73 FLRA No. 178

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5939

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DECISION

July 11, 2024

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

I. Statement of the Case

Arbitrator John F. Markuns issued an award finding the Agency violated law and Agency policy when it discriminated against the grievant and failed to provide her with a reasonable accommodation. The Agency filed an exception arguing the award is contrary to law. Because the Agency does not except to all of the separate and independent grounds for the award, the exception does not provide a basis for finding the award deficient. Therefore, we deny the Agency's exception.

II. Background and Arbitrator's Award

The grievant is an advanced medical support assistant (AMSA) in the Agency's medical center, and is also a Union representative. In June 2022,[1] the grievant began suffering symptoms and sought medical treatment.[2] Consequently, with the Union's assistance, the grievant submitted a reasonable-accommodation request to telework full time with a "flex tour" work schedule.[3] As part of her request, the grievant informed the Agency that she had been "diagnosed with [a]utoimmune [g]astritis" and the request was "time sensitive . . . due to the irregularity of the pain" associated with her condition.[4] The Agency directed the grievant to submit medical documentation to the Agency's reasonable-accommodation coordinator (the RA coordinator) by July 6. The Agency explained that this documentation would need to include certain details, including: the diagnosis, severity and duration of the grievant's impairment; the life activities impacted; the barriers to the grievant being able to perform the essential functions of her position; and how the requested accommodation would assist the grievant in overcoming those barriers.

The grievant did not submit the medical documentation to the Agency by July 6. On August 9, the Union notified the Agency of the grievant's "need for an interim accommodation as quickly as possible."[5] On August 16, the grievant submitted a medical note to the RA coordinator, in which her doctor stated that the grievant was "needing to work from home for medical reasons," "unable to go to work due to medical conditions at this time," and asking the Agency to "[p]lease accommodate her medical needs."[6] The next day, the RA coordinator notified the grievant that the medical note was not sufficiently specific, and directed her to provide the previously requested medical documentation by September 15.

On August 24, while the grievant was on approved leave for "a serious health condition," the Agency approved the grievant's interim reasonable accommodation.[7] Thereafter, the grievant remained on leave and, on August 29, received approval for leave under the Family and Medical Leave Act (FMLA)[8] due to a scheduled surgery. After the Union inquired when the grievant's interim reasonable accommodation would begin, the Agency responded on September 9 that such accommodation could not be processed while the grievant was on FMLA leave.

While still on leave, the grievant inquired whether the Agency had processed her permanent reasonable-accommodation request. On September 19, the RA coordinator notified the grievant that the reasonable-accommodation request was "administratively closed" because she had not provided sufficient medical documentation.[9] On October 5, the grievant sent two Agency managers a medical note with more detailed information about her diagnosis, barriers to her being able to perform her job, and how a telework accommodation

[1] All dates occurred in 2022 unless noted otherwise.
[2] Award at 45.
[3] *Id.* at 49.
[4] *Id.*
[5] *Id.* at 50.
[6] *Id.* at 52 (quoting medical note).
[7] *Id.* at 57 (internal quotations omitted).
[8] 5 U.S.C. § 6384(a).
[9] Award at 66.

with a "flex tour" work schedule would accommodate her medical needs.[10] Neither the grievant nor her representative submitted this documentation to the RA Coordinator.

The Union then grieved the Agency's refusal to provide the grievant with an interim and a permanent reasonable accommodation (collectively, the accommodations). When the parties did not resolve the grievance, the matter went to arbitration.

The parties did not stipulate to an issue. The Arbitrator framed the issues, as relevant here, as whether the Agency violated (1) the Agency's policy on reasonable accommodation (RA policy), the parties' collective-bargaining agreement, the Rehabilitation Act,[11] or Title VII of the Civil Rights Act of 1964 (Title VII)[12] by not providing the grievant with the accommodations; and (2) the parties' agreement or § 7116(a)(2) of the Federal Service Labor-Management Relations Statute[13] by engaging in anti-union animus.

