73 FLRA No. 21

BREMERTON METAL TRADES COUNCIL
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
PUGET SOUND NAVAL SHIPYARD AND
INTERMEDIATE MAINTENANCE FACILITY
BREMERTON, WASHINGTON
(Agency)

0-AR-5779

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DECISION

June 23, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members

I. Statement of the Case

The Agency suspended the grievant for ten days. The Union grieved the suspension and claimed that, because the grievant's schedule consisted of 100% official time, any Agency-imposed discipline would constitute an unfair labor practice (ULP). Arbitrator Stanley H. Michelstetter assumed that the grievant's official-time activities would otherwise be legally protected, but the Arbitrator denied the grievance because the grievant committed flagrant misconduct that enjoyed no protection under the Federal Service Labor-Management Relations Statute (the Statute). The Union filed exceptions contending that the award fails to draw its essence from the parties' agreement, exceeds the Arbitrator's authority, conflicts with the Statute, and is based on a nonfact. For the reasons provided below, we dismiss, in part, and deny, in part, the Union's exceptions.

II. Background and Arbitrator's Award

The Agency provides an office for the shared use of nine union locals that are affiliated with the Union (Union office). Officials of all nine locals perform representational duties at the Union office, and other bargaining-unit employees may be invited there. All of the grievant's work hours are spent performing Union representational functions on official time – primarily at the Union office.

The Agency began investigating the grievant for bullying and verbal abuse. On the basis of that investigation, the Agency concluded that the grievant had engaged in misconduct over a period of several years, so the Agency suspended the grievant for ten days. The Union filed a grievance challenging the suspension. The Agency denied the grievance, and the matter advanced to arbitration. As relevant here, the stipulated issue was, "Did the [Agency] have jurisdiction to discipline [the grievant]?"[1]

The Arbitrator found that the grievant "engaged in 'confrontational and bullying' behavior on a regular basis tending to degrade the morale of individuals working around her and creating an uncomfortable work

[1] Award at 1.

environment for them."[2] As an example, the Arbitrator noted that the grievant's behavior exacerbated the anxiety of a Chief Steward so that the Chief Steward suffered three panic attacks in one month – the last of which required an emergency-room visit.

The Union argued before the Arbitrator that the Agency's imposition of discipline for someone working on 100% official time – mostly in the Union office – would "interfere with internal Union affairs,"[3] in violation of §§ 7116(a)(1) and (3), and 7120(e) of the Statute.[4] As relevant here, § 7116(a)(1) prohibits agencies from interfering with employees in the exercise of any right under the Statute;[5] § 7116(a)(3) prohibits agencies from sponsoring, controlling, or otherwise assisting a union;[6] and § 7120(e) prohibits management officials and supervisors from participating in the management of a union.[7] The Agency denied committing ULPs and argued that the parties' agreement confirmed the Agency's authority to discipline the grievant. According to the Agency, Article 6, Section 0609 and "related provisions show[ed] that the [Union] office [was] subject to some management oversight."[8]

The Arbitrator agreed with the Agency's argument that Article 6, Section 0609 – as well as Section 0610, which concerns security screenings for Union visitors – recognized that the Agency "maintain[ed] sufficient control to ensure that the [Union office] remain[ed] physically safe and usable."[9] Thus, the Arbitrator concluded that the agreement allowed the Agency to discipline any employees who used the Union "office in a way not intended," or who made the office's "occupancy untenable."[10]

Turning to the ULP allegations, the Arbitrator assumed for purposes of the award that all of the grievant's interactions in the Union office or on official time constituted otherwise-protected activity under the Statute. The Arbitrator found that, although it is a ULP for an agency to discipline an employee in order to interfere with the employee's rights or to retaliate or discriminate against the employee, an agency may nevertheless discipline employees for conduct that is "flagrant or otherwise outside the bounds of protected activity."[11]

The Arbitrator found that the record was insufficient to show that the Agency had any retaliatory or discriminatory motive for disciplining the grievant.

