

67 FLRA No. 59

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1897
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
EGLIN AIR FORCE BASE, FLORIDA
(Agency)

0-AR-4904

DECISION

February 7, 2014

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Arbitrator Martin A. Soll upheld the Agency's decision to suspend the grievant for five days, finding that the suspension was for just cause under the parties' agreement. The Arbitrator also essentially found that the Agency did not base the grievant's suspension on "material [ex parte] information"¹ and, thus, that the Agency did not violate the grievant's right to due process under the Fifth Amendment to the United States Constitution. There are three substantive questions before us.

The first question is whether the award is based on nonfacts. Because the challenged factual findings were disputed before the Arbitrator, the answer is no.

The second question is whether the award fails to draw its essence from the parties' agreement. Because the Union does not demonstrate that the Arbitrator's interpretation of the agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

The third question is whether the Arbitrator erred in finding that the Agency did not violate the grievant's right to due process. Assuming that the

Agency was precluded from relying on new and material ex parte information, the Union has not shown that the Arbitrator erred in essentially finding that the Agency did not rely on such information. Therefore, the Union has not shown that the Arbitrator erred in finding no due-process violation.

II. Background and Arbitrator's Award

The grievant, a day-care worker, was standing with a coworker in an area between their classroom and the day-care center's playground, talking to parents. The grievant could not see the playground – or the children playing in it – from where she was standing, and did not see one of the toddlers walk out of the playground through an open gate and onto a sidewalk. Another day-care worker retrieved the toddler.

The grievant's supervisor proposed that the grievant be suspended for five days (the proposal) for "failure to follow appropriate procedures" under Air Force Instruction (AFI) 34-248, *Child Development Centers*, § 8.2.1, *Supervision of Children*,² which requires that "each child is under the care of a specific adult[,] and the adult knows where the child is at all times."³ The proposal stated that the grievant could "reply to the proposed action orally, in writing, or both."⁴ Later, the Agency presented the grievant with a memorandum (the *Douglas* memorandum) that discussed the factors set forth in the Merit Systems Protection Board's (MSPB's) decision in *Douglas v. Veterans Administration*⁵ (the *Douglas* factors). And about two weeks after issuing the *Douglas* memorandum, the Agency provided the grievant its final decision to suspend the grievant (the suspension decision), where the deciding official stated that the charges in the proposal were supported by a preponderance of the evidence, and that the suspension was consistent with the penalties (ranging from reprimand to removal) in AFI 36-704.⁶

The Union filed a grievance, which was unresolved and submitted to arbitration.

The Arbitrator did not frame the issues before him. He began his analysis by considering whether there was evidence to support the suspension. The Arbitrator found that when the grievant was between the classroom and the playground, the toddler walked out of the playground onto the sidewalk. The Arbitrator further found that video footage of the incident indicated that the incident would not have happened if the grievant or her coworker had monitored the playground. The Arbitrator

² *Id.* at 4.

³ *Id.* at 8 (quoting AFI 34-248 § 8.2.1).

⁴ Opp'n, Agency Ex. 8 at 1.

⁵ 5 M.S.P.R. 280, 306-07 (1981).

⁶ Award at 7.

¹ Award at 18 (internal quotation marks omitted).

determined that the grievant's absence from the playground "constituted negligence" and violated AFI 34-248.⁷

Moreover, the Arbitrator found that the toddler was "subject to serious harm,"⁸ and that a five-day suspension was an appropriate penalty under AFI 36-704. According to the Arbitrator, the Union's arguments – that the grievant was properly talking to the parents and that the grievant's coworker was responsible for the toddler – did not "overcome [the grievant's] failures to perform her . . . duties."⁹ Further, the Arbitrator rejected the Union's claims that the Agency failed to prove the grievant's misconduct, and that the Agency imposed an excessive penalty. Based on this analysis, the Arbitrator determined that the Agency had "just cause" to suspend the grievant for five days.¹⁰

The Arbitrator also rejected the Union's claim that the Agency violated the grievant's right to due process by using new and material ex parte information to suspend the grievant. Citing the United States Court of Appeals for the Federal Circuit's (the Federal Circuit's) decision in *Stone v. FDIC (Stone)*,¹¹ the Arbitrator found that it was the grievant's actions – as recorded on video and described in the proposal and the *Douglas* memorandum – that "directly resulted in" her suspension.¹² As such, the Arbitrator concluded that the alleged ex parte information was not "material information" and did not "prejudice" the grievant.¹³ As a result, the Arbitrator found that the Agency did not deprive the grievant of due process.

For all of these reasons, the Arbitrator denied the grievance.

