73 FLRA No. 77

FRATERNAL ORDER OF POLICE
DC LODGE 1
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
PENTAGON FORCE PROTECTION AGENCY
(Agency)

0-AR-5806

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DECISION

January 5, 2023

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

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the Family and Medical Leave Act (FMLA),[1] the parties' collective-bargaining agreement, and Agency policy by preventing a Pentagon police officer (the grievant) from returning to a paid, full-duty status after a period of FMLA leave. Arbitrator Mollie H. Bowers issued an award denying the grievance based on the grievant's failure to comply with the Agency's fitness-for-duty program.

The Union filed exceptions to the award on contrary-to-law, nonfact, public-policy, exceeded-authority, and essence grounds. Because the Union's exceptions do not establish that the award is deficient, we deny them.

II. Background and Arbitrator's Award

The grievant suffered an injury while off duty. After using sick leave to cover her absence from work, the grievant requested, and the Agency approved, FMLA leave. When the grievant was ready to return to work, the Agency instructed the grievant to provide information about her injury to the Agency's "[r]ecruitment, [m]edical, and [f]itness [d]ivision" (medical division),[2] which administers the Agency's fitness-for-duty program.

Instead of contacting the medical division, the grievant provided her supervisor with a doctor's note stating that she could return to full-duty status. In response, the supervisor informed the grievant, via multiple emails, that she could not return to full law-enforcement duties until the medical division received all information pertaining to the injury and evaluated her "fitness for duty."[3] One of the emails cited an Agency regulation that requires police officers to "provide complete and accurate information to the [medical division] upon request" and "promptly report any change in their medical status to th[at division]."[4] The regulation further states that an employee's failure to comply – including a failure "to promptly report a change in medical status – may result in appropriate administrative or adverse action."[5]

The grievant reported to work without submitting the requested medical information to the medical division. During a meeting, the grievant's supervisor told the grievant that she would be disciplined if she continued not to comply with the Agency's fitness-for-duty requirements. Thereafter, the grievant contacted the chief of the medical division and explained that her doctor had approved her return to work. The grievant asked what information the Agency needed to approve her return from FMLA leave and whether there were any documents for her doctor to complete. The chief advised the grievant that the fitness-for-duty program was unrelated to FMLA, and emphasized that the grievant could not return to full duty without undergoing a fitness-for-duty assessment. When the grievant continued not to provide medical information, the Agency placed the grievant in a leave-without-pay (LWOP) status.

The Union filed a grievance alleging, in pertinent part, that the Agency violated various sections of Title I of the FMLA,[6] the parties' agreement, and Agency policy by refusing to return the grievant to full duty and placing the grievant on unpaid leave. The parties proceeded to arbitration.

At arbitration, the Arbitrator adopted the Union's proposed issue: "Did the Agency violate [the grievant's] rights under the [FMLA] . . . or [the Agency's] own policies, procedures and past practices when [it] failed to allow [the grievant] to return to work, wrongfully imposed additional unlawful requirements for her return to duty, and . . . wrongfully placed her in [LWOP] status?"[7]

[1] 5 U.S.C. § 6384(a).
[2] Award at 5.
[3] *Id.* at 7.
[4] Exceptions, Agency Ex. 3, Pentagon Police Medical Standards (Medical Standards) at 61-62.
[5] *Id.* at 62.
[6] Exceptions, Union Ex. 16, Grievance at 75 (alleging violations of "29 U.S.C. § 2612," "29 U.S.C. § 2612(a)(1)(D)," and "29 U.S.C. § 2615").
[7] Award at 2.

