73 FLRA No. 95

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 338
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
FEDERAL LAW
ENFORCEMENT TRAINING CENTERS
GLYNCO, GEORGIA
(Agency)

0-AR-5837

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DECISION

March 27, 2023

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

I. Statement of the Case

At arbitration over whether the Agency's suspension of an employee (the grievant) promoted the efficiency of the federal service, the Union also alleged that suspending the grievant constituted a prohibited personnel practice in violation of the Whistleblower Protection Act (WPA).[1] Arbitrator John G. Kennedy issued an award rescinding the suspension because the Agency failed to establish that the discipline promoted the efficiency of the service. However, as to the Union's WPA allegation, the Arbitrator "refer[red]" the Union to "other jurisdictional courts for relief as they know best."[2]

On exception, the Union challenges the Arbitrator's handling of its WPA allegation. For the reasons set forth below, we deny the Union's exception.

II. Background and Arbitrator's Award

The Agency provides interagency law-enforcement training to federal law-enforcement officers and agents, and the grievant is a training instructor. During a meeting with management, the grievant accused the Agency, and one supervisor in particular (the supervisor), of preselecting candidates for promotions instead of following the merit-promotion process.

Later, several students accused the grievant of inappropriate conduct. The supervisor investigated these allegations and proposed a fourteen-day suspension. Shortly after the supervisor presented the proposed discipline to the grievant, more students alleged that the grievant had acted inappropriately. The Agency rescinded the proposed discipline, and the Agency's Office of Professional Responsibility began investigating the new allegations. At the conclusion of the second investigation, the Agency proposed terminating the grievant based on two charges: conduct unbecoming of a federal employee and lack of candor. The Agency subsequently removed the grievant.

The Union filed a grievance alleging that the grievant's removal did not promote the efficiency of the service. During the grievance process, the Agency mitigated the removal to a fourteen-day suspension and reinstated the grievant to his former position. The Union invoked arbitration challenging the fourteen-day suspension.[3]

Before the Arbitrator, the parties stipulated to the following issues: "[Wa]s the [fourteen-]day suspension of . . . the [g]rievant[] for such cause as to promote the efficiency of the service? If not, what should be the appropriate remedy?"[4]

At arbitration, the Union asserted the suspension did not promote the efficiency of the service, because the Agency failed to prove the charges against the grievant and did not properly consider the factors set forth in *Douglas v. Veterans Administration*.[5] Additionally, the Union alleged that the Agency violated the WPA by retaliating against the grievant for disclosing the supervisor's preselection of candidates. As relevant here, the Union requested backpay under the Back Pay Act[6] and compensatory damages under

[1] 5 U.S.C. § 2302(b)(8).
[2] Award at 28.
[3] Because the claim advanced at arbitration concerns the grievant's fourteen-day suspension, we have jurisdiction to resolve the Union's exception. *See U.S. DOJ, Fed BOP, Fed. Det. Ctr., Miami, Fla.*, 57 FLRA 677, 678 (2002) (noting the "existence of Authority jurisdiction to review an award . . . depends on whether the claim advanced in arbitration is one that would be reviewed by the [Merit Systems Protection Board (MSPB)] and, on appeal, by the Federal Circuit," and "a [fourteen]-day suspension is not a matter that is appealable to the MSPB and reviewable by the United States Court of Appeals for the Federal Circuit" (internal quotation marks omitted) (citations omitted)).
[4] Award at 2; *see* Exception, Attach. 3, Tr. (Tr.) at 8.
[5] 5 M.S.P.R. 280 (1981).
[6] 5 U.S.C. § 5596.

the Whistleblower Protection Enhancement Act of 2012 (WPEA).[7]

After reviewing the grievant's federal-service career and disciplinary history, and the evidence that the Agency provided to support the suspension, the Arbitrator determined that the Agency did not prove the conduct-unbecoming and lack-of-candor charges. Thus, the Arbitrator concluded that the suspension did not promote the efficiency of the service. As remedies, the Arbitrator directed the Agency to rescind the grievant's fourteen-day suspension, remove it from the grievant's personnel file, and pay any corresponding backpay.

Regarding the Union's WPA allegation, the Arbitrator "reviewed [the] com[p]en[sa]t[o]ry damages requested by the Union" and "refer[red]" the Union, "in the event it is successful," to "other jurisdictional courts for relief as they know best."[8] The Arbitrator did not otherwise address the Union's WPA and WPEA arguments.

The Union filed an exception to the award, and the Agency filed an opposition.

III. Analysis and Conclusion: The Union does not establish that the award is deficient.

The Union makes two arguments that the award is contrary to law – both related to the Arbitrator's statement about the WPA and WPEA allegation. First, the Union contends that § 7121(g) of the Federal Service Labor-Management Relations Statute (the Statute)[9] prohibits the Union from pursuing compensatory damages under the WPEA in "other jurisdictional courts," as the Arbitrator directed.[10] Second, the Union asserts that the Arbitrator's failure to award compensatory damages for the WPA violation necessitates a remand for the Arbitrator to award such damages.[11]

When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[12] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[13] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[14]

The premise of both Union arguments is that the Arbitrator found a WPA violation. Although the Union argued to the Arbitrator that the grievant's suspension violated the WPA, there is no indication that the Arbitrator resolved a WPA issue.[15] In this regard, the stipulated issues concerned whether the suspension promoted the efficiency of the service, not necessarily whether it violated the WPA;[16] the Arbitrator did not explicitly find a WPA violation or address the requirements for establishing such a violation; and the Arbitrator's sole statement regarding the Union's WPA and WPEA allegations—"I . . . refer the[Union] to other jurisdictional courts"—indicates that he refused to consider the alleged WPA violation altogether.[17] We note that, even if the stipulated "efficiency of the service" issue *could* be read to encompass a WPA issue, the Arbitrator did not interpret it as including one – and "the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective-bargaining agreement."[18]

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[7] Award at 23; Exception, Attach. 2 (Union Post-Hr'g Br.) at 66-68 (citing 5 U.S.C. § 1221(g)(1)(A)(ii)). As relevant here, the WPEA amended the WPA to provide for awards of compensatory damages. *King v. Dep't of the Air Force*, 122 M.S.P.R. 531, 534 n.3 (2015).

[8] Award at 28. The Arbitrator used the phrase "commentary damages." *Id.* ("I have reviewed *commentary* damages requested by the Union . . . ." (emphasis added)). Because the parties do not dispute that the Arbitrator meant "compensatory damages," we treat "commentary damages" as "compensatory damages." *See* Exception Br. at 1, 4; Opp'n Br. at 1.

[9] 5 U.S.C. § 7121(g) ("An aggrieved employee affected by a prohibited personnel practice . . . may elect not more than one . . . remed[y] . . . . [A] person shall be considered to have elected . . . [the negotiated grievance procedure] if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated grievance procedure . . . .").

[10] Award at 28; Exception Br. at 8 (asserting that the "law is clear that once a jurisdiction is selected by a party to file a [prohibited personnel practice], the person is precluded from seeking that claim in another jurisdiction").

[11] Exception Br. at 4.

[12] *See U.S. Dep't of the Army, U.S. Army Garrison Redstone Arsenal, Huntsville, Ala.*, 73 FLRA 210, 211 (2022).

[13] *Id.*

[14] *U.S. Dep't of VA, Robley Rex Med. Ctr.*, 73 FLRA 468, 469 (2023).

[15] Award at 23; Union Post-Hr'g Br. at 58-65.

[16] Award at 2; Tr. at 8.

[17] Award at 28.

[18] *Int'l Bhd. of Elec. Workers, Loc. 121*, 71 FLRA 161, 162 (2019) (Member DuBester concurring).

As the Arbitrator did not find a WPA violation, his statement about the Union's ability to seek damages for such a violation in "other jurisdictional courts"[19] is dicta.[20] Further, as there is no unremedied WPA violation, there is no basis to remand.[21] Thus, the Union's arguments provide no basis for setting aside the award, and we deny the exception.[22]

IV. Decision

We deny the Union's exception.

[19] Award at 28.

[20] *U.S. DHS, CBP*, 68 FLRA 157, 164 (2015) (Member Pizzella dissenting on other grounds) (holding that, if an arbitrator's findings support the arbitrator's conclusions, then any separate speculation or statements about whether "remedial alternatives exist[] is dicta"); *NFFE, Loc. 1827*, 52 FLRA 1378, 1384-85 (1997) (arbitrator's speculation about the burden of proof that union would bear in judicial, rather than arbitration, proceedings was dicta).

[21] *See U.S. Dep't of HHS, Food & Drug Admin.*, 60 FLRA 250, 252 (2004) (finding "no basis for a remand" because "this is not a case in which there is an unremedied violation"); *see also U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, Puerto Rico*, 70 FLRA 186, 188 (2017) (where arbitrator did not award damages under Back Pay Act, finding meritless excepting party's contention that award of damages conflicted with that Act).

[22] In its opposition, the Agency requests that we take official notice of certain documents allegedly demonstrating that the grievant did not make a WPA claim during the grievance process. *See* Opp'n Br. at 7. Because the Union's exception lacks merit, we find it unnecessary to consider the Agency's request. *See, e.g.*, *U.S. DHS, CBP*, 69 FLRA 579, 581 (2016) (finding it unnecessary to resolve request that Authority take official notice of certain evidence where granting the request would not affect the decision's outcome).