinary record. *Id.* at 9-10. The Agency maintains that these findings are tantamount to a finding that the Agency had just cause to suspend the grievant for three days. According to the Agency, the award fails to draw its essence from the parties’ agreement because: (1) the agreement does not provide for the remedy issued, and (2) nothing in the agreement permits an arbitrator to recognize a grievant’s misconduct while setting aside the Agency-imposed discipline, in the absence of any violation of the agreement or applicable law by the Agency. In connection with the latter exception, the Agency also argues that an arbitrator exceeds his authority when he concludes that an agency did not violate the parties’ agreement as alleged, but nevertheless provides a remedy. *Id.* at 10 (citing *Wash. Plate Printers Union, Local 2, IPPDSPMEU*, 59 FLRA 417 (2003) (then-Member Pope dissenting in pertinent part)).

D. Union’s Opposition

According to the Union, the decisions cited in the Agency’s exceptions do not apply in this case because the Agency has no table of penalties for this type of alleged misconduct and the contract does not contain specific, applicable punishment guidelines. *See* Union’s Opp’n at 2.

IV. Analysis and Conclusions

A. Whether the award is contrary to law, rule, or regulation

When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of

2. The *Douglas* factors are rules developed by the Merit Systems Protection Board to assist a deciding official in determining an appropriate penalty. The factors may either be mitigating or aggravating. *See Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981). The *Douglas* factors govern adverse actions under 5 U.S.C. §§ 4303 and 7512. *See, e.g., U.S. Gen. Servs. Admin., Ne. & Caribbean Region, N.Y., N.Y.*, 61 FLRA 68, 68 n.2 (2005).

law. See *U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*Ala. Nat'l Guard*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. See *id.*

1. The *Douglas* factors

The Union argues that the Arbitrator could not and did not properly apply the *Douglas* factors. Arbitrators are not required to consider the *Douglas* factors in cases involving suspensions of fourteen days or less. See *Nat'l Air Traffic Controllers Ass'n, MEBA/NMU*, 52 FLRA 787, 792 (1996). As this case involves a three-day suspension, the Arbitrator was not required to apply the *Douglas* factors, and the Union's exception provides no basis for finding the award contrary to law in this regard. See *Ala. Nat'l Guard*, 55 FLRA at 40. Consequently, we deny this exception.

2. Due Process

The Union asserts that the grievant was denied due process. However, an award is not deficient on the ground that an employee's Constitutional right to due process was violated unless the employee was denied notice of the charges, an explanation of the agency's evidence, or an opportunity to reply. See *AFGE, Local 1151*, 54 FLRA 20, 26-27 (1998). The grievant was provided with all of those procedural protections, and therefore, this argument does not support a finding that the award is deficient. Consequently, we deny the due-process exception.

B. Whether the Arbitrator exceeded his authority

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. See *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. See *U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).

1. Union's exceeded-authority exception: failure to address Rule 8.4

The Union excepts to the Arbitrator's failure to address whether the grievant violated Rule 8.4. We construe this argument as an exception that the Arbitrator exceeded his authority. As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration. See, e.g., *U.S. Dep't of Justice,*

Fed. Bureau of Prisons, Fed. Corr. Inst., Ashland, Ky., 58 FLRA 137, 139 (2002). Here, there is no evidence that the Arbitrator considered an alleged violation of Rule 8.4 to be among the issues before him, and the Union provides no basis for concluding that he was required to address it. Thus, the Union does not demonstrate that the Arbitrator exceeded his authority by failing to address an issue that he was required to address. Accordingly, we deny the Union's exceeded-authority exception.

2. Agency's exceeded-authority exception: remedy without violation

The Agency argues that the Arbitrator's findings are tantamount to concluding that the Agency had just cause for suspending the grievant and that the Arbitrator, therefore, exceeded his authority by granting relief to the grievant.

The Authority has held that when an arbitrator decides the merits of a dispute and finds no violation of law or contract, the arbitrator has no authority to provide a remedy. See *NLRB, Tampa, Fla.*, 57 FLRA 880, 881 (2002) (*NLRB*); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Marianna, Fla.*, 56 FLRA 467, 472 (2000) (citing *Veterans Admin.*, 24 FLRA 447, 451 (1986)). Thus, the Authority has found that an arbitrator exceeded her authority when she concluded that an agency did not violate the parties' agreement as alleged, but, nevertheless, she provided a remedy. *NLRB*, 57 FLRA at 881; see also *U.S. Dep't of the Navy, Naval Sea Logistics Ctr., Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688-89 (2002). However, where an award is unclear as to whether an arbitrator's mitigation of a penalty is "based on a finding of a specific violation of applicable authority[.]" the Authority will remand the award for clarification from the arbitrator. See *U.S. Dep't of Justice, INS, Honolulu Dist. Office, Honolulu, Haw.*, 43 FLRA 927, 937 (1992) (*INS, Honolulu*).

As discussed above, the Arbitrator found that the grievant violated the Agency's trust when he forwarded confidential documents that he knew he had received in error. Award at 1. Further, the Arbitrator found that the Agency's investigation was thorough and fair. He also expressed unqualified agreement with "the Agency's interpretation of the facts presented into evidence[.]" *Id.* Moreover, he evaluated the Agency's disciplinary action and found that it "appears consistent with the seriousness of the offense and the grievant's unblemished record of the past." *Id.* Nevertheless, the Arbitrator sustained the grievance and set aside the suspension, on the condition that the grievant write an apology letter.

The Arbitrator's only explicit rationale for setting aside the suspension is his belief that "the grievant should have one last chance to redeem himself and to maintain a clean disciplin[ary] record." *Id.* However, the Arbitrator also found that the Agency-imposed sanction appears to be consistent with the grievant's record. It is unclear whether the Arbitrator was finding a violation of law or contract that warranted a remedy, or whether he was granting a remedy without finding a violation. *See INS, Honolulu*, 43 FLRA at 937.

We acknowledge that the parties' agreement does not require the Arbitrator in an expedited arbitration to state explicitly all of his findings as part of his decision.³ Thus, it is possible that the Arbitrator had a basis for setting aside the suspension that is not specified in his written award. However, we also note that Article 25, Section 7(C) of the parties' agreement states that the arbitrator "shall include a brief written explanation of the decision." It seems reasonable to infer that this requirement for a written explanation includes an unstated corollary requirement that such explanation be internally consistent, which this award is not. Because we are unable to determine whether the award is deficient in this regard, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for clarification of the basis for the remedy.⁴

V. Decision

We deny the Union's exceptions and, in connection with the Agency's exceptions, remand for clarification of the basis for the remedy.

3. The parties' agreement, Article 25, Section 5(F), states, "In *other than expedited cases*, the arbitrator shall make specific finding[s]" (emphasis added). Agency's Exceptions, Ex. E.

4. Because the award is being remanded in connection with the Agency's exceeded-authority exception, and as the essence exception requires a similar clarification, it would be premature to address the Agency's essence exception at this time.