73 FLRA No. 121

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
YAZOO CITY, MISSISSIPPI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1013
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5858

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DECISION

August 2, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

The grievant, an employee in a federal prison, reported to the Agency that a supervisor had berated and battered him in front of inmates. In response, the Agency instructed the grievant to refrain from further contact with the supervisor and to halt any further communication about the supervisor's alleged misconduct (the cease-and-desist notice). The Union grieved the Agency's failure to discipline the supervisor and its issuance of the cease-and-desist notice to the grievant.

Arbitrator Jack Clarke issued an award finding that the grievance was procedurally arbitrable and that the cease-and-desist notice constituted retaliation against the grievant in violation of the parties' collective-bargaining agreement and Title VII of the Civil Rights Act of 1964 (Title VII).[1] The Agency filed exceptions to the award, arguing that (1) the award conflicts with Title VII, and (2) the Arbitrator's finding that the grievance was procedurally arbitrable fails to draw its essence from the parties' agreement.

Because the Agency failed to raise its contrary-to-law argument before the Arbitrator, but could have done so, we dismiss this exception under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.[2] In addition, because the Agency does not establish that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement, we deny the Agency's essence exception.

II. Background and Arbitrator's Award

The grievant reported to the prison warden that the supervisor "aggressively grabbed" and berated him in front of inmates.[3] After receiving the allegation, the Agency held a threat-assessment meeting. Subsequently, the Agency issued the grievant the cease-and-desist notice directing him to "refrain from any contact with . . . [the supervisor] outside of his normal working capacity"; to "cease and desist any communication regarding this matter"; and to "refrain from any disruptive behavior or appearance of such regarding this matter."[4]

Six weeks later, the grievant reported to the warden that the supervisor had opened an unauthorized investigation into the grievant. The grievant also alleged that the supervisor had engaged in a pattern of unauthorized investigations and harassment of African American staff, that the supervisor had recently been arrested for stalking another employee, and that the grievant "fear[ed] for [his] safety" in the supervisor's presence.[5] The grievant further alleged that, when African American staff reported the supervisor's misconduct to Agency officials, the reports were "falling on deaf ears."[6]

After attempting informal resolution with the warden but receiving no response,[7] the Union filed a grievance with an Agency regional director. As relevant here, the Union alleged that the Agency violated Title VII by issuing the grievant the cease-and-desist notice. The grievance proceeded to arbitration. The Arbitrator framed the issues as whether the grievance was procedurally arbitrable and whether "the Agency violate[d] the [parties' a]greement" or "any laws, rules, or regulations . . . with respect to any issue raised in the grievance."[8]

At arbitration, the Agency argued that the grievance was procedurally inarbitrable under Article 31(f) of the parties' agreement because the Union filed the grievance with the regional director, rather than the warden. Article 31(f) provides that the Union will file grievances with the warden of a facility "if the grievance

[1] 42 U.S.C. § 2000e-3(a).
[2] 5 C.F.R. §§ 2425.4(c), 2429.5.
[3] Award at 45.
[4] *Id.* at 45-46.
[5] *Id.* at 50.
[6] *Id.*
[7] *Id.* at 40 (finding the Union attempted informal resolution by sending the warden a memorandum).
[8] *Id.* at 37.

pertains to the action of an individual [over whom] the [warden] has disciplinary authority."[9] However, Article 31(f) states that "when filing a grievance against the [warden] of a[] . . . facility," the Union must file the grievance "with the appropriate [r]egional [d]irector."[10]

The Arbitrator noted that the grievance's first sentence specifically identified that it was challenging the "practice of management under the direction of the . . . [w]arden . . . to allow management officials under his disciplinary authority . . . to engage in patterns of unethical behavior[] and practices with employees."[11] Finding that it "c[ould not] be reasonably disputed" that this sentence concerned the warden's conduct, the Arbitrator found the Union's filing of the grievance with the regional director "entirely consistent with Article 31."[12]

