66 FLRA No. 158

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL DETENTION CENTER
HONOLULU, HAWAII
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 1218
(Union)

0-AR-4805

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DECISION

August 3, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator William B. Gould IV filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union did not file an opposition to the Agency's exceptions.

The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to timely investigate allegations of employee misconduct and take any resulting disciplinary and/or adverse action. The Arbitrator found that the Agency violated the parties' agreement in its handling of investigations involving two grievants and ordered the Agency to: (1) compensate the two grievants for wages lost due to their inability to seek other employment while the Agency investigated their alleged misconduct; (2) remove any related records of disciplinary actions from the grievants' official personnel files; and (3) bargain with the Union over the time limits within which the Agency must investigate allegations of employee misconduct and take any resulting disciplinary and/or adverse action.

For the reasons that follow, we: (1) set aside the portions of the award compensating the two grievants for lost wages and directing the removal of disciplinary-action records from their official personnel files, and remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy regarding the two individual grievants; and (2) deny the Agency's remaining contrary-to-law and exceeds-authority exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated Article 30, Section (d) of the parties' agreement by failing to timely investigate allegations of employee misconduct and take any resulting disciplinary and/or adverse action.[2] Award at 3. The Agency denied the grievance, and the parties submitted the matter to arbitration. Exceptions at 5.

The parties stipulated to the following issue: "Did the [Agency] violate investigative time processing and disciplinary or adverse action obligations as stated by the [parties' agreement], Article 30, Section (d). If so, what is an appropriate remedy?" Award at 2.

The Arbitrator found instances where months or sometimes years elapse before the Agency resolves disciplinary matters, "if they are resolved at all." *Id.* at 10. The Arbitrator further found that the Agency's pattern of conduct in this respect was "arbitrary and unreasonable" and violated the parties' agreement. *Id.* at 7-10. He therefore sustained the grievance. Noting that the parties' agreement requires that grievances be filed within forty calendar days of the date of the "alleged grievable occurrence," *id.* at 4, the Arbitrator concluded that only two grievants filed grievances within that time limit. *Id.* at 7-9. The Arbitrator acknowledged, however, that he considered evidence beyond the forty-day time limit as a basis for remedying the Agency's overall delayed processing of disciplinary and/or adverse action matters. *Id.* at 9.

The Arbitrator ordered remedies addressing both the harm experienced by the two grievants and the Agency's ongoing failure to timely investigate employee misconduct and take any resulting disciplinary and/or adverse action. *Id.* at 10-12. Regarding the two grievants, he ordered the Agency to compensate them "for jobs for which they were not considered or which they either filed an application or in which they had expressed an interest" while their disciplinary

[1] Chairman Pope's separate opinion, dissenting in part, is set forth at the end of this decision.

[2] Article 30, Section (d) provides, in pertinent part: "[r]ecognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions." Award at 3-4.

investigations were pending. *Id.* at 10. He also directed the Agency to remove any records of discipline related to the grievances from the two grievants' official personnel files. *Id.* at 11-12. Regarding the bargaining unit generally, the Arbitrator ordered the Agency to bargain with the Union over the time limits within which the Agency must investigate allegations of employee misconduct and take any resulting disciplinary and/or adverse action. *Id.*

III. Agency's Exceptions

The Agency argues that the award is contrary to law for several reasons. First, the Agency claims that the award is contrary to the doctrine of sovereign immunity because the Arbitrator provided no statutory authority supporting the award of damages. Exceptions at 11. Second, the Agency claims, because the Arbitrator awarded the grievants compensation for duties they never performed in positions to which they were never appointed, the award is contrary to Authority precedent providing that an employee is entitled only to the salary of the position to which the employee is appointed. *Id.* at 10 (citing *U.S. Dep't of Agric., Food Safety & Inspection Serv.,* 65 FLRA 417, 419 (2011)). Third, the Agency contends that the award is contrary to 5 C.F.R. § 293.304 (§ 293.304) because, when read in conjunction with the Office of Personnel Management's (OPM's) Guide to Personnel Recordkeeping (Recordkeeping Guide), it requires that documentation of employee suspensions be included in official personnel files.[3] *Id.* at 12-13. Fourth, the Agency argues, the award is contrary to Authority precedent to the extent it requires the parties to bargain over the time limits within which the Agency must investigate allegations of employee misconduct and take any resulting disciplinary and/or adverse action. In the Agency's view, this could prohibit the Agency from acting on a disciplinary matter in the event that such action was untimely under the agreement. *Id.* at 9 n.5 (citing *NFFE, Local 1438*, 47 FLRA 812, 817 (1993) (*Local 1438*).

