

**63 FLRA No. 121**

UNITED STATES DEPARTMENT  
OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
(Agency)

and

NATIONAL AIR TRAFFIC  
CONTROLLERS ASSOCIATION  
(Union)

0-AR-4120

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DECISION

May 29, 2009

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Before the Authority: Carol Waller Pope, Chairman and  
Thomas M. Beck, Member  
Decision by Chairman Carol Waller Pope for the  
Authority

**I. Statement of the Case**

This matter is before the Authority on exceptions to an award of Arbitrator Michael S. Jordan filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The grievance alleges that a five-day suspension the Agency issued an employee for committing an operational error was not for such cause as will promote the efficiency of the service. The grievance alleges further that the Agency imposed the discipline without first having complied with procedures in the 2003 Collective Bargaining Agreement (CBA) governing how operational errors are to be addressed.

In his award, the Arbitrator sustained the grievance and awarded the grievant back pay. For the reasons that follow, we deny the Agency's exceptions.<sup>1</sup>

1. The Union asserts that the Agency failed to submit its exceptions as a dated document and, therefore failed to comply with 5 C.F.R. § 2425.2. Opposition at 2 n.1. However, the date of submission is evident from the date on the transmittal letter and on the certificate of service. Accordingly, the Authority finds that the exceptions were properly filed.

**II. Background and Arbitrator's Award**

The employee is a certified professional air traffic control specialist who has served as a controller at the Agency since 1987. Award at 5. While working alone in the Sioux Falls, South Dakota Air Traffic Control Tower, the employee committed an operational error by permitting a loss of minimum separation between a jet that was inbound for landing and another jet that was cleared for takeoff. *Id.* at 6. After the employee immediately reported the operational error, management conducted an investigation. *Id.* at 7. Ultimately, the Agency issued a notice of the five-day suspension for "careless work performance" that resulted in danger to others. *Id.* at 6-7.

Applicable portions of the CBA provide, in relevant part:

## Article 10, Disciplinary/Adverse Actions

Section 2. When the Agency decides that corrective action is necessary, consideration should be given to the application of measures which, while not disciplinary, will instruct the offending employee and/or remedy the problem. When it is determined that discipline is appropriate, informal disciplinary measures should be considered before taking a more severe action. . . .

Section 3. Disciplinary/adverse actions shall not be taken against an employee except for such cause as will promote the efficiency of the service. . . .

Section 14. In making its determination that disciplinary/adverse action is necessary and when determining the appropriateness of a penalty, the Agency shall consider the factors as outlined in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981).

## Article 62, Immunity Program

Section 1. The Agency, with Union input, has established a policy for operational errors which limits the circumstances under which discipline is imposed. Disciplinary action shall not be imposed when the employee's action was inadvertent . . . .

The Arbitrator found that there was no dispute that the employee committed an avoidable operational error. Award at 17. While acknowledging that the Agency has the discretion to impose discipline for this error, the Arbitrator noted that this discretion must be exercised based on a appropriate consideration of the factors set

out in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). Award at 17-18. Based on his review of the testimony given and documents produced during the hearing, the Arbitrator determined that the operational error was inadvertent and, therefore, discipline should not have been imposed. In addition, the Arbitrator found that disciplinary action was not supported by an appropriate consideration of the *Douglas* factors. *Id.* at 18-21. The Arbitrator found that action short of discipline, such as discussion, training, counseling or another performance improvement method, would have promoted the efficiency of the service. *Id.* at 21.

Based on the foregoing, the Arbitrator sustained the grievance and awarded the grievant back pay. He also invited submissions regarding attorney fees. *Id.* at 22.

### III. Positions of the Parties

#### A. Agency's Exceptions

The Agency contends that the award is deficient because it: (1) is contrary to law; and (2) fails to draw its essence from the parties' agreement.