On the merits, the Arbitrator considered, as relevant here, whether the Agency violated Title VII by retaliating against the grievant for reporting the supervisor's conduct. The Arbitrator noted that to establish a prima facie case of unlawful retaliation, a union must show that (1) the grievant engaged in a statutorily protected activity; (2) the agency was aware of the protected activity; (3) the agency took an adverse personnel action against the grievant; and (4) a causal connection existed between the protected activity and the adverse treatment.[13] Applying this standard, the Arbitrator found that: the grievant engaged in protected activity when he reported the supervisor's allegedly discriminatory conduct to the warden; the Agency was aware of the protected activity when the warden received the grievant's memo;[14] the cease-and-desist notice constituted adverse treatment because it was likely to "deter [the grievant] or others from engaging in [such] activity";[15] and "a nexus exist[ed] between [the grievant's] protected activity and the issuance of the cease[-]and[-]desist notice."[16] Consequently, the Arbitrator concluded that the Union had "shown a prima facie case of reprisal."[17]

Citing Equal Employment Opportunity Commission and U.S. Supreme Court precedent, the Arbitrator then found that the burden shifted to the Agency to "articulate a legitimate, non-discriminatory reason for its actions."[18] In assessing whether the Agency articulated such a reason, the Arbitrator observed that the "only explanation" the Agency provided was that an Agency official issued a memo to all wardens (the memo), which permits, "in some cases[, sending] a cease[-]and[-]desist notice . . . to both parties."[19] However, the Arbitrator noted that the memo also states, "[I]n cases whe[re] there is only one alleged harasser, issuing a [cease-and-desist] letter to additional parties beyond the alleged harasser can be problematic."[20] Thus, the Arbitrator determined that the memo did not support issuing the grievant a cease-and-desist notice and that the Agency had "not satisfied its burden" of rebutting the Union's prima facie case of retaliation.[21] Consequently, the Arbitrator concluded that the Agency violated Title VII, as well as provisions of the parties' agreement that prohibit discrimination.

The Agency filed exceptions to the award on January 19, 2023, and the Union filed an opposition on February 22, 2023.

III. Preliminary Matter: We dismiss the Agency's contrary-to-law exception that alleges legitimate, nondiscriminatory reasons for issuing the cease-and-desist notice.

The Agency argues that the award is contrary to law because the Arbitrator "did not properly investigate or analyze whether the Agency had a legitimate, nondiscriminatory reason for issuing" the cease-and-desist notice.[22] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments or evidence that could have been, but were not, presented to the arbitrator.[23]

The Arbitrator determined that the Union established a prima facie case of retaliation, shifting the burden to the Agency to provide a legitimate, nonretaliatory reason for its action.[24] The Arbitrator found that the Agency did not "satisf[y] its burden" of rebutting the Union's prima facie case by providing a legitimate, nonretaliatory reason for issuing the grievant the

[9] Exceptions, Attach. B, Collective-Bargaining Agreement (CBA) at 72.
[10] *Id.*
[11] Award at 1.
[12] *Id.* at 38-39.
[13] *Id.* at 48-49 (citing *Alesia P. v. DOJ*, EEOC Doc. 2020001024, 2021 WL 2644779, at *5 (2021) (*Alesia P.*)).
[14] *Id.* at 52 ("That the Agency was aware of [the grievant's] protected activity cannot be reasonably disputed.").
[15] *Id.*
[16] *Id.* (noting that the Agency sent the cease-and-desist notice "soon after" the Agency received the grievant's allegation).
[17] *Id.*
[18] *Id.* at 49 (citing *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981) (*Burdine*); *Complainant v. Shinseki*, EEOC Doc. 0120121920, 2014 WL 3000087, at *6 (2014)).
[19] *Id.* at 53.
[20] *Id.* at 47 (citing Opp'n, Attach. D, Memo at 1).
[21] *Id.* at 53; *see also id.* at 47 & n.75 (noting Equal Employment Opportunity Commission held that the issuance of a cease-and-desist letter in response to a report of harassment was "reasonably likely to deter [the c]omplainant from engaging in protected activity" (citing *Alesia P.*, EEOC Doc. 2020001024, 2021 WL 2644779, at *5)).
[22] Exceptions at 11.
[23] 5 C.F.R. §§ 2425.4(c), 2429.5.
[24] Award at 49 (citing *Burdine*, 450 U.S. at 253).

cease-and-desist notice.[25] In its exceptions, the Agency identifies alleged "legitimate, non-discriminatory reasons" for issuing a cease-and-desist notice, including an "internal security right to take whatever actions are necessary in the context of a[misconduct] investigation" and as a "tool[]"to prevent "witnesses [from] discussing what they saw with each other."[26] However, the Agency had the opportunity to provide these reasons to the Arbitrator, and did not do so.[27] Accordingly, consistent with §§ 2425.4(c) and 2429.5 of the Authority's Regulations, we do not consider these arguments now, and we dismiss this exception.[28]

