70 FLRA No. 21

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1698
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL SUPPLY SYSTEMS COMMAND
MECHANICSBURG, PENNSYLVANIA
(Agency)

0-AR-5190

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DECISION

December 20, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Judith C. Bello found that the Agency did not violate the Americans with Disabilities Act (ADA)[1] when it denied an employee's (the grievant's) reasonable-accommodation (RA) request to telework full time. There are four questions before us.

The first question is whether the award is contrary to law because the Arbitrator erred by failing to find that (1) the Agency discriminated against the grievant in violation of the ADA, and (2) the Agency did not engage in the Rehabilitation Act's[2] "required interactive process."[3] Because the Union fails to demonstrate that the award is deficient on these bases, the answer is no.

The second question is whether the award is contrary to law because the Arbitrator did not address the Union's claims that the Agency: violated the Family and Medical Leave Act (FMLA),[4] the parties' collective-bargaining agreement (the CBA), and Agency regulations; and committed "retaliation under [t]he Rehabilitation Act."[5] Because the Union fails to show that the Arbitrator was required to address these claims, the answer is no.

The third question is whether the award is based on nonfacts. Because the Union's nonfact arguments challenge matters that the parties disputed at arbitration, the answer is no.

The fourth question is whether the award is contrary to public policy and/or whether the Arbitrator denied the Union a fair hearing.[6] Because the public policy exception is premised on the Union's contrary-to-law exceptions – which we deny in Section III.A. below – and because the fair-hearing exception is unsupported, we deny these exceptions. Thus, the answer is no.

II. Background and Arbitrator's Award

The grievant was an Agency contract negotiator from 2011 until her termination in May 2015. In March 2014, the Agency approved the grievant's request to telework once a week due to a medical condition that made it difficult for her to leave home. But, the Agency later determined, conduct issues arose that involved the grievant's use of unscheduled leave, her use of unscheduled ad hoc telework, and her absence from work without leave (AWOL).

On August 1, 2014, the Agency issued a Letter of Caution (the Agency's letter) to the grievant that rescinded her telework agreement "for conduct issues."[7] The Agency's letter explained that the grievant's excessive use of unscheduled leave and unscheduled ad hoc telework, along with her being AWOL, raised doubts about the grievant's ability to "maintain a regular work schedule" and to "be at your work site when scheduled."[8] The grievant did not contest the Agency's rescission of her once-a-week telework agreement. Sometime later, the grievant's supervisor "informed the [g]rievant that her performance was poor."[9]

Three months after the Agency rescinded the grievant's once-a-week telework agreement "for conduct issues,"[10] the grievant submitted an RA request to telework full time. Along with her request, the grievant provided medical documentation stating that "she could perform all her work functions[,] but [her medical issues] prevented her from travelling to work or more than [ten] minutes from her home."[11] The Agency denied the grievant's full-time telework request "due to her prior

[1] 42 U.S.C. § 12101.
[2] 29 U.S.C. § 701.
[3] Exceptions at 26.
[4] 5 U.S.C. § 6381.
[5] Exceptions at 4; *see* 29 U.S.C. § 701.
[6] 5 C.F.R. § 2425.6.
[7] Award at 11.
[8] *Id.* at 10.
[9] *Id.* at 11.
[10] *Id.*
[11] *Id.*

misconduct . . . and documented performance issues [that] harmed the Agency's mission."[12]

The Union grieved the Agency's denial of the grievant's RA request to telework full time. When the parties did not resolve the grievance, the matter went to arbitration.

At arbitration, the parties did not stipulate to an issue. So the Arbitrator framed the issue as: "Did the Agency's denial of [the grievant's RA] request violate the [CBA] or any law, [g]overnment[-]wide rule, policy[,] or regulation? If so, what shall the remedy be?"[13] Interpreting the issue that she framed in light of "the issue addressed during the grievance procedure," the Arbitrator "limited" her award to whether "the Agency['s] denial of a[n RA] request by the [g]rievant" violated the ADA.[14]

The Arbitrator concluded that the Agency's denial of the grievant's RA request did not violate the ADA. The Arbitrator found that "[t]here is no requirement under the ADA to grant a[n RA] to an employee who either has abused such an accommodation in the past or who cannot demonstrate that granting such an accommodation would not adversely affect the operations of the Agency."[15] Citing "[c]redible testimony"[16] from the arbitration hearing, the Arbitrator further found that the Agency gave "full consideration . . . to the [g]rievant's request for a[n RA],"[17] but that "the Agency properly denied the [g]rievant's request . . . based upon [her] documented misconduct" and the Agency's "inability to further accommodate [the grievant's] telework request without compromising the Agency's mission."[18] Accordingly, the Arbitrator denied the grievance.

