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United States Department of Justice, Executive Office for Immigration Review (Agency) and National Association of Immigration Judges (Union)

66 FLRA No. 41

UNITED STATES
DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
(Agency)

and

NATIONAL ASSOCIATION
OF IMMIGRATION JUDGES
(Union)

0-AR-4759

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DECISION

September 30, 2011

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Robert B. Hoffman 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 filed an opposition to the Agency's exceptions.

The Arbitrator found that the grievant engaged in misconduct, but concluded that the one-day suspension would not promote the efficiency of the service. For the reasons set forth below,we deny the Agency's exceptions.

II. Background and Arbitrator's Award

A. Background

The grievant is employed by the Agency as an Immigration Judge (IJ). Award at 1. As an IJ, the grievant hears and adjudicates immigration cases involving requests for asylum and/or stays of removals. Id. at 4. The Agency suspended the grievant for two days after learning of the grievant's inappropriate conduct during removal and asylum hearings that were conducted in 2004-2005.

During one hearing, the grievant made several inappropriate comments, including referring to the government's attorney as "obnoxious," saying that the case "stinks," and indicating that he "could vomit." Id. at 5. The Board of Immigration Appeals (BIA), which reviews IJ decisions, found that the grievant used "inappropriate sarcasm," and the United States Court of Appeals for the Eleventh Circuit agreed that the conduct was "inappropriate." Id.

In another hearing, the grievant compared an immigrant's religion to reading "a fortune cookie" and told the immigrant to "have a nice tissue on the [c]ourt." Id. at 6. The Eleventh Circuit vacated the grievant's order and also disapproved the grievant's attitude during the hearing. The BIA subsequently granted asylum to the immigrant. Id. at 7. In a third case, the BIA commented that there seemed to be a "recurring issue" with the grievant and called his conduct sarcastic, "unprofessional," and lacking in "judicial demeanor." Id. at 6.

In 2006, the Miami New Times newspaper wrote an article criticizing the Agency and quoting many of the grievant's comments. Subsequently, and as a result of the BIA and Eleventh Circuit decisions, the Agency ordered the grievant to complete "re-training." Id. at 7-8. After the re-training, the grievant's behavior improved and there were no further concerns about his conduct. Id.

at 9.

The Agency's Office of Professional Responsibility (OPR) initiated an investigation into the grievant's conduct several months after one of the immigrants complained to the OPR about the grievant. Id. at 10. The OPR issued a report roughly a year later, in 2009, finding that the grievant "committed professional misconduct when he acted in reckless disregard of his obligation to be fair and impartial in the administration of justice during the hearings." Id. The report recommended discipline. Id. During the course of the investigation, the grievant agreed that many of his comments were inappropriate. Id.

A few months after OPR issued its report, the grievant's supervisor proposed a two-day suspension. Id. at 11. Several months later, the Agency issued a final disciplinary decision, reducing the grievant's suspension to one day. Id. The Union presented a grievance alleging that the Agency "disregarded principles of progressive discipline" in imposing a suspension. Id. at 2. The issue was not resolved and was submitted to arbitration. The Arbitrator framed the issue as: "whether the grievant engaged in misconduct sufficient to amount to cause for the one[-]day suspension, and if not, what shall be the appropriate remedy." Id. at 3.

B. Arbitrator's Award

The Arbitrator found that the grievant conceded that his comments were inappropriate. Id. at 12. In considering whether the grievant's conduct rose to the level of misconduct, he noted that the BIA and the Eleventh Circuit did not make any findings concerning whether the grievant engaged in misconduct. Id. at 14. He also considered that the OPR's report concluded that the grievant engaged in misconduct. Id. at 15. In this regard, the Arbitrator found that the grievant "failed to live up to the judicial ethical standards" of dignity, courtesy, and respect. Id. at 16.

