

70 FLRA No. 131

UNITED STATES
SMALL BUSINESS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2959
(Union)

0-AR-5246

DECISION

June 28, 2018

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

Arbitrator Sherry R. Wetsch issued an award finding that the Agency violated several articles of the parties' master collective-bargaining agreement (master agreement) and § 7116 of the Federal Service Labor-Management Relations Statute (the Statute).¹

Because the Arbitrator's various conclusions are so unclear and unsupported that we cannot determine whether the award is deficient on the grounds raised by the Agency's exceptions, we remand the award to the parties for resubmission to the Arbitrator for clarification of the award.

II. Background and Arbitrator's Award

The grievant worked as a loan specialist at the Agency's office in Little Rock, Arkansas. On May 28, 2015, the grievant and her second-line supervisor discussed the grievant's availability to participate in an audit in Austin, Texas. After that discussion, the second-line supervisor sent the grievant an email, instructing her to get her first-line supervisor's authorization in order to participate in the audit. The grievant did not receive supervisory authorization. Nonetheless, she traveled to Texas the following week and participated in the audit. On June 1, 2015, while the

grievant was at the audit, the first-line and second-line supervisors discussed disciplining the grievant.

In June 2015, shortly after the audit, the Union filed a grievance alleging that the first-line and second-line supervisors had "harassed" the grievant by failing to authorize her travel to, and participation in, the audit (the June grievance).²

On July 31, 2015, the grievant met with her first-line supervisor for a performance review. During that meeting, the first-line supervisor denied the grievant's request for Union representation.

In September 2015, the Agency issued the grievant a letter of warning for making an inappropriate comment during a staff meeting. The Agency placed the letter on a network drive that was accessible to its employees (the network drive). Around that time, the first-line supervisor also changed some of the grievant's duties.

On September 16, 2015, the Agency proposed suspending the grievant based on her unauthorized travel to, and participation in, the audit.

From June to September 2015, the Union filed three addendums to the June grievance. In those addendums, the Union alleged that the Agency had violated the Statute and numerous articles of the master agreement by, among other things, retaliating against the grievant, creating a hostile work environment, and disclosing the grievant's personally identifiable information.

On October 27, 2015, the grievant again met with her first-line supervisor for a performance review. As he did before, the first-line supervisor denied the grievant's request for Union representation.

On December 15, 2015, the Agency issued the grievant a two-day suspension for failing to follow the second-line supervisor's instruction to get supervisory authorization to participate in the audit. The Union filed a second grievance on December 17, 2015, challenging the suspension and maintaining that the Agency had continually harassed and retaliated against the grievant. The grievant served the suspension in late December 2015.

Unable to resolve the grievances, the parties consolidated them and submitted the dispute to arbitration.

¹ 5 U.S.C. § 7116.

² Exceptions, Attach. 5(2), Grievance at 179.

After a pre-hearing conference, the Arbitrator set forth the following issues:

1. Whether . . . the Agency had just cause to suspend [the grievant], and if not, what is the appropriate remedy?
2. Whether the Agency violated Articles 4, 11, 12, 22, 28, 37, 39 [, and] 44 of the [m]aster . . . [a]greement . . . [?]
 - a. Did [the first line-supervisor] create a hostile work environment for [the grievant]?
 - b. Did [the first line-supervisor] violate Articles 11 [and] 12 when he refused to allow [the g]rievant Union [r]epresentation [during the performance reviews]?
 - c. Did [the first line-supervisor] violate Article 28 when he completed the [g]rievant's performance appraisal?
 - d. Did the Agency commit an [u]nfair [l]abor [p]ractice in violation of Article 44?³

Regarding the suspension, the Arbitrator found – “[b]ased upon all of the evidence presented, including the credibility of the witnesses” – that the Agency did not have “just and sufficient cause” to issue the suspension.⁴ The Arbitrator concluded that by issuing the suspension, the Agency violated Articles 27⁵ and 37.⁶ She further found that the Agency violated Article 37 because “the December 15[] . . . [suspension] was not initiated in an expeditious manner.”⁷

