73 FLRA No. 56

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 149
(Union)

0-AR-5768

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DECISION

September 30, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members
(Member Kiko dissenting in part)

I. Statement of the Case

The Union filed a grievance challenging the Agency's proposed ten-day suspension of an employee (the grievant). Arbitrator Samuel J. Nicholas, Jr. sustained the grievance and directed the Agency to issue the grievant a letter of reprimand. The Agency argues that the award is based on a nonfact and is ambiguous or contradictory. For the reasons discussed below, we find that the Agency fails to establish that the award is deficient on either ground, and we deny the exceptions.

II. Background and Arbitrator's Award

The grievant worked as a border patrol agent at the Progreso, Texas port of entry. Following an interaction between the grievant and a civilian traveler, the Agency charged the grievant with improper conduct. The Agency based this charge on one allegation of using unprofessional language and one allegation of threatening bodily harm – a C2 offense and a C3 offense, respectively, under the Agency's table of penalties. Noting that the grievant previously served a one-day suspension for improper conduct, the Agency proposed a fourteen-day suspension.[1] After the grievant responded to the proposed suspension, the Agency's deciding official reduced the suspension to ten days.

The Union grieved the suspension, which was submitted to arbitration. The Arbitrator stated the issue as "whether the Agency had sufficient evidence to charge the [g]rievant with [improper c]onduct . . . and if so, whether a penalty of [ten]-day suspension is appropriate."[2]

At arbitration, the Union asserted that the Agency had not properly considered the factors set forth in *Douglas v. Veterans Administration* (*Douglas*),[3] when determining the appropriate discipline, and noted that the supervisor who investigated the alleged incident recommended a letter of reprimand. In considering these arguments, the Arbitrator noted the grievant's work history and lack of previous similar complaints, and the evidence that the Agency provided to support the discipline.

The Arbitrator determined that the Agency did not meet its burden of proving that the grievant committed the C3 offense of threatening bodily harm to a civilian traveler. However, the Arbitrator found that the grievant admitted to committing the C2 offense of using unprofessional language toward a civilian traveler. In light of these findings, the Arbitrator explained that the Agency could impose discipline for that offense, so long as the discipline is consistent with its "[t]able of [p]enalties for the C2 offense."[4] As part of this explanation, the Arbitrator "urge[d]" the Agency to "reconsider the *Douglas* factors in selecting the appropriate penalty for the C2 offense," and explained that discipline cannot be used as a "punitive penalty."[5]

Additionally, the Arbitrator noted that the grievant's conduct appeared to be an "isolated incident" and opined that the grievant's ten-day suspension "d[id] not promote the efficiency of the service."[6] Consequently, the Arbitrator concluded the award by sustaining the grievance and directing the Agency to "remove the C3 offense from the [g]rievant's record . . . in favor of a letter [of] reprimand."[7]

The Agency filed exceptions to the award on October 12, 2021, and the Union filed an opposition to the exceptions on November 10, 2021.

[1] At arbitration, the Union conceded that "[t]he [g]rievant had a past disciplinary record . . . for an attendance issue," which resulted in a one-day suspension. Award at 7.
[2] *Id.* at 2.
[3] 5 M.S.P.R. 280 (1981).
[4] Award at 9.
[5] *Id.*
[6] *Id.* at 10.
[7] *Id.*

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the award is deficient because it is based on a nonfact.[8] The Authority will find that an award is based on a nonfact if the excepting party establishes that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[9] Additionally, the Authority rejects nonfact exceptions that challenge alleged findings that an arbitrator did not actually make.[10]

The Agency contends that the Arbitrator erroneously found that the improper-conduct charge was the grievant's "first disciplinary offense, when in fact it was his second."[11] However, the Agency does not identify where in the award the Arbitrator found this was the grievant's first disciplinary offense, and no such finding is apparent. Moreover, the Arbitrator, in summarizing the Union's position, explicitly stated that "[t]he [g]rievant had a past disciplinary record . . . for an attendance issue."[12] As such, the Agency fails to identify a clearly erroneous central fact underlying the award, but for which the Arbitrator would have reached a different result.

Accordingly, we deny the exception.[13]

B. The award is not ambiguous or contradictory.

The Agency asserts that the award is ambiguous or contradictory because it directs two conflicting remedies.[14] Specifically, the Agency alleges that it cannot "reconsider an appropriate penalty" for the grievant's C2 offense if it is also required to "issue [the g]rievant a letter of reprimand" for that same offense.[15] In order for the Authority to find an award deficient as incomplete, ambiguous, or contradictory, "the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain."[16]

Although the Agency asserts that the Arbitrator directed it to take conflicting actions in regard to the grievant's admitted C2 offense, we find that, when read in context, the award provides no such conflicting directions. Rather, in finding that the Agency could discipline the grievant for the C2 offense, the Arbitrator explained that the proper way to determine discipline for that offense was to "reconsider the [*Douglas*] factors" and "decide upon the appropriate penalty that is on the [t]able of [p]enalties for the C2 offense."[17] Applying that explanation, the Arbitrator directed the Agency to "remove the C3 offense from the [g]rievant's record . . . *in favor of a letter [of] reprimand*."[18]

The parties do not dispute the meaning and effect of the Arbitrator's directive to remove the C3 offense from the grievant's personnel file.[19] Further, it is clear to us that the only other "direct[ion]" the Arbitrator gave the Agency is to issue the grievant a letter of reprimand.[20] Thus, we find that, when read in context, the award is neither ambiguous nor contradictory so as to be impossible to implement.

Accordingly, we deny the exception.

IV. Decision

We deny the Agency's exceptions.

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[8] Exceptions Br. at 8-11.
[9] *AFGE, Loc. 2516*, 72 FLRA 567, 568 (2021) (*Local 2516*) (citing *AFGE, Loc. 0922*, 70 FLRA 34, 35 (2016)).
[10] *AFGE, Loc. 1594*, 71 FLRA 878, 880 (2020) (citing *SSA, Off. of Hearing Operations*, 71 FLRA 177, 178 (2019) (*SSA*)).
[11] Exceptions Br. at 8.
[12] Award at 7.
[13] *See SSA*, 71 FLRA at 178 (denying nonfact exceptions premised on alleged findings that the arbitrator did not make).
[14] Exceptions Br. at 11-12.
[15] *Id.* at 12.
[16] *Local 2516*, 72 FLRA at 570 (quoting *U.S. OPM*, 68 FLRA 1039, 1043 (2015)) (internal quotation marks omitted); *see also AFGE, Loc. 2923*, 61 FLRA 725, 728 (2006) (denying exception because argument that award was "confusing and inconsistent" did not demonstrate that it was "impossible to implement"); *U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 200 (1999) (explaining that "[i]n order for an award to be found deficient on the basis that it is incomplete, ambiguous, or contradictory so as to make implementation impossible, the appealing party must show that implementation of the award is *impossible* because the meaning and effect of the award is too unclear or uncertain") (emphasis in original).
[17] Award at 9.
[18] *Id.* at 10 (emphasis added).
[19] Exceptions Br. at 11-12 (stating that the award "directs the Agency to remove the C3 offense"); Opp'n at 2, 7-8 (stating that award is "clear regarding the remedy ordered by the Arbitrator" because it "directs the Agency to remove from the employee's record the allegation that he committed a C3 offense" and issue a reprimand for the admitted C2 offense).
[20] Award at 10.

Member Kiko, dissenting in part:

In this case, the Arbitrator unequivocally directed the Agency to take two conflicting actions in effectuating discipline for the grievant's admitted misconduct. Because the Arbitrator's contradictory directions make the award impossible to implement, I would grant the Agency's ambiguous-or-contradictory exception and remand this case to the parties for resubmission to the Arbitrator for clarification of the award.

Here, the Arbitrator found the grievant's proposed ten-day suspension unwarranted because the Agency proved only one of two charges supporting that penalty. The Arbitrator then stated: "Since the [g]rievant admitted to committing the [C2] offense of using profanity towards a civilian, it will be acceptable for the Agency to decide upon the appropriate penalty that is on the [t]able of [p]enalties for the C2 offense."[1] To guide this decision, the Arbitrator "urge[d] the Agency's deciding official to reconsider the [*Douglas*] factors" and ensure that the chosen penalty was not "punitive."[2]

Despite having just directed the Agency to reevaluate the *Douglas* factors, consult the table of penalties, and propose an "appropriate" discipline for the C2 offense,[3] the Arbitrator – in the very next paragraph – instructed the Agency to "remove the C3 offense from the [g]rievant's record . . . in favor of a letter [of] reprimand."[4]

Attempting to provide clarity where the Arbitrator did not,[5] the majority posits that the Arbitrator's "finding that the Agency could discipline the grievant" was no more than an "explanation" supporting the letter-of-reprimand remedy.[6] However, the Arbitrator did not merely find that the Agency *could* discipline the grievant—he determined that it was "for the Agency to decide" *how* to discipline the grievant.[7] Even if it may be "clear to [the majority] that the only . . . 'direct[ion]' the Arbitrator gave the Agency is to issue the grievant a letter of reprimand,"[8] the majority fails to explain why this direction supersedes the Arbitrator's explicit finding that the appropriate penalty is "for the Agency to decide."[9]

Further, the majority tacitly approves the letter of reprimand as the appropriate discipline even though the Agency's table of penalties provides a range of "[five]-day suspension to removal" for the grievant's admitted misconduct.[10] A remand would allow the parties to obtain a clarified award and address the appropriateness of a letter of reprimand, should the Arbitrator clearly and unambiguously impose that penalty.[11] Regrettably, the parties must now bear the consequences of an ambiguous and contradictory award.

For the foregoing reasons, I dissent in part.[12]

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[1] Award at 9.

[2] *Id.*

[3] *Id.*

[4] *Id.* at 10.

[5] Prior to filing exceptions, the Agency contacted the Arbitrator for a clarification of the award. Exceptions, Attach. 2, Agency's Clarification Email at 1. In response, the Arbitrator informed the parties that he was "well aware" of the relevant issues during arbitration and "reaffirm[ed]" the award. Exceptions, Attach. 3, Arbitrator's Resp. to Agency's Clarification Email at 1.

[6] Majority at 4.

[7] Award at 9.

[8] Majority at 4 (quoting Award at 10).

[9] Award at 9.

[10] Exceptions, Attach. 11, Table of Penalties (TOP) at 6. At arbitration, the Union conceded that "the [g]rievant had a past disciplinary record . . . for an attendance issue," which resulted in a one-day suspension. Award at 7. Thus, a penalty in the subsequent-offenses column – which does not include a letter of reprimand – would be consistent with the table of penalties for the grievant's C2 offense. TOP at 2 (authorizing a disciplinary penalty "above that shown for a first offense when an employee engages in additional misconduct, even though it is not identical or even similar to the past misconduct").

[11] *See U.S. EEOC, Balt. Field Off., Balt., Md.*, 59 FLRA 688, 692 (2004) (finding award incomplete, ambiguous, or contradictory and remanding to the parties where remedy required clarification); *U.S. Dep't of Com., Pat. & Trademark Off.*, 34 FLRA 992, 999 (1990) (remanding award to the parties to seek clarification from arbitrator because remedy was ambiguous).

[12] I agree with the decision to deny the Agency's nonfact exception.