The Arbitrator then concluded that the grievant's conduct was not "egregious." Id. According to the Arbitrator, the grievant's conduct was not intentional, nor did it meet the parties' definition of "egregious," which requires that the conduct "endanger the health or safety of coworkers." Id. (quoting Article 10.2.c of the parties' agreement).[1] The Arbitrator determined that the Agency had "cause" to consider whether disciplinary action would promote the "efficiency of the service." Id. at 17.

The Arbitrator then found that, even though disciplinary action would have been warranted, the Agency violated the parties' agreement by not imposing a penalty in a timely manner. Id. at 18.

The Arbitrator found that five to six years elapsed between the grievant's inappropriate conduct and the discipline. Id. at 17. According to the Arbitrator, the parties' agreement "does not require the Agency to justify untimeliness." Id. at 18. However, he determined that the Agency violated the parties' agreement by taking two years to investigate the matter and another seven months between the OPR's report and the grievant's final disciplinary decision. Id. at 18-19. The Arbitrator concluded that there are limits to the Agency's discretion to determine the timing of discipline, even when there has been an OPR investigation. Id. at 19. The Arbitrator found that the Agency should have been aware of the grievant's misconduct after the BIA and Eleventh Circuit opinions and the Miami New Times newspaper article. The Arbitrator rejected the Agency's argument that it was not aware of the grievant's conduct until after the OPR investigation. Id. at 20-22.

Further, the Arbitrator found that discipline would not "correct employee misconduct," as required by the parties' agreement, because there was evidence that the grievant's behavior already had been corrected. Id. at 22. According to the Arbitrator, discipline would constitute "punishment" because the grievant had been successfully rehabilitated by his re-training. Id. at 22-23. The Arbitrator concluded that the Agency violated Article 10.2.c of the parties' agreement because it did not comply with the principles of "progressive discipline." Id. at 23. Specifically, the Arbitrator determined that the Agency should have imposed a lesser penalty because the grievant had never been reprimanded and his conduct was not egregious. Id. at 23-24.

The Arbitrator next considered the penalty mitigation factors, as set forth by Douglas v. Veterans Administration, 5 M.S.P.R. 280, 305-06 (1981) (Douglas).[2] The Arbitrator determined that the Agency did not consider the Douglas factors until it reduced the grievant's penalty, and even then considered only some of the factors. Id. at 24. The Arbitrator found that, even though the grievant acted inappropriately, the nature of the offense could not have been very serious because the Agency waited so long to discipline the grievant for it. Id. at 25-26. He also noted that the grievant had no past disciplinary record and a positive past work record. Id. at 26. According to the Arbitrator, the offense did not prevent the grievant from performing satisfactorily and he was rehabilitated after it. Id. at 27, 28. He decided that the notoriety to the Agency was not significant because the Agency did not discipline the grievant earlier. Id. at 28. The Arbitrator also found that the grievant's wife was in poor health, which added "[u]nusual job tensions." Id. at 29. The Arbitrator finally considered the fact that the grievant apologized for his behavior. Id. at 29-30.

The Arbitrator concluded that the grievant engaged in misconduct that would have warranted the timely application of sanctions. Id. at 30. However, after considering the Douglas factors and that the Agency did not impose timely sanctions, the Arbitrator found that no penalty would be appropriate. Id. According to the Arbitrator, the suspension violated the parties' agreement because it was not timely, failed to comply with progressive discipline, and would not promote the efficiency of the service. Id. The Arbitrator ordered the Agency to dismiss the grievant's final decision letter and granted the grievant backpay. Id. at 31-32. He further awarded the grievant attorney fees. Id. at 32.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to law and is based on nonfacts. Exceptions at 5 & n.3. The Agency asserts that the "Arbitrator's reliance on the Douglas [f]actors" is misplaced because the Agency was not required to apply the Douglas factors. Id. at 6-7. The Agency contends that it took "most of the Douglas [f]actors" into account in reducing the grievant's suspension. Id. at 7. According to the Agency, if the Arbitrator had taken into account all of the facts the Agency did, he would have upheld the grievant's suspension. Id. at 9.

