65 FLRA No. 157

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
U.S. BORDER PATROL
EL CENTRO SECTOR
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 2554
(Union)

0-AR-4647

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DECISION

April 27, 2011

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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 John P. McCrory 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.[1]

The Arbitrator found that the Agency violated the parties' agreement by suspending the grievant for fourteen days without just cause or reasons that would promote the efficiency of the service. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

A. Background

While on duty, the grievant attempted to free his Agency vehicle from the sand in which it was stuck, and, in the process, he dislodged its bumper. *See* Award at 3. Without the vehicle, he could not continue tracking a nearby group of suspected illegal aliens. *See id.* at 3, 12. The grievant's first-level supervisor directed him to write a memorandum concerning the incident (memo), which the grievant did. *See id.* at 3. In the memo's first three paragraphs, the grievant wrote that he was submitting the memo because he understood that it was required as a condition of employment but that he was reserving any protections afforded him by the United States Constitution or other laws, "especially under the [F]ifth and [F]ourteenth [A]mendments," as well as those protections recognized by certain Supreme Court decisions. *See id.* at 3-4 (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967) (*Garrity*)). When the grievant's first-level supervisor instructed him to remove the first three paragraphs (the *Garrity* preamble, or preamble), he refused. *See id.* at 4.

After a discussion with his second-level supervisor, the grievant agreed to revise the memo. *Id.* Specifically, the grievant removed the *Garrity* preamble but replaced it with a new paragraph, in which he indicated that he was submitting the memo after receiving assurances from his second-level supervisor that the memo would neither leave the station nor result in discipline. *See id.* Upon reviewing the revised memo, the second-level supervisor directed him to remove the new paragraph because the second-level supervisor believed that it mischaracterized their earlier conversation. *See id.* The grievant responded by resubmitting the original version of his memo, including the *Garrity* preamble. *See id.*

After learning of the grievant's insistence that the *Garrity* preamble remain in the memo, the grievant's third-level supervisor met with him. *See id.* When asked whether he would remove the preamble, the grievant declined, in response to which his third-level supervisor stated that "if [the grievant] did not[,] he would be subjecting himself to insubordination." *Id.* After the grievant insisted that "he was relying on his constitutional rights in refusing to remove the preamble[,]" *id.* at 4-5 (footnote omitted), the third-level supervisor "gave him a direct order to remove the *Garrity* [p]reamble . . . , which the [g]rievant chose to disobey[,]" *id.* at 4. As a result, the Agency charged the grievant with insubordination and suspended him for fourteen days, the "sole basis for which . . . [was] his refusal to obey an order to remove the *Garrity* [p]reamble" from his memo. *Id.* at 6. The Union filed a grievance challenging the suspension, and when the matter was not resolved, the parties proceeded to arbitration.

B. Arbitrator's Award

The Arbitrator framed the following issue for resolution: "In accordance with . . . the parties' [a]greement, was the disciplinary action in this case taken for just cause and only for reasons that will promote the efficiency of the service?" *Id.* at 2 (citing Art. 32, § M of the parties' agreement).[2] The Arbitrator stated that the

1. The parties also filed several supplemental submissions, which are addressed *infra* Part III.

2. Article 32, Section M of the parties' agreement states, in pertinent part: "The parties agree that . . . suspension of less

"Agency ha[d] the burden . . . to establish, by a preponderance of the evidence," that the grievant's suspension complied with the parties' agreement. *Id.* at 10.

Addressing the propriety of punishing the grievant for his refusal to remove the preamble, the Arbitrator stated that the "government cannot penalize the assertion of the privilege" against self-incrimination by threatening to take serious disciplinary action against an employee because he or she invokes the privilege. *Id.* at 11-12 (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977)). In this regard, the Arbitrator found that "the Agency, by the actions of its supervisor, had a direct role in causing" the grievant to "belie[ve] that termination could result from disobeying" the order to remove the *Garrity* preamble and that, consequently, the Agency had improperly penalized the grievant's assertion of his Fifth Amendment rights. *Id.* at 12. In response to the Agency's argument that the grievant should have obeyed the order to remove the preamble and grieved the issue later, the Arbitrator determined that "[o]rders that cause the surrender of constitutional rights" fall within a recognized exception to the "obey now[,] . . . grieve later rule[.]" *Id.* at 11 (citations omitted) (internal quotation marks omitted).