As for whether the grievant's statements were outside the bounds of protected activity, the Arbitrator considered four factors that the Authority has used to identify flagrant misconduct: (1) the place and subject matter of the statements; (2) whether the statements were impulsive or designed; (3) whether the statements were in any way provoked by the Agency's conduct; and (4) the nature of the intemperate statements and conduct.[12]

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[2] *Id.* at 5 (quoting Notice of Proposed 10-Day Suspension (Notice)). The Arbitrator noted that the Agency obtained signed statements from individuals who said that the grievant described them using words like "r--ard," "stupid," "slow," "f--king p--sy," "f--king idiot," and "god d--n r--ard." *Id.* (quoting Notice); *see id.* at 6 (Arbitrator's finding that witnesses' statements "corroborat[ed]" the Notice's specifications); *see also* Opp'n, Encl. 3, Agency's Case File at 262-94 (witnesses' statements). Regarding individuals who wanted a second microwave in the Union office, the grievant said that "a lot of people need to take a long look in the mirror before we get a second microwave [because] the last thing the[y] need to be doing is eating." Award at 5 (quoting Notice). The grievant rejected someone's suggestion by saying, "That's absolutely the dumbest f--king idea I've ever heard in my life." *Id.* (quoting Notice). Another individual reported that the grievant's behavior – including "yell[ing] and cuss[ing] and us[ing] the 'F-word' in front of everyone" – "can make the [Union office] h-ll." *Id.* at 6 (quoting Witness's Statement). Witnesses reported that the grievant belittled bargaining-unit employees seeking assistance by calling them "idiots, a--holes, and stupid," and the grievant "berated [a] customer for not having a 'f--king' appointment." *Id.* (quoting Witnesses' Statements). A Chief Steward stated that the grievant once announced in the Union office that "she want[ed] to punch people in the throat." *Id.* (quoting Witness's Statements).

[3] Award at 18.

[4] 5 U.S.C. §§ 7116(a)(1), 7116(a)(3), 7120(e).

[5] *Id.* § 7116(a)(1). The Union argued that decisions of the U.S. Court of Appeals for the Federal Circuit and the Equal Employment Opportunity Commission supported its claim. Award at 18-19; *see* Exceptions, Attach. 2, Union's Arb. Br. (Union's Arb. Br.) at 8 (citing *Skinner v. Dep't of VA*, 819 F. App'x 904 (Fed. Cir. 2020) (unpublished)), 9 (citing *Complainant v. Donovan*, EEOC Doc. 0120132031, 2013 WL 5876860 (2013)).

[6] 5 U.S.C. § 7116(a)(3).

[7] *Id.* § 7120(e).

[8] Award at 19. Specifically, Article 6, Section 0609(b) says: (1) the Union office will be within the "geographical confines" of the Agency's shipyard; (2) the Union agrees "to maintain the space in a clean and orderly condition"; (3) the Union "shall make no alterations to the space without prior written approval" of the Agency; and (4) the Union office "shall be subject to all required inspections." *Id.* at 15 (quoting Collective-Bargaining Agreement (CBA) Art. 6, § 0609(b)); *see also* Opp'n, Encl. 2, Agency's Arb. Br. at 8 (citing restrictions in CBA Art. 6, § 0609(b) as evidence of Agency's oversight).

[9] Award at 22.

[10] *Id.* Relatedly, the Arbitrator found that the grievant's conduct "interfered with the [Agency's] responsibility under the [a]greement to provide usable office space not only for the [Union] but also all of its affiliated [local] unions." *Id.* at 24.

[11] *Id.* at 23 (citing *AFGE, Loc. 54*, 67 FLRA 369, 370 & n.28 (2014) (*Loc. 54*)).

[12] *Id.* (citing *U.S. DOD, Def. Logistics Agency*, 50 FLRA 212, 216-17 (1995)).

The Arbitrator found that the grievant's statements were "repeated, intentional bullying . . . for the purpose of inflicting emotional distress . . . over years" – "both inside and outside the [Union] office."[13] Further, the Arbitrator determined that the conduct was designed for the grievant's "own benefit," with "no reasonable likelihood that this conduct was provoked."[14] And the Arbitrator found that the grievant directed the bullying at "multiple people" to "intimidat[e], demean[], and inflict[] emotional distress" upon them.[15] For those reasons, the Arbitrator concluded that the grievant's misconduct was "flagrant and would exceed the boundaries of protected activity [even] if it were otherwise protected."[16]

While the Union contended that the Agency should have deferred to it to impose any necessary discipline on the grievant, the Arbitrator rejected that contention because, "[i]n this context, there was no other internal [Union] process [that] could have ameliorated the situation to provide a safe work environment."[17] After confirming that the Agency had jurisdiction to discipline the grievant, the Arbitrator denied the grievance.