The Agency also claims that the award is contrary to law because it abrogates management's right to discipline. Id. The Agency contends that, because the Arbitrator found that misconduct occurred but did not permit the Agency to impose any discipline, the award interferes with its right to discipline employees. Id. at 10. The Agency does not dispute that Article 10.2.a and Article 10.2.c constitute arrangements, but argues that, as interpreted by the Arbitrator, they abrogate management's right to discipline. Id. at 12. In this regard, the Agency asserts that the award precludes the Agency from disciplining the grievant and "issuing any other form of discipline, other than a reprimand, absent egregious conduct." Id.

Additionally, the Agency argues that the award fails to draw its essence from Article 10.2.c of the parties' agreement. Id. at 13. According to the Agency, the parties' agreement grants the Agency the sole discretion over the timing of discipline when, as here, there has been an OPR investigation. Id. at 14. The Agency asserts that the language in the agreement is a "stand-alone clause" giving the Agency discretion and, therefore, the Arbitrator erred in finding that the discipline was not timely. Id. The Agency further contends that the award fails to draw its essence from Article 10.2.c of the parties'

agreement because the Arbitrator "improperly relie[d] on the term 'egregious'" to determine that the Agency failed to comply with progressive discipline. Id. at 15. According to the Agency, egregious conduct is only one example of when progressive discipline may not be appropriate and is not required in order to impose a more severe penalty than a reprimand. Id. at 16.

Finally, the Agency argues that the award fails to draw its essence from Article 10.2 of the parties' agreement because the Arbitrator found "just cause" but set aside the discipline in its entirety. Id. According to the Agency, the minimum discipline in Article 10.2 is a written reprimand. Id.

B. Union's Opposition

The Union argues that the Arbitrator was not required to apply the Douglas factors, but was permitted to apply them to determine that the Agency's penalty was unreasonable. Opp'n at 8-9. According to the Union, the Agency's argument that the Arbitrator failed to credit the Agency's weighing of the Douglas factors is simply a disagreement with the Arbitrator's factual findings. Id. at 9-10.

The Union also contends that the Arbitrator's award does not deny management's right to discipline; it merely requires the Agency to discipline in adherence to the parties' agreement. Id. at 7. According to the Union, the Arbitrator limited the Agency's right to discipline only because the Agency violated the parties' agreement by imposing the discipline in an untimely manner and failing to comply with progressive discipline. Id. at 7-8.

Additionally, the Union argues that the award does not fail to draw its essence from the parties' agreement. Id. at 11. In this regard, the Union asserts that Article 10.2.c requires timely application of sanctions, to be determined by the Arbitrator. Id. The Union contends that the Arbitrator considered the limitations and exceptions to the timeliness of discipline and reasonably concluded that the Agency's imposition of a penalty was untimely. Id. at 11-13.

The Union also claims that the Arbitrator correctly determined that the Agency did not apply principles of progressive discipline. Id. at 13. The Union contends that the Arbitrator properly interpreted the parties' agreement in finding that the grievant's conduct was not egregious and that the grievant's behavior had been corrected. Id. at 13-14. According to the Union, the Arbitrator relied on more than just his finding that the grievant's conduct was not "egregious" in determining that the Agency failed to apply progressive discipline. Id. at 14-15.

