UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 36

Docket No. CB-7121-12-0004-V-1

Muhamad Sadiq,

Appellant,

v.

Department of Veterans Affairs,

Agency.

May 16, 2013

Eleanor J. Lauderdale, Esquire, Washington, D.C., for the appellant.

Jack P. Di Teodoro, Esquire, Brooklyn, New York, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant seeks review of an arbitration award that sustained his removal. For the reasons set forth below, we GRANT the request for review under 5 U.S.C. § 7121(d), and FORWARD the matter to the Northeastern Regional Office for further adjudication of the discrimination issue related to the allegation of disparate penalty.[1]

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for

BACKGROUND

¶2 The agency removed the appellant from his position as a Staff Pharmacist at the agency's Lyons campus for making seven errors verifying physicians' medication orders between March 5, 2009, and May 18, 2009. Request for Review File (RFR) File, Tab 5 at 1, Tab 10, Joint Exhibits (Exs.) 2 at 1-2, 7 at 1. In deciding to remove the appellant, the agency considered the appellant's prior discipline for committing medication errors, which resulted in a 5-day suspension in 2008 and a 14-day suspension in 2009. *Id*., Joint Ex. 2 at 3. On behalf of the appellant, the union challenged the removal action pursuant to the negotiated grievance procedure through arbitration. RFR File, Tab 3 at 13. Following a hearing, the arbitrator found that the agency removed the appellant pursuant to 5 U.S.C. chapter 75 and that the action did not violate the collective bargaining agreement (CBA). *Id.* at 30. The arbitrator further found that the agency proved the charges[2] and established that the removal was for "just and sufficient cause," which promoted the efficiency of the service. *Id*. at 38. Accordingly, she denied the grievance. *Id*.

¶3 The appellant filed a request for review of the arbitrator's decision. RFR File, Tab 10. The appellant argued, among other things, that the arbitrator failed to properly interpret the CBA as requiring that the removal action be taken under chapter 43. *Id*. at 4-12, 16-17. The appellant also argued that the arbitrator failed to address the appellant's disparate penalty evidence and to consider the union's argument that the agency subjected the appellant to disparate treatment because of his religion. *Id*. at 12-16. The agency filed a response in opposition to the request for review. RFR File, Tab 12.

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review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

ANALYSIS

¶4 The Board has jurisdiction to review an arbitrator's decision under 5 U.S.C. § 7121(d) when the subject matter of the grievance is one over which the Board has jurisdiction, the appellant has alleged discrimination under 5 U.S.C. § 2302(b)(1) in connection with the underlying action, and a final decision has been issued. RFR File, Tab 3 at 38, Tab 10 at 13; *e.g.*, *Hollingsworth v. Department of Commerce*, 115 M.S.P.R. 636, ¶ 6 (2011). Each of these conditions has been satisfied in this case. The appellant's removal is within the Board's jurisdiction. 5 U.S.C. §§ 7512(1), 7513(d). The appellant has claimed that he was subjected to religious discrimination based on a disparity in penalty. *See* RFR File, Tab 10 at 13; 5 U.S.C. § 2302(b)(1)(A); *Bennett v. National Gallery of Art*, 79 M.S.P.R. 285, 294-95 (1998). The arbitrator issued a November 18, 2011 final decision on the appellant's grievance. RFR File, Tab 3 at 8, 38. Thus, we find that the Board has jurisdiction over the appellant's removal under 5 U.S.C. §§ 7512, 7513(d), and 7701. *See Hollingsworth*, 115 M.S.P.R. 636, ¶ 6.

