66 FLRA No. 189

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MIAMI, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 3690
(Union)

0-AR-4807

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DECISION

September 27, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Lawrence I. Hammer filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions. The Union included in its opposition its own exceptions to the award.

The Arbitrator sustained a grievance challenging the grievant's seven-day suspension, set aside the suspension, and ordered backpay.

For the reasons that follow, we dismiss the Union's exceptions and the Agency's management-rights exception, and deny the Agency's remaining exceptions.

II. Background and Arbitrator's Award

The grievant, a correctional officer, allegedly threw a protective vest at a co-worker that injured her. Award at 5. As a consequence, on the day of the vest-throwing incident, the Agency issued the grievant a "cease and desist order" that prevented him from seeking overtime assignments in any areas of the facility where his co-worker was working on a particular shift. *Id.* at 8, 10.

The "cease and desist order" remained in effect while the Agency investigated the grievant's alleged misconduct. *Id.* at 8. The Agency's investigation lasted "in excess of two years." *Id.* at 10; *see id.* at 8-9. At the end of the investigation, the Agency found that the grievant had engaged in "unprofessional conduct." *Id.* at 9. As a penalty, the Agency imposed a fourteen-day suspension that the Agency later reduced to seven days. *Id.*

The Union filed a grievance challenging the seven-day suspension. When the parties did not resolve the grievance, they submitted it to arbitration. The Arbitrator framed the issues as: "Was the disciplinary adverse action taken for just and sufficient cause? If not, what should be the remedy?" *Id.* at 2.

The Arbitrator sustained the grievance. *Id.* at 11. However, the Arbitrator also found that the grievant's conduct "warrants some punishment." *Id.* (emphasis omitted). Regarding the grievant's culpability, the Arbitrator "concluded that [the grievant] was in some manner, willfully or not, responsible [f]or the vest traveling from his control to [the co-worker's] back." *Id.* at 7-8.

The Arbitrator also examined the justification for the Agency's actions in disciplining the grievant. The Arbitrator focused particularly on an Agency directive (the Directive) issued "only days before the incident," and which he found "mandatory," requiring investigations like the grievant's to "be completed . . . within 120 days." *Id.* at 8.[1]

The Arbitrator found that the grievant's investigation, which lasted "in excess of two years," or "more than six . . . times the Agency's self-administered time limitation," *id.* at 10, constituted an "unreasonable delay" that denied the grievant his rights, *id.* at 11. Sustaining the suspension would, the Arbitrator held, "totally ignore[]" the Directive's objectives. *Id.* at 10. The Arbitrator also found that the "cease and desist order" that remained in effect for the length of the entire

[1] The Directive provides, in pertinent part:

> For Classification 1 and 2 allegations, local investigations should be completed and the investigative packet forwarded to the [Office of Internal Affairs (OIA)] within 120 calendar days of the date the local investigation was authorized by the OIA.

Exceptions, Attach. H, Memorandum For All Chief Executive Officers at 3.

investigation "severely limited" the grievant's overtime opportunities. *Id.* Accordingly, the Arbitrator ordered the grievant's personnel file expunged "of any and all references to the . . . incident." *Id.* at 12. The Arbitrator also directed "[t]hat the [g]rievant be awarded restoration of any and all . . . wages and benefits . . . withheld or denied as a result of these proceedings." *Id.* And the Arbitrator ordered the parties to negotiate a "settlement figure" for lost overtime, which the Arbitrator limited to thirty-five percent of the grievant's actual earnings during a ten-month baseline period immediately preceding the incident. *See id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to management's right to discipline under § 7106(a)(2)(A) of the Statute. Exceptions at 7. The Agency argues that the Arbitrator improperly set aside the grievant's suspension, effectively preventing management from disciplining the grievant when, after a prolonged investigation, management found that misconduct occurred. *Id.* at 7-9.

In addition, the Agency contends that the award fails to draw its essence from the parties' agreement. *Id.* at 9. The Agency makes two objections. First, the Agency maintains that the Arbitrator's findings that the Agency did not complete the investigation and propose a penalty in a timely manner ignore the wording of Article 30(d). *Id.* at 10. Second, the Agency asserts that the Arbitrator's setting aside of the discipline in its entirety fails to represent a plausible interpretation of Article 30(b) because the Arbitrator found just cause for discipline. [2] *Id.* at 12-13 (citing *U.S. Dep't of Justice, INS, Del Rio Border Patrol Sector, Tex.*, 45 FLRA 926 (1992) (*INS, Del Rio*)).