As relevant here, the Arbitrator found that the grievant and the Union "relied on the wrong provisions of the FMLA to make [their] case" by alleging that the Agency violated Title I of the FMLA,[8] which does not cover federal employees,[9] instead of Title II, which does.[10] Because this "error was perpetuated at each and every" step of the grievance procedure "up to and including . . . arbitration," the Arbitrator found that the Union's claim of an FMLA violation could not be "rehabilitate[d]."[11] Therefore, she refused "to give credit to" that claim and asserted that she would give "no weight . . . to claims that any law, rule, or regulation was violated."[12]

Still, the Arbitrator analyzed the Union's claim that the Agency was required to place the grievant in a full-duty status upon her return from FMLA leave. As an initial matter, the Arbitrator found that the FMLA required the Agency to restore the grievant to the position she held prior to using FMLA leave.[13] However, the Arbitrator rejected the Union's contention that "return from FMLA leave is synonymous and interchangeable with return to a full[-]duty status."[14] In distinguishing FMLA procedures from fitness-for-duty requirements, the Arbitrator explained that "the medical documentation required . . . to grant an employee FMLA leave is separate and distinct from any documentation legitimately required" to certify that an employee is fit for duty.[15] Based on this distinction, the Arbitrator found that the doctor's note the grievant provided to her supervisor – although satisfactory for FMLA purposes – was not "credible evidence that the [g]rievant was medically fit to perform all of the essential functions of her position as a . . . [p]olice [o]fficer."[16]

Addressing the grievant's nonparticipation in the Agency's fitness-for-duty program, the Arbitrator determined that the grievant was aware of the policy requiring police officers to notify the medical division about changes in medical status and to provide medical information upon request. On this point, the Arbitrator found that the Agency gave the grievant "direct orders to comply" with the policy, but the grievant "repeatedly refused."[17] Thus, the Arbitrator concluded that the Agency was "under no legal or contractual obligation to return [the grievant] to a full[-]duty status."[18]

Based on these findings, the Arbitrator concluded that the Agency did not take an "unjustified personnel action" against the grievant.[19] Consequently, the Arbitrator denied the grievance.

The Union filed exceptions to the award on April 22, 2022, and the Agency filed an opposition to the exceptions on May 23, 2022.

III. Analysis and Conclusions

A. The Union's misunderstanding of the award does not demonstrate that the award is contrary to law.

An exception that is based on a misunderstanding of an arbitrator's award does not show that the award is contrary to law.[20] Here, the Union argues that it was an "error of law" for the Arbitrator to "hold [the grievant], a federal employee, to Title I of [the] FMLA"[21] because Title I does not apply to federal employees.[22] However, the Union – not the Arbitrator – was responsible for introducing Title I at arbitration. As the Arbitrator noted, "at every step of the grievance procedure" and at arbitration, the Union alleged violations of Title I.[23] Even assuming that the Union may now raise an argument that the Arbitrator erroneously relied on Title I,[24] that argument lacks merit. The Arbitrator explicitly refused to "give credit" to the Union's Title I allegations, observing that it was the "wrong [Title] of the FMLA" and stating that the Union's repeated reliance on Title I was an "error"

[8] *Id.* at 26.
[9] 29 U.S.C. § 2611(2)(B) (excluding from Title I "any Federal officer or employee" from the definition of "eligible employee").
[10] 5 U.S.C. § 6381(1)(B) (defining "employee" in Title II as "any individual who . . . has completed at least [twelve] months of service as an employee . . . of the Government of the United States").
[11] Award at 26.
[12] *Id.*
[13] *See id.* at 20 (noting that "the FMLA affords employees taking leave . . . to retain their position").
[14] *Id.*
[15] *Id.* at 24.
[16] *Id.* at 21 (observing that the doctor's note was just a "printed . . . standardized form," and the grievant's doctor "simply checked [a] box" relating to the grievant's ability to return to work).
[17] *Id.* at 25.
[18] *Id.* at 27.
[19] *Id.*; *see also id.* at 28 (concluding that the Union failed to prove that "all or any part of . . . [the] grievance should be sustained").
[20] *SPORT Air Traffic Controllers Org.*, 66 FLRA 552, 554 (2012) (*SPORT*).
[21] Exceptions at 8.
[22] *Compare* 29 U.S.C. § 2611(2)(B) (excluding "any Federal officer or employee" from Title I's definition of "eligible employee"), *with* 5 U.S.C. § 6381(1)(B) (defining "employee" in Title II of the FMLA as "any individual who . . . has completed at least [twelve] months of service as an employee . . . of the Government of the United States").
[23] Award at 26.
[24] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority has stated that it will not consider arguments offered in support of an exception if those arguments differ from, or are inconsistent with, the party's arguments to the arbitrator. 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 69 FLRA 176, 178 (2016).

that could not be "rehabilitate[d]."[25] Thus, contrary to the Union's claim, the Arbitrator did not apply any substantive provisions of Title I.

