69 FLRA No. 82

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1992
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY
RICHMOND, VIRGINIA
(Agency)

0-AR-5166

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DECISION

September 20, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Arbitrator Kenneth E. Moffett issued an award denying the Union's grievance alleging that the Agency improperly denied the grievant's reasonable-accommodation request. The Union filed exceptions to the Arbitrator's award.

The Union raises two exceptions to the Arbitrator's award. First, the Union alleges that the award is contrary to the Rehabilitation Act (Act)[1] and 29 C.F.R. § 1630.9(a) because the Arbitrator found that "the [g]rievant had to undertake some new request in a particular format while this case was ongoing."[2] Although the Arbitrator's determination denying the grievance is inconsistent with applicable legal principles, the Arbitrator failed to make sufficient findings for us to determine whether his legal conclusion – that the Agency did not violate the Act – is contrary to law. Accordingly, we remand the case back to the parties, absent settlement, for further proceedings.

The Union also argues that the Arbitrator exceeded his authority by failing to address an issue submitted to arbitration. Because we are remanding the case to the parties, and the Arbitrator can address this issue on remand, we find that it is not necessary to address this exception.

II. Background and Arbitrator's Award

The grievant, a military veteran, is an employee with a disability – specifically, Post-Traumatic Stress Disorder (PTSD). As part of his position, the grievant interacts with military commands and units to assist them in disposing of excess property and equipment. When the Agency informed the grievant that it was reassigning him from Richmond, Virginia, to the U.S. Marine base at Quantico, Virginia, the grievant submitted a request for a reasonable accommodation. His first request asked the Agency to not reassign him to Quantico. In that regard, his request "indicated [that] he suffered from [PTSD] and [that] his [d]octors recommended [that] he not be stationed on a military base for an extended period of time."[3] The Agency denied this request, stating that having the grievant at Quantico full time would "ensure efficient and timely processing of material."[4]

The grievant then filed a second request for a reasonable accommodation. In his second request, the grievant requested to work two, nonconsecutive days at Quantico and to telework the remaining days. The Agency also denied this request, stating that the "reason why this position is being transferred to Quantico is to have constant[,] . . . on[-]site customer assistance and training."[5] The Agency also indicated that it was "willing to work with [the grievant] . . . regarding an appropriate amount of . . . time" for working at an alternate site once he was at Quantico.[6] After the second denial, the grievant initiated a grievance. When the parties did not resolve the grievance, they submitted the issue to arbitration.

The issue before the Arbitrator was "[w]hether the Agency had the right to turn down the [g]rievant[']s request for a reasonable accommodation."[7]

At arbitration the Union argued that the Agency had improperly denied the grievant's second accommodation request. As a remedy, the Union requested that the Agency allow the grievant to telework while stationed at Quantico.

The Agency argued that the grievant's request was "predicated on avoiding a transfer from Richmond to Quantico" and that the grievant never made any request for an accommodation or to telework *after* transferring to

[1] 29 U.S.C. §§ 701-95.
[2] Exceptions at 5.
[3] Award at 5.
[4] *Id*. (citation omitted).
[5] *Id*. at 6.
[6] *Id*.
[7] *Id*. at 3.

Quantico.[8] The Agency also argued that it properly denied the grievant's accommodation request "because of the undue hardship [it] would have placed on the Agency."[9]

The Arbitrator acknowledged that both parties agreed that the grievant is an individual with a disability. The Arbitrator found that "[t]he circumstances in Richmond were different from th[ose] of Quantico" and that "[t]he new environment had to be assessed[,] and without the formal request for a specific reasonable accommodation in Quantico[,] the matter of addressing the disability would have to be put on hold."[10] The Arbitrator was also "not persuaded by the Union[']s argument that [the grievant] need not file a new request when [his] duty station change[d]."[11] Therefore, the Arbitrator found that, "[b]ecause of a procedural mistake made by the Union, I deny the [g]riev[a]nce."[12]

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

III. Analysis and Conclusion: We remand the case to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

The Union alleges that the award is contrary to law.[13] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo.[14] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions – not his or her underlying reasoning – are consistent with the applicable standard of law.[15] In making this assessment, the Authority defers to the arbitrator's underlying factual findings.[16]

The Union argues[17] that the award is contrary to 29 C.F.R. § 1630.9(a) and the Act. Specifically, the Union contends that "[t]o hold, as the Arbitrator did here, that the [g]rievant had to undertake some new request in a particular format while this case was ongoing is wrong and contrary to law."[18]

