OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

AFSCME Council 26, AFL-CIO	)	
	)	
Union,	)	
	)	
v.	)	
	)	Case Number: 13-ARB-01
Office of the Architect of the Capitol	)	
	)	
Employing Office.	)	
	)	
	)	

Before the Board of Directors: Barbara L. Camens, Chair; Alan V. Friedman, Roberta L. Holzwarth, Susan S. Robfogel, and Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

This matter is before the Board on exceptions filed on July 3, 2013, by the Office of the Architect of the Capitol ("AOC"), to an award by Arbitrator Margaret R. Brogan ("the Arbitrator"). Also, on July 3, 2013, the American Federation of State, County and Municipal Employees, Council 26, AFL-CIO ("Union") filed a "Motion to Strike the Architect's Exceptions."[1] On July 9, 2013, the AOC filed a "Response to Union's Motion to Strike the Architect's Exceptions," and on July 12, the Union filed a "Reply to the Architect's Response to Union's Motion to Strike." On August 2, 2013, the Union filed an "Opposition to Architect's Exceptions."

[1] The Union filed a motion to strike the AOC's exceptions as untimely filed in which it asserts that the AOC's exceptions, filed on July 3, 2013, were outside of the 30-day filing period prescribed by 5 U.S.C. § 7122, as applied by Section 220 of the Congressional Accountability Act (2 U.S.C. § 1351). In its motion to strike, the Union contends that the Arbitrator served her award on both parties simultaneously via e-mail on June 2, 2013. Under § 2425.1(b) of the Office of Compliance Labor Management Regulations, the "time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date the award is served on the filing party." As we consider the time limit for filing an exception to an arbitration award to be 30 days beginning *on the date the award is served* on the filing party, we find that the Arbitrator's Award was served on the AOC and Union on June 2, 2013. However, because the Procedural Rules of the Office of Compliance do not specify whether additional time should be added to the 30 days when an award is served by e-mail, and for the purpose of this case only, we find that pursuant to Section 1.03(c) of the Procedural Rules, the award was served by a form of expedited service and AOC had an additional 2 days in which to file exceptions. Accordingly, we find the AOC's exceptions to be timely.

The Board of Directors has reviewed this matter pursuant to the requirements of 5 U.S.C. 7122, as adopted by section 220(a) of the Congressional Accountability Act [2 U.S.C. 1351(a)], and Part 2425 of the Regulations of the Office of Compliance.

On October 28, 2011, David Washington ("Washington") and Thomas Jordan[2] ("Jordan") (collectively "the grievants"), day laborers of the AOC, were involved in an incident which led to their terminations. The Arbitrator found that the grievants' terminations were not for just cause and violated the collective bargaining agreement ("CBA"). The AOC was ordered to reduce Washington's termination to a one-day suspension and Jordan's termination to a written reprimand. The Arbitrator further ordered the AOC to immediately reinstate the grievants to their former or substantially similar positions and make them whole for their losses, including back pay and benefits.

The Arbitrator determined that the AOC failed to properly consider five *Douglas* factors [3] that were required under the CBA to determine the disciplinary penalties. Thus, the Arbitrator found that there was: 1) a lack of intent to steal; 2) insufficient notice that the conduct was impermissible; 3) significant tenure and job performance; 4) conduct that was not egregious or demonstrative of little potential for rehabilitation; and 5) inconsistency of the discipline with applicable table of penalties.

The AOC filed Exceptions to the Arbitrator's Award, arguing that the Award was deficient because it granted a remedy that usurped the authority of the AOC under 2 U.S.C. § 60-1.[4]

The AOC contends that because this provision gives the AOC exclusive authority to appoint, discipline, and remove employees, the AOC did not "abridge" that exclusive authority when entering into the CBA with the Union. The AOC concedes that the CBA gives the Arbitrator the authority to award "appropriate remedies, including back pay."

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[2] According to the AOC's exceptions, Jordan's termination case was settled in connection with a civil complaint filed with the U.S. District Court for the District of Columbia. In its opposition to the exceptions, the Union indicated that the settlement was signed by the District Court Judge on June 21, 2013, after the Arbitrator issued her award. Nevertheless, the Architect and the Union included Jordan in their discussion because the facts involving Washington and Jordan were closely intertwined.

