65 FLRA No. 48

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2441
COUNCIL OF PRISON LOCALS
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MORGANTOWN, WEST VIRGINIA
(Agency)

0-AR-4399

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DECISION

October 29, 2010

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

I. Statement of the Case

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

The Arbitrator found that the Union failed to establish that the Agency, by its action in requiring the grievant to adhere to a certain dress code and restricting his use of the Agency's Groupwise system (Groupwise e-mail system), violated the parties' collective bargaining agreements or retaliated against the grievant because of his protected activities. For the reasons that follow, we deny the exceptions.

II. Background and Arbitrator's Award

The Agency (DOJ) operates a minimum security correctional institution under the Bureau of Prisons (BOP) in Morgantown, West, Virginia (facility). Award at 2. The grievant, the President of the Union at the facility, is a drug treatment specialist and a non-uniformed unit member. *Id.*

The grievant met with the Warden of the facility concerning a memorandum that notified unit employees on the day watch shift that they no longer had a 30-minute duty free lunch period. *Id.* at 3. At this meeting, the grievant was on "official time" and was "wearing jeans." *Id.* After the meeting, the grievant advised Union members, through the Agency's Groupwise e-mail system, that the "Union suggested employees who arrive early or stay late [request] overtime and require management to deny overtime in writing." *Id.*

The next day, the Warden met with the grievant and told him that jeans were not acceptable dress while on official time. *Id.* The following day, the grievant again wore jeans. *Id*. The Warden instructed him to change to appropriate trousers, which required the grievant to go home to change clothing. *Id.* at 3 & 6. The grievant complied with this instruction. Later, the Warden and the grievant discussed the matter further in the Warden's office. *Id.* at 3. At some point during this discussion, the grievant asked for a Union representative, which the Warden denied. *Id.* at 3 & 6. At this meeting, the Warden reminded the grievant that he should not be using the Groupwise e-mail system for matters that were not permitted under the parties' master agreement (MA). *Id.* at 3 & 6.

The Union considered the Warden's actions regarding the dress requirement and the Groupwise e-mail system to be retaliation against the grievant because of his protected union activities. *Id.* at 3. The grievant filed a grievance, which was not resolved and was submitted to arbitration. As relevant here, the Arbitrator framed the issues as: [1]

> Did the Warden coerce, intimidate and retaliate against [the] [g]rievant because of his protected activity by, denying him the right to wear "jeans" at the work place, threatening to deny him the opportunity to use a computer provide by the Agency, and requiring him to go home to secure other

1. A third issue concerning whether the Agency denied the grievant the right to a Union representative during the last meeting with the Warden was also before the Arbitrator. The Arbitrator found that the evidence did not establish that this meeting constituted an investigatory interview and, therefore, found that the Agency did not violate the agreements or law. Award at 12. Because the Union does not except to this finding, it will not be mentioned further in this decision.

> clothing in place of the "jeans" [the g]rievant was wearing?
>
> Did the Warden violate the Master Agreement [(MA)] when he told the grievant that he was using an Agency computer to circulate messages to employees throughout the [facility] which the Warden believed were matters pertaining to internal [U]nion matters and thus not permitted by the [MA] and informed [the] [g]rievant that the use of the internal Agency computer system would be denied him if he persisted in such use?

Id. at 1 & 2.

Before the Arbitrator, the Union argued that: (1) the grievant was on official time during the meetings with the Warden and thus was entitled to wear clothing of his choice without regard to Article 10 of the parties' supplemental agreement (SA); [2] and (2) the restriction of the grievant's use of the Groupwise e-mail system was retaliation for the e-mail that he sent concerning overtime use. *Id.* at 4. The Union argued that the Warden's actions constituted reprisal against the grievant because of his protected activities. *Id.* at 5. The Agency disputed the Union's assertions. *Id.* at 6-7.