IV. Analysis and Conclusions

A. The Agency does not demonstrate that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement.

The Agency argues the Arbitrator's finding that the grievance was procedurally arbitrable fails to draw its essence from Article 31(f) of the parties' agreement.[29] The Authority will find an award fails to draw its essence from the parties' agreement when the excepting party establishes 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 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]

The Agency contends that Article 31(f) required the Union to file the grievance with the warden, rather than the regional director, because the grievance did not concern the warden's conduct.[31] As noted above, Article 31(f) states that if a "grievance pertains to the action of an individual [over whom] the [warden] has disciplinary authority," then the Union must file the grievance with the warden.[32] However, if the "grievance [is] against the [warden]," then Article 31(f) states that the Union must file the grievance with the regional director.[33]

According to the Agency, the Union grieved only the supervisor's conduct "toward[] the grievant and not any specific identifiable conduct of the [w]arden."[34] However, the Arbitrator found that the grievance explicitly "object[ed] to the [warden's] conduct" by alleging, "It continues to be the practice of management *under the direction of the* . . . [*w*]*arden* . . . to allow management officials under his disciplinary authority . . . to engage in patterns of unethical behavior[] and practices with employees."[35] In other words, the Arbitrator concluded that the grievance concerned the warden's failure to take appropriate action when presented with allegations of harassment.[36] As the Agency does not provide a basis for finding the Arbitrator's interpretation deficient, we deny the Agency's essence exception.[37]

B. The Agency fails to support its remaining exceptions.

Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c).[38] Consistent with § 2425.6(e)(1), when a party does not provide any arguments to support its exception, the Authority will deny the exception.[39]

In its exceptions, the Agency raises four additional contrary-to-law exceptions, a bias exception, and a fair-hearing exception.[40] However, the Agency does not support these exceptions with any arguments. Moreover, these exceptions appear unrelated

[25] *Id.* at 53.
[26] Exceptions at 11.
[27] Award at 53 (noting "only explanation" Agency provided was that the memo permits sending cease-and-desist letters to victims of harassment under some circumstances (citing Exceptions, Attach. F, Hr'g Tr. at 378)).
[28] *See U.S. DHS, U.S. CBP, U.S. Border Patrol, San Diego Sector*, 68 FLRA 642, 642-43 (2015) (dismissing exception where excepting party did not raise the underlying argument before the arbitrator, but could have).
[29] Exceptions at 7.
[30] *NTEU, Chapter 149*, 73 FLRA 413, 416 (2023).
[31] Exceptions at 7.
[32] CBA at 72.
[33] *Id.*
[34] Exceptions at 8.
[35] Award at 38.
[36] *Id.*; *see also id.* at 43 (finding the Union attempted informal resolution by sending the warden a memorandum in which "the Union requested the telephonic report [demonstrating that] 'appropriate authorities' (the Office of Internal Affairs) were advised of the incident"); *id.* at 51-52 (noting that African American staff had filed repeated internal complaints against the supervisor with the warden, as well as police reports).
[37] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mia., Fla.*, 73 FLRA 154, 157 (2022) (upholding arbitrator's determination that grievance filed with regional director was arbitrable under Article 31(f) where arbitrator found that warden was responsible for grieved actions); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 71 FLRA 997, 998 (2020) (upholding arbitrator's conclusion that grievance concerned the warden's actions where arbitrator found that the warden was "ultimately responsible" for the grieved action).
[38] *NTEU*, 70 FLRA 57, 60 (2016).
[39] *Id.* (citing *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014)).
[40] Exceptions at 4-5.

to this case.[41] Accordingly, we deny these exceptions as unsupported under § 2425.6(e)(1) of the Authority's Regulations.[42]

V. Decision

We partially dismiss and partially deny the Agency's exceptions.

[41] *E.g.*, *id.* (challenging the award's alleged lack of analysis concerning gender discrimination, the Fair Labor Standards Act, official time, and the Back Pay Act).

[42] *See Haw. Fed. Emp. Metal Trades Council*, 70 FLRA 324, 325-26 (2017) (denying exceptions where excepting party "fail[ed] to support [its] exceptions with any arguments").