The Agency also claims that the Arbitrator exceeded his authority because he awarded a remedy for an issue that was not submitted to arbitration. *Id.* at 7. The issue before the Arbitrator, the Agency claims, was limited to whether the Agency violated the parties' agreement by failing to timely investigate allegations of employee misconduct and take any resulting disciplinary and/or adverse action, and not whether it refused to negotiate over time limits for doing so with the Union. *Id.* The Agency argues that the Arbitrator's finding of a contractual violation does not provide a basis for directing the parties to bargain over these time limits. The Agency claims that the Union did not seek such negotiations as a remedy, but rather only sought relief for individual bargaining unit employees who had been the subject of prolonged disciplinary and/or adverse action investigations. *Id.* at 7-8.

In addition, the Agency argues that the Arbitrator exceeded his authority because he disregarded specific limitations on his authority by ordering the parties to bargain over the time limits mentioned above. According to the Agency, the result of such bargaining would effectively modify the terms of the parties' agreement in violation of Article 32, Section (h).[4] *Id.* In the alternative, the Agency contends that the award is deficient on essence grounds because it evidences a manifest disregard of the agreement by modifying the agreement with time limits. *Id.* at 9 n.6.

IV. Analysis and Conclusions

A. The award is contrary to law, in part.

When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.,* 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. The award is contrary to the doctrine of sovereign immunity.

The United States, as sovereign, is immune from suit except as it consents to be sued. *U.S. Dep't of Transp., FAA*, 52 FLRA 46, 49 (1996) (*DOT*) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)). Thus, there is no right to money damages in a suit against the United States without a waiver of sovereign immunity. *DOT*, 52 FLRA at 49. In order to waive sovereign immunity, Congress must unequivocally express its intention to do so. *Id.* (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)). The government's consent to a particular remedy also must be unambiguous. *DOT*, 52 FLRA at 49 (citing *Dep't of the Army, Fort Benjamin Harrison, Indianapolis, Ind. v. FLRA*, 56 F.3d 273, 277 (D.C. Cir. 1995)). As such, an award by an arbitrator

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[3] Section 293.304 prescribes that an employee's OPF "shall contain long-term records affecting the employee's status and service as required by OPM's instructions and as designated in the [Recordkeeping Guide]."

[4] Article 32, Section (h) provides, in pertinent part: "[t]he arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of . . . this [a]greement . . . ." Award at 4.

requiring that an agency provide monetary damages to a union or employee must be supported by statutory authority to impose such a remedy. *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 61 FLRA 366, 370 (2005) (*Air Force*) (then-Member Pope dissenting in part on another matter) (citation omitted). Absent a waiver of sovereign immunity, an arbitrator's monetary remedy is contrary to law. *DOT*, 52 FLRA at 49.

The Agency claims that the award is contrary to the doctrine of sovereign immunity because the Arbitrator provided no statutory authority supporting the award of damages. Exceptions at 11. As the Agency contends, the Arbitrator did not cite any statutory basis for compensating the two grievants for alleged missed job opportunities due to the Agency's failure to timely investigate allegations of their misconduct and take any resulting disciplinary and/or adverse action. And the Union does not cite another statutory waiver of sovereign immunity to support the award. Accordingly, we find the award of damages contrary to law and set it aside. *See Soc. Sec. Admin., Office of Disability Adjudication & Review, Region 1,* 65 FLRA 334, 338 (2010).[5]

2. The award is contrary to 5 C.F.R. § 293.304.

Section 293.304 states that an employee's official personnel file "shall contain long-term records affecting the employee's status and service as required by OPM's instructions and as designated in the [Recordkeeping Guide]." The Recordkeeping Guide provides instructions concerning documents that must be contained in an employee's personnel file. Because § 293.304 specifically references the Recordkeeping Guide as governing the maintenance of records in personnel files, the Authority has interpreted § 293.304 – when read in conjunction with the Recordkeeping Guide – as prescribing both the records that must be contained, and those that may not be contained, in official personnel files. *See U.S. Dep't of Def., Dep't of Def. Dependents Sch., Eur.,* 65 FLRA 580, 581 (2011) (*DOD*).