The Union filed exceptions to the award, and the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusions

A. The award is not contrary to law.

1. The award is not contrary to the ADA or the Rehabilitation Act.

The Union claims that the award is contrary to the ADA and the Rehabilitation Act. The Union contends that the Arbitrator erred by failing to find (1) that the Agency violated the ADA by discriminating against the grievant when the Agency denied her RA request to telework full time;[19] and (2) that the Agency violated the Rehabilitation Act when it did not "engage[] in an interactive process with the employee in good faith to make a[n RA]."[20]

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.[21] In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[22] In making that determination, the Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that those findings are deficient as nonfacts.[23]

Also, exceptions pertaining to disability discrimination in the federal government implicate the Rehabilitation Act, which addresses disability discrimination in federal employment.[24] However, in resolving exceptions dealing with disability discrimination, the Authority applies the standards of the ADA, because Congress has specifically adopted the ADA's standards to determine whether there has been disability discrimination in violation of the Rehabilitation Act.[25] The Union's exceptions claim that the award – which only mentions and applies the standards of the ADA – is contrary to law. Therefore, we address the Union's first exception as a challenge to the Arbitrator's application of the ADA's standards under the Rehabilitation Act.

[12] *Id.*
[13] *Id.* at 1.
[14] *Id.* at 9.
[15] *Id.* at 11.
[16] *Id.*
[17] *Id.* at 12.
[18] *Id.* at 11.
[19] Exceptions at 4, 22-26.
[20] *Id.* at 28 (emphasis omitted).
[21] *U.S. DOL*, 68 FLRA 779, 781-82 (2015).
[22] *Id.* at 782.
[23] *Id.*
[24] *See OPM*, 61 FLRA 358, 361 (2005).
[25] *Id.* (citing 29 U.S.C. § 791(f); *U.S. DOJ, INS*, 57 FLRA 254, 255 (2001)).

a. The award is not contrary to the ADA.

Regarding the Union's ADA-discrimination contention, as relevant here, an RA "is a modification or adjustment to the work environment that enable[s] a qualified individual with a disability to perform the essential functions of [the] position."[26] But the Arbitrator found that the RA that the grievant requested would *not* enable her to achieve this level of performance. Thus, the Arbitrator found that "the Agency properly denied the [g]rievant's request . . . based upon [(1) her] documented misconduct"[27] that raised doubts about her ability to "maintain a regular work schedule" and to "be at [her] work site when scheduled,"[28] and (2) the Agency's "inability to further accommodate [the grievant's] telework request without compromising the Agency's mission."[29]

The Union does not claim that the Arbitrator's reliance on these findings is contrary to any law. Further, to the extent that the Union challenges these findings as nonfacts, we deny those claims in Section III.B., below.

Additionally, case law supports the Arbitrator's reliance on the grievant's misconduct and performance issues to uphold the Agency's denial of the grievant's RA request to telework full time. The Equal Employment Opportunity Commission has held that "telework . . . [is] not an effective accommodation – i.e., one that would enable [an individual] to perform the essential functions of [the individual's] position" – where there is "credited . . . testimony . . . finding that [the individual] had previous difficulties with time and attendance, telework, and time and attendance during telework."[30] The Arbitrator's findings in this case concerning the grievant's misconduct and performance issues are analogous, and support the conclusion that full-time telework for the grievant would not be an effective accommodation under the ADA.

Further, the Union's reliance on *Davis v. Guardian Life Ins. Co. of America* (*Davis*)[31] is misplaced. In *Davis*, the court found that teleworking was an RA because the employee in *Davis* could perform the essential job functions "well, or at least competently."[32] Here, the Arbitrator determined that the grievant was unable to perform the essential job functions of her position while teleworking, and that the Agency's evidence supported its decision to deny the grievant's RA request to telework full time. Therefore, *Davis* does not support the Union's position that the award is contrary to the ADA. Consequently, we find that the Union's contention – that the Arbitrator erred by failing to find that the Agency discriminated against the grievant when the Agency denied her RA request to telework full time – is without merit.

Accordingly, we deny the Union's exception.

b. The award is not contrary to the Rehabilitation Act.

We also reject the Union's contention that the Agency did not engage in the Rehabilitation Act's "required interactive process."[33] Authority case law holds that "[d]etermining an appropriate [RA] for an employee with a disability should be an interactive process involving both the employee and the employer."[34] The process involves a dialogue between the employee and employer, the goal of which is to identify the employee's needs and the most effective accommodation for those needs.[35] In determining whether an agency has met its obligation to engage in the interactive process and provide an RA for a qualified employee with a disability, it is important to "look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary."[36]

Applying these considerations in this case, we reject the claim that the Arbitrator erred by failing to find an interactive-process violation by the Agency. Rather, the Arbitrator found that the "Agency proved by a preponderance of the credible evidence that full consideration was given to the grievant's request for a[n RA]."[37] Specifically, the Arbitrator found that the Agency – prior to the grievant's submission of an RA request – (1) warned the grievant about her poor performance and attendance issues;[38] and (2) attempted to address the grievant's issues by granting the grievant