In addition, the Arbitrator found that other components of the Agency permitted employees to include a *Garrity* preamble in their memos and that permitting the grievant to do the same "would have been relatively costless to the Agency." *Id.* at 13. The Arbitrator also noted that the Agency had other alternatives, such as: agreeing to a memorandum of understanding recognizing the applicability of *Garrity* protections to all memos concerning on-duty performance; or providing routine *Garrity* rights notices to officers when they were required to write a memo, which would obviate the need for reservations of rights in the memos themselves. *Id.* The Arbitrator found that the availability of these "'relatively costless' alternative courses of action[, which] would address [the Agency's] stated concerns without infringing [on] the rights of agents[,]" belied the Agency's contention that permitting employees to include preambles in memos would "significantly undermine the efficiency of the Agency." *Id.* Accordingly, the Arbitrator found that the "Agency [did] not . . . establish just cause for the [g]rievant's suspension[,] or that the suspension was only for reasons as will promote the efficiency of the Agency." *Id.* at 14.

than fifteen days . . . will be taken only for appropriate cause as provided in applicable law. Such cause . . . shall be just and sufficient and only for reasons as will promote the efficiency of the [s]ervice." Award at 2; *see also* Exceptions, Attach., Joint Ex. 1 at 51.

III. Preliminary Matters

As noted previously, *supra* note 1, the parties filed several supplemental submissions. Specifically, the Agency filed a motion for leave to file a motion to strike certain attachments to the Union's opposition. *See* Mot. for Leave to File & Mot. to Strike (Motions) at 1 (citing 5 C.F.R. § 2429.26(a)).[3] In its concurrently filed motion to strike, the Agency contends that attachments to the Union's opposition either were not presented in the proceedings before the Arbitrator, although they could have been presented, or are irrelevant to the parties' dispute. *See* Motions at 2-3 (citing 5 C.F.R. § 2429.5).[4] In addition, the Agency requests that, if the Authority strikes attachments to the Union's opposition, then the Authority also strike any references to those attachments from the Union's arguments in opposition to the exceptions. *See id.* at 2. The Union filed a motion opposing the Agency's motion to strike. *See* Opp'n to Agency's Mot. to Strike at 1.

Section 2429.26 of the Authority's Regulations (the Regulations) requires a party filing a supplemental submission to request permission to do so. 5 C.F.R. § 2429.26; *see also AFGE, Local 1061*, 63 FLRA 317, 317 n.1 (2009). In addition, a filing party must demonstrate why its supplemental submission should be considered. *NTEU, Chapter 98*, 60 FLRA 448, 448 n.2 (2004) (Chairman Cabaniss dissenting as to other matters) (*Chapter 98*). The Authority has granted permission to file motions to strike where a moving party alleges that evidence or arguments presented for the Authority's consideration were not presented in the proceedings before the arbitrator. *E.g.*, *U.S. Dep't of the Interior, Nat'l Park Serv., Women's Rights Nat'l Historic Park, Ne. Region, Seneca Falls, N.Y.*, 62 FLRA 378, 379 (2008) (*Interior*). The Agency's motion to strike alleges that certain parts of the Union's opposition to the exceptions were not presented before the Arbitrator. Thus, consistent with *Interior*, we grant the Agency's motion for leave to file its motion to strike. *See Chapter 98*, 60 FLRA at 448 n.2. However, the Union did not request permission to file its opposition to the motion to strike. *See* 5 C.F.R. § 2429.26. Therefore, we decline to

3. 5 C.F.R. § 2429.26(a) states, in pertinent part: "The Authority . . . may in [its] discretion grant leave to file other documents as [it] deem[s] appropriate."

4. The Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations – including § 2429.5 – were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the exceptions and opposition in this case were filed before the effective date of the revised Regulations, we apply the prior version of the Regulations. Under the prior Regulations, 5 C.F.R. § 2429.5 stated, in pertinent part: "The Authority will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the . . . arbitrator."

consider the Union's opposing motion. *Cf. U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 535 n.1 (2010) (declining to consider motion to strike without request for leave to file).