III. Analysis and Conclusions

- A. One of the Union's exceptions does not raise a ground under § 2425.6 of the Authority's Regulations for reviewing the award.

While the Union acknowledges that the Arbitrator was not required to apply the *Douglas* factors,¹⁴ the Union asserts that, using the "*Douglas* [f]actors as guidance . . . the Agency's five[-]day suspension of [the grievant] is excessive."¹⁵

Section 2425.6(a) of the Authority's Regulations lists the grounds for Authority review of an arbitration award.¹⁶ Section 2425.6(e) provides that an exception may be dismissed if it fails to raise and support a ground for review.¹⁷ Here, the Union does not argue that the award is contrary to law or cite any other ground for review under § 2425.6(a).¹⁸ Therefore, consistent with § 2425.6(e), we dismiss the exception.¹⁹

- B. The award is not based on nonfacts.

The Union alleges that the award is based on nonfacts. Specifically, the Union argues that the Arbitrator erred in finding that: (1) the grievant was responsible for the toddler;²⁰ (2) the grievant committed misconduct;²¹ (3) the grievant's coworker was not solely responsible for the toddler;²² and (4) the video footage was credible.²³ Additionally, the Union claims that the playground gate was broken and that the day-care center's director had the "responsibility . . . to maintain the equipment."²⁴

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact

¹⁶ 5 C.F.R. § 2425.6(a).

¹⁷ *Id.* § 2425.6(e).

¹⁸ Exceptions at 15-18.

¹⁹ Member DuBester notes the following: I agree that the Union's *Douglas* factors exception is properly dismissed under 5 C.F.R. § 2425.6(e). In so doing, I note that following the implementation of the Authority's Arbitration Initiative, which included revision of the Authority's Regulations concerning review of arbitration awards, we counseled the parties that we would no longer construe parties' exceptions as raising recognized grounds for review when the parties have failed to state such grounds. *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting in part) (*Local 3955*). Following *Local 3955*, in cases involving two of the recognized grounds for review in the private sector (essence and exceeds authority), I indicated that where parties articulate a well-established standard supporting a recognized ground, that action is sufficient to raise a recognized ground under § 2425.6. *See, e.g., AFGE Gen. Comm.*, 66 FLRA 367, 370 (2011) (finding that the union's claim that the award was not based on "a plausible interpretation of the [parties' agreement]" was sufficient to raise the recognized private-sector ground of essence); *AFGE, Local 3627*, 65 FLRA 1049, 1051 n.2 (2011) (finding that the union's claim that the award failed to "resolve the issues submitted" was sufficient to raise the recognized private-sector ground of exceeds authority). I have not yet had the occasion to consider whether any analogous principle applies to the assertion of a contrary-to-law exception. And, given the Union's acknowledgment that the Arbitrator was not required to apply the *Douglas* factors in his award, I find that there is no need to do so in this case.

²⁰ Exceptions at 13.

²¹ *Id.* at 14.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 15.

⁷ *Id.* at 16.

⁸ *Id.*

⁹ *Id.* at 18-19; *see also id.* at 13.

¹⁰ *Id.* at 21.

¹¹ 179 F.3d 1368, 1376-77 (Fed. Cir. 1999).

¹² Award at 18.

¹³ *Id.*

¹⁴ Exceptions at 15-16.

¹⁵ *Id.* at 16.

underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.²⁵ However, the Authority will not find an award deficient on the basis of an arbitrator's determination of a factual matter that the parties disputed at arbitration.²⁶

The Union's challenges to findings (1)-(4) pertain to factual matters that the parties disputed at arbitration.²⁷ Therefore, consistent with the principles set forth above, the Union's arguments do not demonstrate that the award is based on nonfacts. With regard to the Union's claim that the day-care center's director was responsible for the gate's maintenance, the Union does not show that the Arbitrator made a clearly erroneous determination, but for which he would have reached a different result. Thus, the Union has not demonstrated that the award is based on a nonfact in this respect.

C. The award does not fail to draw its essence from the parties' agreement.

The Union asserts that the award fails to draw its essence from the parties' agreement, arguing that the agreement "requires discipline to be issued for just and sufficient cause, which the Arbitrator did not rely upon in his decision."²⁸

When 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.²⁹ 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.³⁰ In addition, when a party misunderstands an award, an exception based on that misunderstanding does not demonstrate that the award fails to draw its essence from the parties' agreement.³¹

²⁵ *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).

²⁶ *See id.* at 593-94.

²⁷ *See Award* at 13, 15, 18-19.

²⁸ Exceptions at 13.

²⁹ *See, e.g., AFGE, Council 220*, 54 FLRA 156, 159 (1998).