The Arbitrator sustained the grievance. In doing so, the Arbitrator applied the legal framework under the Rehabilitation Act for determining whether the Agency discriminated against the grievant on the basis of a disability – specifically, "the principles of the American[s] with Disabilities Act [ADA],"[14] as incorporated into the RA policy.[15] The Arbitrator found the grievant was a qualified person with a disability entitled to the reasonable accommodation of telework, and that the Agency did not demonstrate the accommodations would impose an undue hardship on the Agency. Therefore, he found the Union established the grievant was entitled to the accommodations. He further concluded the Agency "failed to make a good[-]faith effort to accommodate her and that she suffered both pecuniary and non[-]pecuniary compensatory damages as a result."[16]

The Arbitrator also found there was "unrefuted evidence that the [Agency's reasonable-accommodation] team harbored anti[-]union animus," and this animus was a motivating factor in how the Agency handled the accommodation requests.[17]

Additionally, the Arbitrator found the Agency discriminated against the grievant on the basis of race under Title VII by failing to provide the accommodations. Referencing the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*,[18] he concluded the grievant established a *prima facie* case of disparate treatment based on race through the Union's evidence of comparator employees who were granted telework as an interim accommodation. He further found that the Agency did not articulate a nondiscriminatory reason for treating those employees differently from the grievant.

Lastly, the Arbitrator found the Agency's handling of the grievant's accommodation requests violated the RA policy. Specifically, the Arbitrator found the RA coordinator failed to consult with the Agency's Occupational Health Unit to seek review of the grievant's medical documentation regarding the nature of her medical condition. He also found the Agency's reasonable-accommodation team did not use readily available resources to address the grievant's requests.

The Arbitrator awarded several remedies based on these findings. Specifically, he directed the Agency to retroactively assign the grievant to a "restructured [AMSA] telework position . . . with all appropriate equipment and implementation of a telework agreement as necessary" (the accommodation remedy).[19] He further found that, by "wrongfully denying" the grievant an interim accommodation and charging her as absent without leave for part of the time she was unable to work, the Agency committed an "unjustified or unwarranted personnel action entitling [the grievant] to back pay and benefits."[20] The Arbitrator also found the grievant was "entitled to an award of $60,000 in compensatory damages for pain and suffering from the emotional harm by the Agency's actions," but reduced this amount based on "the unnecessary complication to [g]rievant's situation" caused by her failure to submit her more detailed medical note directly to the RA coordinator's team.[21]

On December 18, 2023, the Agency filed an exception to the award. On January 18, 2024, the Union filed an opposition to the exception.

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[10] *Id.* at 59.
[11] 29 U.S.C. §§ 701-796. Although the Arbitrator refers to the "Reasonable Accommodation Act" as part of the framed issue, Award at 7, we find that, when read in context with the remainder of the award, the Arbitrator is referring to the Rehabilitation Act.
[12] 42 U.S.C. § 2000e-3(a).
[13] 5 U.S.C. § 7116(a)(2).
[14] Award at 73; *see also* 42 U.S.C. § 12101.
[15] Award at 73. The Rehabilitation Act applies the employment standards of the ADA to federal agencies. 29 U.S.C. § 791(f); *see also AFGE, Loc. 1045*, 64 FLRA 520, 522 (2010) ("Congress has specifically adopted the standards of the ADA for determining violations of the Rehabilitation Act.").
[16] Award at 74.
[17] *Id.* at 75.
[18] 411 U.S. 792 (1973).
[19] Award at 75.
[20] *Id.*
[21] *Id.* at 76.

III. Preliminary Matter: The Union's opposition is untimely.

Under the Authority's Regulations, the time limit for filing an opposition to exceptions is thirty days after the date of service of the exceptions.[22] As relevant here, the date of service is the date the exceptions are transmitted by email.[23] The Agency filed its exceptions on December 18 using the Authority's eFiling system and asserted that it served the Union with a copy of the exceptions by email.[24] Based on this assertion, the Union's opposition would have been due no later than January 17, 2024. Because the Union filed its opposition on January 18, the Authority issued an order directing the Union to show cause why its opposition should not be dismissed as untimely.[25]

The Union did not respond to the order. Therefore, the Union has not demonstrated that the opposition is timely, and we do not consider it.[26]