Under § 2429.5 of the Regulations, the Authority generally will not consider evidence or arguments that could have been, but were not, presented to the arbitrator. *See supra* note 4 for text of § 2429.5; *see Soc. Sec. Admin.*, 57 FLRA 530, 534 (2001) (*SSA*) (citing *NAGE, Local R4-45*, 53 FLRA 517, 520 (1997); *U.S. Agency for Int'l Dev.*, 53 FLRA 187, 187 n.2 (1997)). In addition, the Authority has held that awards are not subject to review on the basis of evidence that comes into existence after arbitration. *See, e.g., U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1068 n.12 (2001) (*Corpus Christi*). However, § 2429.5 does not preclude consideration of arguments in support of exceptions where such arguments arise from the issuance of an award and could not have been presented at arbitration. *See NAGE, Local R3-77*, 59 FLRA 937, 940 (2004) (Chairman Cabaniss dissenting as to other matters) (*Local R3-77*) (citing *U.S. Dep't of the Navy, Supervisor of Shipbuilding Conversion & Repair, Pascagoula, Miss.*, 57 FLRA 744, 745 (2002)); *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 57 FLRA 4, 5 (2001) (Chairman Cabaniss concurring) (*USDA*) (citing *Prof'l Airways Sys. Specialists, Dist. No. 1, MEBA/NMU (AFL-CIO)*, 48 FLRA 764, 768 n.* (1993)).

The Union's attachment A provides the job title and describes the responsibilities of an Agency official who was promoted to a high-ranking position within the Agency after the award issued. *See* Opp'n, Attach. A; *see also* Opp'n at 1 (describing Union's purpose for submitting attachment A). The job title and responsibilities listed in the attachment are those of the official after his promotion. *See id.* The Union contends that, in his *former* position – which he held at the time that arbitration proceedings occurred in this case – this official was in charge of a component of the Agency that "entered into a Memorandum of Understanding [(MOU)] with the Union" permitting employees to reserve their *Garrity* rights in connection with any memo that the Agency compelled them to submit. *See* Opp'n at 1. According to the Union, the eventual promotion of this official reinforces the soundness of his decision, while occupying his former position, to enter into the aforementioned MOU. *See id.* As the promotion of this official occurred after the award issued, the information in the attachment came into existence after arbitration. *See Corpus Christi*, 56 FLRA at 1068 n.12. In addition, there is no indication that the promotion arose from (i.e., occurred because of) the issuance of the award. *Cf. Local R3-77*, 59 FLRA at 940 (§ 2429.5 does not preclude consideration of issues arising from award that could not have been presented at arbitration). Accordingly, we strike attachment A from the record.

Attachments B and C concern a grievance arbitration over an Agency employee's *Garrity* rights; that arbitration involved the same agency and union as this dispute but a different grievant. *See* Opp'n, Attachs. B & C. Both attachments are dated months before the Arbitrator issued the award at issue here. *See id.* However, there is no indication that the Union submitted these materials to the Arbitrator, although the Union presented other evidence at arbitration regarding the use of *Garrity* preambles by other Agency employees. *E.g.*, Award at 1, 6 ("The Union offered evidence regarding the use of the *Garrity* [p]reamble in the [Agency's other] Sectors."), 9, 13. Thus, the Union could have presented attachments B and C at arbitration. Because there is no indication that the Union did so, we strike attachments B and C from the record. *See* 5 C.F.R. § 2429.5; *SSA*, 57 FLRA at 534.

Attachments D and E are letters to another arbitrator addressing whether he should take official notice of the Arbitrator's award in the instant dispute, *see* Opp'n, Attachs. D & E, which establishes that the letters came into existence after the Arbitrator issued the award. However, the question of whether another arbitrator should take notice of the Arbitrator's award is a matter that arises from the issuance of the award and could not have been presented to the Arbitrator. *See Local R3-77*, 59 FLRA at 940; *USDA*, 57 FLRA at 5. Because § 2429.5 does not bar the consideration of matters that arise from the issuance of the award and could not have been presented to the Arbitrator, *see id.*, we deny the motion to strike attachments D and E from the record.[5]

Finally, the Union argues in its opposition to the exceptions that the Arbitrator's professional qualifications, as reflected in attachments F and G, counsel in favor of upholding his award. *See* Opp'n at 3. The Union would have had no reason to make this argument until after the award issued. *Cf. U.S. Dep't of Veterans Affairs Med. Ctr., N. Chi., Ill.*, 52 FLRA 387, 399 n.10 (1996) (submissions pertaining to whether award was deficient arose as result of award and, thus, were not barred by § 2429.5). Therefore, we deny the motion to strike attachments F and G. *See Local R3-77*, 59 FLRA at 940; *USDA*, 57 FLRA at 5.

