72 FLRA No. 109

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 987
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
WARNER ROBINS AIR LOGISTIC COMPLEX
(Agency)

0-AR-5704

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DECISION

December 13, 2021

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

This matter is before the Authority on exceptions to an award of Arbitrator Robert J. Paci filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute)[1] and part 2425 of the Authority's Regulations.[2] The Agency did not file an opposition to the Union's exceptions.

We have determined that this case is appropriate for issuance as an expedited, abbreviated decision under § 2425.7 of the Authority's Regulations.[3]

As a preliminary matter, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar consideration of the Union's argument that the award "violates" Article 5.01(b) of the parties' collective-bargaining agreement because the disciplinary action was untimely under that provision.[4] Although the Union asserts that it raised this argument to the Arbitrator, the Arbitrator made no findings as to the timeliness of the discipline and the Union provided no evidence in the record that it raised this argument below.[5] Therefore, we dismiss this argument.[6]

The Union also argues that the award fails to draw its essence from Articles 3.01, 5.03(a), and 5.06(a) of the parties' agreement, but does not support that argument. Therefore, we deny this argument under § 2425.6(e)(1) of the Authority's Regulations.[7]

Accordingly, we dismiss, in part, and deny, in part the Union's exceptions.

[1] 5 U.S.C. § 7122(a).
[2] 5 C.F.R. pt. 2425.
[3] *Id.* § 2425.7 ("Even absent a [party's] request, the Authority may issue expedited, abbreviated decisions in appropriate cases.").
[4] Exceptions at 6-7.
[5] *Id.*
[6] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also U.S. DHS, U.S. CBP*, 66 FLRA 335, 337-38 (2011) (where a party should have known to make an argument to the arbitrator, but the record does not indicate that the party did so, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the party from raising that argument to the Authority).
[7] 5 C.F.R. § 2425.6(e)(1); *see also Fraternal Ord. of Police, Pentagon Police Lab. Comm.*, 65 FLRA 781, 785 (2011) (exceptions are subject to denial under § 2425.6(e)(1) of the Authority's Regulations if they fail to support arguments that raise recognized grounds for review).

Member Abbott, concurring:

A threat to punch coworkers is conduct that cannot be tolerated in any workplace. I dare say that few employees – whether union officer, BUE, GS, WG, SES, temporary – would disagree. And threatening to punch coworkers seems even more discordant when it occurs during a Sexual Assault Prevention Course. But that is what occurred here. During a Sexual Assault Prevention Course, the grievant threatened to "knuckle sandwich" several coworkers and to punch others in the throat. It should come as no surprise then that the Agency suspended the grievant for this outrageous behavior. It is somewhat surprising that the suspension was just for one day, but as I have noted before, an Agency's assessment as to what penalty is most appropriate under the circumstances is entitled to substantial deference when it falls within an Agency's table of penalties or other standardized guidelines.[1]

Therefore, I agree with my colleagues that the Union's exceptions are properly dismissed or denied. However, because this case has the "potential for precedential value,"[2] I do not agree that this case is appropriate for an expedited, abbreviated decision (EAD).

I have previously addressed the issue regarding arbitral review of an agency deciding official's penalty decision. I have urged my colleagues to clarify to what extent an arbitrator's judgement can or should replace that of the agency deciding official, particularly when the penalty imposed falls squarely within a table of penalties or standardized guide. This case presents the perfect opportunity to provide clear guidance to the federal labor-management relations community.

In this case, the Arbitrator deferred to the Agency's penalty determination assessment based on the evidence presented at hearing. I have consistently stated that arbitrators should be required to exercise the same level of deference with respect to agency disciplinary actions as the Merit Systems Protection Board (Board) applies in adverse action appeals.[3]

Here, the Arbitrator exercised appropriate arbitral review with respect to the Agency deciding official's penalty determination. Thus, this case could establish a clear framework that defines the extent to which arbitrators may review an agency's penalty determination.

The EAD moves the case off of the Authority's docket. However, it does not provide agencies and unions any clear guidance on how to resolve disputes that erupt over penalty determinations. I would take this opportunity to provide that guidance.

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[1] *U.S. DOL, Off. of Workers' Comp.*, 72 FLRA 489, 493 (2021) (Concurring Opinion of Member Abbott); *U.S. DOD, Def. Logistics Agency, Distrib. Warner Robins, Warner Robins AFB, Ga.*, 71 FLRA 1029, 1032 (2020) (Dissenting Opinion of Member Abbott); *SSA*, 71 FLRA 798, 803 (2020) (Dissenting Opinion of Member Abbott).

[2] 5 C.F.R. § 2425.7.

[3] *See Batara v. Dep't of Navy*, 123 M.S.P.R. 278, 281 (2016) ("[T]he employing agency . . . has primary discretion in maintaining employee discipline and efficiency. The Board will not displace management's responsibility, but instead will ensure that managerial judgment has been properly exercised."); *Saiz v. Dep't of Navy*, 122 M.S.P.R. 521, 524 (2015) (same).