74 FLRA No. 7

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 19
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
SCOTT AIR FORCE BASE, ILLINOIS
(Agency)

0-AR-5962

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DECISION

September 17, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

Following a physical altercation between an employee (the grievant) and a coworker, the Agency investigated and disciplined both employees. The Union grieved, arguing that the Agency lacked just cause to discipline the grievant. Arbitrator George L. Fitzsimmons issued an award sustaining the Agency's disciplinary decision.

Based on testimony at arbitration concerning the Agency's investigation, the Union filed an exception arguing the deciding official violated the grievant's right to due process under the Fifth Amendment to the United States Constitution. Because the Union does not establish that the Agency deprived the grievant of due process, we deny this exception.

II. Background and Arbitrator's Award

On December 4, 2021, the grievant and a coworker engaged in a verbal altercation that escalated to physical contact (physical altercation), and several employees stepped in to deescalate the situation. Subsequently, the Agency conducted an investigation. Based on witness statements, the Agency determined that, while both the grievant and the coworker were culpable, the grievant was the "instigator of the altercation."[1]

Less than eight months earlier – on April 23, 2021 – the Agency had issued the grievant a letter of counseling for a verbal altercation with a different coworker involving abusive language, which stated that his "inappropriate behavior points to a recurring pattern of anger outbursts in the workplace," and that "any future incidents such as these will not be tolerated and may result in a disciplinary action to include removal from your position."[2]

Following an investigation into the physical altercation, the Agency charged the grievant with behavior unbecoming a federal employee and proposed removing him. In the notice of proposed removal (notice), the proposing official explained that, in addition to the grievant's conduct during the physical altercation, several "aggravating factors necessitate[d]" his removal.[3] The notice identified the letter of counseling as a factor and noted that six coworkers claimed the grievant created a "hostile work environment [by] . . . repeatedly act[ing] in an overly aggressive, hostile, and rude manner towards co[]workers."[4] Ultimately, citing the grievant's "repeated offenses" and the "particular[ly] concern[ing] . . . frequency" of the latest incidents, the proposing official concluded the Agency had lost trust in the grievant's ability to "continue effectively working in [his] current position."[5]

In the grievant's response to the notice, he apologized for his behavior, identified a medical condition that allegedly contributed to his actions, and asserted that the letter of counseling "documented an event[,] not a pattern."[6] Considering the evidence in the notice and the grievant's response, the deciding official sustained the charge against the grievant but imposed a fourteen-day suspension rather than a removal.

The Union grieved, arguing the Agency did not have just cause to discipline the grievant, and the grievance proceeded to arbitration. The parties stipulated the issue as "[w]hether the Agency had just cause to suspend [the g]rievant for [fourteen] days without pay for [c]onduct [u]nbecoming a [f]ederal [e]mployee?"[7]

At arbitration, the deciding official, the grievant, and several of the witnesses testified. The deciding official testified he conducted follow-up interviews with certain employees to clarify ambiguities in the witness statements and to discuss the grievant's past behavior with his

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[1] Award at 14 (internal quotation marks omitted).
[2] Opp'n, Attach. 2 at 3, Notice of Proposed Removal (Notice) at 3.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Opp'n, Attach. 2 at 55, Grievant's Response at 1.
[7] Award at 4.

supervisors. Citing the deciding official's testimony, the Union argued in its post-hearing brief that the deciding official deprived the grievant of due process by investigating additional matters not contained in the notice.

Based on the testimony and written statements, the Arbitrator found "[t]he Agency sustained the burden of proof that it conducted a full and fair investigation before disciplining the [g]rievant . . . [and] that the [g]rievant was guilty of the misconduct charged."[8] Thus, the Arbitrator denied the Union's grievance.

The Union filed an exception on May 13, 2024, and the Agency filed an opposition on May 31, 2024.

III. Preliminary Matter: An expedited, abbreviated decision is inappropriate in this case.

The Union requests we resolve its exceptions in an expedited, abbreviated decision.[9] An expedited, abbreviated decision is one that "resolves the parties' arguments without a full explanation of the background, arbitration award, parties' arguments, [or] analysis of those arguments."[10] Under § 2425.7 of the Authority's Regulations, when a party requests such a decision, the Authority will determine whether such a decision is appropriate by considering "all of the circumstances of the case," including whether the opposing party objects to issuance of such a decision, and "the case's complexity, potential for precedential value, and similarity to other, fully detailed decisions involving the same or similar issues."[11]

The Agency does not object to the Union's request.[12] However, after considering the circumstances of this case, particularly the limited number of Authority decisions concerning ex parte communications during disciplinary proceedings,[13] we find that an expedited, abbreviated decision is inappropriate. Accordingly, we deny the Union's request for an expedited, abbreviated decision.[14]

