

71 FLRA No. 220

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2266
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-5473

DECISION

November 30, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member Abbott dissenting)

I. Statement of the Case

Arbitrator Sharon Henderson Ellis found that the Agency discriminated against the grievant, and violated the parties' collective-bargaining agreement and an Agency policy when it removed the grievant from certain collateral duties. The Agency challenges the Arbitrator's finding that it violated the parties' agreement on essence and contrary-to-law grounds. Because the Agency does not except to all of the separate and independent grounds for the award, the Agency's exceptions provide no basis for finding the award deficient. Therefore, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant is a border patrol agent in the Swanton sector of Vermont. In 2004, after volunteering to be a canine handler and successfully completing "challenging canine handler training,"¹ the Agency selected her to be a canine handler. As a canine handler, the Agency assigned the grievant a dog to assist in conducting searches. When canine handlers take their dogs home for the night, they receive one hour of overtime pay per day. The grievant served as an instructor for the canine-handler program, and was the only female among the Swanton sector's twenty canine handlers.

The grievant had eighteen years of service with the Agency without prior discipline. On December 19, 2012, the grievant received her first performance counseling because her dog's rabies vaccine had expired on December 8, 2012. The grievant arranged to have the dog vaccinated on the day she received the counseling.

On October 17, 2013, the grievant took her injured dog to a veterinarian for treatment and medication, with the Agency's approval. Later that month, the Agency issued the grievant a performance counseling concerning her decisions related to handling the canine after its treatment. In the performance counseling, the Agency warned that "[f]uture incidents could result in disciplinary action, should circumstances warrant, you may be removed from the canine program."² When the Agency issued the performance counseling, it informed the grievant that she did not need Union representation and did not permit her to respond to the performance counseling.

On October 31, 2013, with supervisory approval, the grievant took her dog for a follow-up veterinarian visit and was "given a clean bill of health."³ She subsequently placed the dog in an Agency-approved commercial kennel during non-working hours and while on leave. While the dog was kenneled, the Agency sent an agent to check on the dog.

In November 2013, allegedly concerned for the dog's health and safety following its treatment, the Agency removed the dog from the grievant's custody because the Agency believed that she "would hurt" the dog.⁴ The Agency then issued a memorandum (the separation memo) separating the grievant from the canine-handler program. The separation memo alleged that the grievant violated the Agency's Canine Unit Policy and Procedures (canine policy) by, among other

¹ Award at 2.

² *Id.* at 14.

³ *Id.* at 36.

⁴ *Id.* at 21.

alleged violations, failing to report an October 18 veterinarian visit. The Agency did not allow the grievant to respond to the separation memo.

Subsequently, the grievant applied for several canine-handler vacancies in 2014 and 2015. She was the only female applicant, and was the only applicant not interviewed.

The Union filed several grievances that were consolidated for arbitration. As relevant here, the Arbitrator framed the issues as: “(1) Whether the Agency’s issuance of a performance counseling on October 18, 2013, to [the grievant] without the presence of a union representative violated the [parties’] agreement or any law, rule, regulation . . .; if so, what shall be the remedy”; and (2) “[w]hether the November 25, 2013 separation of [the grievant] from her service-issued canine and/or her removal from her canine handler and instructor duties violated the [parties’] agreement, the [canine policy], or any law, rule, or regulation; if so, what shall be the remedy?”⁵

The Arbitrator determined that the Agency violated the “basic principle of due process,”⁶ and the due process provisions in Article 32 when it issued the performance counseling by telling the grievant “to remain silent” during the meeting.⁷

Next, the Arbitrator found that the Agency’s separation of the grievant from the canine-handler program violated the parties’ agreement, the canine policy, and federal statute. As to the parties’ agreement, the Arbitrator found – as relevant here – that removal of the grievant’s overtime-earning canine duties was a “reduction in pay,” which amounted to an adverse action under Article 32.⁸ The Arbitrator concluded that the Agency did not follow the due process requirements provided in Article 32(F) and did not establish that it had “appropriate cause” to remove the grievant from her canine-handler duties, as required by Article 32(M).⁹

Moreover, the Arbitrator concluded that “[e]ven if” removal of the grievant from her canine duties “was not intended to be covered by Article 32,” the Agency violated several sections of the canine policy – which sets forth the procedures for removing an

employee from the canine-handler program.¹⁰ Citing Section 6.7.6 – which requires that any decision to separate an employee from the canine-handler program “shall be documented and explained to the employee”¹¹ – the Arbitrator found that the Agency never provided the grievant with the documents that it relied on in its separation recommendation to management. Further, she found that the Agency’s charge that the grievant failed to report a veterinarian visit on October 18 was “markedly erroneous” because the grievant did not take her dog to the veterinarian that day.¹² The Arbitrator concluded that the separation of the grievant from the canine-handler program was “punitive and illegitimate,” in violation of Section 6.7.8 of the canine policy.¹³