Under § 1630.9(a), it is improper "not to make [a] reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business."[19] Under the Act, to establish a prima facie case of discrimination, a grievant must show that he or she: (1) has a disability within the meaning of the Act; (2) is qualified to perform the essential functions of the position in question, with or without a reasonable accommodation; and (3) was discriminated against because of his or her disability.[20] An agency commits unlawful discrimination under the Act by failing to reasonably accommodate a qualified individual with a known disability unless the agency demonstrates that the requested accommodation would impose an undue hardship on the agency.[21]

Additionally, certain legal principles govern the process of requesting reasonable accommodations and responding to those requests. As relevant here, when a qualified individual with a disability requests a reasonable accommodation, this triggers an "interactive process" that requires an employer to (among other things) act in good faith to assist the employee in seeking accommodation.[22] In this regard, "when the duty to reasonably accommodate arises, both employee and employer must 'exchange essential information[,] and neither side can delay or obstruct the

[8] *Id*. at 8.
[9] Exceptions, Attach. C (Agency's Post-Hr'g Br.) at 6.
[10] Award at 11-12.
[11] *Id*. at 13-14.
[12] *Id*. at 14.
[13] Exceptions at 4.
[14] *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)).
[15] *U.S. DHS, U.S. CBP*, 68 FLRA 276, 277, *recons. denied*, 68 FLRA 807 (2015), *pet. for review dismissed sub nom., U.S. DHS, U.S. CBP v. FLRA*, No. 15-1342, 2016 WL 231956 (D.C. Cir. Jan. 4, 2016).
[16] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[17] Exceptions at 4-5.
[18] *Id*. at 5.
[19] 29 C.F.R. § 1630.9(a).
[20] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Englewood, Colo.*, 69 FLRA 474, 476 (2016); *U.S. Dep't of the Treasury, IRS, Serv. Wage & Inv. Div., Austin, Tex.*, 64 FLRA 39, 49 (2009) (*IRS*) (citing *U.S. Dep't of the Army, Corps of Engr's, Huntington Dist., Huntington, W. Va.*, 59 FLRA 793, 797 (2004) (*Dep't of the Army*)).
[21] *IRS*, 64 FLRA at 49 (citing *Dep't of the Army*, 59 FLRA at 797).
[22] *E.g., IRS*, 64 FLRA at 50; *see also Floyd v. Lee*, 85 F. Supp. 3d 482, 506 (D.D.C. 2015) ("The employer's duty to engage in the interactive process is 'trigger[ed]' by the employee's initial provision of notice of her disability and request for accommodation.") (citing *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 312-15 (3d Cir. 1999)). *Cf. Hovell v. Dep't of the Navy*, EEOC Appeal No. 01A43005 at *1 (Aug. 9, 2004) (the failure to address a request for reasonable accommodation constitutes a recurring violation that repeats each day that the accommodation is not provided).

process.'"[23] Under Executive Order (E.O.) 13,164, "[e]ach [f]ederal agency shall establish effective written procedures for processing requests for reasonable accommodation by employees and applicants with disabilities."[24] In its Policy Guidance on E.O. 13,164, the Equal Employment Opportunity Commission (EEOC) states that an agency may not "require that a request for reasonable accommodation be made to a certain agency official[.]"[25] Further, EEOC regulations implementing the Act provide that even if a particular, requested reasonable accommodation that is otherwise appropriate is not possible at a given time, an employer's knowledge that it will be possible in the near future obligates the employer to offer that accommodation once it does become possible.[26]

We find that the Arbitrator's determination denying the grievance is inconsistent with these principles. In this case, the Agency denied the grievant's telework request on the basis that the grievant's position was "being transferred to Quantico . . . to have constant[,] . . . on[-]site customer assistance and training."[27] There is no dispute that the Agency knew what the working conditions at Quantico were, and that it knew the nature of the grievant's disability. Thus, even before the grievant's transfer, the Agency "could have determined on an individual basis whether teleworking could have been offered to [the grievant] as a reasonable accommodation."[28] But the Arbitrator effectively found that the Agency could deny the request solely on the basis that the grievant was not yet at Quantico, and that the burden shifted to the grievant to make a new, identical request *after* the Agency put the grievant (against his wishes) into the situation that he alleged could trigger his symptoms related to his PTSD. We find that the Arbitrator's determination denying the grievance does not comport with the legally requisite interactive process and the other legal principles set forth above.

