66 FLRA No. 130

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
SAN FRANCISCO ASYLUM OFFICE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1616
(Union)

0-AR-4823

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DECISION

June 7, 2012

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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 Stephen D. Owens filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator determined that the Agency did not have just cause to suspend the grievant for seven days, and he mitigated the suspension to three days. For the following reasons, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency suspended the grievant, an asylum officer, for seven days based on five specifications. Award at 1-3. The Union filed a grievance challenging the suspension. *Id.* at 3-4. The grievance was unresolved and submitted to arbitration, where the Arbitrator framed the issue as "[w]hether or not the seven working-days suspension issued to [the grievant] was for just cause?" *Id.* at 9.

As an initial matter, the Arbitrator determined that the Agency "ha[d] the burden of proving by a preponderance of the evidence that its action was warranted." *Id.* In this connection, the Arbitrator stated that "there are several factors that can be applied when assessing just cause[] or[] 'appropriate cause' as stated . . . in Section B of Article 29" of the parties' agreement.[1] *Id.* at 10.

The Arbitrator denied the grievance as to two of the five specifications, but found that the Agency had failed to establish just cause to discipline the grievant for the following three specifications: (1) leaving the office late and triggering the alarm system; (2) failing to immediately print interview notes and place them in a particular file following an interview that she conducted with an asylum applicant; and (3) "failing to call up [her] first interview within [thirty] minutes of the scheduled interview time on [seventeen] out of [forty-nine] cases." *Id.* at 1-3, 16.

As to the first specification, the Arbitrator found that "the discipline based on the [g]rievant's activation of the alarm . . . is flawed because the [g]rievant was not properly forewarned of the consequences of her actions." *Id.* at 11. With regard to the second specification, the Arbitrator determined that the evidence demonstrated that, on the day at issue, the grievant experienced a computer malfunction, which resulted in the partial loss of her notes. *Id.* at 13. The Arbitrator further determined that the Agency disciplined the grievant "based on a flawed and inadequate investigation" because it did not investigate the grievant's claims concerning the computer malfunction. *Id.* at 14. With respect to the third specification, he determined that "the [g]rievant's misconduct [was not] the sole cause of the interview problem." *Id.* at 15. In this connection, the Arbitrator found that "the problem [was] a function not only of her inability to effectively prepare for the first interview, but also because of the interview start times specified by the Agency." *Id.*

The Arbitrator found that these three specifications "deal[t] with performance issues for which discipline, under the terms of Article 22,[2] is not warranted." *Id.* at 16. Accordingly, as relevant here, he reduced the penalty to a three-day suspension. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the Arbitrator erred as a matter of law in finding that Article 22 of the parties' agreement "prohibits management from charging 'performance[-]based' actions under [5 U.S.C.]

[1] The pertinent wording of Article 29, Section B of the parties' agreement is set forth *infra.*

[2] The pertinent wording of Article 22 of the parties' agreement is set forth *infra.*

Chapter 75" (Chapter 75).[3] Exceptions at 3. In this connection, the Agency contends that: (1) an agency can take a performance-based action under Chapter 75 – even when employee misconduct is not the sole cause of the problem – so long as the agency complies with relevant procedural requirements; and (2) there is no precedent holding that a bargaining-agreement provision concerning performance management, such as Article 22, precludes such action. *Id.* at 3-4. The Agency also argues that the award fails to draw its essence from the parties' agreement because there is no wording in "*any* [a]rticle [of the] [a]greement" that prohibits the Agency from taking performance-based actions under Chapter 75. *Id.* at 3.

B. Union's Opposition

The Union maintains that the award is "lawful and draws its essence from" the parties' agreement." Opp'n at 4. In this connection, the Union contends that the Agency's exceptions "misinterpret the Arbitrator's [a]ward." *Id.* Specifically, the Union argues that "[t]he Arbitrator clearly found that the Agency failed to prove any misconduct worthy of discipline for three of the five [specifications] brought by the Agency to support its seven-day suspension." *Id.* at 4. The Union further argues that the Agency's exceptions "represent mere disagreement" with the Arbitrator's factual findings and "do not provide a basis for finding the award deficient." *Id.* at 7.

IV. Analysis and Conclusions

A. The award is not contrary to law.

When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions 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.*

Where an arbitrator resolves a claim under a collective-bargaining agreement 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., Soc. Sec. Admin.*, 65 FLRA 286, 288 (2010) (*SSA*).

Here, the Arbitrator framed the issue as whether the Agency had "just cause" or "appropriate cause" to discipline the grievant as required by Article 29, Section B of the parties' agreement. Award at 10. He did not set forth as an issue, or resolve, whether the suspension violated Chapter 75. Because the issue before the Arbitrator was a purely contractual claim, the Arbitrator was not required to apply a particular legal standard, and the Arbitrator's alleged misapplication of Chapter 75 does not provide a basis for setting aside the award as contrary to law. *See SSA*, 65 FLRA at 288. Accordingly, we deny the Agency's contrary-to-law exception. *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).

B. The award draws its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because there is no language in "*any* [a]rticle [of the] [a]greement" that prohibits the Agency from taking performance-based actions under Chapter 75. Exceptions at 3. 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. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining 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 collective-bargaining 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

[3] Title 5 U.S.C. Chapter 75 provides, in pertinent part: "[A]n employee may be suspended for [fourteen] days or less for such cause as will promote the efficiency of the service." 5 U.S.C. § 7503(a).

agreement for which the parties have bargained." *Id.* at 576.

Article 29, Section B of parties' agreement provides, in pertinent part: "The Agency will administer disciplinary and adverse action procedures and determine appropriate penalties to all employees in a fair and equitable manner, and only for appropriate cause as provided by applicable law." Exceptions, Attach., Master Agreement at 75. Article 22 of the parties' agreement provides, in pertinent part: "The performance appraisal program shall be administered fairly, reasonably, uniformly, and in good faith; shall provide employees with regular feedback to keep them advised of what is expected of their performance and of how well they meet those expectations." *Id.* at 56.

The Arbitrator found that the Agency did not establish just cause under Article 29, Section B of the parties' agreement to discipline the grievant for certain specifications. Award at 16. In so finding, the Arbitrator determined that those specifications "deal[t] with performance issues for which discipline, under the terms of Article 22, is not warranted." *Id.* As stated previously, the Arbitrator was interpreting the parties' agreement, not Chapter 75. And the Arbitrator interpreted the agreement as precluding the Agency from using Article 29, Section B disciplinary procedures for specifications related to performance issues that should be processed under Article 22. The Agency provides no basis for finding that the Arbitrator's interpretation is unfounded, irrational, implausible, or manifest disregard of the agreement. Accordingly, we deny the Agency's essence exception.

V. Decision

The Agency's exceptions are denied.