¶5 The standard of the Board's review of an arbitrator's award is limited; such awards are entitled to a greater degree of deference than initial decisions issued by the Board's administrative judges. *Vena v. Department of Labor*, 111 M.S.P.R. 165, ¶ 5 (2009). The Board will modify or set aside such an award only when the arbitrator has erred as a matter of law in interpreting a civil service law, rule, or regulation. *Id.* Even if the Board disagrees with an arbitrator's decision, absent legal error, the Board cannot substitute its conclusions for those of the arbitrator. *Id.* Thus, the arbitrator's factual determinations are entitled to deference unless the arbitrator erred in his legal analysis, for example, by

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[2] The arbitrator concluded, based on reviewing the record, that it was undisputed that the appellant made the seven medication errors charged by the agency, and the appellant does not dispute this on review. RFR File, Tab 3 at 38.

misallocating the burdens of proof or employing the wrong analytical framework. *Hollingsworth*, 115 M.S.P.R. 636, ¶ 7. Nevertheless, the Board can only defer to the arbitrator's findings and conclusions if the arbitrator makes specific findings on the issues in question. *Id.* Further, the Board may make its own findings when the arbitrator failed to cite any legal standard or employ any analytical framework for his evaluation of the evidence. *Id.*, ¶ 8.

¶6 In the request for review, the appellant contends that the arbitrator committed legal error by applying 5 U.S.C. chapter 75 to the removal action because the parties' CBA states that all performance-based actions are to be taken under 5 U.S.C. chapter 43. RFR File, Tab 10 at 3-11. The appellant argues that the relevant provision of the CBA states that "[a]ctions based upon substantively unacceptable performance should be taken in accordance with Title 5, Chapter 43 and will be covered in Article 26 Performance Appraisal System." *Id.* at 6, 23 (citing Article 13, Section 1 of the Master Agreement).[3] The appellant further asserts that the agency committed harmful error in failing to afford him the procedures required under 5 U.S.C. chapter 43. *Id.* at 3-4, 11, 28-29.

¶7 As set forth above, the Board's standard of review of an arbitrator's award is narrow; such awards are entitled to a greater degree of deference than initial decisions issued by the Board's administrative judges. *Fanelli v. Department of Agriculture*, 109 M.S.P.R. 115, ¶ 6 (2008). The Board will modify or set aside an arbitration decision only when the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation, and absent such legal error, the Board cannot substitute its conclusions for those of the arbitrator, even if it would disagree with the arbitrator's decision. *Id.* An arbitrator is uniquely qualified to interpret a CBA, which is the source of the arbitrator's authority. *Id.* Thus, an arbitration award that "draws its essence" from the CBA is entitled to deference,

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[3] In the arbitration, the parties jointly submitted the CBA as an exhibit; however, this exhibit is missing from the case file. *See* RFR, Tab 10, Joint Exhibit 1.

and should only be vacated when it manifests an infidelity to this obligation. *Id.*, ¶ 10. In making this determination, any doubts concerning the merits of the arbitrator's decision must be resolved in favor of the decision. *Id.* An arbitration award is deficient as failing to draw its essence from the CBA when the award: (1) Cannot in any rational way be derived from the CBA; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the CBA as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *Id.*, ¶¶ 10-11.

¶8 The arbitrator in this case found that the agency did not violate the CBA when it removed the appellant under chapter 75. RFR File, Tab 1 at 14-15, 29-30. In so doing, she relied on an earlier arbitration decision (*Roudebush*) that interpreted the same agreement. The arbitrator in *Roudebush* interpreted Article 13, Section 1 as mirroring *Lovshin v. Department of the Navy*, 767 F.2d 826, 843 (Fed. Cir. 1985) (en banc), which held that an agency may rely on either 5 U.S.C. chapter 75 or 5 U.S.C. chapter 43 to take a performance-based employee misconduct action, and found that the third sentence of Section 1 affirmed the ability of the agency to take disciplinary action against an employee for such cause as will promote the efficiency of the service, the exact standard for disciplinary actions taken under chapter 75, while the fourth sentence indicated that actions taken based on "substantively unacceptable performance" should be taken in accordance with chapter 43. RFR File, Tab 12 at 21. The arbitrator in *Roudebush* held that "[t]his language does not limit the Agency's ability to use chapter 75; it simply mirrors the language in *Lovshin*." *Id.* The arbitrator in *Roudebush* also noted that the court in *Lovshin* noted that the statutory term "unacceptable performance" was not a synonym for generally poor performance or inefficiency, but was a defined term of art in chapter 43 actions, and went on to distinguish "unacceptable performance" from inadequate performance that could be pursued under chapter 75. *Id.* The arbitrator in *Roudebush* concluded that

Article 13, "[s]ection 1 of the Master Agreement, taken in as a whole, encompasses both Chapter 43 and Chapter 75 and does not limit the Agency to pursuing performance-based actions only under Chapter 43 procedures." *Id*.