Further, the Agency contends that the award violates the Back Pay Act, 5 U.S.C. § 5596. *Id.* at 5. Specifically, the Agency asserts that "the Arbitrator did not find that the Agency's delay in disciplining the grievant was a violation of the [parties' agreement]." *Id.* at 6. Because "the Arbitrator never found that the Agency violated the [parties' agreement]," the Agency argues, "no unjustified or unwarranted personnel action has been committed by the Agency." *Id.* Therefore, the Agency contends, "the Arbitrator failed to make the findings necessary for an award of backpay." *Id.* at 5. Moreover, the Agency claims, absent a finding of a contractual violation, the award also fails to establish the required causal connection between an unjustified or unwarranted personnel action and the grievant's loss of pay, allowances, or differentials. *Id.* at 6.

B. Union's Opposition

The Union asserts that § 2429.5 of the Authority's Regulations bars the Agency's management-rights exception because the argument could have been, but was not, presented to the Arbitrator. Opp'n at 12-13 (citations omitted). The Union further asserts that, even assuming the Agency's argument is properly before the Authority, the award does not impermissibly interfere with management's right to discipline. *Id.* at 13.

The Union also argues that the award draws its essence from the parties' agreement. *Id.* at 13-18.

In addition, the Union contends that the award does not violate the Back Pay Act because the Arbitrator made the necessary findings for an award of backpay. *Id.* at 8-10. Specifically, the Union argues that "after finding no language in the [parties' agreement] that provided explicit guidance on the timeliness of investigations," *id.* at 8, "the Arbitrator turned to [the Directive] issued by the Agency itself," *id.* at 9, and "found that the Agency's actions were unreasonable because [the Agency] violated its own [D]irective," *id.* at 8. The Union maintains that the Agency's violation of its own Directive constitutes an unjustified or unwarranted personnel action for Back Pay Act purposes. *Id.* at 9. The Union further argues that the required causal connection exists between the Agency's unjustified or unwarranted personnel action and the Arbitrator's backpay award. *Id.* at 9-10.

Finally, the Union challenges the Arbitrator's denial of attorney fees and failure to award interest on the backpay award. *Id.* at 11-12. As to attorney fees, the Union asserts that the Arbitrator's denial was premature. *Id.* at 11. As to interest, the Union claims that the Arbitrator's failure to award interest on the backpay award is contrary to the Back Pay Act. *Id.* at 11-12.

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[2] Article 30 of the parties' agreement provides, in relevant part, as follows:

> *Section b.* Disciplinary actions are defined as written reprimands or suspensions of fourteen (14) days or less. . . .
>
> . . . .
>
> *Section d.* Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions.

Exceptions, Attach. I, Master Agreement at 70.

IV. Preliminary Matters

A. The Union's exceptions are untimely.

As stated above, in its opposition, the Union asserts that the Arbitrator's denial of attorney fees was premature and that the Arbitrator's failure to award interest on the backpay award is contrary to the Back Pay Act. *Id.* at 11-12.

To the extent the Union's assertions seek to modify the award, they relate to the award's validity and constitute exceptions. *See, e.g., AFGE, Local 3627*, 63 FLRA 116, 116 n.1 (2009); *Fort McClellan Educ. Ass'n*, 56 FLRA 644, 645 n.3 (2000). As the Union filed these exceptions outside the time period that the Regulations allow for filing exceptions, they are not timely. 5 C.F.R. § 2425.2(b) and (c). Accordingly, based on the case law cited above, we dismiss the Union's exceptions as untimely.

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's management-rights exception.

The Agency contends that the award is contrary to management's right to discipline under § 7106(a)(2)(A) of the Statute because, by setting aside the suspension, the award improperly prevents the Agency from disciplining the grievant for his misconduct. *See* Exceptions at 7-9. In opposition, the Union asserts that § 2429.5 of the Authority's Regulations bars the Agency's claim because the Agency failed to present it to the Arbitrator. Opp'n at 12-13.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[3] *E.g., U.S. Dep't of Homeland Sec., Customs & Border Prot.*, 66 FLRA 495, 497 (2012) (*CBP*).