The Arbitrator examined the parties' agreements and found that Article 10 of the SA contains a "prohibition against 'jeans[.]'" *Id.* at 9. After considering the wording of the parties' agreements, the Arbitrator concluded that the SA "does not make any exception which would cover the non-application of the dress code to persons on [o]fficial [t]ime[.]" *Id.* at 9; *see also id.* at 11. In this regard, the Arbitrator found that a Union officer on official time is not a "normally uniformed person, but rather a professional required to wear appropriate professional dress[.]" *Id.* at 9. The Arbitrator determined that, as a drug treatment specialist, the grievant comes into contact with inmates and his dress is considered to have some effect on his relationship with them. *Id.* Although recognizing that, while on official time, the grievant is not performing his regular work duties, the Arbitrator found that it was not "unreasonable to conclude that [the grievant] may not always be in the Union's office . . . , but may be [involved in situations in] the facility where he could be seen by inmates" under his professional care. *Id.* The Arbitrator also rejected the Union's argument that "past practice" supported the exemption of persons on Union business from the dress requirement, finding that the "evidence of past practice in this regard is scant." *Id.* Moreover, although recognizing "some inconsistency" with the "propriety of permitting 'jeans' to be worn on Dress Down Days" and the "strict requirement of adherence to the standard dress regulations on other occasions, including when [U]nion officials are on [o]fficial [t]ime," the Arbitrator stated that it was not "within [his] authority" to change the language of the agreement and that, if the Union "is dissatisfied with any . . . provision [in the SA,] it should be the subject of current negotiation[s]." *Id.* at 8.

The Arbitrator also found that the evidence was insufficient to conclude that the Warden's action concerning the grievant's wearing of jeans was reprisal or retaliation because of his protected activities. *Id.* at 9. The Arbitrator determined that, because the Warden had been assigned to the facility less than a month before his initial meeting with the grievant, "it was reasonable to conclude" that he was not aware of the jeans provision at that time. *Id.* Moreover, in reaching his conclusion, the Arbitrator noted that the Warden decided "to apply the rule on a consistent basis" and that, as a result, his decision also affected other employees, including supervisors. *Id.* Accordingly, the Arbitrator concluded that the evidence did not establish that the Warden enforced the dress requirement against the grievant as a reprisal or reprimand in an effort to retaliate against him because of his protected activities. *Id.* at 11.

The Arbitrator further found that the Warden's restriction on the grievant's use of the Groupwise e-mail system "was not taken as a reprisal because of [his] protected [U]nion activity." *Id.* The Arbitrator found that the parties' agreements "clearly restrict the use the Union may make of the system[.]" *Id.* The Arbitrator found that Article 12, Section (c) provides that, "[u]nder no circumstances will [Agency] manpower or supplies be used in support of internal Union business[,]" which is defined as "any activities performed by any employee relating to the internal business of a labor organization." *Id.* at 10. The Arbitrator examined e-mails submitted by the Agency and determined that the e-mails concerned internal Union business. *Id.* at 10 & 11. The Arbitrator also found that the Administrative Law Judge's (ALJ) decision in *SBA, Newark, N.J.*, FLRA ALJ Dec. Rep. No. 138, 1998 WL 964232 (*SBA*), cited by the Union, was not controlling because the parties' agreement in that case differed "markedly" "with respect to [the] restrictions on the use of

2. The relevant text of the parties' agreements is set forth in the appendix to this decision.

agency email by the union" from the parties' MA in the subject case. *Id.* at 11.

The Arbitrator denied the grievance, finding that the "evidence . . . [did] not establish that the Agency violated the [parties'] . . . agreements" or that it "took action against the [g]rievant as a reprisal or [retaliation] because of his Union activities." *Id.* at 11-12.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the award fails to draw its essence from the parties' agreements. Exceptions at 1 & 7. The Union contends that the award "contradicts . . . the partie[s' MA] . . . to include but not limited to Articles 6, 12 and 32." *Id.* at 4. Specifically, the Union asserts that Article 12, Section (c) defines internal union business. The Union states that it "stipulated" that the Union could not "use the Groupwise [e-mail] system to conduct internal union business" as provided in the parties' MA and § 7131(b) of the Statute, but that testimony shows that it can use the system to conduct official business as provided by Article 12. *Id.* at 5. The Union asserts that the "[e-mail] advising bargaining unit staff of their right to overtime" concerning the lunch hour does not concern internal union business. *Id.* at 6.

In addition, the Union contends that the Arbitrator exceeded his authority. *Id.* at 1 & 5. According to the Union, by finding no violation of Article 12, the Arbitrator "change[d]" the meaning of this provision. *Id.* at 5.

