

66 FLRA No. 14

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3911
(Union)

and

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
(Agency)

0-AR-4521

DECISION

August 31, 2011

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 Margery E. Williams 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 established just cause under the parties' collective bargaining agreement (CBA) for the grievant's two-day suspension.

For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency suspended the grievant for two days for failing to carry out instructions and engaging in inappropriate and unprofessional conduct. Award at 2. Regarding the first charge, the grievant had allegedly continued to lock file drawers containing official Agency records to which co-workers needed access, after being instructed to leave the drawers unlocked. *Id.* at 5-7. Regarding the second charge, the grievant allegedly engaged in a series of disruptive, inappropriate interactions with her supervisors and her co-workers. *Id.*

at 3-9, 17. The grievant had previously been reprimanded for, among other things, failing to carry out instructions, engaging in inappropriate conduct, and failing to work cooperatively and professionally with co-workers. *Id.* at 2-9.

The Union filed a grievance contesting the suspension. *Id.* at 2. When the matter was not resolved, it was submitted to arbitration. The stipulated issue before the Arbitrator was whether "the . . . suspension of [the grievant] [was] for just and sufficient cause . . . [and] [i]f not, what shall be the remedy?" *Id.*

The Arbitrator sustained the grievance in part, finding that the Agency had failed to establish just cause to discipline the grievant for certain conduct upon which the suspension was partially based. *Id.* at 31.

However, based on other conduct upon which the suspension was based, the Arbitrator upheld the suspension because the Agency had established just cause under the CBA.¹ *Id.* The Arbitrator noted that the Agency had the burden of proving that the grievant's conduct constituted just cause for the grievant's suspension. *Id.* at 17. In determining whether the Agency met this burden, the Arbitrator made credibility determinations based on witness testimony regarding the conduct that is the basis for the suspension. *Id.* at 17-25.

The Arbitrator found the suspension warranted by the grievant's misconduct and the grievant's "standing in the disciplinary progression." *Id.* at 30.

In addition, the Arbitrator determined that the Agency conducted a fair investigation into the grievant's conduct that was the basis of the proposed suspension. *Id.* at 25. The Arbitrator found that, during that investigation, the grievant responded to the Agency's proposed suspension and had "ample opportunity to tell her side of the story." *Id.* at 25-26.

The Arbitrator also rejected the Union's argument that the Agency was obligated to produce certain witnesses at the arbitration hearing. *Id.* at 28. He reasoned that the Agency "has no obligation to produce a witness that the Union wishes to cross-examine, or to give the grievant the opportunity to 'confront her accuser.'" *Id.*

Furthermore, the Arbitrator rejected the Union's argument that the Agency's denial of twenty-nine of its forty-nine requests for information "hampered its representation of the grievant." *Id.* at 26. Although the

¹ The relevant provision of the CBA states that "[a]ll disciplinary actions will be taken only for just and sufficient cause. . . . A. Where applicable, the Parties agree to the philosophy of progressive discipline." *Id.* at 2.

Arbitrator found that the Union's argument was untimely raised in the Union's post-hearing brief, the Arbitrator nonetheless reviewed the denials, but did not engage in a "point-by-point" analysis. *Id.* at 27. The Arbitrator analyzed the Agency's denials and determined that they were proper because the requests were "either overbroad or request irrelevant, unnecessary or abstract matter." *Id.* For example, the Arbitrator ruled that certain information requests for documents for the purpose of attacking a witness' credibility were unnecessary because the witness was available for cross-examination on this point. *Id.*

In sum, the Arbitrator concluded that the grievant's suspension was for just and sufficient cause. *Id.* at 31.

III. Preliminary Matter

The Authority issued an order directing the Union to show cause why its exceptions should not be dismissed as untimely filed. Order to Show Cause (Order) at 1. In the Order, the Authority noted that the time limit for filing exceptions to an arbitration award is thirty days from the date of service of the award. *Id.*; 5 U.S.C. § 7122(b). The Authority further noted that the date of service for an award that is served by commercial delivery is the date received. Order at 1; 5 C.F.R. § 2429.27(d).² The Authority stated that, based on the record, it appeared that the Union was served with the award by commercial delivery and that it appeared that the exceptions were untimely. *Id.*

Responding to the Order, the Union argues that it timely filed its exceptions. Response at 4. In support, the Union submitted affidavits claiming that the Union did not receive the award until one day after the award was "signed for" by an individual unknown to the Union. *Id.* at 2, 4.

The record reflects that the individual who first signed for the award is not the Union's representative of record in this case. Further, the Agency does not dispute the Union's arguments on this point. Therefore, we conclude that the date of service of the award -- the date the award was received by the Union -- was one day after the award was initially signed for. Consequently, the Union's exceptions were timely filed.

² The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.27(d), were revised effective October 1, 2010. 75 Fed. Reg. 42,283 (2010). Because the Union's exceptions were filed before this date, we apply the former Regulations. 5 C.F.R. § 2429.27(d) (2009).

