

65 FLRA No. 178

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2018
(Union)

and

UNITED STATES MARINE CORPS
MARINE AIR GROUND TASK FORCE
TRAINING COMMAND
(Agency)

0-AR-4696

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DECISION

May 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 Jan Stiglitz 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 concluded that the Agency properly suspended the grievant for making a false statement during the course of an investigation. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievant is a financial management analyst. Award at 2. He is also the Union's vice president. *Id.* The grievant met with an Agency attorney (meeting) to discuss a dispute concerning an employee's posting of a grievance on an Agency bulletin board. *Id.* During the meeting, the Agency attorney and the grievant engaged in a heated argument over whether the grievant had been authorized to conduct Union business. *Id.* at 2-3; Opp'n at 2.

Five days later, the grievant informed the Agency of his intent to file an unfair labor practice (ULP) charge alleging, among other things, a "battery upon a [U]nion official" based on an incident at the meeting. Award at 3. In response to the grievant's notice, the Agency conducted an investigation into what occurred at the meeting. *Id.* As part of the investigation, the Agency conducted an investigatory interview of the grievant concerning the meeting. *Id.* During the investigatory interview, an Agency representative asked the grievant whether the Agency attorney touched the grievant during the meeting. *Id.* at 3-4. In response, the grievant claimed that the Agency attorney "poked him in the chest with a finger." *Id.* at 3. Other witnesses who had been at the meeting provided statements to the Agency denying that the Agency attorney poked the grievant in the chest. *Id.*

After the investigation concluded, the Agency imposed a three-day suspension on the grievant for providing false information during the investigatory interview. *Id.* at 1-2. Specifically, the Agency determined that the grievant knowingly made the false statement at the interview that the Agency attorney poked him in the chest at the meeting. *Id.* at 3.

The Union grieved the suspension. Award at 1-2. The grievance was not resolved and was submitted to arbitration. As stipulated by the parties, the issues to be resolved by the Arbitrator were:

1. Did the Agency have just cause to suspend [the grievant] for three days based on the charge of providing false information during an investigation?
2. If not, what is the appropriate remedy?

Id. at 2.

The Arbitrator ruled that the Agency had just cause to impose the three-day suspension on the grievant for providing false information during an investigation. Specifically, the Arbitrator found that the grievant knowingly made the false statement during the investigatory interview that the Agency attorney poked him in the chest at the meeting. *Id.* at 15. The Arbitrator credited the testimony of witnesses at the meeting in finding that the Agency attorney did not poke the grievant in the chest. *Id.* Further, the Arbitrator concluded that the Union did not provide sufficient evidence to prove that the Agency attorney poked the grievant in the chest. *Id.* Therefore, the Arbitrator found, based on the

evidence, that the grievant knowingly made a false statement during the investigatory interview. *Id.*

The Arbitrator also rejected the Union's argument that the grievant's false statement was protected activity under the Statute because of the grievant's status as a Union representative. *Id.* at 17. The Arbitrator determined that the grievant was not acting as a Union representative when he made the false statement at the investigatory interview. *Id.* The Arbitrator reasoned that although the questions at the investigatory interview may have related to events that took place while the grievant was acting as a Union representative, the Agency summoned him to the interview as an Agency employee. *Id.*

Moreover, the Arbitrator rejected the Union's argument that the suspension was based on the grievant's conduct at the meeting. Specifically, the Arbitrator found that the Agency did not consider the grievant's conduct at the meeting in deciding whether the grievant made the false statement at the investigatory interview. *Id.* However, the Arbitrator reasoned, the Agency properly considered what happened at the meeting in evaluating any mitigating circumstances bearing upon the range of discipline. *Id.* at 17-18.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the award is contrary to law and is based on a nonfact.

The Union makes two contrary to law claims. First, the Union asserts that the Arbitrator's decision to uphold the grievant's three-day suspension is contrary to law because the grievant was engaged in protected activity at all times relevant to the suspension. Exceptions at 6-7. The Union argues that the grievant's conduct cannot be the basis for discipline because he was on 100 percent official time. Thus, the Union contends, the grievant was acting in a representational capacity at all times associated with the disciplinary action – at the meeting and at the investigatory interview. *Id.* at 6, 9. Because the grievant was acting in this capacity, the Union asserts, the grievant's false statement was protected activity and not subject to discipline because it did not exceed the bounds of protected activity. *Id.* at 9.

The Union also maintains that the award is contrary to 5 U.S.C. § 7503. The Union argues that § 7503 required the Agency to notify the grievant that

the proposed suspension was based in part on his actions at the meeting, but that the Agency failed to do so.¹ The Union claims in this connection that one of the bases for the suspension was the grievant's actions at the meeting. *Id.* at 9-10.

Finally, the Union contends, the Arbitrator's conclusion that "the Agency's case stands unrefuted" and, "on the critical issue – did [the Agency attorney] poke [the grievant] with his finger – there were no inconsistencies," is based on a nonfact. *Id.* at 10. Specifically, the Union argues, the Arbitrator ignored conflicting evidence on this point presented at the arbitration hearing. *Id.* at 10-12.