Regarding the records that must be contained in official personnel files – i.e., "long-term records affecting the employee's status and service," § 293.304 – Section 3-F of the Recordkeeping Guide refers to OPM's Guide to Processing Personnel Actions (Personnel Actions Guide) for a list of personnel actions that have long-term effects on an employee's status and service. The Personnel Actions Guide specifically identifies as such a personnel action a "suspension that is effected under 5 U.S.C. chapter 75" and "[i]s for [fourteen] calendar days or less." Personnel Actions Guide, Ch. 15 at 15-12. The record that documents such a suspension is a standard form 50 (SF-50), and the Recordkeeping Guide provides that SF-50s are filed in employees' official personnel files. Recordkeeping Guide, Section 3-F; *see DOD,* 65 FLRA at 581-82. Thus, when read in conjunction with the Recordkeeping Guide and the Personnel Actions Guide, § 293.304 requires that an employee's official personnel file must contain an SF-50 documenting a suspension of fourteen-days or less.

The only disciplinary action at issue is a one-day suspension issued to one of the grievants.[6] The Agency claims as to that suspension that the award is contrary to § 293.304 because, when that regulation is read in conjunction with OPM's Recordkeeping Guide, it requires that documentation of employees' suspensions be included in their official personnel files. Exceptions at 12-13. Therefore, in the Agency's view, the Arbitrator's order that the Agency remove the grievant's suspension from the grievant's official personnel file is contrary to law. *Id.* at 13.

Nothing in the award renders § 293.304's requirements inapplicable. For example, the Arbitrator does not set aside the first grievant's suspension. Indeed, the Arbitrator does not find that the Agency's failure to conduct its disciplinary investigations in a timely fashion had any effect whatsoever on the Agency's determination to suspend the first grievant. Accordingly, we set aside as contrary to § 293.304 the portion of the award requiring the Agency to remove the record of one grievant's one-day suspension from his official personnel file. As there is no dispute that the second grievant was not disciplined, and thus, that there is nothing to remove from his official personnel file, we find the Agency's claim moot as to the second grievant.

Where the Authority sets aside an entire remedy, but an arbitrator's finding of an underlying violation is left undisturbed, the Authority remands the award for determination of an alternative remedy. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 88 (2011) (*DOJ*) (remanding award where liability determination upheld but remedy regarding that violation set aside); *U.S. Dep't of Transp., Fed. Aviation Admin., Salt Lake City, Utah,* 63 FLRA 673, 676 (2009) (remanding award where setting aside arbitrator's

[5] Given this conclusion, we find it unnecessary to resolve the Agency's claim that the award of damages is contrary to law because Authority precedent provides that employees are only entitled to the salary of the positions to which they are appointed. *See Soc. Sec. Admin., Branch Office, E. Liverpool, Ohio,* 54 FLRA 142, 149 (1998); Exceptions at 10.

[6] The Agency contends, and the Union does not dispute, that the Agency suspended the first grievant for one day. Exceptions at 10 n.8 (citing Tr. at 139-40). Further, the Agency contends, and the Union does not dispute, that the Agency ultimately determined not to discipline the second grievant. *Id.* (citing Tr. at 144).

unauthorized remedy left contract violation without redress).

Here, the Arbitrator ordered three remedies for the Agency's contract violation: two addressing the harm experienced by the two individual grievants, and one addressing the harm experienced by the collective-bargaining unit as a whole. Award at 9-11. As we set aside the Arbitrator's remedies regarding the two individual grievants while leaving undisturbed the Arbitrator's finding of the underlying violation as to the grievants, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy regarding the two grievants.

3. The award is not contrary to Authority precedent.

The Agency argues that the award is contrary to law "to the extent that the Arbitrator was attempting to require the parties to bargain time limit[s]" that could prevent the Agency from disciplining employees. Exceptions at 9 n.5. Citing *Local 1438,* 47 FLRA at 817, the Agency claims that Authority precedent holds that proposed contractual time limits are nonnegotiable where the failure to meet those limits would result in an agency's inability to take any action at all with respect to a potential disciplinary matter. Exceptions at 9 n.5.

The Agency's reliance on *Local 1438* is misplaced. Although *Local 1438* discusses the negotiability of provisions requiring timely resolution of disciplinary processes, it does not bar the bargaining order in this case. And the award does not require the parties to agree to any particular contract provisions, including provisions similar to those involved in *Local 1438*. Further, there is nothing in the record showing that the Arbitrator's order that the parties bargain over the time limits would somehow prohibit the Agency from disciplining employees. The Arbitrator directed the parties to "bargain time limits in order to assure that disciplinary investigations and adverse action[s] with discipline are dealt with expeditiously." Award at 11. The Arbitrator did not direct the parties to implement time limits that would prohibit the Agency from disciplining employees in the event that it does not administer discipline within a particular timeframe. Accordingly, we find the Agency has not demonstrated that the award is contrary to law in this respect and deny the exception.

B. The Arbitrator did not exceed his authority.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In determining whether an arbitrator has exceeded his or her authority, 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. *See NTEU*, 64 FLRA 982, 986 (2010) (citing *U.S. Info. Agency, Voice of Am.,* 55 FLRA 197 (1999)). In addition, Arbitrators have great latitude in fashioning remedies. *See U.S. Dep't of Justice, U.S. Fed. Bureau of Prisons, U.S. Penitentiary, Lewisburg, Pa.* 39 FLRA 1288, 1301 (1991) (*DOJ*). That the Union does not request a particular remedy provides no basis for setting it aside. *See id.*

1. The Arbitrator did not award a remedy for an issue that was not submitted to arbitration.

The Agency argues that the only issue before the Arbitrator was whether the Agency violated the parties' agreement by failing to timely investigate allegations of employee misconduct and take any resulting disciplinary and/or adverse action. Exceptions at 6-7. Thus, the Agency claims, the Arbitrator exceeded his authority by ordering the Agency to negotiate with the Union over time limits governing such matters. *Id.*

The parties stipulated to the following issue: "Did the [Agency] violate investigative time processing and disciplinary or adverse action obligations as stated by the [parties' agreement], Article 30, Section (d). If so, what is an appropriate remedy?" Award at 2. The Arbitrator found that the Agency violated Article 30, Section (d) because the Agency failed to timely investigate allegations of employee misconduct and take any resulting disciplinary and/or adverse action. As a remedy, he ordered the Agency to, among other things, bargain with the Union over the time limits governing such matters. *Id.* at 11-12.

The Arbitrator did not exceed his authority by awarding this particular remedy. As noted above, arbitrators have great latitude in fashioning remedies, *see DOJ,* 39 FLRA at 1301, and nothing in the stipulated issue restricted the remedy that the Arbitrator could order if he found the Agency violated the agreement. In its grievance and at arbitration, the Union objected to the Agency's general failure to timely investigate allegations of employee misconduct and take any resulting disciplinary and/or adverse action. Award at 3-5. The Arbitrator's remedy requiring the parties to bargain over time limits regarding those matters is directly responsive to what he found to be the Agency's "pattern of delay that has emerged over a number of years." Award at 10. That the Union did not seek such negotiations as a remedy provides no basis for setting the award aside as

exceeding the Arbitrator's authority. *See DOJ,* 39 FLRA at 1301. As the remedy redresses the harm caused by the Agency's delay in investigating and resolving allegations of employee misconduct, we find that the Agency has not demonstrated that the Arbitrator exceeded his authority and deny the exception. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Sheridan, Or.,* 66 FLRA 388, 391 (2011) (arbitrator did not exceed his authority by awarding a particular remedy where the remedy addressed the harm at issue).

2. The Arbitrator did not disregard specific limitations on his authority.

The Agency also claims that the Arbitrator disregarded specific limitations on his authority because the parties' agreement prohibits arbitrators from altering or modifying the parties' agreement. Exceptions at 8 (citing Article 32, Section (h)). The Agency contends that ordering the parties to bargain over the time limits within which the Agency must investigate allegations of employee misconduct and take any resulting disciplinary and/or adverse action requires the parties to modify the terms of their agreement because they will have to define, for the first time, what is "timely" with regard to these matters. *Id.* at 8-9.

The Agency fails to demonstrate that, by ordering the parties to bargain over time limits, the Arbitrator disregarded specific limitations on his authority by impermissibly modifying the parties' agreement. The Arbitrator did not order the parties to implement specific time limits. He merely ordered the parties to bargain over them. An order directing the parties to bargain over the time limits within which the Agency must investigate allegations of employee misconduct and take any resulting disciplinary and/or adverse action is not an alteration or modification of the agreement, it is solely an instruction requiring the parties to negotiate over the issue. Thus, the Agency fails to establish that the Arbitrator modified the agreement and, thereby, disregarded specific limitations on his authority.[7] *Id.* Accordingly, we deny the Agency's exception.

V. Decision

We: (1) set aside the portions of the award compensating the two grievants for lost wages and directing the removal of disciplinary-action records from the their files and remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy; and (2) deny the Agency's remaining contrary-to-law and exceeds-authority exceptions.