Addressing the remainder of the Union's allegations, the Arbitrator concluded that the Agency: (1) created a “hostile work environment” for the grievant by, among other things, issuing the letter of

warning;⁸ (2) violated Articles 11⁹ and 12¹⁰ by denying the grievant Union representation during her performance reviews;¹¹ (3) violated Article 28¹² by failing to rate the grievant on certain critical elements in her performance appraisal; and (4) violated § 7116 of the Statute and Article 44¹³ by changing the grievant's job duties in “retaliation for filing” the June grievance.¹⁴

The Arbitrator also concluded that the Agency “violated the [grievant's] privacy” by placing the letter of warning on the network drive,¹⁵ and “acted in bad faith”¹⁶ by issuing that letter without “just cause.”¹⁷

Ultimately, the Arbitrator sustained the grievances. As remedies, she awarded backpay and \$35,500 in attorney fees, with interest, stating that the grievant was “substantially innocent.”¹⁸

On December 12, 2016, the Agency filed exceptions to the award, and, on January 10, 2017, the Union filed an opposition to those exceptions.

III. Analysis and Conclusion: We remand the award to the parties for resubmission to the Arbitrator.

The Agency raises several arguments,¹⁹ including that the award is “ambiguous.”^{20 21} Where an

³ Award at 3; *see also* Opp'n, Attach. 6, Pre-H'rg Conference Order at 1.

⁴ Award at 18.

⁵ Article 27 concerns classification and position-description matters. Exceptions Br., Attach. 5(1), Master Agreement at 65-67.

⁶ Article 37 states, in relevant part, that “[n]o bargaining[-]unit employee will be the subject of a disciplinary action except for just and sufficient cause” and that “[d]isciplinary or adverse actions will be initiated in an expeditious manner given the nature and circumstances of each incident.” Award at 8 (quoting Master Agreement, Art. 37, §§ 1, 3)).

⁷ *Id.* at 18.

⁸ *Id.* at 21.

⁹ Article 11 states, as relevant here, that “[p]ursuant to 5 U.S.C. [§] 7114(a)(2)(A), the Union shall be given the opportunity to be represented at any formal discussion.” Award at 4 (quoting Master Agreement, Art. 11, § 2(a)).

¹⁰ Article 12 authorizes the Union official time for certain purposes. Award at 5.

¹¹ Concerning the July and October 2015 performance reviews, the Arbitrator stated that the Agency was “in the process of” disciplining the grievant when those meetings occurred. Award at 19.

¹² Article 28 details the parties' obligations with regard to performance appraisals. Award at 6-7.

¹³ Article 44 provides, among other things, that the parties “shall make every reasonable effort to prevent the occurrence of any [u]nfair [l]abor [p]ractice under 5 U.S.C. [§] 7116.” Award at 11 (quoting Master Agreement, Art. 44, § 1)).

¹⁴ *Id.* at 18.

¹⁵ *Id.* at 20.

¹⁶ *Id.*

¹⁷ *Id.* at 18.

¹⁸ *Id.* at 22.

¹⁹ *See, e.g.*, Exceptions Form at 4-11 (arguing that: the award is contrary to law; the Arbitrator was biased; the award is contrary to public policy; the Arbitrator denied the Agency a fair hearing; the award is based on nonfacts; the award fails to draw its essence from the master agreement; and the Arbitrator exceeded her authority).