The Union further asserts that the Arbitrator erred by finding that the evidence did not establish that the Agency retaliated against the grievant because of his protected activities and argues that such finding is contrary to §§ 7114, 7116(a)(1) and (2), and 7131(b) of the Statute. *Id.* at 4 & 7. The Union claims that the Agency's action in restricting the grievant's use of the Groupwise e-mail system and "enforc[ing the] dress requirement against [him]" while he was on official time was reprisal because of his protected activities. *Id.* at 6. The Union asserts that the "e-mail advising [unit employees] of their right to overtime" does not constitute internal union business within the meaning of § 7131(b) and that such activity is protected under § 7114. *Id.* The Union argues that *NTEU*, 6 FLRA 508 (1981), and *SBA* support its position that the e-mails did not concern internal union business under Article 12. *Id.* at 5-6.

B. Agency's Opposition

The Agency disputes the Union's claim that the award fails to draw its essence from the parties' MA. The Agency asserts that the Union cites Articles 6, 12, and 32, of the parties' MA, but only provides arguments concerning Article 12. Opp'n at 4. The Agency contends that the Arbitrator specifically found that the e-mails in dispute were not permitted pursuant to Article 12 because they dealt with internal union business. *Id.* at 5.

The Agency contends that the Union has not demonstrated that the Arbitrator exceeded his authority with respect to Article 12. *Id.* at 6-7. The Agency asserts that the award was directly responsive to the issues as determined by the Arbitrator. *Id.* at 7. The Agency also asserts that the Union has not demonstrated that the award is contrary to any law, rule, or regulation. *Id.* at 7-9.

IV. Analysis and Conclusions

A. The award does not fail to draw its essence from the parties' agreements.

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. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 129, 132-33 (2007). Accordingly, the party appealing the award must establish 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. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Union argues that the award "contradicts . . . the partie[s'] [MA] . . . to include but not limited to Articles 6, 12 and 32." Exceptions at 4. Specifically, the Union contends that, although it "stipulated" that the Union could not "use the Groupwise [e-mail] system to conduct *internal* union business" as

provided in the parties' MA and § 7131(b) of the Statute, the Union can use the system to conduct *official* business as provided by Article 12. *Id.* at 5 (emphasis added). The Union asserts that the "[e- mail] advising bargaining unit staff of their right to overtime" concerning the lunch hour does not concern internal union business. *Id.* at 6.

The Arbitrator framed one of the issues before him as:

> Did the Warden violate the [MA] when he told [the g]rievant he was using an Agency computer to circulate messages to employees throughout the [facility] which the Warden believed were matters pertaining to internal union matters and thus not permitted by the [MA] and informed [the g]rievant that the use of the internal Agency computer system would be denied him if he persisted in such use?

Award at 2. In resolving this issue, the Arbitrator examined Article 12, Section (c) of the MA, which identifies Agency items available for the Union's use, including office equipment, and provides how the items may be used. *See id.* at 5. Article 12, Section (c) provides, in part, that "[i]t is understood that such use of these items is expected to promote efficient labor management relations. Under no circumstances will [Agency] manpower or supplies be used in support of internal Union business." *Id.* at 5.

Applying this provision, the Arbitrator found that, during a meeting with the grievant, the Warden instructed the grievant to "discontinue use of the Groupwise [e-mail] system for internal union business." *Id.* at 10. The Arbitrator found that the disputed Union e-mails demonstrated that the Union was using the Groupwise e-mail system in support of internal Union business, and that, therefore, the Agency's action in instructing the grievant to discontinue use of the Groupwise e-mail system for internal union business did not violate the parties' agreements. *See id.* at 10-11. The Arbitrator's finding was based on his evaluation of the evidence and his interpretation and application of Article 12. *See id.* As set forth above, the Authority defers to the Arbitrator's interpretation of the agreement "because it is the [A]rbitrator's construction of the agreement for which the parties have bargained." *OSHA*, 34 FLRA at 576. The Union has not demonstrated that the Arbitrator's interpretation of Article 12, Section (c) is irrational, implausible, or otherwise deficient.