[7] The Agency also argues that the award fails to draw its essence from the parties' agreement "by modifying the agreement with time limit[s]." Exceptions at 9 n.6. This contention raises the same issue as the Agency's claim that the Arbitrator exceeded his Authority. Accordingly, we decline to address this claim separately. *See, e.g., AFGE, Local 3627*, 64 FLRA 547, 550 n.3 (2010) (declining to separately address agency's essence claims, which did nothing more than restate its exceeds-authority claim).

APPENDIX

5 C.F.R. § 2425.2 provides, in relevant part:

> (b) *Timeliness requirements–general*. The time limit for filing an exception to an arbitration award is thirty (30) days after the date of service of the award. This thirty (30)-day time limit may not be extended or waived. In computing the thirty (30)-day period, the first day counted is the day after, not the day of, service of the arbitration award. . . .

5 C.F.R. § 2429.21[8] provided, in relevant part:

> (b) . . . when this subchapter requires the filing of any paper with the Authority . . . the date of filing shall be determined by the date of mailing indicated by the postmark date . . . .

5 C.F.R. § 2429.24 provided, in relevant part:

> (e) All documents filed pursuant to this section shall be filed in person, by commercial delivery, by first-class mail, or by certified mail. . . .

5 C.F.R. § 2429.27 provided:

(d) The date of service or date served shall be the day when the matter served is deposited in the U.S. mail, delivered in person, deposited with a commercial delivery service that will provide a record showing the date the document was tendered to the delivery service or, in the case of facsimile transmissions, the date transmitted.

[8] The Authority's Regulations – including 5 C.F.R. §§ 2429.21, 2429.24, and 2429.27 – were revised effective June 4, 2012, to allow for electronic filing and clarify existing procedural Regulations. *See* 77 Fed. Reg. 26,430 (2012). As the Agency's exceptions were filed before that date, we apply the prior Regulations.

Chairman Pope, dissenting in part:

I agree with the majority's decision to set aside the portion of the award compensating the two grievants for lost pay. I also agree with denying the contrary-to-precedent and exceeded-authority exceptions. However, I would not find the award to be contrary to § 293.304, The Guide to Personnel Recordkeeping (Recordkeeping Guide), or The Guide to Processing Personnel Actions (Processing Guide), and I would not find the dispute concerning the relief afforded to the second grievant to be moot.

In *U.S. Department of Defense, Department of Defense Dependents Schools, Europe*, 65 FLRA 580 (2011) (*DOD*) – on which the majority relies, Majority at 5 – the arbitrator specifically found just cause for the grievant's discipline, but nevertheless directed the removal of the standard form 50 (SF-50) documenting that discipline from the grievant's official personnel folder (OPF). *DOD*, 65 FLRA at 580. By contrast, the Arbitrator here analogized this case to one in which, because of the agency's "arbitrary and unreasonable" delays, the resulting disciplinary sanctions constituted "unwarranted personnel actions." Award at 9. The Arbitrator specifically found that the Agency's violations of the parties' agreement "repeated . . . anew" the same "pattern identified in" the earlier case – i.e., a pattern of delays resulting in "unwarranted personnel actions." *Id.* Thus, the Arbitrator effectively found that the discipline at issue here was unwarranted. *See also id.* at 11 (Agency violated parties' agreement "through its handling of the disciplinary matters" involving the two individual grievants). As stated in *DOD*, an agency may delete an SF-50 based on an administrative determination that a disciplinary action was unjustified or unwarranted. 65 FLRA at 582 n.4 (citation omitted); *accord* Processing Guide, ch. 3, subchs. 2-1 to 2-3, 2-7 (instructions for removing documents from official personnel folder to implement decisions of arbitrators and the Authority). Consequently, the Arbitrator's direction to remove unwarranted disciplinary-action records from the first grievant's OPF is not contrary to § 293.304, the Recordkeeping Guide, or the Processing Guide.

With regard to the second grievant, the Arbitrator found that, *as of the date of the hearing*, the grievant had "not been notified of the outcome of the disciplinary grievance" – which, in context, appears to mean "disciplinary *investigation*." Award at 8 (emphasis added). I see no basis in the record for finding that the grievant is no longer subject to discipline and, thus, would not find the exception to be "moot" as it applies to him; rather, I would deny it for the same reasons that I would deny it as to the first grievant. As I would deny this exception as to both grievants, I would not remand for alternative remedies, even assuming that such a remand would be appropriate if the award were deficient in the manner alleged.