B. Agency's Opposition

The Agency asserts that the Union's contrary to law claims are without merit. In response to the Union's first argument, the Agency contends that the grievant was not acting as a Union representative when he made the false statement that is the basis of the three-day suspension. Opp'n at 7-8. The Agency notes that it summoned the grievant to the investigatory interview as an Agency employee to provide information relevant to an alleged ULP that occurred at the meeting. *Id.* at 8. The Agency further asserts that the grievant was not summoned to the investigatory interview to discuss any labor-related issue on behalf of another member of the bargaining unit. *Id.* at 9. Moreover, the Agency also claims, even if the grievant was acting as a Union representative when he made the false statement, the statement exceeded the bounds of protected activity. *Id.* at 10-11.

In addition, the Agency argues that the award is not inconsistent with 5 U.S.C. § 7503. The Agency maintains that the Union misconstrues the Arbitrator's award to hold that the grievant was disciplined for his conduct at the meeting. *Id.* To the contrary, the Agency argues, the grievant's suspension was not based on his conduct at the meeting. *Id.* at 12.

Finally, the Agency argues, the Union's nonfact exception lacks merit. In the Agency's view, the Arbitrator weighed all relevant evidence presented at arbitration when he determined that the Agency

1. The relevant portion of 5 U.S.C. § 7503 provides: "(b) An employee against whom a suspension for 14 days or less is proposed is entitled to--(1) an advance written notice stating the specific reasons for the proposed action"

attorney did not poke the grievant in the chest. *Id.* at 4-6.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Union contends that the award is contrary to law because the grievant was engaged in protected activity at all times associated with the disciplinary action. 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.*

Whether an employer allegedly took actions against an individual during the course of protected activity applies in cases where an agency is alleged to have violated § 7116 of the Statute.² *See U.S. Dep't of Transp., FAA*, 64 FLRA 365, 369 (2009) (Member Beck concurring). Specifically, where an agency is alleged to have committed a ULP on this basis, "a necessary part of the [agency's] defense" against the ULP allegation is that the individual's actions constituted flagrant misconduct or otherwise exceeded the bounds of protected activity. *Id.*

The Authority has held that arbitrators are required to apply statutory burdens of proof when resolving an alleged ULP. *E.g., U.S. GSA, Ne. & Caribbean Region, N.Y., N.Y.*, 60 FLRA 864, 866 (2005). By contrast, where an arbitrator resolves a claim under a collective bargaining agreement (CBA) rather than a statutory claim, "unless a specific burden of proof is required, an arbitrator may establish and apply whatever burden the arbitrator considers appropriate . . ." *Id.* In this connection, the Authority distinguishes allegations that an agency lacked just cause for discipline under a CBA from allegations of unlawful interference with protected

rights under the Statute. *See U.S. Dep't of Veterans Affairs, VA Md. Healthcare Sys.*, 65 FLRA 619, 621 (2011) (where parties stipulated a just-cause issue, Authority declined to consider claim of alleged violation of § 7102(a) of Statute that was not raised before arbitrator); *AFGE, Local 2923*, 65 FLRA 561, 563 (2011) (finding that there was no need to address union's claim that arbitrator improperly analyzed whether grievant exceeded bounds of protected activity when issue before arbitrator was whether there was "'just and sufficient cause' for the suspension" rather than whether suspension violated the Statute). In addition, when an arbitrator is not required to apply a statutory standard, alleged misapplications of that standard do not provide a basis for finding the arbitrator's award deficient. *See Soc. Sec. Admin.*, 65 FLRA 286, 288 (SSA) (2010).

Here, the record reflects, and there is no dispute, that the parties stipulated that the issue before the Arbitrator was whether there was "just cause" for the grievant's suspension, not whether the suspension violated § 7116. Award at 2. Because the issue before the Arbitrator was a contractual claim, the Arbitrator was not required to apply statutory standards, and the Arbitrator's alleged misapplication of the statutory standard concerning protected activity under § 7116 does not provide a basis for setting aside the award. *See AFGE, Local 2923*, 65 FLRA at 563.

The Union also excepts to the award on the basis that it is contrary to 5 U.S.C. § 7503 because the Agency did not notify the grievant that his proposed suspension was based in part on his conduct at the meeting. Exceptions at 9-10. For the reasons explained above, the Arbitrator was not required to apply statutory standards, and the Arbitrator's alleged misapplication of the statutory standard concerning notice under 5 U.S.C. § 7503 does not provide a basis for setting aside the award. *See AFGE, Local 2923*, 65 FLRA at 563.

For these reasons, we deny the Union's contrary to law exceptions.

B. The award is not based on a nonfact.

The Union contends that the Arbitrator's finding, that "the Agency's case stands unrefuted" and, "on the critical issue—did [the grievant] poke [the Agency attorney] with his finger – there were no inconsistencies," are based on nonfacts. Exceptions at 10. 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

2. Section 7116(a)(2) of the Statute provides, in pertinent part, that it is a ULP for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]"

which the arbitrator would have reached a different result. See *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*NFFE*).

The Union's nonfact exception challenges the weight that the Arbitrator accorded testimony and other evidence. The Authority has long held that disagreement with an arbitrator's evaluation of evidence and the weight to be accorded such evidence does not provide any basis for finding an award deficient. *AFGE, Local 3295*, 51 FLRA 27, 32 (1995). Here, the Union simply disagrees with the Arbitrator's evaluation of the evidence that he found refuted the Union's case. Accordingly, we deny the Union's nonfact exception.

V. Decision

The Union's exceptions are denied.