

73 FLRA No. 112

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 4156
(Union)

and

SOCIAL SECURITY ADMINISTRATION
ATLANTA REGIONAL OFFICE
(Agency)

0-AR-5870

DECISION

June 20, 2023

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

I. Statement of the Case

Arbitrator Sidney Moreland, IV denied a grievance challenging the grievant's five-day suspension (the suspension). The Union filed exceptions to the award on contrary-to-law, fair-hearing, and nonfact grounds. For the following reasons, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant is a claims specialist and works fifty percent of the time as a Union representative on official time. The Agency issued the suspension as discipline for failure to follow instructions based on two specifications of misconduct. Both specifications allege the grievant failed to meet work-assignment deadlines.

The Union grieved the suspension, and the grievance proceeded to expedited arbitration.

Before the arbitration hearing, the Union submitted two motions to the Arbitrator asking him to compel the Agency to provide data allegedly related to the dispute. The motions stated the Union "will use the data

to prove our affirmative defenses[:] that management discriminated against [the grievant] based on her race and/or based on her Union affiliation and activities."¹ After acknowledging the motions, the Arbitrator determined that "the issue(s) can best be handled at the hearing," further noting that if the Union demonstrated it could not present its case because the Agency was withholding documents it was required to provide under the parties' agreement, the Arbitrator would "entertain [an] adverse inference."²

The parties did not stipulate the issues to be resolved at arbitration, but the Arbitrator recited each party's proposed issues in the award. As relevant here, the Union's proposed issues concerned whether (1) the Agency had just cause to suspend the grievant and (2) "an adverse inference [should] be drawn by the Agency's repeated refusal to provide data."³ The Agency's proposed issue concerned whether the Agency established that the grievant engaged in the conduct underlying the charge.

Characterizing the Union's assertion that "the [g]rievant's discipline emanated solely from her Union activities" as "speculative," the Arbitrator found "[t]here is no preponderance of evidence that the Agency discriminated against the [g]rievant because of her status as a Union representative."⁴ The Arbitrator also determined the Agency "proved by a preponderance of evidence that the [g]rievant simply failed to follow repeated instructions to perform routine ministerial tasks incumbent of the [g]rievant's job duties as a [c]laims [s]pecialist and essential to the Agency's mission," despite having "ampl[e]" time to complete the assignments.⁵ On this basis, the Arbitrator concluded the Agency had just cause to suspend the grievant for failure to follow instructions.

The Arbitrator then determined that "[a]ll motions and objections by either party made prior to or during the hearing have been considered and are denied."⁶

The Union filed exceptions to the Arbitrator's award on February 24, 2023, and the Agency filed an opposition on March 22, 2023.

III. Analysis and Conclusions

A. The Union fails to establish that the award is contrary to law.

The Union argues the award is contrary to law because the Arbitrator concluded the grievant's charge

¹ Exceptions, Attach. 1 at 3-4; Exceptions, Attach. 2 at 6.

² Exceptions, Attach. 8, Arbitrator Email at 1; Opp'n, Attach. 2, Ex. E at 1.

³ Award at 1.

⁴ *Id.* at 13; *see also id.* at 9 (finding "no substantiated evidence" that the suspension was based on the grievant's union activity or other protected bases).

⁵ *Id.* at 13-14.

⁶ *Id.* at 14.

was substantiated despite the Agency's failure to meet its burden to prove one of the charge's specifications.⁷ Although the Union acknowledges it did not raise this argument before the Arbitrator, it asserts it did not know to do so.⁸ Because the arbitration was expedited – with no briefs or transcript – we cannot determine from the record before us whether the Union should have known to raise its argument before the Arbitrator.⁹ Under these circumstances, we assume, without deciding, that the Union's argument is properly before us.¹⁰

When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award *de novo*.¹¹ Applying a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.¹² In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.¹³ However, exceptions that are based on misunderstandings of an arbitrator's award do not show that an award is contrary to law.¹⁴

Contrary to the Union's assertion, the Arbitrator found that the Agency met its burden to prove the charge, including both specifications.¹⁵ Specifically, in referencing the charge's accompanying specifications,¹⁶ the Arbitrator found that the Agency "proved by a preponderance of evidence that the [g]rievant simply failed to follow *repeated* instructions to perform routine ministerial tasks incumbent of the [g]rievant's job duties as a [c]laims [s]pecialist and essential to the Agency's mission."¹⁷ Thus, the Union's argument is based on a misunderstanding of the award and provides no basis for finding the award deficient.¹⁸

Moreover, the decision the Union cites *does not support its argument*.¹⁹ In that decision, the court held that in a "situation where more than one event or factual specification is set out to support a single charge . . . *proof*

of one or more, but not all, of the supporting specifications is sufficient to sustain the charge."²⁰ The Union's reliance on that decision does not demonstrate the Arbitrator's conclusions are contrary to law.