Because the Union's exception is premised on a misunderstanding of the award, it provides no basis for finding the award deficient. Accordingly, we deny the exception.[26]

B. The award is not contrary to public policy.

The Union argues that the award is contrary to the public policy "in favor of arbitrators resolving issues . . . on the merits rather than dismissing them for procedural mistakes."[27] For an award to be found deficient as contrary to public policy, the asserted public policy must be "explicit, well[-]defined, and dominant," and the appealing party must show a clear violation of the policy.[28] In addition, the appealing party must identify the policy "by reference to the laws and legal precedents and not from general considerations of supposed public interest."[29]

Citing *Buffkin v. DOD* (*Buffkin*)[30] and § 7121(e) of the Federal Service Labor-Management Relations Statute (the Statute),[31] the Union asserts that the Arbitrator violated the alleged public policy by "ignor[ing] the merits of" the Union's FMLA claims and denying the grievance on the basis that the Union relied on Title I.[32] Contrary to the Union's assertion, the cited authorities are inapposite to the instant case. In *Buffkin*, the court held that a grievance challenging an adverse action appealable to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) under 5 U.S.C. § 7703 was arbitrable despite the agency's allegation that it was premature.[33] Here, the Arbitrator denied the Union's FMLA claim on the ground that Title I does not apply to federal employees – not because the *grievance* was premature or otherwise inarbitrable.[34] Further, the Union's grievance does not concern an adverse action reviewable by the Merit Systems Protection Board (MSPB) and, on appeal, by the Federal Circuit.[35]

With respect to § 7121(e) of the Statute, the Union does not demonstrate how that statutory provision – which gives employees the choice of appealing adverse actions through the procedures set forth in 5 U.S.C. § 7701 or the negotiated grievance procedure[36] – requires arbitrators to consider alleged violations of inapplicable laws when resolving grievances under the Statute. Consequently, the Union fails to establish that the award clearly violates an explicit, well-defined, and dominant public policy.

Accordingly, we deny the exception.[37]

C. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact.[38] 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.[39]

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[25] Award at 26.

[26] *See SPORT*, 66 FLRA at 555 (denying exception alleging that arbitrator applied 5 U.S.C. § 7106 because, in fact, arbitrator did not apply § 7106); *AFGE, Loc. 3911*, 69 FLRA 233, 234-35 (2016) (denying exception claiming that arbitrator applied Title VII of the Civil Rights Act of 1964 because arbitrator "did not apply Title VII").

[27] Exceptions at 11.

[28] *AFGE, Loc. 1441*, 73 FLRA 36, 38 (2022).

[29] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Guaynabo, P.R.*, 72 FLRA 636, 638 (2022) (Member Abbott dissenting in part on other grounds).

[30] 957 F.3d 1327 (Fed. Cir. 2020).

[31] 5 U.S.C. § 7121(e).

[32] Exceptions at 11.

[33] *Buffkin*, 957 F.3d at 1332-33.

[34] Award at 26 (denying "credit to the Union's claim that the FMLA was violated"), *id.* (allocating "no weight . . . to claims that any law, rule, or regulation was violated in the instant case").

[35] Both the Federal Circuit and MSPB have found that where an employee was required, but failed, to provide medical documentation, the agency's placement of that employee in an unpaid or absent without leave (AWOL) status, even for longer than fourteen days, was not a constructive suspension or other adverse action appealable to the MSPB. *Perez v. MSBP*, 931 F.2d 853, 855 (Fed. Cir. 1991) (where agency placed employee in AWOL status for repeatedly failing to provide adequate documentation, employee was "voluntarily absent[]" rather than constructively suspended); *Marren v. DOJ*, 49 M.S.P.R. 45, 48-51 (1991) (finding that grievant's refusal to provide medical documentation and resulting placement in AWOL status constituted a voluntary absence).