[3] The Douglas factors were established by the decision of the Merit Systems Protection Board in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). The *Douglas* factors are certain enumerated criteria and mitigating or aggravating circumstances that must be considered and balanced in determining an appropriate penalty for the sustained charge. *See e.g.*, *Kline v. Dep't of Transp.*, 808 F.2d 43, 46 (Fed. Cir. 1986). Under the CBA, these factors included: the nature and seriousness of the offense, the relation to the employee's duties, whether the offense was intentional, the employee's past disciplinary and work record, and the clarity with which the employee was on notice of any rules that were violated in committing the offense. In addition, the CBA incorporates the parties' Letter of Understanding, dated February 21, 2003, which provides additional factors for consideration in imposing discipline, such as the consistency of the penalty with those imposed upon other employees, the potential for the employee's rehabilitation, and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

[4] Under § 60-1(a): "Authority of officers of Congress over Congressional employees, **…**[e]: Each officer of the Congress having responsibility for the supervision of employees… shall have authority 1. to determine [whether potential employees possess] the qualifications necessary for the satisfactory performance of the duties and responsibilities to be assigned to him; and 2. to remove or otherwise discipline any employee under his supervision." 2 U.S.C. § 60-1(a).

The AOC, however, maintains that the CBA does not authorize the Arbitrator to order reinstatement.

The AOC also argued in its exceptions that the Award was deficient because the facts were not supported by the evidence. The AOC submits that the Arbitrator erroneously concluded that the AOC violated the CBA when it terminated Washington and Jordan for unauthorized possession without properly considering the *Douglas* factors. The AOC asserts that the Award was based on errors of fact.

For the reasons stated below, we deny the AOC's exceptions. The standard for the Board's review of exceptions to an arbitration award is whether the award is deficient because (1) the decision of the arbitrator is contrary to law, rule, or regulation, or (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations. Substantive Regulations § 2425.3.

AOC's first exception that the Arbitrator's order of reinstatement contravened the AOC's authority under § 60-1(a) is without merit. While it is true that 2 U.S.C. § 60-1(a) grants the AOC the authority to remove and discipline employees, this authority is also expressly limited by the statutory language in 5 U.S.C. § 7106 [applicable to the AOC under CAA § 220(a)(1)] which restricts management rights in these areas to those exercised "in accordance with applicable laws" [5 U.S.C. § 7106(a)(2)(A)] and which specifically allows the AOC to negotiate with labor organizations both the "procedures which management officials of the agency will observe in exercising any authority under this section" and "appropriate arrangements for employees affected by the exercise of any authority under this section by such management officials." 5 U.S.C. § 7106(b)(2) & (3).

Federal Labor Relations Authority ["Authority" or "FLRA"] precedent also supports the Arbitrator's order. In analyzing whether an arbitrator's award violates a management right protected by § 7106:

> the Authority first assesses whether the award affects the exercise of the asserted management right. If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b). Also, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right.

U.S. Dep't of Justice Executive Office for Immigration Review, 66 FLRA 221, 225 (2011) ("EOIR") (internal citations omitted).[5]

Initially, it is our assessment that the Award does not actually affect the exercise of the asserted management right. Management rights are protected under § 7106 only to the extent that they are exercised "in accordance with applicable law." Contrary to the

[5] The FLRA's application of the "abrogation" standard replaced the previous "excessive interference" standard. *U.S. Envtl. Prot. Agency*, 65 FLRA 113, 118 (2010).

AOC's assertions, the Award does not affect the AOC's right to discipline employees; rather, it "merely requires the [AOC], in disciplining employees, to comply with its regulations." *DHS Customs & Border Protection and NAAE*, 63 FLRA 495, 500 (2009).

Moreover, in accordance with FLRA precedent, even if we were to find that the Award affects the exercise of a management right, we find that the Award merely enforces a contract provision properly negotiated under § 7106(b) and that the limitations placed on the exercise of that management right by the contract do not violate § 7106. Although the Award limits the AOC's ability to discipline the grievants for the reasons articulated by the AOC in this case, the AOC is not precluded from disciplining employees for these reasons in all cases and therefore we cannot find that its management right to discipline employees has been abrogated by enforcement of this Award. *See, U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enforcement*, 65 FLRA 529, 533 (2011) (finding that management rights were not abrogated by a contract interpretation that does not preclude an agency from disciplining employees for similar reasons in all cases).