The Agency argues that by setting aside the grievant's suspension, the award is contrary to management's right to discipline under § 7106(a)(2)(A) of the Statute. The record establishes that the Agency was on notice, while before the Arbitrator, that the Union was seeking to set aside the grievant's suspension. *See* Exceptions, Attach. C, Agency's Post-Hearing Brief at 1. But the record contains no indication that the Agency argued to the Arbitrator that setting aside the suspension would improperly affect management's rights. As the Agency could have made its management's right argument to the Arbitrator, but did not do so, we dismiss the exception under §§ 2425.4(c) and 2429.5. *See, e.g., CBP*, 66 FLRA at 497; *U.S. Dep't of Def., Def. Contract Mgmt. Agency*, 66 FLRA 53, 55-56 (2011).

V. Analysis and Conclusions

A. The award does not fail to draw its essence from the collective bargaining agreement.

The Agency contends that the award fails to draw its essence from the parties' agreement. Exceptions at 9. The Agency maintains that the Arbitrator's findings that the Agency did not complete the investigation and propose a penalty in a timely manner ignores the wording of Article 30(d). *Id.* at 10. And the Agency asserts that the Arbitrator's setting aside of the discipline in its entirety fails to represent a plausible interpretation of Article 30(b) because the Arbitrator found just cause for discipline. *Id.* at 12.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that 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 collective bargaining 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. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990).

The Agency's argument concerning the Arbitrator's timeliness determination is based on a misinterpretation of the award – specifically, a belief that the Arbitrator based his determination on an interpretation of the parties' agreement. However, the record does not support the Agency's belief. As the Agency argues, without opposition from the Union, "the Arbitrator never found that the Agency violated the [parties' agreement]. . . . [T]he Arbitrator did not find that the Agency's delay in disciplining the grievant was a violation of the [parties' agreement]." Exceptions at 6. Instead, as discussed in more detail in Section V.B., below, the Arbitrator based his finding that the Agency's

[3] Section 2425.4(c) provides, in pertinent part, that exceptions may not rely on "any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented to the arbitrator." 5 C.F.R. § 2425.4(c). Section 2429.5 provides, in pertinent part, that the "Authority will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented . . . before the . . . arbitrator." 5 C.F.R. § 2429.5.

delay in disciplining the grievant was unreasonable on the Agency's failure to abide by its own Directive. Consequently, because the Agency's argument is based on a misinterpretation of the award, the argument does not provide a basis for finding the award deficient. *See, e.g., Soc. Sec. Admin., Indianapolis, Ind.*, 66 FLRA 62, 65-66 (2011) (Member DuBester dissenting as to another matter) (because the excepting party misinterpreted the award, the exception did not provide a basis for finding that the award failed to draw its essence from the parties' agreement).

The Agency's additional claim, that the Arbitrator erred by setting aside the grievant's discipline in its entirety after finding just cause for discipline, also does not provide a basis for finding the award deficient. The Agency argues that the Arbitrator found just cause for discipline based, for example, on the Arbitrator's finding that "the [g]rievant's conduct warrants some punishment." Exceptions at 12 (quoting Award at 11 (emphasis and internal quotation marks omitted)). The Agency argues further that the minimum discipline permitted in the parties' agreement is a written reprimand. *Id.* The Agency concludes, therefore, that the Arbitrator's decision to set aside the discipline entirely is contrary to the parties' agreement. *Id.*

Like the Agency's first essence exception, this exception is based on a misinterpretation of the award. An examination of the award reflects that the Arbitrator did not find just cause for discipline. Looking first to the award's plain language, the Arbitrator's determinations make no mention whatsoever of "just cause." Similarly, the Arbitrator does not find that the grievant is due any "discipline." Therefore, the award's plain language does not support the conclusion that the Arbitrator found just cause for discipline.

Moreover, read in context, the award indicates that the Arbitrator found *no* just cause for disciplining the grievant. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Terre Haute, Ind.*, 65 FLRA 460, 463 (2011) ("[T]he Authority interprets the language of an award in context."). The Arbitrator framed the issue as: "Was the disciplinary adverse action taken for just and sufficient cause? If not, what should be the remedy?" Award at 2. The Arbitrator concluded "[t]hat the grievance is sustained," *id.* at 11, and ordered a remedy, *id.* at 12. The only way to harmonize these key portions of the award is to conclude that the Arbitrator found no just cause for "the disciplinary adverse action taken" by the Agency. Therefore, for this reason as well, the award does not support the conclusion that the Arbitrator found just cause for discipline.