With respect to the first exception, the Agency contends that the award is contrary to: (1) its right to discipline under § 7106(a)(2)(A) of the Statute<sup>2</sup>; and (2) its statutory right to develop its own personnel management system. The Agency argues that it retains the right to determine whether a given situation is best remedied by initiating a disciplinary action. Exceptions at 5. As for the second argument, the Agency takes the position that the award is contrary to its statutory authority<sup>3</sup> to develop its own personnel management system, which, according to the Agency, expressly delegates to its supervisors the authority to impose discipline. *Id.* at 5 and Exhibit 3.

As for the second exception, the Agency contends that the Arbitrator wrongly interpreted the CBA to require management to seek performance improvement before it imposes discipline. As the Agency interprets the CBA, at Article 10, Section 2, it is free to bypass alternative remedies when it decides to take disciplinary action. *Id.* at 8.

2. § 7106(a)(2)(A) states that "nothing in this chapter shall affect the authority of any management official of any agency . . . in accordance with applicable laws . . . to suspend, remove, reduce in grade or pay, or take any other disciplinary action against such employees . . ."

3. The Department of Transportation Appropriations Act of 1996, Pub. L. No. 104-50, § 347, 109 Stat. 436, 460 (1995), as amended by Pub. L. No. 104-122, § 1, 110 Stat. 876 (1996).

#### B. Union's Opposition

The Union contends that the award is not inconsistent with management's right to discipline because, according to the Union, the parties chose to negotiate disciplinary action procedures and appropriate arrangements under § 7106(b)(2) and (3) of the Statute. Opposition at 4-7. The Union also contends that the Agency's argument that the award is contrary to its statutory authority to develop its own personnel system cannot be raised now because it was not raised before the Arbitrator. *Id.* at 9-10.

As for the Agency's claim that the award fails to draw its essence from the CBA, the Union points out that Article 20, Section 5 requires the Agency to take steps to improve unacceptable performance before imposing discipline. *Id.* at 12.<sup>4</sup>

### IV. Preliminary Matter

The Agency acknowledges that it did not present to the Arbitrator its argument that the award is contrary to its authority to develop its own personnel management system. Exceptions at 5. The Agency asserts, nonetheless, that it is not precluded from raising this issue now because "there was no indication, prior to the Arbitrator's [a]ward, that its authority to develop its own disciplinary system was under question." *Id.* at 5 n.2.

Under 5 C.F.R. § 2429.5, an issue that could have been but was not presented to an arbitrator will not be considered by the Authority. See *United States Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003). In this regard, the parties agreed that the Arbitrator was to decide the appropriateness of the Agency's disciplinary action. Award at 2. Thus, the Agency could have presented to the Arbitrator its argument that its statutory authority precludes an arbitrator from reviewing its dis-

4. Article 20, Section 5 provides, in relevant part:

When the employee's performance is unacceptable, the Employer shall afford the employee a reasonable opportunity . . . to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position.

. . . .

Every thirty (30) days during the period for improving performance, the supervisor shall provide the employee with a written review identifying the employee's progress and identifying any areas still needing improvement. Additionally, the supervisor shall include specific recommendations of methods and means of improving that the employee may use to attain an acceptable level of competence.

Opposition, Ex. 8.

ciplinary actions. *See* Exceptions at 5 n.2. As the Agency conceded that it did not do so, we dismiss this exception.

## V. Analysis and Conclusions

A. The Agency has not established that the award is contrary to law.

The Authority reviews questions of law raised by an exception to an arbitrator's award *de novo*. *See, e.g., NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of *de novo* review, the Authority determines whether the award is consistent with the applicable standard of law. *See, e.g., NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making this determination, the Authority defers to the arbitrator's underlying findings of fact. *Id.* The Authority defers to the arbitrator's findings of fact because it was the arbitrator's evaluation of the record for which the parties bargained and not the Authority's evaluation. *See, e.g., AFGE, Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1275 (1998) (citing *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987)).