The Union filed exceptions to the award on December 3, 2021, and the Agency filed an opposition on December 29, 2021.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Union's arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[18] As part of its contrary-to-law exception, the Union argues that the award is contrary to § 7116(a)(8) of the Statute.[19] Although the Union raised §§ 7116(a)(1) and (3), and 7120(e) at arbitration,[20] the Union did not raise § 7116(a)(8). Thus, §§ 2425.4(c) and 2429.5 bar consideration of this argument, and we dismiss it.[21]

Separately, the Union argues that the award fails to draw its essence from Article 6, Sections 0609 and 0610 of the parties' agreement.[22] The Union admits that it did not offer arguments concerning those provisions at arbitration, but the Union contends that it could not foresee that the Arbitrator would rely on those sections.[23] However, the Agency argued at arbitration that Section 0609 and "related provisions" confirmed management's oversight of the Union office.[24] Thus, the Union should have known to raise arguments concerning those sections at arbitration. Because the Union did not do so, §§ 2425.4(c) and 2429.5 bar consideration of the Union's essence exception, and we dismiss it.[25]

IV. Analysis and Conclusions

A. The flagrant-misconduct finding did not exceed the Arbitrator's authority.

The Union argues that the finding of flagrant misconduct exceeded the Arbitrator's authority because the stipulated issue concerned § 7116(a), "not . . . flagrant misconduct."[26] As relevant here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration.[27] However, arbitrators do not exceed their authority by addressing any issue that necessarily arises from issues included in a stipulation.[28]

As explained in more detail in the next section, "flagrant misconduct" is an exception that permits an agency to discipline an employee engaged in otherwise-protected activity without committing a ULP under § 7116(a).[29] The Union concedes that alleged § 7116(a) ULPs were part of the stipulated issue.[30] Because flagrant misconduct provides a defense to such ULPs, the flagrant-misconduct finding necessarily arose from issues included in the parties' stipulation.[31]

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[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* The Arbitrator also found that: (1) all of the employees performing representational duties in the Union office were subject to recall to perform their Agency-assigned duties; (2) the grievant's "long-term bulling, intimidation, and belittling conduct" required others to take time off work or seek medical care; and (3) consequently, the grievant's conduct would interfere with employees' abilities to perform Agency-assigned work in the event of a recall. *Id.* at 24.
[17] *Id.* at 24.
[18] 5 C.F.R. §§ 2425.4(c), 2429.5.
[19] Exceptions at 3.
[20] Union's Arb. Br. at 7.
[21] *See, e.g., NFFE, Loc. 1953*, 72 FLRA 306, 306 n.7 (2021) (*Loc. 1953*) (dismissing arguments that §§ 2425.4(c) and 2429.5 barred).
[22] Exceptions at 5.
[23] *Id.*
[24] Award at 19 (reciting Agency's arguments).
[25] *See, e.g., Loc. 1953*, 72 FLRA at 306 n.7 (dismissing arguments that §§ 2425.4(c) and 2429.5 barred).
[26] Exceptions at 6.
[27] *E.g., U.S. DHS, U.S. CBP, L.A., Cal.*, 72 FLRA 411, 412 (2021).
[28] *E.g., Ass'n of Admin. L. Judges, IFPTE*, 72 FLRA 302, 304 (2021) (*IFPTE*) (Member Abbott concurring).
[29] *Loc. 54*, 67 FLRA at 370.
[30] *See* Exceptions at 6.
[31] *IFPTE*, 72 FLRA at 304 (noting that arbitrators do not exceed their authority by deciding issues that necessarily arise from issues included in a stipulation).

Therefore, we deny the Union's exceeded-authority exception.

B. The award is not contrary to the Statute.

The Union claims that the award violates § 7116(a)(1) of the Statute[32] by interfering with the exercise of employees' rights.[33] Section 7116(a)(1) makes it a ULP "for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]."[34] However, involvement in protected union activity "does not immunize [an] employee from discipline."[35] "Where an agency is alleged to have committed a ULP for disciplining an employee who was engaged in protected activity, 'a necessary part of the [agency's] defense' against the ULP allegation is that the individual's actions constituted flagrant misconduct or otherwise exceeded the bounds of protected activity."[36]

As stated earlier, in denying the Union's ULP arguments, the Arbitrator found that the grievant committed flagrant misconduct.[37] Further, we have denied the Union's only direct challenge to the flagrant-misconduct finding itself.[38]

In support of its § 7116(a)(1) claim, the Union relies on two cases[39] – *Skinner v. Department of VA*,[40] which is a nonprecedential decision by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), and *Complainant v. Donovan* (*Donovan*),[41] which is a decision by the Equal Employment Opportunity Commission (EEOC).

In *Skinner*, the Federal Circuit upheld an administrative judge's conclusion that an agency's repeated attempts to resolve an alleged hostile work environment created by a union president "could have *potentially* subjected the agency to liability for a [ULP]."[42] This nonprecedential observation about potential ULP liability fails to establish that the grievant's discipline violated § 7116(a)(1).