5. Although the Agency objects to several of these attachments as irrelevant, a party need not demonstrate the relevance of the documents that it files with its exceptions or opposition in order for the Authority to accept those documents for consideration. *Cf. NFFE, Bureau of Indian Affairs Council*, 31 FLRA 3, 8 n.3 (1988) (although various documents were "of questionable relevance" to resolving the parties' dispute, they were not "of such nature to warrant granting a motion to strike"). In contrast, as discussed above, if a party requests permission to file a *supplemental* submission, then that party must demonstrate why its supplemental submission should be considered, *NTEU, Chapter 98*, 60 FLRA at 448 n.2, including that submission's relevance to the parties' dispute.

In accordance with the foregoing, we also grant the Agency's request to strike from the Union's opposition any references to attachments A, B, and C.

IV. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the Arbitrator's finding that the grievant was compelled to submit the memo is based on the nonfact that the grievant reasonably believed that he was required to submit the memo or face termination. *See* Exceptions at 12, 23, 25. The Agency further argues that the award is contrary to *Garrity* and other judicial decisions concerning the employee protections first recognized in *Garrity*. *See, e.g.*, *id.* at 11, 12-13, 23, 31-32, 34. Finally, the Agency argues that the award is contrary to law because it does not require obedience to the "obey now, grieve later" rule. *See, e.g.*, *id.* at 36-38.

B. Union's Opposition

The Union disputes the Agency's assertion that the memo was not compelled. *See* Opp'n at 4-5. In addition, the Union contends that the award is consistent with *Garrity* and its progeny, as well as the "obey now, grieve later" rule. *See id.* at 9-10.

V. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the Arbitrator's finding that the grievant was compelled to submit the memo is based on the nonfact that the grievant reasonably believed that he was required to submit the memo or face termination. Exceptions at 12. 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. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, 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. *See id.* Even assuming that the Arbitrator's finding regarding compulsion constitutes a factual determination, the parties disputed this matter before the Arbitrator. *See* Award at 7 (Agency argued that grievant failed to establish compulsion to submit the memo), 9 (Union argued grievant included preamble in memo "to document that the statement was compelled and therefore protected"). Therefore, we deny the nonfact exception.

B. The award is not contrary to law.

The Agency alleges that the award is contrary to *Garrity* and the "obey now, grieve later" rule. 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.*

Although the Agency alleges flaws in the Arbitrator's legal analyses concerning *Garrity* rights and the "obey now, grieve later" rule, *e.g.*, Exceptions at 36-38, the issue framed by the Arbitrator involved whether "disciplinary action in this case [was] taken for just cause and only for reasons that will promote the efficiency of the service[.]" Award at 2 (citing Art. 32, § M of the parties' agreement). Where an arbitrator resolves a claim under a collective bargaining agreement (CBA) rather than a legal claim, "unless a specific burden of proof is required, an arbitrator may establish and apply whatever burden the arbitrator considers appropriate[.]" *U.S. Dep't of Veterans Affairs, VA Md. Healthcare Sys.*, 65 FLRA 619, 621 (2011) (*VA Md.*) (quoting *U.S. GSA, Ne. & Caribbean Region, N.Y.C., N.Y.*, 60 FLRA 864, 866 (2005)) (internal quotation marks omitted). In addition, where an arbitrator is not required to apply a particular legal standard, alleged misapplications of that standard do not provide a basis for finding the arbitrator's award deficient. *E.g.*, *SSA*, 65 FLRA 286, 288 (2010).

The Arbitrator found that the "Agency ha[d] the burden . . . to establish, by a preponderance of the evidence," that the grievant's suspension complied with the parties' agreement. Award at 10. For the reasons set forth *supra* Part II.B., the Arbitrator found that the "Agency [did] not . . . establish just cause for the [g]rievant's suspension[,] or that the suspension was only for reasons as will promote the efficiency of the Agency." *Id.* at 14. Because the issue before the Arbitrator was a contractual claim, the Arbitrator was not required to apply a particular legal standard, and the Arbitrator's alleged misapplication of *Garrity* rights doctrine or the "obey now, grieve later" rule does not provide a basis for setting aside the award as contrary to law. *See SSA*, 65 FLRA at 288. Accordingly, we deny the contrary-to-law exceptions. *Cf. VA Md.*, 65 FLRA at 621-22 (denying contrary-to-law exceptions challenging legal standard used by arbitrator, where arbitrator resolved grievance under parties' agreement on finding of no just cause for discipline).

VI. Decision

The Agency's exceptions are denied.