[36] 5 U.S.C. § 7121(e)(1) (providing, in relevant part, that "[m]atters covered under [5 U.S.C. §§] 4303 and 7512 . . . may . . . be raised either under the appellate procedures of [5 U.S.C. §] 7701 . . . or under the negotiated grievance procedure, but not both").

[37] *See U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 72 FLRA 575, 580 n.64 (2021) (Chairman DuBester concurring in part and dissenting in part; Member Abbott dissenting in part on other grounds) (holding that excepting party, "by merely restating its [non-meritorious] contrary-to-law exceptions and citing statutory language," did not demonstrate that award was deficient on public-policy grounds); *AFGE, Loc. 2172*, 57 FLRA 625, 629 (2001) (where grievance did not concern adverse action under 5 U.S.C. § 7703, Federal Circuit's legal principles for reviewing those actions did not establish an explicit, well-defined, and dominant public policy).

[38] Exceptions at 12-14.

[39] *NTEU*, 73 FLRA 101, 103 (2022) (citing *AFGE, Loc. 17*, 72 FLRA 162, 163 (2021) (Member Abbott concurring on other grounds); *NLRB Pro. Ass'n*, 68 FLRA 552, 554 (2015)).

The Union claims that the Arbitrator misrepresented its legal argument at arbitration.[40] According to the Union, the "crux" of its argument was that "the Agency exceeded the scope of [the] FMLA by refusing to return [the grievant] to a duty status with pay and benefits *before* subjecting her to . . . [a] fitness[-]for[-]duty examination."[41] However, that is exactly how the Arbitrator summarized the Union's argument: "The heart[]beat of the Union's case is that, under the FMLA, the [g]rievant should have been returned from [FMLA] leave to full duty and to full pay/benefit status in her position as a . . . [p]olice [o]fficer *before* any determination was made about her capability to perform the essential functions of her duty."[42]

Based on the above, even assuming that the Arbitrator's characterization of the Union's position concerns a factual matter, the Union has failed to establish that the Arbitrator clearly erred. Accordingly, we deny the Union's nonfact exception.[43]

D. The Arbitrator did not exceed her authority by failing to resolve an issue submitted to arbitration.

The Union asserts that the Arbitrator exceeded her authority by failing to resolve an issue submitted for arbitration.[44] Specifically, the Union alleges that the Arbitrator did not address "whether the Agency violated the [parties' agreement] or its own policies."[45] The Authority has held that arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration.[46] It is well settled that when parties do not agree on the issues, arbitrators have the discretion to frame them.[47]

Here, the parties did not stipulate to the issue, and the Arbitrator adopted the Union's proposed issue—which asked whether "the Agency violate[d] . . . the [FMLA] . . . or [the Agency's] own policies, procedures and past practices" by placing the grievant in a LWOP status and not allowing her to return to full duty.[48] In resolving this issue, the Arbitrator did not "give credit to the Union's claim that the FMLA was violated" because "the Union relied on the wrong [Title] of the FMLA to make its case."[49] Further, the Arbitrator concluded that the Agency properly required the grievant to comply with its "legitimate, well known" fitness-for-duty program.[50] Because the grievant did not comply with the Agency's fitness-for-duty requirements, the Arbitrator determined that "the Agency was under no legal or contractual obligation to return [the grievant] to a full[-]duty status."[51]

As the award is directly responsive to the issue before the Arbitrator, we deny the Union's exceeded-authority exception.[52]

E. The remaining exceptions do not demonstrate that the award is deficient.

The Union argues that the award is contrary to the FMLA,[53] contrary to an Agency instruction implementing FMLA requirements,[54] and fails to draw its essence from the parties' agreement.[55] Additionally, the Union contends that the Arbitrator lacked the authority to issue an award that "permits the Agency to violate the [parties' agreement] and federal law."[56] The underlying