IV. Positions of the Parties

A. Union's Exceptions

The Union contends that the award is contrary to law for three reasons.

First, the Union asserts that the Arbitrator denied the grievant due process because she was not given the opportunity to confront and cross-examine certain Agency officials that the Agency did not produce as witnesses at the arbitration hearing. Exceptions at 3.

Second, the Union claims that the Arbitrator denied the grievant her due process right to present evidence necessary to her defense at the arbitration hearing. *Id.* at 5. Specifically, the Union argues that the Arbitrator improperly failed to engage in a "point-by-point" analysis of the Agency's denial of the Union's information requests. *Id.* The Agency had refused to comply with twenty of forty-nine information requests that the Union submitted. *See id.*

Third, the Union asserts that the Arbitrator applied an incorrect burden of proof. *Id.* at 6-7. Specifically, the Union claims that the Arbitrator erroneously applied a lesser burden of proof -- a substantial evidence standard -- than the Agency used when deciding to discipline the grievant. *Id.* Rather, the Union contends, Arbitrator should have applied a "preponderance-of-the-evidence" standard. *Id.*

B. Agency's Opposition

The Agency contends that the Union's contrary-to-law claims are without merit.

First, the Agency argues that the Arbitrator did not deny the grievant due process by denying her the opportunity to confront and cross-examine certain Agency witnesses. Opp'n at 3. The Agency asserts that these Agency officials had no first-hand knowledge of the incidents that were the basis for the grievant's suspension. *Id.* In addition, the Agency claims, the grievant had the opportunity to present evidence to the Agency's deciding official during the investigation, and to present evidence and to cross-examine Agency witnesses with first-hand knowledge at the hearing. *Id.* at 4.

Second, the Agency asserts that the Arbitrator did not deny the grievant her due process right to present arguments on the issue of information requests. *Id.* at 5. The Agency asserts that the Arbitrator sufficiently analyzed and ruled on the Agency's denial of the requests. *Id.*

Third, the Agency argues that the Arbitrator did not use an incorrect burden of proof in this case. *Id.* at 6.

V. Analysis and Conclusions

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*. *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. *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. *Id.*

- A. The Arbitrator did not deny the grievant due process.

The Union contends that the award is contrary to law because the Arbitrator erroneously: (1) denied the grievant due process by denying her the opportunity to confront and cross-examine certain Agency officials when he determined that the Agency was not obligated to produce witnesses at the Union's request; and (2) denied the grievant her due process right to present evidence necessary to her defense at the arbitration hearing. Exceptions at 3-6.

The Union's contentions lack merit. The Union's exceptions focus on the Arbitrator's actions in the conduct of the hearing and not the Agency's actions as part of the pre-decisional process of proposing and deciding to suspend the grievant. The Union's allegations raise the question of what process was due the grievant from the Arbitrator, as a matter of law. The Authority has held that federal employees suspended for fourteen days or less are not entitled to post-suspension proceedings. *NTEU, Chapter 45*, 52 FLRA 1458, 1465 (1997). As a post-suspension proceeding in a case like this is not required as a matter of law, there are no procedures specified by law that an arbitrator must follow in resolving a grievance. *Id.* Based on the foregoing, the Union does not demonstrate that any of the actions by the Arbitrator that the Union dispute denied the grievant the process that was due her as a matter of law.

Accordingly, we deny these exceptions.

- B. The Arbitrator did not apply an incorrect burden of proof.

The Union contends that the Arbitrator applied an incorrect burden of proof. Exceptions at 6-7. The Union asserts that the correct burden, which was used by the Agency in rendering its decision to suspend, is "the preponderance of the evidence." *Id.* at 6.

If a burden of proof is set forth in applicable law, rule, or regulation, or in the parties' collective bargaining agreement, then an arbitrator must apply the prescribed burden. *AFGE, Local 3310*, 65 FLRA 437, 441 (2011). However, when no burden of proof is laid out, an arbitrator is empowered to prescribe whatever burden of proof he or she considers appropriate, and the award will not be found deficient on the basis that the arbitrator applied an incorrect burden of proof. *Id.*

In this case, the Union fails to establish that applicable law, rule, regulation, or the CBA prescribed the burden of proof. Therefore, as the Union fails to establish a prescribed burden of proof, the Union's claim that the Arbitrator applied an incorrect burden of proof provides no basis for finding the award deficient. *See id.* (denying union's exception that arbitrator applied wrong burden of proof where union failed to establish prescribed burden of proof); *see also Elkouri & Elkouri, How Arbitration Works*, 949 (Alan Miles Ruben, ed., BNA Books 6th ed. 2003) ("quantum of proof required to support a decision to discipline . . . is unsettled").

Accordingly, we deny this exception.

VI. Decision

The Union's exceptions are denied.