Accordingly, we deny this exception.

B. The Arbitrator did not deny the Union a fair hearing.

The Union argues the Arbitrator denied it a fair hearing because he did not "rule on" its motions to compel the Agency to provide data and, had he granted these motions, the Union would have been able to prove its affirmative defense of retaliation.²¹ An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.²²

Contrary to the Union's assertion, the Arbitrator "considered and . . . denied" the Union's motions.²³ Other than asserting the Arbitrator should have ruled in its favor on the motions,²⁴ the Union does not explain how the Arbitrator refused to hear or consider pertinent and material evidence in denying the motions. As such, the

⁷ Exceptions at 3-4.

⁸ *Id.* at 4.

⁹ *SSA, Louisville, Ky.*, 65 FLRA 787, 789 (2011) (Member Beck dissenting in part on other grounds) (where Authority cannot determine whether party could have raised its claims before arbitrator, Authority has considered those claims); *see also AFGE, Loc. 836*, 69 FLRA 502, 503 (2016) (Member Pizzella dissenting in part on other grounds) (declining to dismiss union's argument under 5 C.F.R. §§ 2425.4(c) and 2429.5 where Authority lacked an "objective basis for determining whether this argument was or was not argued before the [a]rbitrator").

¹⁰ *See NTEU, Chapter 149*, 73 FLRA 413, 415 n.18 (2023) (assuming, without deciding, that an argument was properly before the Authority).

¹¹ *NTEU, Chapter 338*, 73 FLRA 487, 488 (2023) (citing *U.S. Dep't of the Army, U.S. Army Garrison Redstone Arsenal, Huntsville, Ala.*, 73 FLRA 210, 211 (2022)).

¹² *Id.*

¹³ *Id.* (citing *U.S. Dep't of VA, Robley Rex Med. Ctr.*, 73 FLRA 468, 469 (2023)).

¹⁴ *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 419 (2023) (*Interior*) (citing *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 220, 221 (2022)).

¹⁵ Award at 11, 13-14.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 14 (emphasis added); *see id.* at 12.

¹⁸ *Interior*, 73 FLRA at 420.

¹⁹ Exceptions at 4 (citing *Burroughs v. Dep't of the Army*, 918 F.2d 170 (Fed. Cir. 1990)).

²⁰ *Burroughs*, 918 F.2d at 172 (emphasis added).

²¹ Exceptions at 4-5.

²² *AFGE, Loc. 2338*, 73 FLRA 229, 230-31 (2022) (citing *NTEU*, 66 FLRA 835, 836 (2012)).

²³ Award at 14.

²⁴ Exceptions at 5.

Union does not demonstrate that the Arbitrator denied it a fair hearing, and we deny this exception.²⁵

C. The award is not based on a nonfact.

The Union asserts the award is based on a nonfact.²⁶ 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.²⁷ As relevant here, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not establish that an award is based on a nonfact.²⁸

The Union challenges the Arbitrator's finding that the grievant had "ample time to do the work assignments assigned."²⁹ The Union contends that it provided contrary evidence and that the Agency's evidence does not support the Arbitrator's finding.³⁰ However, the Union's contention merely disagrees with the Arbitrator's evaluation of the evidence. Therefore, it does not provide a basis for finding the award is based on a nonfact, and we deny this exception.³¹

IV. Decision

We deny the Union's exceptions.

²⁵ See *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 503 (denying fair-hearing exception where excepting party failed to demonstrate how it was prejudiced by arbitrator's challenged conduct); *AFGE, Loc. 1101*, 70 FLRA 644, 646 (2018) (Member DuBester concurring) (same); *AFGE, Loc. 3438*, 65 FLRA 2, 3-4 (2010) (denying fair-hearing exception when excepting party did not demonstrate the arbitrator failed to consider material evidence).

²⁶ Exceptions at 5.

²⁷ *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022) (citing *U.S. Dep't of HHS, Food & Drug Admin., San Antonio, Tex.*, 72 FLRA 179, 179-80 (2021) (Chairman DuBester concurring)).

²⁸ *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 67, 70-71 (2022) (Member Kiko concurring on other grounds) (citing *Fed. Educ. Ass'n, Stateside Region*, 72 FLRA 724, 725 (2022); *Int'l Bhd. of Boilermakers, Loc. 290, Bremerton Metal Trades Council*, 72 FLRA 694, 696 (2022); *NTEU*, 69 FLRA 614, 619 (2016)).

²⁹ Exceptions at 5 (internal quotations omitted).

³⁰ *Id.*

³¹ *AFGE, Loc. 2142*, 72 FLRA 764, 765-66 (2022) (Chairman DuBester concurring).