The Arbitrator also found that the Agency’s separation of the grievant from the canine-handler program was an act of continuing discrimination against the grievant. In particular, the Arbitrator found that the Agency violated Article 22(A) of the parties’ agreement, which prohibits discrimination on the basis of sex; the Agency’s canine policy, including Section 6.6.4, which requires that the Agency interview all candidates if it chose to interview any candidates; and 5 U.S.C. § 2302, which applies to a personnel action that discriminates on the basis of gender.¹⁴ She based this conclusion upon the Agency’s treatment of the grievant compared to the other canine handlers¹⁵ and its failure to interview her as part of the selection process for the canine-handler vacancies in 2014 and 2015 even though the Agency interviewed male candidates.

¹⁰ *Id.*

¹¹ *Id.* at 41-42 (quoting the canine policy).

¹² *Id.* at 24; *see also id.* at 48.

¹³ *Id.* at 43 (quoting the canine policy).

¹⁴ Regarding § 2302, the Arbitrator noted that the statutory definition of “personnel action” includes “details, transfers or reassignments . . . and . . . any other significant change in duties, responsibilities or working conditions.” *Id.* at 44; *see also* 5 U.S.C. § 2302(a)(2).

¹⁵ Specifically, the Arbitrator found that the Agency refused to allow other agents to give the grievant rides when her Agency vehicle was unavailable, “a service that continued to be provided to at least one other male handler.” Award at 35. Regarding the counselling of the grievant for the alleged expiration of her dog’s rabies vaccine, the Arbitrator credited testimony that vaccinations within the month they were due had previously been treated by the Agency as timely. *Id.* at 5-6. She also found that when the Agency counseled the grievant regarding the vaccination, it counseled a male agent for the same reasons specifically to avoid the appearance of discrimination. *Id.* at 35, 45. In this regard, she credited the male agent’s “un-rebutted statement evincing [m]anagement’s discriminatory intent.” *Id.* at 35; *see also id.* at 6 (male agent testified that he was told, when receiving the counseling, that he “would have to take one for the team because [the grievant] was going to be written up for that also”).

⁵ *Id.* at 1.

⁶ *Id.* at 50.

⁷ *Id.* Article 32 sets forth the procedures for issuing a proposed adverse action. It entitles an employee to notice of, and an opportunity to respond to, a proposed action; copies of relevant materials; representation; and a final decision, including the reasons for the decision. *See* Exceptions, Attach. E, Parties’ Agreement at 45-50.

⁸ Award at 41.

⁹ *Id.*

As a remedy, the Arbitrator directed the Agency to restore the grievant to the canine-handler program and awarded her all overtime and backpay lost as a result of her removal from the program.

On February 2, 2019, the Agency filed exceptions to the award, and on March 14, 2019, the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's contrary-to-law exceptions.

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.¹⁶

In its exceptions, the Agency argues that the award is contrary to the "Due Process Clause of the U.S. Constitution" because it erroneously requires that the Agency afford due process to the grievant upon issuing the performance counseling.¹⁷ Towards this end, the Agency appears to argue that due process is only required for adverse actions under 5 U.S.C. § 7512 and a performance counseling is not an adverse action under that statute.¹⁸ However, a review of the record, including both parties' post-hearing briefs to the Arbitrator, demonstrates that the Agency failed to raise these arguments to the Arbitrator. And the Agency could have raised this argument because the Union acknowledged that Article 32 of the parties' agreement incorporates § 7512,¹⁹ and argued that that the Agency violated Article 32(F), which involves due process.²⁰ As the Agency could have raised this argument below, but did not do so, we dismiss it.²¹

IV. Analysis and Conclusion: The exceptions do not address all of the grounds for the award.

The Agency contends that the Arbitrator erred in finding that the Agency's removal of the grievant from the canine-handler program violated the parties' agreement.²² Specifically, the Agency challenges the Arbitrator's finding that the removal constituted an

adverse action under Article 32 of the parties' agreement. In support, the Agency argues that this action is not a "reduction in pay"²³ and that the Agency's canine policy – rather than Article 32 – governs procedures for removing an employee from the canine-handler program.²⁴ On this basis, the Agency asserts that the award is contrary to law²⁵ and fails to draw its essence from the parties' agreement.²⁶

The Authority has 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 find the award deficient.²⁷ Accordingly, if the excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the arbitrator, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other ground.²⁸