IV. Analysis and Conclusion: The Union does not establish that the award is contrary to law.

According to the Union, the award conflicts with federal-court precedent that required the Arbitrator to find the Agency deprived the grievant of due process.[15] When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions and the award de novo.[16] 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.[17] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are based on nonfacts.[18]

The Authority has held that, under 5 U.S.C. § 7503,[19] nonprobationary, federal employees in the competitive service have a constitutionally protected property interest in employment such that they may not be suspended for fourteen days or less without due process.[20] As there is no dispute that the grievant is a nonprobationary, federal employee in the competitive service, the grievant was entitled to due process before the Agency could suspend him.[21] When an agency charges such an employee with misconduct, the Authority has held that the employee is entitled to: (1) notice of the charges; (2) an explanation of the employer's evidence; and (3) an opportunity to respond.[22]

The Union argues the deciding official deprived the grievant of due process by conducting ex parte interviews into "additional matters" not included in the notice.[23] According to the Union, the deciding official

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[8] *Id.* at 15-16.
[9] Exception Form at 11.
[10] 5 C.F.R. § 2425.7.
[11] *Id.*
[12] Opp'n, Attach. 3, Statement on Expedited, Abbreviated Decision at 1.
[13] 5 C.F.R. § 2425.7.
[14] *See AFGE, Loc. 2338*, 73 FLRA 24, 24 n.7 (2022) (denying unopposed request for an expedited, abbreviated decision where Authority determined such a decision was not appropriate under the circumstances of the case).
[15] Exception Form at 7.
[16] *U.S. Dep't of the Treasury, IRS*, 73 FLRA 888, 889 (2024).
[17] *Id.*
[18] *U.S. Dep't of the Navy, Naval Med. Ctr. Camp LeJeune, Jacksonville, N.C.*, 73 FLRA 137, 140 (2022).
[19] 5 U.S.C. § 7503 (providing that employees may be suspended for fourteen days or less "for such cause as will promote the efficiency of the service," but that the employees are entitled to "advance written notice" of the proposed disciplinary action; "a reasonable time to answer"; "an attorney or other representative"; and "a written decision" with the specific reasons for selected outcome).
[20] *AFGE, Loc. 1897*, 67 FLRA 239, 241 (2014) (*Loc. 1897*) (Member Pizzella concurring) (holding that 5 U.S.C. § 7503 entitles nonprobationary, federal employees in the competitive services to due process before suspensions for fourteen days or less); *U.S. Dep't of VA, Nat'l Mem'l Cemetery of the Pac.*, 45 FLRA 1164, 1175 (1992) (relying on § 7503 to find that nonprobationary, competitive service federal employees "have a constitutionally protected property interest in their employment").
[21] *See Loc. 1897*, 67 FLRA at 241 (finding a nonprobationary, federal employee in the competitive service "had the requisite property interest in employment to be entitled to due process" for § 7503 disciplinary actions).
[22] *Id.* at 242.
[23] Exception Form at 10.

engaged in two conversations that deprived the grievant of due process: (1) when he discussed the grievant's past behavior with supervisors; and (2) when he interviewed a witness concerning the physical altercation.[24] In support of its argument, the Union cites the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) decision in *Ward v. U.S. Postal Service* (*Ward*),[25] in which the court held that a deciding official's reliance on ex parte communications in adverse-action decisions under 5 U.S.C. § 7513 can deprive an employee of due process.[26]

The Authority has not previously determined whether *Ward* and related Federal Circuit precedent concerning adverse actions under § 7513 apply to suspensions of fourteen days or less under § 7503.[27] However, even assuming, without deciding, that this precedent applies, the Union does not demonstrate that the Agency deprived the grievant of due process.[28] In *Ward*, the Federal Circuit held that "not every ex parte communication is a procedural defect so substantial and likely to cause prejudice that it undermines . . . due process."[29] Instead, "only ex parte communications that introduce new and material information to the deciding official violate due process."[30] Both the Federal Circuit and the Merit Systems Protection Board (MSPB) have found "cumulative" information, such as "[i]nvestigatory interviews and communications that do no more than confirm or clarify pending charges[,] do not introduce new and material information."[31]

Regarding the deciding official's conversations with the grievant's supervisors, the Union argues the grievant "focused exclusively" on defending his conduct during the physical altercation because he did not know the Agency was considering his past behavior.[32] However, the notice claimed several "aggravating factors" supported the disciplinary proposal, including his previous letter of counseling for abusive conduct; his coworker's accusations that he created a "hostile work environment [by] . . . repeatedly act[ing] in an overly aggressive . . . manner"; and the "particular[ly] concern[ing] . . . frequency" of his problematic incidents.[33] As the notice specifically cited the grievant's "repeated offenses" as a basis for the proposed discipline,[34] the grievant knew, or should have known, the deciding official was considering his past conduct. Thus, the Agency provided the grievant sufficient explanation of the evidence against him to defend against the alleged pattern of misconduct.[35]

As for the Union's argument that the deciding official investigated "additional matters" when he interviewed a witness to the physical altercation,[36] the Union does not identify any new subjects the deciding official explored in this interview. Because the Agency attached the witness's statement in the notice, his account of the incident was already part of the investigative record.[37] According to the deciding official's testimony, he met with the witness to "further clarify" details in the witness's statement because the witness had provided his statement in writing, rather than meeting with investigators.[38] Under the line of precedent the Union cites, interviews that merely "clarify" information in the record do not introduce new and material information that deprives a charged employee of due process.[39]

Thus, even assuming *Ward* applies to § 7503 disciplinary actions, the Union does not establish that the

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[24] *Id.*
[25] 634 F.3d 1274 (Fed. Cir. 2011).
[26] Exception Form at 7-8 (citing *Ward*, 634 F.3d at 1279).
[27] *See, e.g.*, *Loc. 1897*, 67 FLRA at 242 (finding it unnecessary to decide whether Federal Circuit precedent concerning process due for § 7513 adverse actions applied to suspension under § 7503 where union did not demonstrate due-process violation under that precedent).
[28] *See AFGE, Loc. 2923*, 69 FLRA 286, 290 (2016) (*Loc. 2923*) (assuming, without deciding, that Federal Circuit precedent concerning process due for § 7513 adverse actions applied to suspension under § 7503 where union did not demonstrate due-process violation under that precedent).
[29] *Ward*, 634 F.3d at 1279 (quoting *Stone v. FDIC*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999) (*Stone*)) (internal quotation marks omitted).
[30] *Id.* (quoting *Stone*, 179 F.3d at 1377) (internal quotation marks omitted).
[31] *Blank v. Dep't of the Army*, 247 F.3d 1225, 1229 (Fed. Cir. 2001) (*Blank*); *see Grimes v. DOJ*, 122 M.S.P.R. 36, 45 (2014) ("A deciding official does not commit a due[-]process violation when he considers ex parte information that merely confirms or clarifies information already contained in the record." (internal quotation marks omitted)).
[32] Exception Form at 12.
[33] Notice at 3.
[34] *Id.*
[35] *See AFGE, Loc. 2028*, 54 FLRA 1467, 1471 (1998) (rejecting due-process argument where disciplined employee was "sufficiently on notice to defend against the charges").
[36] Exception Form at 10.
[37] Notice at 3.
[38] Exception, Ex. C, Hr'g Tr. at 13-14 ("I met one night with [the witness] and asked him to further clarify. Initially, his statement was provided through email, and he was unable to meet direct[ly] with the police investigator.").
[39] *See Hornseth v. Dep't of the Navy*, 916 F.3d 1369, 1375-76 (Fed. Cir. 2019) (upholding MSPB finding that employee not deprived of due process where "ex parte communications involved only cumulative material" "already known" to the employee and deciding official merely sought "to clarify" information in the record); *Blank*, 247 F.3d at 1229-30 (finding ex parte interview proper because "information regarding pending charges obtained by investigatory communications that do no more than confirm or clarify the record does not undermine an employee's constitutional due[-]process guarantee of notice and the opportunity to respond").

award conflicts with that decision.[40] Moreover, because the Agency provided the grievant with notice of the charges against him, a clear explanation of its evidence, and an opportunity to respond to the allegations in the notice, the Union does not establish that the Agency denied the grievant due process when it suspended him.[41]

Consequently, the Union has not established that the award is contrary to law, and we deny the Union's exception.

V. Decision

We deny the Union's exception.

[40] *See Loc. 2923*, 69 FLRA at 290 (denying contrary-to-law argument where, even assuming Federal Circuit's § 7513 precedent applied, union did not establish ex parte communication introduced "material" information); *Loc. 1897*, 67 FLRA at 242 (rejecting due-process argument where, even assuming Federal Circuit's § 7513 precedent applied, union did not demonstrate that ex parte information deciding official considered was "new and material").

[41] *See U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 4, 7 (2005) (finding no due-process violation where employee received written notice of charges against him, the material the agency relied on to propose the charge, and an opportunity to respond to the charges against him); *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 596-97 (1993) (finding disciplinary process was "constitutionally sufficient" where agency sustained suspension against employee for fighting on duty based in part on his conduct after the fight because the agency "adequately explained and notified the grievant of the evidence on which the proposed suspension was based").