IV. Analysis and Conclusion: The Agency does not demonstrate that the award is deficient.

The Agency argues the Arbitrator erred in finding the Agency violated Title VII by discriminating against the grievant on the basis of race (discrimination finding).[27] Specifically, the Agency claims the award fails to establish the Agency treated the grievant differently from similarly situated employees outside of her protected class, and the discrimination finding is erroneously based on the hearsay testimony of the Union president.[28]

The Authority has repeatedly held that when an arbitrator bases an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient before the Authority will set the award aside.[29] If the excepting party does not demonstrate that the award is deficient on a ground upon which the arbitrator relied, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other grounds.[30]

Reading the Arbitrator's various statements in context,[31] we find he determined the Agency's failure to provide the accommodations violated the Rehabilitation Act (disability finding),[32] which constitutes a separate basis – independent from the discrimination finding – for his conclusion that the Agency wrongfully denied the accommodation requests. Additionally, while the Agency does not separately challenge the awarded remedies, we note that the disability finding supports the accommodation,[33] compensatory-damages,[34] and backpay[35] remedies. Thus, the disability finding constitutes a separate basis for the awarded remedies, independent from the discrimination finding. As the Agency does not challenge the disability finding, the Agency's exception challenging only the discrimination finding provides no basis for finding the award deficient.

We deny this exception.[36]

V. Decision

We deny the Agency's exception.

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[22] 5 C.F.R. § 2425.3(b).
[23] *Id.* § 2429.27(b)(6).
[24] Exceptions Form at 4.
[25] Order to Show Cause at 2.
[26] *See AFGE, Loc. 987*, 73 FLRA 722, 723 (2023) (declining to consider untimely opposition where opposing party did not timely respond to Authority show-cause order); *U.S. Dep't of VA, John J. Pershing Med. Ctr., Poplar Bluff, Mo.*, 68 FLRA 852, 853 (2015) (Member DuBester concurring on other grounds; Member Pizzella dissenting on other grounds) (finding opposition untimely after opposing party failed to timely respond to Authority show-cause order).
[27] Exceptions Br. at 2.
[28] *Id.* at 2-10.
[29] *U.S. Dep't of VA*, 73 FLRA 660, 661 (2023) (citing *AFGE, Loc. 2338*, 73 FLRA 510, 513 (2023) (*Local 2338*)).
[30] *Id.* (citing *Local 2338*, 73 FLRA at 513-14).
[31] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 73 FLRA 860, 861 (2024) (reading arbitrator's statements in context to ascertain award's meaning (citing *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 420 (2023))).
[32] Award at 73-74.
[33] 29 U.S.C. § 794a (monetary and equitable remedies available for violations of the Rehabilitation Act).
[34] *See, e.g.*, *U.S. DOD, Def. Logistics Agency, Richmond, Va.*, 71 FLRA 729, 731 (2020) (Member Abbott concurring) (finding compensatory damages to be appropriate remedy under Rehabilitation Act and denying agency exception challenging remedy) (citing 29 U.S.C. § 794; *Blount v. Napolitano*, EEOC Doc. 0720070010, 2009 WL 3700690, at *7 (2009) ("Failing to make a good[-]faith effort to accommodate a [qualified, disabled employee] exposes an agency to liability for compensatory damages.")).
[35] *See, e.g.*, *AFGE, Council of Prison Locs. C-33, Loc. 720*, 68 FLRA 452, 453 (2015) (explaining that "an unjustified or unwarranted personnel action" can be satisfied by a violation of applicable law, a governing agency regulation, or the parties' collective-bargaining agreement).
[36] *See U.S. Dep't of VA, John J. Pershing Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 503-04 (2023) (denying exception challenging arbitrator's finding that grievant was a qualified individual with a disability where agency did not establish that a separate and independent ground for that finding was deficient); *U.S. DHS, U.S. CBP*, 68 FLRA 184, 188 (2015) (denying exception challenging remedy where remedy was based on separate and independent grounds and the agency did not establish one of those grounds was deficient); *SSA, Region VI*, 67 FLRA 493, 496 (2014) (denying exception where the arbitrator based the award on three grounds and excepting party did not challenge all grounds).