[40] Exceptions at 13.
[41] *Id.* (emphasis added).
[42] Award at 10 (emphasis added).
[43] *See AFGE, Loc. 3917*, 72 FLRA 651, 653 (2022) (Chairman DuBester concurring) (award not deficient on nonfact grounds where challenged finding was not central to the award); *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 64 FLRA 701, 706 (2010) (denying nonfact exception where excepting party failed to "identify a factual finding or demonstrate that any alleged factual finding" was clearly erroneous).
[44] Exceptions at 15-16.
[45] *Id.* at 16.
[46] *NTEU, Chapter 149*, 73 FLRA 133, 135 (2022) (citing *NTEU, Chapter 66*, 72 FLRA 70, 71 (2021) (Chairman DuBester concurring on other grounds; Member Abbott dissenting on other grounds)).
[47] *U.S. Dep't of VA, Nashville Reg'l Off., VA Benefits Admin.*, 72 FLRA 371, 374 (2021) (Member Abbott concurring on other grounds) (citing *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 70 FLRA 900, 901 (2018) (Member DuBester concurring)).
[48] Award at 2.
[49] *Id.* at 26.
[50] *Id.* at 25; *see also id.* at 21 (finding that the grievant's doctor's note was not "credible evidence that the [g]rievant was medically fit" to return to full duty).
[51] *Id.* at 27.
[52] *See NAIL, Loc. 10*, 71 FLRA 513, 515 (2020) (where award was "directly responsive" to arbitrator's framed issue, Authority denied exceeded-authority exception); *see also AFGE, Loc. 2502, Council of Prison Locs. 33*, 73 FLRA 59, 61 (2022) (Chairman DuBester concurring) (denying exceeded-authority exception based on erroneous premise that arbitrator failed to resolve grievance's merits).
[53] Exceptions at 4-7 (arguing that Agency violated the FMLA by placing grievant in unpaid status and requiring her to submit medical information as condition of returning to full duty).
[54] *Id.* at 8-9 (asserting that award is contrary to "Department of Defense Administrative Instruction 67," which "outlines the Agency's administration of FMLA leave").
[55] *Id.* at 14-15 (arguing that award is deficient on essence grounds because "the Agency's actions violated the [parties' agreement]" but the Arbitrator improperly "fail[ed] to consider whether" the Agency violated "federal law").
[56] *Id.* at 16-17.

premise of these exceptions is that the award conflicts with Title II of the FMLA.[57]

The Authority has repeatedly held that when an arbitrator has based 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.[58] Here, the Arbitrator gave "no weight" or "credit to the Union's claim that the FMLA was violated" because the Union and grievant "relied on the wrong provisions of the FMLA" throughout the grievance process.[59] That holding alone provides a separate and independent ground for the Arbitrator's denial of the grievance. Because the Union has not demonstrated that that holding is deficient, we need not address the Union's exceptions challenging the award's consistency with Title II of the FMLA. Accordingly, we do not consider the remaining exceptions.[60]

IV. Decision

We deny the Union's exceptions.

[57] 5 U.S.C. § 6384(a) (entitling federal employees who return from FMLA leave "to the position held . . . when the leave commenced" or "to an equivalent position"); *id.* § 6384(d) (permitting federal agencies to implement "a uniformly applied practice or policy that requires . . . certification from the health care provider of the employee that the employee is able to resume work").

[58] *U.S. DHS, U.S. CBP*, 71 FLRA 1155, 1157 (2020) (Member Abbott dissenting); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Englewood, Colo.*, 69 FLRA 474, 478 (2016).

[59] Award at 26.

[60] *See U.S. Dep't of the Treasury, IRS*, 68 FLRA 145, 148 (2014) (where excepting party did not demonstrate that a separate and independent ground for award was deficient, Authority did not consider exception because "the award would stand regardless of whether the [a]rbitrator made erroneous findings" as alleged).