³⁰ *See U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

³¹ *E.g., U.S. Dep't of HHS, Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 572 (2011).

Contrary to the Union's claim, the Arbitrator did apply the just-cause standard, finding that the grievant's actions warranted the five-day suspension.³² Thus, the exception is based on a misunderstanding of the award and does not show that the award is deficient. Further, the Union does not otherwise assert that the Arbitrator interpreted the just-cause provision in a way that is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Accordingly, the Union provides no basis for finding that the award fails to draw its essence from the parties' agreement.

D. The award is not contrary to law.

The Union asserts that the award is contrary to law because the Arbitrator erred in concluding that there was no due-process violation.³³

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.³⁴ 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.³⁵ In making that assessment, the Authority defers to the arbitrator's underlying factual findings.³⁶ And when a contrary-to-law claim asserts that an arbitrator erred in finding no due-process violation, the Authority asks: (1) whether the grievant had a constitutionally protected property interest entitling him or her to due process; and, if so, (2) whether the grievant received the process that he or she was due.³⁷

As for the first question, the Authority has determined that, under 5 U.S.C. § 7503, nonprobationary, federal employees in the competitive service have a constitutionally protected property interest in employment such that they may not be suspended for fourteen days or less without due process.³⁸ Here, there is no dispute that the grievant is a nonprobationary, federal employee in the competitive service.³⁹ As such, the grievant had the requisite property interest in employment to be entitled to due process.⁴⁰

³² Award at 15-16, 21; *see also id.* at 7-8 (quoting Art. 5, § 5.01 of the parties' agreement).

³³ Exceptions at 5, 12.

³⁴ *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)).

³⁵ *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

³⁶ *Id.*

³⁷ *U.S. Dep't of VA, Nat'l Mem'l Cemetery of the Pac.*, 45 FLRA 1164, 1174-75 (1992) (*Veterans*).

³⁸ *Id.* at 1175.

³⁹ *See Award* at 16-18; Exceptions at 7; Opp'n at 10-12.

⁴⁰ *Veterans*, 45 FLRA at 1175.

As the grievant was entitled to due process, the next question is whether the Arbitrator erred in finding that the grievant received due process.⁴¹ The Authority has held that employees such as the grievant are entitled to: (1) notice of the charges; (2) an explanation of the employer's evidence; and (3) an opportunity to respond.⁴²

The Union argues that the grievant did not receive notice or an opportunity to respond because the grievant's suspension was based on new and material ex parte information. For support, the Union cites *Stone*,⁴³ and Federal Circuit and MSPB precedent applying *Stone*.⁴⁴ In *Stone*, the Federal Circuit addressed a deciding official's use of ex parte information.⁴⁵ The court noted that only ex parte information that introduces "new and material information to the deciding official will violate the due[-]process guarantee of notice."⁴⁶ The court stated that, "[u]ltimately," the inquiry is whether the ex parte information is "so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances."⁴⁷ And, in decisions applying *Stone*, the Federal Circuit and the MSPB have held that ex parte information is not material if it is not the basis of the discipline.⁴⁸

The Union acknowledges that these cases involved serious adverse actions under § 7513, rather than discipline under § 7503.⁴⁹ However, the Union argues that the Authority should apply these decisions here because both § 7503 and § 7513 "provide for identical statutory protections" that limit an agency's actions to those that are for "such cause as will promote the efficiency of the service."⁵⁰ It is unnecessary for us to decide whether *Stone* and decisions interpreting it apply to suspensions under § 7503. Even assuming that they do, the Union has not demonstrated that the Arbitrator's award is contrary to these decisions.

The Arbitrator determined that it was the grievant's actions – as recorded on video and described in the proposal and the *Douglas* memorandum – that "directly resulted in" her suspension.⁵¹ As such, the Arbitrator determined that the ex parte information did

not "constitute or rise to the level of material information" under *Stone*.⁵² Thus, the Arbitrator essentially made a factual finding that the Agency did not rely on the alleged ex parte information in imposing the grievant's suspension. The Union does not allege that this factual finding is a nonfact.⁵³ And, under de novo review of a contrary-to-law claim, where there is no demonstration that factual findings are nonfacts, the Authority defers to such findings.⁵⁴

By essentially finding that the alleged ex parte information was not the basis for the suspension and therefore not material, the Arbitrator determined, consistent with Federal Circuit and MSPB precedent, that no constitutional-due-process violation occurred.⁵⁵ Further, the decisions that the Union cites do not demonstrate that the Arbitrator's ruling is contrary to law. The first such decision, *Ross-Rawlins v. U.S. Postal Service*, MSPB Docket No. DE-0752-11-0006-I-1 (Initial Decision, July 8, 2011), is not in the record,⁵⁶ and our research has not disclosed it. The Union also cites *Silberman v. DOL*,⁵⁷ and *Gray v. DOD*,⁵⁸ where the deciding officials used ex parte information as the basis of their decisions.⁵⁹ Here, however, the Arbitrator essentially found that the deciding official did not actually use ex parte information as the basis of her decision to suspend the grievant. Therefore, the Union's reliance on *Silberman* and *Gray* is misplaced.

For all of these reasons, we find that the Union has not demonstrated that the award is contrary to law.

IV. Decision

We dismiss in part, and deny in part, Union's exceptions.

⁴¹ *Id.* at 1174-75.

⁴² *E.g., SSA, Balt., Md.*, 64 FLRA 516, 518 (2010) (*SSA*).

⁴³ 179 F.3d at 1376-77.

⁴⁴ *See* Exceptions at 7-8.

⁴⁵ 179 F.3d at 1376.

⁴⁶ *Id.* at 1377.

⁴⁷ *Id.*

⁴⁸ *See Hull v. Dep't of the Air Force*, 374 F. App'x 981, 982-83 (Fed. Cir. 2010) (per curiam) (not selected for publication); *Dobruck v. Dep't of VA*, 102 M.S.P.R. 578, 585 (2006).

⁴⁹ *See* Exceptions at 6-7.

⁵⁰ *Id.* at 6 (internal quotation marks omitted).

⁵¹ Award at 18.

⁵² *Id.* (internal quotation marks omitted).

⁵³ *See AFGE, Local 1770*, 67 FLRA 93, 95 (2012).

⁵⁴ *E.g., NAGE, Local R4-17*, 67 FLRA 4, 6 (2012).

⁵⁵ *See Hull*, 374 F. App'x at 983; *Dobruck*, 102 M.S.P.R. at 585.

⁵⁶ *See* Exceptions at 12.

⁵⁷ 116 M.S.P.R. 501 (2011).

⁵⁸ 116 M.S.P.R. 461 (2011).

⁵⁹ *See Silberman*, 116 M.S.P.R. at 507; *Gray* 116 M.S.P.R. at 466.

Member Pizzella, concurring:

I join my colleagues to deny the Union's nonfact, essence, and due-process exceptions.

I do not agree with my colleagues, however, to the extent they conclude that we should dismiss the exception concerning application of the *Douglas* factors¹ because it fails to "argue that the award is contrary to law" under § 2425.6(e) of our Regulations.² But my disagreement with my colleagues on this point should not be read in any sense as endorsing the premise of the Union's argument (which, as explained below, I find to be simply incredible).

Unlike my colleagues, I agree with the proposition set forth by Member Beck in his separate opinions in *AFGE, Local 33*³ and in *AFGE, Local 1738*⁴ that our regulations do not require a party "to invoke any particular magical incantation[]" to perfect an exception so long as the party provides "sufficient citation to legal authority" or "explain[s] how" the award is deficient as contrary to law. Here, the Union submits that "in applying the *Douglas* factors as guidance . . . the . . . five[-]day suspension . . . is excessive."⁵ Even though the Union does not use the specific phrase, "contrary to law," it has clearly set forth an arguable contrary-to-law exception that cannot be merely dismissed.

Therefore, I would address the exception – albeit in short order – and deny it because the Union has failed to establish that the Arbitrator's conclusion – that the five-day suspension was warranted – is contrary to law.

It is undisputed that a toddler, under the care of the grievant (and one other child care center employee who was also disciplined for the incident), "walk[ed] out of the playground through an unclosed gate in the fence surrounding the playground and proceed[ed] down the sidewalk adjacent to the playground" while the grievant was conversing with a parent.⁶

Considering the significant risk of "serious injury" to which the toddler was exposed and the clear language of the Agency's table of penalties that permits a penalty of up to "removal" for a first offense of this nature,⁷ it defies belief that the Union would expose itself and the Agency to the embarrassing argument that a

five-day suspension is "excessive" under these circumstances.⁸ In fact, it is difficult to imagine any set of factors that could mitigate against the gravity of this offense.

Thank you.

¹ 5 M.S.P.R. 280, 306-07 (1981).

² Majority at 3.

³ 65 FLRA 887, 891 (2011) (Concurring Opinion of Member Beck).

⁴ 65 FLRA 975, 977 (2011) (Concurring Opinion of Member Beck).

⁵ Exceptions at 16.

⁶ Award at 2.

⁷ *Id.* at 20.

⁸ Exceptions at 15-18; Award at 13-14.