[26] *U.S. Dep't of the Treasury, IRS, Austin Serv. Ctr.*, 58 FLRA 546, 548 (2003) (citing 29 C.F.R. § 1630.2(o)).
[27] Award at 11.
[28] *Id.* at 10.
[29] *Id.* at 11.
[30] *Petitioner v. Deborah Lee James, Sec'y, Dep't of the Air Force*, EEOC DOC 0320150024, 2015 WL 3484770 at *4 (2015).
[31] Exceptions at 25 (citing *Davis*, No. CIV. A. 98–5209, 2000 WL 122357 (E.D. Pa. Feb. 1, 2000)).
[32] *Davis* at *4.
[33] Exceptions at 26.
[34] *U.S. Dep't of the Army Corps of Eng'rs, Huntington Dist., Huntington, W. Va.*, 59 FLRA 793, 797 (2004) (quoting *Billman v. Principi*, 2003 WL 21997673 at *3 (2003) (citing 29 C.F.R. § 1630.9)).
[35] *See id.*
[36] *Id.* (quoting *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996)).
[37] Award at 12.
[38] *Id.* at 11.

leave-without-pay status to accommodate her needs.[39] The Arbitrator also found that the Agency fully considered the grievant's RA request and supporting medical documentation before denying her requested RA.[40] And the Union does not challenge these findings as nonfacts. Consequently, we find that the Union's contention – that the Arbitrator erred by failing to find that the Agency did *not* "engage[] in an interactive process with the employee in good faith to make a[n RA]"[41] – is without merit.

Accordingly, we deny this Union exception as well.

2. The Union's remaining contrary-to-law claims do not provide a basis for finding the award deficient.

The Union claims that the award is contrary to law because the Arbitrator failed to find violations of the FMLA,[42] aspects of the Rehabilitation Act dealing with retaliation issues,[43] the CBA,[44] and Agency regulations.[45] But the Union does not identify any law, rule, or regulation that required the Arbitrator to address every claim that the Union attempted to raise. Nor does the Union argue that the Arbitrator exceeded her authority by the manner in which she framed the issues before her, which focus on the ADA and the grievant's RA request.[46] We therefore deny these exceptions.

Accordingly, we deny the Union's contrary-to-law exceptions.

B. The award is not based on a nonfact.

The Union claims that three of the award's findings are based on nonfacts. Specifically, the Union challenges the Arbitrator's findings that (1) the grievant committed misconduct; (2) the grievant was unable to satisfy the conditions of telework; and (3) granting the grievant's RA request would adversely affect the Agency's operations.[47]

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[48] However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[49]

The Union's nonfact exceptions lack merit because they challenge matters that the parties disputed at arbitration.[50] Accordingly, we deny the Union's nonfact exceptions.

C. The Union's remaining exceptions lack merit.

On its exceptions form, the Union takes the position that the award is contrary to public policy, and that the Arbitrator denied the Union a fair hearing.[51] Regarding the Union's public-policy exception, the Union premises that exception on its contrary-to-law exceptions.[52] As we deny those exceptions in Section A., above, we likewise deny the Union's public-policy exception.[53]

Regarding the Union's fair-hearing exception, under § 2425.6(b) of the Authority's Regulations, a party arguing that an award is deficient on private-sector grounds has an express duty to "explain how, under standards set forth in the decisional law of the Authority or Federal courts[,]" the award is deficient.[54] In addition, § 2425.6(e)(1) provides that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground as required in" § 2425.6(b).[55]

The Union does not provide any further support for its fair-hearing exception beyond stating that "[t]he refusal of the Arbitrator to consider the [g]rievant's FMLA claims denied the [g]rievant a fair hearing."[56] Therefore, because the Union does not support its exception and fails to explain how the award is deficient under the standards set forth in applicable precedent, we deny the exception.

IV. Decision

We deny the Union's exceptions.

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[39] *Id.*
[40] *Id.* at 11-12.
[41] Exceptions at 28 (emphasis omitted).
[42] *Id.* at 12.
[43] *Id.* at 19.
[44] *Id.* at 15.
[45] *Id.*
[46] *See* Exceptions at 34 (responding "No" on the exceptions form in response to the question, "Are you alleging that the arbitrator exceeded his or her authority?").
[47] *Id.* at 28.
[48] *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[49] *See id.*
[50] *See* Award at 1-9.
[51] Exceptions at 32.
[52] *Id.*
[53] *Indep. Union of Pension Emp. for Democracy & Justice*, 68 FLRA 999, 1007 (2015) (denying exceptions that were based on faulty exception).
[54] 5 C.F.R. § 2425.6(b).
[55] *Id.* § 2425.6(e)(1).
[56] Exceptions at 32.