Finally, the Union argues that the award draws its essence from the parties' agreement because the Arbitrator found that the discipline failed to promote the efficiency of the service. Id. at 15. According

to the Union, reasonableness is a part of finding that the discipline was for just cause, and here the Arbitrator did not find that the discipline was appropriate. Id. The Union contends that it was not incorrect for the Arbitrator to set the discipline aside. Id. at 16.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception 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. Douglas Factors

The Agency first argues that the award is contrary to law because the Agency was not required to apply the Douglas factors and because the Arbitrator relied on them in sustaining the grievance. Exceptions at 6-7. The Authority has held repeatedly that arbitrators are bound by the same substantive standards as the Merit Systems Protection Board (MSPB) only when resolving grievances concerning actions covered by 5 U.S.C. §§ 4303 and 7512. Soc. Sec. Admin., 65 FLRA 286, 288 (2010) (SSA) (citing IFPTE, Local 11, 46 FLRA 893, 902 (1992)). Suspensions of fourteen days or less are not covered under 5 U.S.C. §§ 4303 or 7512. Id.

The Agency argues that the Arbitrator erred in applying the Douglas factors and by not crediting the Agency's weighting of the Douglas factors. Exceptions at 9. However, because the Arbitrator was not required to consider the Douglas factors, we find that the Agency's contention that the Arbitrator incorrectly applied them does not provide a basis for finding the award deficient. See SSA, 65 FLRA at 288 (citing NATCA MEBA/NMU, 52 FLRA 787, 792 (1996)) (finding that an argument that the arbitrator incorrectly applied the Douglas factors did not provide a basis for finding the award deficient).

The Agency also asserts that the Arbitrator's finding that the Agency did not apply the Douglas factors constitutes a nonfact. Exceptions at 5 n.3. To establish that an award is based on a nonfact, the

appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. See NFFE, Local 1984, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. See id. In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. See NLRB, 50 FLRA 88, 92 (1995).

Without regard to whether the Arbitrator's factual findings are accurate, we find that they are not central facts underlying the award, such that the Arbitrator's decision would have been different had he decided these facts differently. See AFGE, Local 3979, Council of Prisons Locals, 61 FLRA 810, 815 (2006). In this regard, even if the Agency were correct, the Arbitrator could have applied the Douglas factors himself without regard to whether or how the Agency applied the factors. Further, to the extent that the Agency is arguing that the Arbitrator erred in finding that the discipline was not for just cause, the Arbitrator's determination cannot be challenged as a nonfact. See U.S. Dep't of Veterans Affairs, N.Y. Reg'l Office, N.Y.C., N.Y., 60 FLRA 17, 18 (2004) (then-Member Pope dissenting in part as to other matters).

For the foregoing reasons, we deny this exception.

2. § 7106 of the Statute

The Agency also argues that the award is contrary to § 7106 because the Arbitrator's interpretation of Article 10.2.a and Article 10.2.c of the parties' agreement abrogates its right to discipline employees. Exceptions at 12. The Authority revised the analysis that it applies when reviewing exceptions alleging that awards are contrary to law because they are inconsistent with management rights under § 7106 of the Statute. See U.S. Envtl. Prot. Agency, 65 FLRA 113, 115 (2010) (EPA) (Member Beck concurring); FDIC, Div. of Supervision & Consumer Prot., S.F. Region, 65 FLRA 102 (2010) (FDIC, S.F. Region) (Chairman Pope concurring). Under the revised analysis, the Authority first assesses whether the award affects the exercise of the asserted management right. EPA, 65 FLRA at 115. If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b). Id. 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. See id. at 116-18.

The parties do not dispute that the award affects management's right to discipline. Exceptions at 12; Opp'n at 6. See also U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enforcement, 65 FLRA 529, 533 (2011) (finding that, because the arbitrator set aside the reprimand, the award affected management's right to discipline). However, the Agency has not shown that the award is deficient. Although the Agency argues that the Arbitrator's interpretation of Article 10.2.a and Article 10.2.c of the parties' agreement abrogates management's right to discipline, the Arbitrator, in his award, was enforcing the equivalent of a just cause provision when he determined that the grievant's discipline was not for the efficiency of the service. See U.S. Dep't of Transp., Fed. Aviation Admin., 63 FLRA 383, 385 (2009) (FAA) (finding that requirements that discipline be for the "efficiency of the service" are functional equivalent to requirements that discipline be for "just cause"). 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. See U.S. Dep't of the Army, Fort Huachuca, Ariz., 65 FLRA 442, 445-46 (2011) (Army); FAA, 63 FLRA at 385 (citing Soc. Sec. Admin., Balt., Md., 53 FLRA 1751, 1754 (1998)).