However, that does not end the inquiry into whether the Arbitrator's legal *conclusion* – that the Agency did not violate the Act – is contrary to law. In this regard, while the parties do not dispute that the grievant is an employee with a disability as defined by the Act,[29] the Arbitrator did not make findings that are necessary to assess whether the Agency otherwise complied with the Act. Specifically, the Arbitrator made no findings identifying the essential functions of the position or stating whether the employee was a qualified individual who could perform the essential functions of the position, with or without a reasonable accommodation. The Arbitrator also made no findings pertaining to the Agency's argument that the requested accommodation imposed an undue hardship on the Agency. Therefore, the Arbitrator did not make sufficient findings for us to determine whether his legal conclusion is consistent with the Act.

Consequently, we find it necessary to remand this case to the parties for resubmission to the Arbitrator, absent settlement.[30] If the case is resubmitted to the Arbitrator, then he should address: (1) whether the grievant is a qualified individual who could perform the essential functions of the position in question, with or without a reasonable accommodation; and (2) if so, whether the grievant was discriminated against because of his disability; that is, whether the Agency failed to reasonably accommodate a qualified individual with a known disability or whether the Agency demonstrates that the requested accommodation would impose an undue hardship on the Agency.[31]

Furthermore, because we remand the case to the parties, there is no need to address the Union's argument that the Arbitrator exceeded his authority by failing to make findings regarding the Agency's denial of the grievant's accommodation request.[32] Specifically, because the Arbitrator can address this issue on remand, we need not consider this exception at this juncture.

Additionally, in response to the concurrence, we note the following. Unlike the concurrence, we are *not* saying that the Arbitrator's failure to apply the correct legal analysis to the grievant's reasonable-accommodation request, by itself, renders his

[23] *Carroll v. Dep't of the Navy*, 321 F. Supp. 2d 58, 69 (D.D.C. 2004) (quoting *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114-15 (9th Cir. 2000)); *accord Complainant v. Dep't of Commerce* (*Bureau of the Census*), EEOC Appeal No. 0120112930 at *5 (Feb. 19, 2015) ("An employer should respond expeditiously to a request for reasonable accommodation.").

[24] E.O. 13,164, Requiring Federal Agencies to Establish Procedures to Facilitate the Provision of Reasonable Accommodation, § 1(a), 65 Fed. Reg. 46,565 (July 26, 2000).

[25] EEOC Policy Guidance on E.O. 13,164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, Notice no. 915.003 (Oct. 2000).

[26] *See* 29 C.F.R. pt. 1630, App. ("As an example, suppose there is no vacant position available at the time that an individual with a disability requests reassignment as a reasonable accommodation. The employer, however, knows that an equivalent position for which the individual is qualified, will become vacant next week. Under these circumstances, the employer should reassign the individual to the position when it becomes available.").

[27] Award at 6.

[28] *Tanya D. v. Dep't of VA*, EEOC Appeal No. 0120123154 at *3 (Nov. 3, 2015).

[29] Award at 12.

[30] *See AFGE, Local 1401*, 67 FLRA 34, 38 (2012).

[31] *IRS*, 64 FLRA at 49 (citing *Dep't of the Army*, 59 FLRA at 797).

[32] *See AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 468 n.3 (2009).

legal conclusion denying the grievance contrary to law. The concurrence's contrary view, proposing to decide the case on this basis, fails to address the issue this case presents. That issue is whether the Arbitrator's determination – denying the grievance because the grievant purportedly had an obligation to make a new request, post-transfer – is inconsistent with the applicable standard of law. We hold that it is, and hold further that the award does not otherwise contain sufficient findings for us to determine *whether* the grievant had a right to a reasonable accommodation. The issue the concurrence would sidestep is outcome-determinative in this case. If the Arbitrator's determination was legally sufficient – and the grievant *did* have a legal obligation to make a new, post-transfer request – then *we would not remand*. Rather, we would simply deny the Union's contrary-to-law exception. In that scenario, none of the issues the concurrence would reach would matter. That is, it would not matter whether the Arbitrator failed to assess whether the grievant was a qualified individual with a disability or whether the requested accommodation would impose an undue hardship on the Agency. In short, no further proceedings would be necessary. However, because the Arbitrator's determination denying the grievance is legally insufficient, and he did not make sufficient additional findings for us to assess whether the Agency violated the Act, we must remand.