The case the Agency principally relies on, *INS, Del Rio*, 45 FLRA 926, is distinguishable. In that case, the Authority found an arbitrator's award deficient where the arbitrator set aside the grievant's discipline despite the arbitrator's finding that there was just cause to sustain the disciplinary action. *See id.* at 932. The Authority based its conclusion that the arbitrator found just cause for the disciplinary action on the arbitrator's finding that "the discipline invoked by management appears well within the scope of its discretion." *Id.* at 927 (citation and internal quotation marks omitted). The award in the case before us does not contain any comparable finding. Therefore, our rejection of the Agency's essence exception in this case is not inconsistent with the Authority's holding in *INS, Del Rio.*

Accordingly, because this essence exception is based on a misinterpretation of the award, it does not provide a basis for finding the award deficient.

B. The award is not contrary to the Back Pay Act.

The Agency claims that the award is contrary to the Back Pay Act. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id*.

An award of backpay is authorized under the Back Pay Act only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of an employee's pay, allowances, or differentials. *E.g., U.S. Dep't of the Air Force, Warner Robins Air Force Base, Ga.*, 56 FLRA 541, 543 (2000) (citation omitted).

The Agency claims that backpay may not be awarded in this case because "no unjustified or unwarranted personnel action has been committed by the Agency." Exceptions at 6. The Agency argues in support that "the Arbitrator did not find that the Agency's delay in disciplining the grievant was a violation of the [parties' agreement]." *Id.*

A violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action under the Back Pay Act. *See, e.g., U.S. Dep't of Def., Dep't of Def. Dependents Schools*, 54 FLRA 773, 785 (1998)). However, "unjustified or unwarranted personnel action" has other meanings as well. These

include a violation of a "mandatory personnel policy established by an agency." 5 C.F.R. § 550.803; *see Fed. Employees Metal Trades Council*, 39 FLRA 3, 7-8 (1991).[4]

Referencing the Agency's Directive issued "only days before the incident," Award at 8, the Arbitrator found the Agency's delay in disciplining the grievant "unreasonable" because the investigation lasted "in excess of two years," or "more than six . . . times the Agency's self-administered time limitation" of 120 days in its Directive, *id.* at 10. Sustaining the suspension would, the Arbitrator held, "totally ignore" the directive's objectives. *Id.* Read in context, these findings indicate that the Arbitrator found that the Agency's delay in disciplining the grievant violated the Agency's Directive. Furthermore, the Arbitrator found, without dispute by the Agency in its exceptions, that the Directive's 120-day time limitation is "mandatory." *Id.* at 8.

The Arbitrator's finding that the Agency's delay in disciplining the grievant violated the Agency's Directive constitutes a finding that the Agency violated a "mandatory personnel policy" within the meaning of 5 C.F.R. § 550.803. The Directive, setting forth requirements for "Review of Local Staff Misconduct Investigations," establishes personnel policies. Exceptions, Attach. H, Directive at 1. Moreover, as noted, there is no dispute that the Directive's 120-day time limitation on investigations is mandatory. Therefore, we find that the Arbitrator made a determination of an unjustified or unwarranted personnel action sufficient to support the award's backpay remedy.

The Agency's additional Back Pay Act claim also lacks merit. The Agency argues that absent a finding of a contractual violation, the award fails to establish the required causal connection between an unjustified or unwarranted personnel action and the grievant's loss of pay, allowances, or differentials. Exceptions at 6. Based on the finding, above, that the Arbitrator made the required determination that the Agency committed an unjustified or unwarranted personnel action, we further find that the Arbitrator's backpay award is not contrary to the Back Pay Act.

VI. Decision

The Union's exceptions and the Agency's managements-right exception are dismissed, and the Agency's remaining exceptions are denied.

[4] Section 550.803 of the regulations implementing the Back Pay Act states, in relevant part:

> *Unjustified or unwarranted personnel action* means an act of commission or an act of omission . . . that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation, *or mandatory personnel policy established by an agency* or through a collective bargaining agreement.

5 C.F.R. § 550.803 (emphasis added).