Moreover, to the extent that the union claims that the award fails to draw its essence from other provisions of the parties' agreements, including Article 10, the Union fails to provide any explanation or arguments to support this claim. When a party fails to provide any arguments or authority to support its contention, the Authority will deny the exception as a bare assertion. *See, e.g.*, *AFGE, Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1117 (2010). Therefore, we deny the claim as a bare assertion.

Accordingly, we find that the Union has not demonstrated that the award fails to draw its essence from the parties' agreements, and we deny this exception.

B. The Arbitrator did not exceed his authority.

The Union asserts that, by finding no violation of Article 12 of the parties' MA, the Arbitrator changed the meaning of this provision. Exceptions at 5. 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. *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. *U.S. Dep't of the Air Force*, 61 FLRA 797, 801 (2006); *U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).

We find no merit to the Union's claim that the Arbitrator exceeded his authority. One of the issues framed by the Arbitrator was:

> Did the Warden violate the [MA] when he told [the g]rievant that he was using an Agency computer to circulate messages to employees throughout the [facility] which the Warden believed were matters pertaining to internal union matters and thus not permitted by the [MA] and informed [the g]rievant that the use of the internal Agency computer system would be denied him if he persisted in such use?

Award at 2. Interpreting and applying Article 12, Section (c) of the parties' MA, the Arbitrator found that, because the Union's e-mails concerned internal union business, the Agency did not violate the parties' MA by instructing the grievant not to use the Groupwise e-mail system for such matters. This

finding is directly responsive to the framed issue. The Union has not provided any information that demonstrates that the Arbitrator's finding exceeds any limitations on his authority that are imposed by the parties' MA.

Accordingly, we deny this exception.

C. The award is not contrary to law.

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 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). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Union asserts that the Arbitrator erred by finding that the evidence did not establish that the Agency retaliated against the grievant because of his protected activities and argues that such finding is contrary to §§ 7114, 7116(a)(1) and (2), and 7131(b) of the Statute. Although the record does not reveal whether the Union referenced a particular section of the Statute in the grievance, one of the issues framed by the Arbitrator was:

> Did the Warden coerce, intimidate and retaliate against [the] [g]rievant because of his protected activity by, denying him the right to wear "jeans" at the work place, threatening to deny him the opportunity to use a computer provided by the Agency, and requiring him to go home to secure other clothing in place of the "jeans" [g]rievant was wearing?

Award at 1. In addition, in alleging that the Agency retaliated against the grievant, the Union relied on *SBA,* which involved a § 7116(a)(1) and (2) allegation, and the Arbitrator distinguished that decision from the instant case. *See id.* at 11. These matters indicate that the Arbitrator resolved statutory issues.

Where statutory issues concerning union discrimination are raised, the Authority reviews the award under the statutory principles applicable to § 7116(a)(2). *See, e.g., NLRB*, 61 FLRA 197, 199 (2005); *AFGE*, 59 FLRA 767, 769-70 (2004). Section 7116(a)(2) of the Statute provides that it is an unfair labor practice (ULP) for an agency to encourage or discourage membership in a union by discrimination in connection with hiring, tenure, promotion, or other conditions of employment. When a grievance under § 7121 of the Statute involves an alleged ulp, the arbitrator must apply the same standards and burdens that would be applied by an administrative law judge in a ULP proceeding under § 7118. *See, e.g.*, *AFGE, Local 3529*, 57 FLRA 464, 465 (2001). In a grievance alleging a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *See id.* As in other arbitration cases, the Authority defers to an arbitrator's findings of fact. *See id.*

Further, in cases alleging discrimination, the Authority applies the framework in *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*). *See AFGE, Local 2145*, 64 FLRA 661, 664 (2010) (Member Beck dissenting, in part). Under that framework, the party making such an assertion establishes a *prima facie* case of discrimination by demonstrating that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee. Once the *prima facie* showing is made, an agency may seek to establish the affirmative defense that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken even in the absence of the protected activity.

Turning to the instant case, although the Arbitrator did not expressly apply the *Letterkenny* framework, the record is sufficient for the Authority to do so. In this regard, even assuming that the Union established a *prima facie* case of discrimination with respect to both the dress requirement and the Groupwise e-mail system, the Arbitrator's factual findings establish that provisions of the parties' agreements permitted the Agency's disputed actions – i.e., prohibiting the wearing of jeans and certain use of e-mail. *See IRS, Wash., D.C.*, 47 FLRA 1091, 1110 (1993) (an agency may rebut a *prima facie* showing that its actions would constitute a violation of a statutory right by establishing the parties' collective bargaining agreement permitted the agency's actions); *see also*, *SSA, Region VII, Kan. City, Mo.*, 55 FLRA 536, 538 (1999).