Last, we note simply that the concurrence's hostility to the grievance-arbitration process is directly contrary to Congress' determination in the Statute that grievance-arbitration, a statutorily-mandated product of collective bargaining in the civil service, fosters governmental effectiveness and efficiency and is in the public interest.[33]

IV. Decision

We grant the Union's contrary-to-law exception and vacate the award. We remand this case to the parties for further proceedings, absent settlement.

[33] *See* 5 U.S.C. §§ 7101, 7121.

Member Pizzella, concurring:

The Rehabilitation Act[1] requires the Arbitrator to apply a well-established burden-shifting framework.[2] Therefore, I agree with my colleagues that the Arbitrator failed to properly apply that framework or to make findings sufficient to apply that framework and, therefore, his award is contrary to law and must be remanded.

This case demonstrates the strange results that can occur when employees and unions fail to direct their grievances and workplace complaints to the jurisdictional body which has the legal and technical expertise to best render a determination on a complaint which pertains to a request for reasonable accommodation. In this case, it is the Equal Employment Opportunity Commission (EEOC) which is the jurisdictional entity which has the best, and most extensive, legal expertise to render a decision on the responsibilities of agencies and employees with respect to requests for reasonable accommodation.

Without any doubt, the grievant had the *option* and *right* to direct his grievance, concerning whether the Agency appropriately addressed his request for reasonable accommodation, through the parties' negotiated grievance procedure and ultimately to take that matter to arbitration. But it is equally true that the EEOC is far more qualified to evaluate the technical and legal nuances of a disputed request for reasonable accommodation than is an arbitrator, or for that matter, the Federal Labor Relations Authority.

I am bemused then that my colleagues take offense at the simple notion that the EEOC is *more qualified* (than is the Arbitrator or are we) to assess the circumstances of this complaint insofar as it involves the highly technical issues concerning an employee's entitlement (or their non-entitlement) to a reasonable accommodation.

More to the point, however, I am shocked that my colleagues would describe my observation as "***hostility*** to the grievance-arbitration process" itself.

My observation is based in common sense and is supported by the fact that Congress created several quasi-judicial authorities – the Authority, the EEOC, the Merit Systems Protection Board (MSPB), and the Office of Special Counsel (OSC) − to adjudicate different and complex bodies of law. Whereas the Authority is entitled to deference in matters concerning the collective-bargaining process, it is the EEOC which is the recognized expert in matters concerning Title VII and requests for reasonable accommodation (among others), the MSPB in matters concerning adverse actions and reductions in force (among others), and the OSC in matters concerning whistleblower complaints and prohibited personnel practices (among others).

But my observation of this notion is supported by more than common sense. The notion that specific complaints are best left to the jurisdictional body with the most expertise is supported by the U.S. Court of Appeals for the District of Columbia Circuit which has reminded the Authority on more than one occasion (but most recently this majority) that the Authority has no business using our "organic" Federal Service Labor-Management Relations Statute (Statute) to interpret federal statutes that fall outside of our purview and expertise.[3] When the Authority goes beyond our "area of expertise" the Authority generally adds even more confusion to an area of law that is already complex.

By choosing the grievance forum, rather than using the complaint procedures set forth in Title VII and the Rehabilitation Act, the Union gets the result one might expect – an erroneous award by an Arbitrator who did not apply the correct legal standard and an erroneous determination by the Authority which misapplies the legal requirements imposed by the Rehabilitation Act and which assumes facts and makes factual findings which are unnecessary to resolve this case.

To resolve this case, it is not necessary to make *any determination* concerning the Rehabilitation Act's interactive process. In this respect, the Arbitrator failed to apply the appropriate framework, as set forth by the EEOC, and failed to make those determinations – what are the essential functions of the grievant's position and whether the employee was a qualified individual – which would permit the Authority to make any determination concerning the interactive process.

We need do no more than remand this case for the Arbitrator to make those determinations. The Authority should not hint at and predetermine, as the majority does, how the Arbitrator should resolve the

[1] 29 U.S.C. §§ 701-95.

[2] *U.S. Dep't of the Treasury, IRS, Serv. Wage & Inv. Div., Austin, Tex.*, 64 FLRA 39, 49 (2009) (*IRS*) (citing *U.S. Dep't of the Army, Corps of Engr's, Huntington Dist., Huntington, W. Va.*, 59 FLRA 793, 797 (2004)).