²⁰ *See* Exceptions Br. at 23.

arbitrator has not made sufficient findings for the Authority to determine whether the award is deficient, the Authority will remand the award to the parties for further action.²²

Here, the Arbitrator's conclusions are unsupported. For example, the Arbitrator concluded that the Agency violated Article 37 by issuing the two-day suspension.²³ Although the Arbitrator asserted that her conclusion was based on "all of the evidence presented, including the credibility of the witnesses,"²⁴ she did not indicate: what evidence she considered; how she balanced that evidence; whose testimony she credited; or on what bases she made her credibility determinations. As a result, the Arbitrator failed to sufficiently support her determination that the Agency did not have "just and sufficient cause" to issue the suspension.²⁵

Moreover, in concluding that the Agency violated Article 37 by failing to expeditiously "initiate[]" the suspension, the Arbitrator referenced only the date on which the Agency *issued* the suspension – December 15, 2015.²⁶ But, as noted in other portions of the award, the grievant's first-line and second-line supervisors discussed disciplining the grievant as early as June 1, 2015;²⁷ the Agency was "in the process of" disciplining the grievant on July 31, 2015;²⁸ and the Agency proposed suspending the grievant on September 16, 2015.²⁹ The Arbitrator, however, did not explain why she considered that evidence insufficient to establish that the Agency timely *initiated* the suspension under Article 37.³⁰

²¹ For the reasons explained in his concurring opinion in *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 623 (2018) (Member Abbott concurring, Member DuBester dissenting), Member Abbott, does not agree, as the dissent implies, that "ambiguity" could be a sufficient basis upon which to remand a case. Upon the filing of exceptions, the Authority must determine whether an "award is either right or [whether] it is wrong." An ambiguous award is deficient and should be vacated. *Id.* at 625. Here, the Arbitrator did not make sufficient findings for us to determine whether the award is right or wrong.

²² See, e.g., *AFGE, Local 3506*, 64 FLRA 583, 584 (2010) (*Local 3506*).

²³ Award at 18.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *id.* (stating only that the Agency "violated Article 37 in that the December 15[] disciplinary action was not initiated in an expeditious manner given the nature and circumstances of the alleged incident").

²⁷ *Id.* at 20.

²⁸ *Id.* at 19.

²⁹ *Id.* at 14.

³⁰ See *id.* at 8 (Article 37 requires the Agency to "initiate[] discipline[] in an expeditious manner" (quoting Master Agreement, Article 37, § 3)).

As noted above, the Arbitrator also concluded that the Agency created a "hostile work environment" for the grievant,³¹ "violated the [grievant's] privacy,"³² and did not have "just cause" to issue³³ – and "acted in bad faith" by issuing³⁴ – the letter of warning. However, the Arbitrator did not indicate whether those conclusions represented statutory or contractual violations. If contractual, then the Arbitrator should have identified articles of the master agreement and discussed the evidence upon which she relied to conclude that the Agency violated those articles.³⁵ And if those violations were statutory, then the Arbitrator should have identified the relevant laws and applied the appropriate legal standards.³⁶

Concerning the violations of Articles 11 and 12,³⁷ Article 11 provides, in relevant part, that the Union shall be given the opportunity to be present at any "formal discussion," consistent with § 7114(a)(2)(A) of

³¹ *Id.* at 21.

³² *Id.* at 20.

³³ *Id.* at 18.

³⁴ *Id.* at 20.

³⁵ See *AFGE, Local 3974*, 67 FLRA 306, 308 (2014) (it is "critical to ascertain whether [an] [a]rbitrator addressed" a contractual issue or a statutory issue because if "he addressed a statutory issue, [then] he [would be] required to apply . . . statutory . . . principles"); *Local 3506*, 64 FLRA at 584-85 (where it was unclear whether arbitrator resolved contractual or statutory issues, and arbitrator did not make sufficient factual findings for the Authority to "assess or determine" the arbitrator's conclusions, Authority remanded the award).

³⁶ E.g., *Outlaw v. Johnson*, 49 F.Supp.3d 88, 91 (D.D.C. 2014) (to establish a prima facie case of a hostile work environment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, the employee must demonstrate, among other things, that: (1) she was a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was based on her membership in the protected class; (4) the harassment was severe to a degree which affected a term, condition, or privilege of employment; and (5) the employer knew or should have known about the harassment, but nonetheless failed to take steps to prevent it); *AFGE, Local 1592*, 58 FLRA 584, 585 (2003) (to maintain a suit for an unauthorized disclosure of information under the Privacy Act, 5 U.S.C. § 552a, a claimant must prove the following four elements: (1) the information is covered by the Privacy Act as a record contained in a system of records; (2) the agency disclosed the information; (3) the disclosure had an adverse effect on the claimant; and (4) the disclosure was willful or intentional).

³⁷ Award at 19.

the Statute,³⁸ and Article 12 concerns official time.³⁹ The Arbitrator did not explain why, under the Statute or either of those articles, the grievant was entitled to Union representation at the performance reviews.

Similarly, the Arbitrator: failed to support the conclusion that the Union did not act in bad faith during the grievance process;⁴⁰ provided no explanation as to how the Agency violated Article 27 by issuing the suspension;⁴¹ failed to identify any particular section of Article 28 that the Agency violated with regard to the grievant's performance appraisal;⁴² and did not discuss the relevant legal standard⁴³ in concluding that the Agency violated § 7116 of the Statute by "retaliat[ing]" against the grievant.⁴⁴

As for the awarded remedy of attorney fees with interest, the Authority has long held that, when resolving a request for attorney fees, arbitrators must set forth specific findings supporting their determinations "on each pertinent statutory requirement."⁴⁵ One of the prerequisites for an award of attorney fees under 5 U.S.C. § 7701(g) is that the award of fees be warranted in the interest of justice.⁴⁶ While the Arbitrator appeared to address § 7701(g)'s interest-of-justice requirement by finding that the grievant was "substantially innocent,"⁴⁷ the Arbitrator did not discuss the applicable legal

standard.⁴⁸ Nor did she provide any reasoning for awarding interest.⁴⁹ Accordingly, there is not a sufficiently articulated basis for the awarded remedy.⁵⁰

Because the Arbitrator's conclusions are so unclear and unsupported that we cannot determine whether the award is deficient on the grounds raised by the Agency's exceptions, we remand the award to the parties for resubmission to the Arbitrator for clarification. On remand, the Arbitrator should, consistent with this decision, explain the statutory or contractual bases for her various conclusions; apply the relevant legal standards, where appropriate; explain any arbitral interpretations of the applicable articles of the master agreement; and support her conclusions with factual findings.⁵¹

IV. Decision

We remand the award for action consistent with this decision.⁵²

³⁸ *Id.* at 4 (quoting Master Agreement, Art. 11, § 2(a)); *see also U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 174 (2009) (in order for a union to have representation rights under § 7114(a)(2)(A): (1) there must be a discussion, (2) which is formal, (3) between one or more representatives of the agency and one or more unit employees or their representatives, (4) concerning any grievance or any personnel policy or practice or other general condition of employment).

³⁹ Award at 5.

⁴⁰ *Id.* at 19 (stating only that "the evidence d[id] not support" that the Union acted in bad faith during the grievance process).

⁴¹ *Id.* at 22.

⁴² *Id.* at 19 (stating, without reference to any section of Article 28, that the Agency "had the responsibility to complete the appraisal").

⁴³ *See AFGE, Local 1345, Fort Carson, Colo. (In Trusteeship) & AFGE, AFL-CIO*, 53 FLRA 1789, 1793 (1998) (in cases of alleged retaliation against an employee for engaging in protected activity, it must be shown that: (1) the employee against whom the alleged discriminatory action was taken was engaged in activity protected by the Statute; and (2) such protected activity was a motivating factor in the agency's treatment of the employee); *see also U.S. Dep't of the Treasury, IRS, New Carrollton, Md.*, 57 FLRA 942, 946 (2002).

⁴⁴ Award at 18.

⁴⁵ *E.g., Int'l Bhd. Elec. Workers, Local 2219*, 68 FLRA 448, 451 (2015) (*IBEW*).

⁴⁶ *Id.*

⁴⁷ Award at 22.

⁴⁸ *See Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420, 434 n.35 (1980) (in making a determination that an employee is substantially innocent "the presiding official should examine the degree of fault on the employee's part and the existence of any reasonable basis for the agency's action"); *see also AFGE, Local 12*, 38 FLRA 1240, 1251 (1990) (same).

⁴⁹ Award at 22.

⁵⁰ *See AFGE, Local 2583*, 69 FLRA 538, 540 (2016) (remanding where arbitrator did not "fully address" the statutory requirements for an award of attorney fees); *IBEW*, 68 FLRA at 451 (remanding where arbitrator did not make "findings addressing the pertinent statutory requirements for attorney fees"); *see also NAGE, Local R4-106*, 32 FLRA 1159, 1166 (1988) (remanding for arbitrator to apply the substantially innocent standard); *FAA, Nat'l Aviation Facilities Experimental Ctr.*, 32 FLRA 750, 753 (1988) (same).

⁵¹ *See, e.g., AFGE, Local 2054*, 63 FLRA 169, 173 (2009) (remanding award where arbitrator had not made sufficient findings for the Authority to assess the arbitrator's conclusions).

⁵² We note that nothing in this decision precludes the parties from mutually agreeing to select a different arbitrator upon remand.

Member DuBester, dissenting:

I disagree with the majority's decision to remand the award. The Arbitrator's factual findings support her legal conclusions, and the record is sufficient to address the Agency's exceptions.

The Arbitrator finds that this entire controversy "was avoidable."¹ The confusion about whether or not the grievant should have attended the Austin audit was "created by management."² Further, because the grievant's two-day suspension was based on the grievant's earnest attempt to follow the Agency's confusing instructions, the Arbitrator finds the suspension without just or sufficient cause.³

For example, based on credited testimony, the Arbitrator determines that the grievant "tried to follow [the Agency's] instructions."⁴ But the Agency's supervisors created confusion by failing "to clearly and timely communicate with [the grievant] regarding their expectations pertaining to her participation in the audit."⁵ Moreover, the Arbitrator determines that the bulk of the Agency's allegations, supporting the Agency's determination that the grievant acted improperly, simply "did not happen."⁶

In addition, contrary to the majority's decision,⁷ the award, reasonably interpreted, finds both contractual and statutory violations. Reading together how the Arbitrator frames and resolves the issues, it is apparent that the Arbitrator finds that the Agency violated Article 37, sections 1(b) (the "just and sufficient cause" standard), 2(b) (the employees' right to Union representation), and 3 (the timeliness requirement for disciplinary actions).⁸ It is similarly apparent that the Arbitrator finds that the Agency violated Article 44 (incorporating 5 U.S.C. § 7116's prohibition on unfair labor practices).⁹ Further, the Agency does not question these findings, or claim that the award is "ambiguous" in this respect.¹⁰

¹ Award at 18.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Majority at 5.

⁸ Compare Award at 3-13 (stating framed issues and pertinent sections of parties' agreement) with *id.* at 18-23 (finding multiple contract and statutory violations).

⁹ *Id.* at 18.

¹⁰ The Agency only challenges as "ambiguous" one of the Arbitrator's remedies. Compare Majority at 4 ("The Agency raises several arguments, including that the award is 'ambiguous.'") with Exceptions Br. at 23 (alleging that the Arbitrator's remedy is ambiguous because "[t]he Arbitrator does

I would therefore deny all of the Agency's exceptions to the award but one: the Agency's challenge to the award of interest on attorney fees. I would grant that exception. But I see no need to remand the award.

not specify from where the Agency is to remove the [September 2015] letter [of warning] . . . [since it] was not filed in the [g]rievant's official personnel file."). As I have stated previously, I disagree with the suggestion that if an arbitrator's award is "ambiguous," it "is deficient and should be vacated." Majority at 4 n.21. See *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 623, 626 (2018) (Dissenting Opinion of Member DuBester).