Here, the Arbitrator found that the Agency's separation of the grievant from the canine-handler program violated both Article 32 and the canine policy (canine-policy finding).²⁹ Further, the Arbitrator found that the Agency's action amounted to gender-based discrimination in violation of Article 22, the canine policy, and 5 U.S.C. § 2302 (discrimination finding).³⁰ Therefore, the canine-policy finding and the discrimination finding *each* constitutes a separate basis for the award, independent from her finding that the Agency violated Article 32. As the Agency does not challenge the canine-policy finding³¹ or the discrimination finding, the Agency's remaining contrary-to-law and essence exceptions that challenge only the Arbitrator's interpretation of Article 32 provide no basis for finding the award deficient. Accordingly, we deny these exceptions.³²

Finally, we cannot leave unaddressed our colleague's allegation that the grievant's dog's (Sara-B's) "safety and wellbeing" was compromised" because of

¹⁶ 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Local 3627*, 70 FLRA 627, 627 (2018); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 343 (2017) (citing *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012)).

¹⁷ Exceptions Br. at 15; *see id.* at 13-14.

¹⁸ *Id.* at 14-15.

¹⁹ Exceptions, Attach. D, Union's Post-Hr'g Br. at 11.

²⁰ *Id.* at 56.

²¹ *AFGE, Council 215*, 66 FLRA 771, 773 (2012).

²² Exceptions Br. at 15-21.

²³ *Id.* at 16; *see id.* at 15-17.

²⁴ *Id.* at 17-21.

²⁵ *Id.* at 15-17; *see id.* at 13.

²⁶ *Id.* at 17-21.

²⁷ *U.S. DOJ, Fed. BOP., Fed. Corr. Inst. Englewood, Colo.*, 69 FLRA 474, 478 (2016) (citing *SSA*, 69 FLRA 208, 210 (2016)).

²⁸ *Id.*

²⁹ Award at 41.

³⁰ *Id.* at 43-44.

³¹ We note that the Agency acknowledges that the canine policy provides the process for canine separation in support of its essence exception, but it does not challenge the Arbitrator's conclusion that the Agency violated the canine policy. Exceptions Br. at 19-20.

³² *E.g., AFGE, Council of Prison Locals 33, Local 3690*, 69 FLRA 127, 132 (2015); *U.S. DHS, U.S. CBP*, 68 FLRA 184, 188 (2015) (citing *SSA, Region VI*, 67 FLRA 493, 496 (2014)).

the grievant's "neglect."³³ In painting this fictional narrative, the dissent relies on allegations regarding the grievant's care for Sara-B that the Arbitrator specifically found to be unsubstantiated.³⁴ Moreover, the Arbitrator noted that the grievant "demonstrated her knowledge on canine health and other issues,"³⁵ that the grievant "was passionate about her work and the animals she cared for,"³⁶ and that the loss of the grievant as a canine handler was "harmful to the efficiency of the Agency's canine handler program."³⁷ And the remainder of the dissent's allegations concerning the grievant's care of Sara-B are contrary to the Arbitrator's findings, and fail to recognize that the grievant acted in accord with the

veterinarian's instructions.³⁸ Moreover, the dissent's apparent claim that the grievant never challenged the removal of Sara-B from her care or the grievant's removal from the canine-handler program are similarly contrary to the Arbitrator's findings.³⁹

We remind our colleague that we defer to an arbitrator's unchallenged factual findings. We certainly are not free to disregard "what the Arbitrator may have considered relevant."⁴⁰ Our colleague should more carefully review the Arbitrator's findings and the record

³³ Dissent at 8.

³⁴ Regarding vaccinations, the Arbitrator made no findings that the grievant failed to "ensure timely vaccinations," Dissent at 9, on any occasion. Rather, the Arbitrator found that the grievant timely administered Sara-B's rabies vaccine and credited testimony finding that the grievant timely administered vaccinations for her former canine. Award at 45; *see id.* at 6 (finding that the rabies vaccine had not expired, was timely administered, and under Agency's past practice, vaccinations were timely if given during the month of expiration); *see also id.* at 36 (finding that the counseling "included two false assumptions: (1) that [the grievant] had put kennel staff in danger of being bitten; and (2) that Sara-B had been . . . temporarily barred from working"); *id.* at 46 (finding that the grievant "acted promptly to take Sara-B to the veterinarian and . . . did what was required to protect the safety and health of her canine"); *id.* at 49 (finding that the October 18, 2013 visit to the veterinarian never occurred.); *id.* (finding that the grievant did not fail to ensure the safety of Sara-B).

³⁵ Award at 34; *see id.* at 4 n.5.

³⁶ *Id.* at 34.

³⁷ *Id.* at 35; *see id.* at 34.

³⁸ The Arbitrator made no finding that Sara-B was diagnosed with an injury that required Sara-B to be taken to a surgeon or specialist. Instead, he cited veterinarian notes stating that *if the medication does not resolve the injury*, the grievant should "consider seeing a specialist or surgeon." *Id.* at 15 n.28 (emphasis added). The Arbitrator then found that the veterinarian gave Sara-B a "clean bill of health" on her follow-up visit. *Id.* at 36. Regarding Sara-B's rehabilitation, the Arbitrator found that the veterinarian preferred "crating and kenneling" rather than taking Sara-B to the grievant's home to prevent Sara-B from being overstimulated. *Id.* at 46; *see id.* at 10, 14. Regarding kenneling, the Arbitrator found that the veterinarian preferred kenneling because Sara-B may be overstimulated and would have to climb multiple sets of stairs at grievant's home. *Id.* at 10. Moreover, the Arbitrator credited testimony that canines were "often kenneled when their canine handlers were on leave." *Id.* at 8. And the Arbitrator found that Sara-B could hurt herself if not crated, *id.* at 10, 14, and noted testimony that the veterinarian instructed the grievant to crate Sara-B "to prevent her from being overactive and jumping around." *Id.* at 14; *see also id.* at 17 (crediting testimony that Sara-B would jump repeatedly outside of crating and the veterinarian's instruction "not to immediately return the canine to a situation where she would be doing lots of jumping"), *id.* at 19 (finding that Sara-B was crated for discrete periods of time during her recovery and while the grievant was on leave, in accordance with Agency policy). Additionally, the Arbitrator found the veterinarian did not prescribe that Sara-B be temporarily out of service to the Agency. Award at 46; *see id.* at 10. The "unapproved diet" referenced by the dissent was simply a dietary supplement used to assist a canine who had difficulty gaining weight that the grievant used based on a veterinarian's recommendation for her prior Agency canine. Award at 20. The Arbitrator credited the grievant's testimony that she had concerns about Sara-B's ability to maintain weight and evidence that she had communicated her concerns about Sara-B's diet to the Agency. *Id.* On this point, the Arbitrator also credited testimony that there was no practice that required supervisory approval for a change to canine diet. *Id.* at 37.

³⁹ Award at 25-26 (finding separate grievances concerning the grievant's removal from the canine-handler program and her subsequent non-selection for the program); *id.* at 25 (finding that the Union requested a grievance meeting with the Agency the same day that the Agency notified that the grievant that it was removing Sara-B from her care); *id.* at 26 (finding that the Agency delayed adjudication of the grievance challenging the removal when it "delayed providing the Union with its statutory right to information that it requested" to assist it in the arbitration).

⁴⁰ Dissent at 9.

before lodging allegations of such grave significance against a party before us.

V. Decision

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

Member Abbott, dissenting:

She is employed by the United States Customs and Border Protection (CBP). She works long hours, often under difficult and demanding circumstances, and plays a significant role in support of the CBP's mission. In other words, she plays an important role in securing the borders of the United States. She receives no pay for her service and does not belong to a bargaining unit. She has a name – Sara-B – although in reports and statistics and in regulation and policy, she and others like her are referred to as “working canines.” As a “working canine,” she has no choice in who cares for her or in the quality of her care. Those decisions are made for her entirely by CBP officers who apply to become “canine handlers.” Canine handlers receive overtime pay for every day they take their charge home. For the CBP officer, this is a “collateral duty,” but for Sara-B and her colleagues, it determines their quality of life. Typically, this arrangement works well. Sadly, for Sara-B, it did not.

This case, and the discipline imposed by the Agency, concerns how Sara-B's “safety and wellbeing” was compromised by her handler's neglect. The grievant and Union are more concerned about the loss of the overtime pay that the grievant could not earn when Sara-B was removed from the grievant's care because of her neglect of Sara-B. And when the CBP refused to reinstate the grievant as a collateral-duty canine handler because of her prior neglect of Sara-B, she alleged discrimination.

In 2012, the grievant was counselled for a “failure to timely vaccinate” Sara-B.¹ In 2013, Sara-B was diagnosed with a serious hip and leg injury. The veterinarian recommended “referral [to] a specialist or surgeon,”² and rest for two weeks progressing to limited activity.³ Rather than assisting in Sara-B's rehabilitation and notifying the canine coordinator as required, the grievant placed Sara-B in a commercial kennel directing that she be crated for the entire stay. The grievant neglected to inform the kennel that Sara-B should be moved to an indoor-outdoor kennel after two weeks to allow for rehabilitative activity and movement.⁴ During the stay at the kennel, the grievant ordered an unapproved diet “that should not have been administered to Sara-B.”⁵ Then, the grievant returned Sara-B back into full service without approval from the veterinarian or the Agency's Canine Coordinator. As a consequence, the Canine Coordinator recommended “the separation of

¹ Exceptions, Attach. C, Agency's Post-Hr'g Br. (Agency Post-Hr'g Br.) at 9.

² *Id.* at 11.

³ *Id.* at 15-16.

⁴ *Id.*

⁵ *Id.* at 16.

[the grievant] from her service canine, Sara-B.”⁶ The grievant never challenged the details which were the basis of the Canine Coordinator’s actions until she tried, and was rejected, to be reinstated as a canine handler over a year later.

I do not agree that the award draws its essence from Article 32 which applies only to adverse actions and discipline. A performance counselling, especially one that concerns neglect in the performance of a collateral duty, *is not an adverse or disciplinary action*. The Arbitrator also errs in concluding that the grievant was “remov[ed] from her position.”⁷ The grievant was not so much “separated from her canine” as Sara-B was removed from the grievant for her “safety and wellbeing” pursuant to the canine policy.⁸ Thus, it is the canine policy, not Article 32, which has any relevance here. The grievant is not automatically entitled to serve as a canine handler and Sara-B does not belong to her.

Although the Arbitrator and the majority view this case through the narrow lens of contract provisions that pertain to the grievant as a canine handler, it is telling that they ignore and fail to consider the impact that the grievant’s neglect had on Sara-B’s well-being and quality of life.⁹ In court, charges of the state are appointed guardians ad litem to protect their interests in judicial proceedings. Here, Sara-B was the victim, not the grievant, and she could not speak on her own behalf because she is afforded no protection under the parties’ collective-bargaining agreement (CBA).¹⁰ Sara-B has no voice at all. The majority’s rationale, taken to its end, would mean that our review – of a claim against a grievant charged with punching an agency visitor in the face (following a prior incident of slapping the same visitor) – would be limited to considering CBA provisions that apply to the grievant and any consideration of whether the visitor suffered temporary or permanent injuries.

The provisions of the CBA may be interpreted by the Arbitrator and his findings and interpretations are entitled to a degree of deference. But, regardless of what

the Arbitrator found, both the American Humane Society and the Animal Legal Defense Fund cite – as examples of animal neglect – the failure to provide routine care and vaccinations on a timely basis and to withhold sufficient care such as prescribed rehabilitation plans.¹¹ Such neglect significantly impacts an animal’s well-being and quality of life. Here, the grievant neglected to ensure timely vaccinations on several occasions, left Sara-B crated at a kennel after suffering a leg injury, failed to arrange to have Sara-B moved to an indoor-outdoor kennel to aid in her rehabilitation, and failed to participate in Sara-B’s rehabilitation or visit her while kenneled, all the while she continued to receive overtime as a canine handler.

I cannot conclude, under these circumstances, that the Arbitrator’s findings that the Agency’s actions – removing Sara-B from the grievant’s care, removing the grievant from canine handler duties, and rejecting the grievant’s attempts to reapply as a canine coordinator – were unreasonable and failed to comport with the requirements of the CBA. The Arbitrator’s myopic conclusions do not draw their essence from the CBA’s provisions concerning the responsibilities of canine handlers. For these reasons, I would conclude that the Arbitrator’s award, whether characterized as one or three, does not draw its essence from the CBA and is contrary to law.

⁶ *Id.* at 19; Exceptions, Attach. B, Hr’g Tr. at 753, lines 13-25.

⁷ Award at 51.

⁸ Agency Post-Hr’g Br. at 3.

⁹ As the Arbitrator and the majority choose to ignore the quality of life aspect for Sara-B, they should at least realize that Sara-B represents a serious investment in time and money and returning a working canine to such an environment could undermine the return on investment.

¹⁰ The irony of the majority’s recent decision in *NLRB* is not lost on me. In that case, my colleagues found that a management official not part of the parties’ CBA could nonetheless be found to have violated that CBA. *NLRB*, 71 FLRA 1149 (2020) (Chairman Kiko concurring; Member Abbott dissenting).

¹¹ *Animal Cruelty & Neglect FAQ*, The Humane Society of the U.S., <https://www.humanesociety.org/resources/animal-cruelty-and-neglect-faq> (last visited Nov. 24, 2020); *How to Help a Neighbor’s Neglected Animal*, Animal Legal Defense Fund, <https://aldf.org/article/animal-neglect-facts> (last visited Nov. 24, 2020).