[3] *U.S. Dep't of the Navy v. FLRA*, 665 F.3d 1339, 13448 (D.C. Cir. 2012) (Vacating an Authority decision and stating that "[t]he FLRA is entitled to 'considerable deference' when interpreting and applying the [Statute], its 'own enabling statute.' It receives no deference, however, when it 'has endeavored to reconcile its organic statute with another statute' . . . 'not within its area of expertise.'" (citations omitted)); *U.S. Dep't of the Air Force v. FLRA*, 648 F.3d 841, 846 (D.C. Cir. 2011) (same).

grievant's entitlement – or non-entitlement – to a future request for reasonable accommodation.

Here, the grievant was moved to a new worksite ***after*** he made a request for reasonable accommodation. The majority concludes, however, that the Arbitrator erred when he found that "the burden shifted to the grievant to make a new, identical request *after*" the Agency moved him.[4] That is *not the issue* in *this* case, but the majority offers unsolicited advice that when an accommodation is not possible at a given time, "*an employer's knowledge* that it will be possible in the near future *obligates* the employer to offer that accommodation *once it does become possible*."[5]

Not only does the majority advise on a question that is not an issue in this case, its advice on that question is wrong. The Rehabilitation Act does not "obligate[]" an employer to provide *any* particular accommodation.[6]

As the majority acknowledges, the Arbitrator made *no findings* concerning the *essential functions* of the grievant's position or whether the employee was a *qualified individual* who could perform the essential functions of the position, with or without accommodation.[7] Without those determinations, it is entirely speculative and impossible to determine whether the Agency had an obligation to provide *any accommodation* at all.[8] The majority does not even explain what law the Arbitrator supposedly violated or how he supposedly violated it. Instead, they throw up their metaphorical hands and conclude that the Arbitrator erred without citing anything more concrete than some undefined and vague "principles"[9] which are apparently hidden in unspecified EEOC guidance and trial court decisions.

Beyond adding confusion to the law, the majority assumes facts and makes factual findings which are not necessary and are not supported by the record.

My colleagues frequently observe that they only "apply the law to the issues and facts properly before [the Authority]" and that "it is wrong to incorporate other matters into decisions . . . [or to comment on] outside-the-case considerations."[10] But contrary to that oft-repeated assurance, in this case, the majority substitutes its own findings, some of which directly contradict the Arbitrator's undisputed findings, even though it is unnecessary for them to do so.

Specifically, the majority incorrectly finds that "even *before* the grievant's transfer, the Agency 'could have determined on an individual basis whether teleworking could have been offered to [the grievant] as a reasonable accommodation.'"[11] That may have been true in the case of *Tanya D. v. Department of VA*, cited as precedent by the majority, but in *this* case, there *was* a real dispute regarding the conditions at the grievant's new duty station. On this point, the Arbitrator *found* that, although the Union argued that the conditions were exactly the same, "[t]he circumstances in Richmond were different from th[ose] [at] Quantico."[12] Therefore, it is undisputed that the Arbitrator *never found* that the Agency *could have assessed* the new environment prior to the move. He found only that "[t]he new environment had [yet] to be assessed."[13]

My colleagues suggest that I am "proposing" something new.[14] But that is not true. Unlike the majority, I would remand this case back to the parties because the Arbitrator failed to find facts sufficient to apply the burden-shifting framework, which has been consistently applied by the Authority,[15] federal courts,[16] and the EEOC[17] until today. We need not go any further.

Thank you.

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[4] Majority at 5.
[5] *Id.* at 4-5 (emphasis added).
[6] EEOC Enforcement Guidance: Reasonable Accommodation & Undue Hardship Under the Americans with Disabilities Act, Notice no. 915.002 (Oct. 2002) ("[T]he preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations." (quoting 29 C.F.R. pt. 1630 App. § 1630.9 (1997))).
[7] *IRS*, 64 FLRA at 49.
[8] *Id.*
[9] Majority at 4.
[10] *U.S. DHS, CBP*, 67 FLRA 107, 111 (2013) (Concurring Opinion of Chairman Pope & Member DuBester).
[11] Majority at 5 (quoting *Tanya D. v. Dep't of VA*, EEOC Appeal No. 0120123154 at *3 (Nov. 3, 2015) (emphasis added)).
[12] Award at 11.
[13] *Id.*
[14] Majority at 6.
[15] *IRS*, 64 FLRA at 49.
[16] *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997).
[17] *Complainant v. Lew*, EEOC Doc 0120133355, 2015 WL 3955321 at *3 (2015) (citation omitted).