The Agency claims that the award is contrary to its right to discipline. When an agency asserts that an arbitrator's award violates a management rights under § 7106(a) of the Statute, the Authority first determines whether the award affects those rights. *See United States Small Business Administration and AFGE, Local 2951*, 55 FLRA 179, 184 (1999). If it does, then the Authority applies the two-prong test set forth in *United States Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C.*, 53 FLRA 146, 151-54 (1997) (*BEP*).

Under prong I of *BEP*, the Authority determines whether the arbitrator was enforcing either an applicable law, within the meaning of section 7106(a)(2) of the Statute, or a contract provision that was negotiated pursuant to section 7106(b) of the Statute. *See BEP* at 153. Under prong II, the Authority determines whether the award constitutes a reconstruction of what management would have done if it had not violated the applicable law or contract provision at issue. *See id.* at 154. In the instant award, the Arbitrator set aside a five-day suspension, thereby affecting management's right to discipline. Award at 1. As a result, it is necessary to apply the *BEP* framework.

With respect to prong I, the Arbitrator found that the grievant's suspension violated Article 10, Section 14 and Article 62 of the CBA. Award at 17-21.<sup>5</sup> The Agency asserts that the Arbitrator ignored Article 10,

Section 2 of the CBA, which the Agency interprets as permitting it to bypass non-disciplinary remedies when deciding to discipline an employee for an operational error. Exceptions at 8. The Agency also asserts that the Arbitrator interpreted the phrase "promote the efficiency of the service" in a way that permitted him to impose his own standards for discipline. Exceptions at 10.

The Authority has found that requirements that discipline be for "the efficiency of the service" are functionally identical to requirements that discipline be for "just cause." *AFGE, Local 1760*, 22 FLRA 195, 197 (1986). Further, the Authority has held that contract provisions requiring discipline for just cause constitute appropriate arrangements within the meaning of § 7106(b)(3) of the Statute. *See Soc. Sec. Admin., Balt. Md.*, 53 FLRA 1751, 1754 (1998) (*SSA, Balt.*). As the Authority has held both that contract provisions requiring just cause for discipline satisfy the requirements of prong I of *BEP*, and that provisions permitting discipline "in the efficiency of the service" are the functional equivalent of just cause requirements, the award in this case satisfies prong I of *BEP*. 22 FLRA at 197.

With regard to prong II of *BEP*, the Authority has held that an arbitrator's enforcement of a just cause provision, by setting aside or reducing the disciplinary action, "operates in effect to reconstruct what management would have done had the provision been followed." *SSA, Balt.*, 53 FLRA at 1754 (citation omitted). The Arbitrator's setting aside of the five-day suspension based on the "efficiency of the service" provision in the CBA operates in effect to reconstruct what management would have done if it had complied with the provision. Therefore, we find that prong II of *BEP* has been satisfied.

Accordingly, we deny this exception.

B. The Agency has not established that the award fails to draw its essence from the parties' agreement.

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. *United States Dep't of Homeland Security, United States Customs and Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 129, 133 (2007) (*CBP*). Under this stan-

5. Although the Arbitrator's analysis does not specifically reference Article 10, Section 14 (set out in Award at 2-3), which requires management to consider the *Douglas* factors when making decisions on discipline, it does discuss how the Agency should have applied those factors. Award at 17-21.

ard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 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. *Id.* at 133.

Article 10, Section 3 of the CBA provides that “[d]isciplinary/adverse action shall not be taken against an employee except for such cause as will promote the efficiency of the service.” The CBA also requires that a determination as to whether disciplinary action should be taken be based on a consideration of the factors set out in *Douglas v. Veterans Administration*, 5 MSPB 313 (cited before, page 3). Based on his consideration of the *Douglas* factors, the Arbitrator concluded that no discipline was appropriate. Award at 16-21. Therefore, the Agency has not established 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 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. *CBP* at 133.

Accordingly, we deny this exception.

## **VI. Decision**

The Agency’s exceptions are denied.