¶9 Here, there is no alleged misinterpretation of a law, rule, or regulation, and the appellant has not shown that the award meets the criteria set forth in *Fanelli* for finding that an award fails to draw its essence from a CBA. Rather, the reasoning in *Roudebush*, which was relied upon by the arbitrator in this case, is a plausible interpretation of a purely procedural provision of the CBA and not so unfounded in reason and fact, and so unconnected with the wording and purposes of the agreement, as to manifest an infidelity to the obligation of the arbitrator. Even if the Board were to agree with the appellant that there is an alternative way of interpreting the master agreement, there is no basis for disregarding the deference due to the arbitrator's interpretation of the agreement in this case.

¶10 The union also alleged before the arbitrator that the agency subjected the appellant to disparate treatment based on his religion. RFR File, Tab 6 at 72-77, Tab 8 at 65-67, Tab 10 at 13, 53. The appellant claims that the arbitrator failed to address the issue of disparate treatment and, in effect, "disallowed" the union from "pursuing the fact that the appellant's religious difference (Muslim) played a role in higher level of scrutiny." RFR File, Tab 10 at 13. The appellant further requests that the Board remand the case if it needs to hear the testimony the union was precluded from offering on the disparate treatment issue. *Id*. at 17.

¶11 Additionally, in the request for review, the appellant raises a claim of disparate penalty, arguing that the arbitrator ignored the *Douglas* factors to the extent that *Douglas* requires agencies to impose similar penalties for similar misconduct. RFR File, Tab 10 at 12-16; *see Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981) (one of the relevant factors in determining the appropriateness of a penalty is the "consistency of the penalty with those imposed upon other employees for the same or similar offense"). The appellant argues, among other things, that the arbitrator "overlooked" the testimony of a pharmacist

concerning other agency pharmacists who made errors resulting in the death or near-death of patients but who were not removed from federal service. RFR File, Tab 10 at 14. The union raised the disparate penalty[4] issue before the arbitrator and challenged the deciding official's *Douglas* analysis in its post-hearing brief. RFR File, Tab 3 at 25; Tab 10 at 27 n.5.

¶12 Here the arbitrator did not set forth any analytical framework for adjudicating the appellant's claims of discrimination or disparate penalty. Further, the arbitrator did not make any findings on these issues. Accordingly, the Board has no basis upon which to defer to the arbitrator. *Hollingsworth*, 115 M.S.P.R. 636, ¶ 8. Therefore, we are vacating the arbitration decision as to the penalty. Pursuant to the Board's authority in 5 C.F.R. § 1201.155(e), we forward the matter to the Board's Northeastern Regional Office for assignment to an administrative judge to make recommended findings on the appellant's discrimination and disparate penalty claims under the appropriate legal standards. *See Pace v. Department of the Treasury*, 118 M.S.P.R. 542, ¶¶ 9, 12 (2012).

ORDER

¶13 For the reasons set forth above, we forward this case to the Northeastern Regional Office for further adjudication. The administrative judge shall conduct such further proceedings as necessary and make recommended findings to the Board regarding the affirmative defense of discrimination and the disparate penalty claim consistent with this Opinion and Order. After the administrative judge issues the recommendation, the case will be forwarded back to the Board. The parties may file exceptions to the administrative judge's recommendation

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[4] Although the union did not use the term "disparate penalty," the union clearly raised a claim of disparate penalty before the arbitrator by alleging that "other pharmacists whose dispensing errors either harmed or killed patients were not removed from their positions," and the appellant was removed for making errors dispensing medicine, "which the Agency admits never reached a patient and never caused any harm to any patient." RFR File, Tab 3 at 25.

with the Clerk of the Board within 20 days of the date of the recommendation. The parties may respond to any submission by the other party within 15 days of the date of such submission. The Board will subsequently issue a final decision on the merits of the appellant's request for review.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.