In the present case, the Arbitrator was enforcing a provision of the CBA that required the AOC to consider the *Douglas* factors in determining discipline. The Authority has consistently held that provisions requiring discipline to be for "just cause" or to "promote the efficiency of the federal service" constitute appropriate arrangements within the meaning of § 7106(b)(3) of the Statute. *EOIR*, 66 FLRA at 225. Similarly, the Authority has held that contract provisions establishing general standards, including "fair" or "for just or specific cause" to guide the exercise of management's right to discipline constitute appropriate arrangements within the meaning of section 7106(b)(3). *U.S. Dep't of Veterans Affairs Med. Ctr. Birmingham, Ala.*, 51 FLRA 270, 273-74 (1995) ("*VAMC*"). The Authority also has held that the enforcement of such provisions does not abrogate management's right to discipline because such provisions reserve to management the right to discipline employees for all conduct for which management can establish that the standards have been met. *VAMC*, 51 FLRA at 273-74. *See also U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst. Cumberland, Maryland*, 53 FLRA 278, 283-84 (1997) (upholding an award rescinding a suspension where the Arbitrator found that the agency violated the just cause provision in the CBA). In this respect, the Authority has noted that where an arbitrator vacates or mitigates a disciplinary action taken in violation of a contractual just cause provision, the award "operates in effect to reconstruct what management would have done had the provision been followed". *VAMC*, 51 FLRA at 274.

The same analysis leads us to conclude that the Award is not deficient as contrary to law as reflected in § 60-1(a). The AOC explicitly agreed to be bound by the terms of the CBA, which included provisions requiring that discipline be warranted and that penalties be appropriate.[6] By authorizing the Arbitrator to review disciplinary action, the CBA also authorizes the Arbitrator to vacate or mitigate a disciplinary action in order to

[6] Based on this record, it is not clear that the AOC raised this management rights issue before the Arbitrator. For us to consider the issue, it must have been presented to the Arbitrator. See *SSA Newark and AFGE Local 2369*, 64 FLRA 259, 260 (2009).

"reconstruct what management would have done" had the CBA been followed.[7] The AOC may still discipline its employees for all conduct for which management can establish that the standards set forth in the CBA have been met. As such, FLRA precedent instructs us that enforcement of the standards set forth in the CBA does not abrogate the AOC's authority to discipline under §60-1(a). Accordingly, we find that the Award is not deficient as contrary to law and we deny this exception.

The second exception is premised largely on the AOC's assertions that the Arbitrator erred in making her findings of fact. Our scope of review of arbitration decisions in these circumstances is extremely narrow. *Fraternal Order of Police, U. S. Capitol Police Labor Committee v. United States Capitol Police Board*, 08-ARB-1, (April 29, 2009). *See, e.g., United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987) ("The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract."); *Major League Baseball Players Ass'n. v. Garvey,* 532 U.S. 504, 509 (2001) ("When an arbitrator resolves disputes regarding the application of a contract… the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award.").

The Arbitrator has authority to weigh the parties' evidence and conclude whether it constitutes "convincing information." *Aramark Facility Servs. v. Serv. Employees Int'l Union, Local 1877, AFL CIO*, 530 F.3d 817, 828 (9th Cir. 2008). When the arbitrator makes such factual findings, they are not debatable on review of the award. *Id.* We find no basis for overturning the Arbitrator's Award. Accordingly, the AOC's exceptions are denied.

It is so ORDERED.

Issued, Washington, DC on February 26, 2014

[7] Moreover, we note that arbitration agreements should be rigorously enforced. *See Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220 (1987); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, (1991) ("questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."); *Dean Witter Reynolds Inc., v. Byrd*, 470 U.S. 213, 221 (1985) (agreements to arbitrate must be rigorously enforced); *Moses H. Cone*, 460 U.S. 1, 24–25 (1983) (doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability).