**68 FLRA No. 81**

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 511
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION AND CUSTOMS ENFORCEMENT
OFFICE OF FINANCIAL MANAGEMENT
(Agency)

0-AR-4999

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DECISION

April 20, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

## I. Statement of the Case

Arbitrator Blanca Torres upheld the Agency's decision to suspend the grievant for three days, finding that the grievant failed to follow supervisory instructions. The grievant initially said that he would not attend any scheduled training sessions, and then he made a medical appointment for the day the Agency scheduled one of the training sessions. When the grievant's supervisor asked him for medical documentation for the appointment, the grievant did not respond in a timely manner. There are two substantive questions before us.

The first question is whether the award is contrary to law because the Agency did not issue the suspension "at the earliest practicable date" as required by 5 U.S.C. § 7503(b)(4) and, the Union asserts, the grievant's due-process rights. There was a 107-day lapse between the notice of proposed suspension (notice) and the Agency's decision to suspend the grievant. Because the Union does not show that the Agency failed to issue the suspension "at the earliest practicable date" under § 7503(b)(4), or that the Agency violated the grievant's due-process rights, the answer is no.

The second question is whether the award fails to draw its essence from the parties' agreement. The Union argues that the Arbitrator erred by failing to find that the suspension was not "fair and equitable" under Article 26 of the parties' agreement.[1] Because the Union bases its essence exceptions on claims that are either without merit, or irrelevant to the suspension that the Arbitrator sustained, the answer is no.

## II. Background and Arbitrator's Award

The grievant is an Agency accountant. After scheduling an audit, the Agency hired a contractor to conduct a series of training sessions "concerning the procedures to be used in preparation for the audit."[2] The grievant's supervisor directed the grievant to attend the training sessions. The grievant told the supervisor that he declined to participate in the training. The supervisor warned the grievant that his "failure to attend may result in disciplinary action" because the training was mandatory.[3]

On the day the grievant received the supervisor's warning, the grievant requested sick leave for the day the Agency scheduled one of the training sessions. Before approving the grievant's leave request, the supervisor requested a doctor's note to justify the leave, but the grievant declined to provide it. Nevertheless, the supervisor approved the grievant's leave request, on the condition that the grievant provide a doctor's note within fifteen days of the request. The supervisor told the grievant that if he failed to provide the note, he would be charged with being absent without leave (AWOL) and face other disciplinary action.

The grievant was absent from one of the training sessions, and did not provide a doctor's note by the supervisor's fifteen-day deadline. After the fifteen-day deadline passed, the grievant gave the supervisor a printed "[a]ppointment [r]eminder" for his medical appointment on the day he was absent.[4]

The Agency issued the grievant a notice proposing a five-day suspension. The notice charged him with: (1) AWOL; (2) failure to provide a doctor's note; and (3) failure to attend the training. The supervisor did not attach the appointment reminder to the notice that was sent to the Agency's deciding official for review. After the Union responded, and 107 days after the Agency issued the notice to the grievant, the deciding official dismissed the AWOL charge, sustained the doctor's-note and training charges, and reduced the suspension to three days.

The Union filed a grievance challenging the suspension, which was unresolved and submitted to arbitration. The parties were unable to agree on the

[1] Award at 2.
[2] *Id.* at 4.
[3] *Id.*
[4] *Id.* at 8 (internal quotation marks omitted).

issues, so the Arbitrator framed them, in pertinent part, as: "Whether the [grievant's] suspension . . . for failure to follow supervisory instructions was supported by the facts. If so, whether the discipline promoted the efficiency of the service."[5]

The Arbitrator found that the failure to attend the training could not be the basis for any discipline because the deciding official dismissed the AWOL charge, putting the grievant on approved leave for that day. Therefore, the Arbitrator dismissed the training charge.

However, the Arbitrator rejected the Union's request to set aside the suspension based on the 107-day lapse between the notice and the suspension. The Union argued that the 107-day lapse violated § 7503(b)(4) because the suspension was not issued "at the earliest practicable date."[6] Rejecting the Union's argument, the Arbitrator found that: (1) "[the deciding official] was not given a deadline [by which] to make his final decision and that he had other projects to tend to prior to" issuing the suspension; (2) there was "no evidence that the delay in issuing the [suspension] caused any financial harm or undue hardship [to the grievant];" and (3) the Union did not "introduce[]" "any preceden[t] . . . establishing that discipline was set aside for [a] similar delay."[7] The Arbitrator concluded, therefore, that the suspension was issued "at the earliest practicable date" under § 7503(b)(4).[8]

Next, the Arbitrator sustained the charge of failure to provide a doctor's note. The Arbitrator found that the failure to provide the doctor's note in a timely fashion "was a discrete act[,] apart from the . . . absence [at the training], which may warrant discipline."[9] She also found that, because the grievant requested sick leave immediately after his supervisor warned him that the training was mandatory, the Agency had "reasonable grounds to believe that the [grievant] was abusing the sick[-]leave benefit."[10] Thus, the Arbitrator determined that the Agency was justified in requesting a doctor's note under the parties' agreement. She also found that requesting the doctor's note did not violate the grievant's due-process rights and that the suspension was supported by the record.

In addition, the Arbitrator rejected the Union's arguments that: (1) the appointment reminder should have been included in the notice so that it could be considered by the deciding official; and (2) the suspension was not fair and equitable under Article 26 of the parties' agreement. Regarding the appointment reminder, she found that "[the grievant's] belated submission of the [appointment reminder] . . . did not comply with the supervisor's instruction,"[11] and that the inclusion of the appointment reminder in the notice would have supported only dismissing the AWOL charge, which the deciding official had already dismissed. The Arbitrator also found that the suspension was "fair and reasonable"[12] and promoted the efficiency of the service under the parties' agreement.

The Union filed exceptions to the Arbitrator's award, and the Agency filed an opposition to the Union's exceptions.

## III. Analysis and Conclusions

### A. The award is not contrary to law.

The Union argues that the award is contrary to law because: (1) the suspension was not issued "at the earliest practicable date" under 5 U.S.C. § 7503(b)(4) and 5 C.F.R. § 752.203; and (2) the Arbitrator erred in finding that the Agency did not violate the grievant's due-process rights.[13] As § 752.203 is an implementing regulation that mirrors the requirements of § 7503, our analysis of § 7503(b)(4)'s requirements at issue in this case will encompass the mirroring requirements of § 752.203.[14]

#### 1. The Union has not demonstrated that the suspension was not issued "at the earliest practicable date" under § 7503(b)(4).

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.[15] 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.[16] In making that assessment, the Authority defers to the

[5] *Id.* at 1-2.
[6] *Id.* at 8 (internal quotation marks omitted).
[7] *Id.*
[8] *Id.* (internal quotation marks omitted).
[9] *Id.* at 9.
[10] *Id.* at 10.
[11] *Id.* at 13.
[12] *Id.*
[13] Exceptions at 13.
[14] *See NTEU*, 52 FLRA 1458, 1465 (1997) (noting that Authority has previously found that findings with regard to § 7503(b) also apply to § 752.203).
[15] *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)).
[16] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

arbitrator's underlying factual findings,[17] unless a party demonstrates that the findings are nonfacts.[18]

Reciting various events that occurred between the Agency's issuance of the notice and the Agency's decision to suspend the grievant, the Union argues that the 107 days that elapsed violated § 7503(b)(4)'s requirement that such decisions be issued at the "earliest practicable date."[19] The Union relies, in part, on the testimony of Agency officials who processed the notice to support its argument.[20] However, the testimony that the Union cites does not contradict any of the Arbitrator's factual findings, and does not address at all the Arbitrator's key finding that the deciding official "had other projects to tend to prior to" issuing the suspension.[21] Moreover, the Union does not explain how the testimony demonstrates that the suspension decision was not issued "at the earliest practicable date" under § 7503(b)(4).[22]

The Union also relies for support on the awards of other arbitrators, and on Authority case law.[23] Because the authorities the Union cites do not support its claim, and finding no other legal basis for finding a violation of § 7503(b)(4) under these circumstances, we deny this Union contrary-to-law exception.

The Union's reliance on other arbitration awards does not provide a basis for finding that the award in this case is contrary to law. The Union argues that these awards demonstrate that the suspension issued here was not issued "at the earliest practicable date" under § 7503(b)(4).[24] But it is well established that arbitration awards are not precedential, and a contention that an arbitration award conflicts with other arbitration awards does not provide any basis for finding an award deficient.[25]

The Union's reliance on Authority case law is also misplaced. The Union cites the Authority's decision in *INS*[26] to support its argument that the suspension was not issued "at the earliest practicable date" under § 7503(b)(4).[27] However, *INS* is inapposite. Unlike this case, *INS* concerned an agency's delay in *proposing* discipline after the date of a grievant's offending conduct.[28] The agency waited 240 days.[29] Moreover, as relevant here, the only issue before the Authority was whether the agency's delay constituted a "harmful error" within the meaning of 5 U.S.C. § 7701(c).[30] No issue was raised or decided by the Authority as to whether discipline was issued "at the earliest practicable date"[31] under § 7503(b)(4). Therefore, the Union's reliance on *INS* does not demonstrate that the award is contrary to law because the suspension was not issued "at the earliest practicable date"[32] under § 7503(b)(4).

2. The Arbitrator did not err in finding that the grievant's due-process rights were not violated by the 107-day lapse between the notice and the suspension decision.

When a contrary-to-law exception 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 (2) if so, whether the grievant received the process that he or she was due.[33] The Authority has determined that, under § 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.[34] Here, there is no dispute that the grievant is a nonprobationary federal employee in the competitive service. As such, the grievant had the requisite property interest in employment to entitle him to due process.[35]

As the grievant was entitled to due process, the question is whether the Arbitrator erred in finding that the grievant's due-process rights were not violated by the 107-day lapse between the notice and the suspension decision.[36] The Authority has held that employees such as the grievant are entitled to: (1) notice of the charges; (2) an explanation of the agency's evidence; and (3) an opportunity to respond.[37]

Applying these standards, the Union's claim does not demonstrate that the grievant's due-process rights were violated. The Union does not assert that the

[17] *Id.*
[18] *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).
[19] Exceptions at 8-12.
[20] *Id.* at 8-13.
[21] Award at 8.
[22] 5 U.S.C. § 7503(b)(4).
[23] Exceptions at 13-14.
[24] *Id.*
[25] *AFGE, Local Union No. 171*, 58 FLRA 469, 471 (2003).
[26] 22 FLRA 643 (1986).
[27] Exceptions at 13.
[28] 22 FLRA at 643.
[29] *Id.*
[30] *Id.* at 644.
[31] 5 U.S.C. § 7503(b)(4).
[32] *Id.*
[33] *U.S. Dep't of VA, Nat'l Mem'l Cemetery of the Pac.*, 45 FLRA 1164, 1174-75 (1992).
[34] *Id.* at 1175.
[35] *Id.*
[36] *Id.* at 1174-75.
[37] *E.g., SSA, Balt., Md.*, 64 FLRA 516, 518 (2010).

grievant failed to receive any of these due-process protections. And the Union does not identify any legal authority, and none is otherwise apparent, supporting a determination that a 107-day delay in issuing a disciplinary suspension constitutes a due-process violation. Therefore, we reject the Union's argument that the Arbitrator erred in finding that the grievant's due-process rights were not violated.

Accordingly, we deny the Union's contrary-to-law exceptions.

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

The Union argues that the award fails to draw its essence from the parties' agreement.[38] Specifically, the Union argues that the Arbitrator erred by failing to find that the suspension was not "fair and equitable" under Article 26 of the parties' agreement because: (1) the Agency violated § 7503(b)(4) by not issuing the suspension "at the earliest practicable date;"[39] and (2) the supervisor did not include the appointment reminder in the notice.[40]

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.[41] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' 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.[42] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[43]

Regarding the Union's first argument, the Arbitrator found no violation of § 7503(b)(4),[44] and we have denied the Union's exception to that ruling. Therefore, the Union fails to support its claim that the time that elapsed from the Agency issuing the notice to the Agency's decision to suspend the grievant was not "fair and equitable" under Article 26 of the parties' agreement[45] because the Agency violated § 7503(b)(4).

The Union's second argument – that the Arbitrator should have found that the grievant's suspension not "fair and equitable" under Article 26 because the supervisor did not include the appointment reminder in the notice[46] – is also unpersuasive. The Union's claim addresses a matter that the Arbitrator found irrelevant to the suspension that she sustained.

The Arbitrator sustained a three-day suspension of the grievant for failure to follow instructions – that is, failure to provide a doctor's note in a timely fashion.[47] In the Arbitrator's view, the failure to attach the "belated"[48] appointment reminder to the notice only supported dismissing the AWOL charge, which the deciding official had already dismissed.[49] As a consequence, the Arbitrator rejected the Union's argument "that once the AWOL was converted to approved leave, the grievant's failure to follow the supervisor's instruction to provide medical documentation within [fifteen] days became a moot point."[50] Rather, the Arbitrator ruled, "the act of failing to follow instructions is an act that is distinct and independent from an approved or unapproved leave."[51] The Union does not challenge this ruling. Accordingly, because the Union's exception does not contest an aspect of the award relevant to the suspension that the Arbitrator sustained, the Union's exception does not provide a basis for finding the award deficient.

Accordingly, we deny the Union's essence exceptions.

## IV. Decision

We deny the Union's exceptions.

[38] Exceptions at 16.
[39] *Id.*
[40] *Id.* at 17-23.
[41] *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[42] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[43] *Id.* at 576.
[44] Award at 8.
[45] Exceptions at 15-16.
[46] *Id.* at 17.
[47] Award at 14.
[48] *Id.* at 13.
[49] *Id.* at 8.
[50] *Id.* at 12-13.
[51] *Id.* at 13.