With respect to the dress requirement, Article 10 of the parties' SA concerns work attire for "[n]on-uniformed staff" and provides that "[u]nacceptable attire includes jeans[.]" Award at 4; Exceptions, Attach., SA at 6. The Arbitrator interpreted this provision and found that Article 10 applied to the grievant, a Union officer and non-uniformed member of the staff. *Id*. at 9. The Arbitrator further found that the parties' SA "does not make any exception which could cover the non-application of the dress code to persons on [o]fficial [t]ime" and that the Warden applied the rule on a "consistent basis which affected other employees as well as supervisors[.]" *Id.* As to the Groupwise e-mail system, the Arbitrator found that the parties' labor agreements "clearly restrict the use the Union may make of the system[.]" *Id*. at 11. In this regard, the Arbitrator found that Article 12, Section (c) of the parties' MA provides that, "[u]nder no circumstances will [Agency] manpower or supplies be used in support of internal Union business[,]" which is defined as "any activities performed by any employee relating to the internal business of a labor organization." *Id.* at 10. The Arbitrator examined e-mails submitted by the Agency as evidence and found that relevant e-mails fell within this contractual prohibition. *Id*. (e.g., grievant's e-mail to a unit employee questioning the employee's attendance at Union meetings and grievant's e-mail to unit employee regarding grievant's performance as a Union officer).

Moreover, the Union has not asserted that either of the relevant contract provisions is unenforceable, nor has it demonstrated that the award fails to draw its essence from the parties' agreements. As such, the Agency established its affirmative defense that provisions of the parties' agreements permitted the Agency to prohibit the grievant from wearing jeans and using the Groupwise e-mail system in support of internal Union business.

In addition, the cases cited by the Union provide no basis for finding the award deficient. In this regard, *NTEU* involved a proposal that concerned an announcement card that would be distributed to union members. *See NTEU,* 6 FLRA at 518. The proposal was found to be within the duty to bargain because the card simply advised employees of the union's status as exclusive representative and did not involve internal union business, as found here. *Id.* at 520. Further, *SBA* is non-precedential because it is an ALJ's decision to which no exceptions were filed. *See, e.g.*, *PASS*, 56 FLRA at 125 n.*.

Accordingly, we find that the Union has not demonstrated that the award is contrary to law, and we deny this exception.

V. Decision

The Union's exceptions are denied.

APPENDIX

ARTICLE 10 of the parties' SA provides as follows:

ARTICLE 10 NON-UNIFORM WORK ATTIRE

> Non-uniformed staff may wear apparel that is deemed professional in nature. Unacceptable attire includes: jeans, skirts (including split skirts) and dresses above the knee, spandex, t-shirts, sweatshirts, sweatpants, shorts (except authorized uniforms), jogging suits, tank tops, leotards, high spiked heel shoes, sand[als], low cut, backless or sheer clothing, or any other item thought of as casual or recreational.

Exceptions, Attach., SA at 6.

ARTICLE 12 of the parties' MA provides as follows:

ARTICLE 12 USE OF OFFICIAL FACILITIES

> Section a. The [Agency] agrees to permit distribution of notices and circulars sponsored by the Union to all employees in the unit through regular internal distribution procedure provided that they:
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> 1. are reasonable in size;
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> 2. are signed by the local President or designee;
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> 3. contain nothing that would seem to identify them as official [Agency] material or imply that they are sponsored or endorsed by the [Agency];
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> 4. are limited to matters of direct concern to employees in relation to the Union or the [Agency], which will not endanger staff or the security of the institution; and
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> 5. require no significant staff time.
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> . . . .
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> Section c. The use of [Agency] bulletin boards, office space, and office equipment is negotiable at the local level. It is understood that such use of these items is expected to promote efficient labor management relations. Under no circumstances will [Agency] manpower or supplies be used in support of internal Union business. Internal Union business is defined as: any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues).

Exceptions, Attach., MA at 35.