In *Donovan*, an employee filed an internal union complaint about sexual harassment by another union official, but the employee never reported the harassment to any management officials before raising the matter in the EEOC's complaint processes.[43] The EEOC held that the employee could not use its proceedings to collaterally attack the union's internal complaint processes.[44] Unlike *Donovan*, in this case, employees did report the grievant's misconduct to management officials,[45] and the award itself does not mention any internal Union proceedings for which the grievant's suspension would serve as a collateral

[32] 5 U.S.C. § 7116(a)(1).
[33] Exceptions at 3. When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. 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. *E.g.*, *AFGE, Loc. 2145*, 71 FLRA 818, 819 (2020).
[34] 5 U.S.C. § 7116(a)(1).
[35] *Loc. 54*, 67 FLRA at 370 (alteration in original) (quoting *AFGE, Loc. 1164*, 64 FLRA 599, 601 (2010)).
[36] *Id.* (alteration in original) (quoting *U.S. Dep't of Transp., FAA*, 64 FLRA 365, 369 (2009)).
[37] Award at 21, 23.
[38] Part IV.A. above. Member Kiko notes that the Authority recently supplemented the factors for identifying conduct that exceeds the bounds of the Statute's protection. Specifically, "in assessing the totality of the circumstances, the Authority will place less emphasis on whether an employee's conduct is similar to conduct previously found protected" because "the norms of acceptable conduct in the workplace have changed throughout the years as employers have recognized their legal obligations to prevent harassment and ensure a safe and civil environment for employees." *Int'l Bhd. of Boilermakers, Loc. 290*, 72 FLRA 586, 591 (2021) (Chairman DuBester concurring; Member Abbott concurring). Additionally, "the circumstances under consideration must include an agency's responsibility to 'maintain civility in the workplace' and to ensure a safe and civil environment for employees and supervisors alike." *Id.* (quoting *Dep't of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 201 (D.C. Cir. 2002)). Moreover, flagrant misconduct is just one example of conduct that exceeds the bounds of protected activity. *Id.* at 589 n.40.
[39] Exceptions at 3.
[40] 819 F. App'x 904.
[41] EEOC Doc. 0120132031, 2013 WL 5876860.
[42] 819 F. App'x at 907 (emphasis added) (citing 5 U.S.C. § 7116(a)(1)).
[43] EEOC Doc. 0120132031, 2013 WL 5876860, at *2.
[44] *Id.*
[45] Award at 5-6 (reviewing statements provided to management).

attack. Thus, the Union's reliance on *Donovan* does not show that the award is contrary to § 7116(a)(1).[46]

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

C. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[47] But a challenge to a legal conclusion cannot establish that an award is deficient as being based on a nonfact.[48]

The Union argues that the award is based on the nonfact that "there was no other internal [Union] process [that] could have ameliorated the situation to provide a safe work environment."[49] The Union contends that its internal processes were not part of the stipulated issue,[50] but this contention does not identify a factual error. Because the contention fails to show how the Arbitrator's finding about internal processes was clearly erroneous, we deny it.[51] The Union also argues that the Arbitrator relied on an inapplicable Authority decision,[52] but because this challenge to a legal conclusion cannot establish a nonfact, we deny it as well.[53]

For the foregoing reasons, we deny the nonfact exception.

V. Decision

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

[46] The Union also argues that the award is contrary to §§ 7116(a)(3) and 7120(e). Exceptions at 3. Even assuming that arguments regarding those sections fall within the scope of the stipulated issue before the Arbitrator, the Union's arguments concerning § 7116(a)(3) are conclusory. *Id.* (arguing that the award "overrid[es]" the Union's by-laws and constitution, without identifying any by-laws or constitutional provisions, and arguing that the award "allows the Agency to assist" a Union-affiliated local, without explaining how). Similarly, the Union's argument about § 7120(e) is one sentence. *Id.* Particularly in the absence of any citations to supportive caselaw, the Union's limited arguments about §§ 7116(a)(3) and 7120(e) fail to establish that the award is inconsistent with the Statute.

[47] *E.g.*, *Int'l Bhd. of Boilermakers, Loc. 290, Bremerton Metal Trades Council*, 72 FLRA 694, 696 (2022) (*Loc. 290*).

[48] *E.g.*, *Fed. Educ. Ass'n, Stateside Region*, 72 FLRA 724, 725 (2022) (*FEA*).

[49] Exceptions at 4 (quoting Award at 24).

[50] *Id.*

[51] *See Loc. 290*, 72 FLRA at 697 (finding party failed to show challenged finding was "clearly erroneous").

[52] Exceptions at 4 (citing *Loc. 54*, 67 FLRA 369).

[53] *See FEA*, 72 FLRA at 726 (finding party's challenge to legal conclusion failed to establish nonfact).