Accordingly, because the Arbitrator was enforcing a provision that constituted an appropriate arrangement, the Agency has failed to show that the award is contrary to § 7106, and we deny this exception.[3]

B. The award draws its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement. Exceptions at 12-17. In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. See 5 U.S.C. § 7122(a)(2); AFGE, Council 220, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement 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.

See U.S. Dep't of Labor (OSHA), 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." Id. at 576.

1. Timeliness

First, the Agency argues that the Arbitrator's determination that it did not impose discipline in a timely manner does not draw its essence from Article 10.2.c of the parties' agreement. Exceptions at 12-13. The Agency has not shown that the Arbitrator's interpretation of Article 10.2.c of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement. It was not irrational for the Arbitrator to conclude that, because the parties' agreement requires the timely application of sanctions, there was an implicit reasonableness requirement even when there is an OPR investigation. See U.S. Dep't of the Air Force, Minot Air Force Base, N.D., 61 FLRA 366, 368-69 (2005) (then-Member Pope dissenting as to another matter) (denying an essence exception where the agency did not show that the arbitrator irrationally interpreted the parties' agreement broadly). Accordingly, we deny this exception. See U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, 55 FLRA 152, 156 (1999) (award not deficient under an essence standard where the exceptions did not dispute the arbitrator's implicit findings).

2. Egregious Conduct

Second, the Agency argues that the award fails to draw its essence from Article 10.2.c of the parties' agreement because the Arbitrator improperly relied on the term "egregious" in finding that the Agency failed to comply with progressive discipline. Exceptions at 15-16. According to the Agency, because the Arbitrator found that the grievant's conduct was not "egregious," he required management "to impose the lowest form of discipline." Id. at 15. However, the Agency misinterprets the Arbitrator's award. The Arbitrator found that the grievant engaged in misconduct and that the misconduct was not "egregious." Award at 16-17. However, the Arbitrator then considered whether the suspension was "reasonable" and concluded it was not, based on his determination that the suspension: (1) was untimely, id. at 17-22; (2) was imposed as a punishment rather than to correct the grievant's misconduct, id. at 22-24; and (3) was inappropriate given his analysis of the Douglas factors, id. at 24-30.

Accordingly, the Arbitrator did not rely solely on his finding that the grievant's conduct was not egregious in rescinding the grievant's suspension. The Arbitrator also did not mandate that the

Agency impose a reprimand absent egregious conduct. Rather, the Arbitrator considered several factors in his determination that the grievant's suspension would not promote "the efficiency of the service." Id. at 30. The Agency has not shown that the Arbitrator's interpretation is irrational, unfounded, implausible, or in manifest disregard of the agreement and, therefore, we deny this exception. See Soc. Sec. Admin., 65 FLRA 905, 906 (2011) (denying an essence exception where the arbitrator found that the agency violated progressive discipline by bypassing a written reprimand where the grievant's conduct was not severe).

3. Just Cause

Third, the Agency argues that the award fails to draw its essence from Article 10.2 of the parties' agreement because the Arbitrator found just cause to discipline, but set aside the discipline in its entirety. Exceptions at 16. According to the Agency, the minimum discipline permitted by the parties' agreement is a written reprimand and the Arbitrator's decision to set aside the discipline entirely is contrary to Authority precedent. Id. at 16-17 (citing Soc. Sec. Admin., Lansing, Mich., 58 FLRA 93 (2002) (SSA, Lansing) (then-Member Pope dissenting); U.S. Dep't of Justice, INS, Del Rio Border Patrol Sector, Tex., 45 FLRA 926 (1992) (INS)).

As the Authority has recognized, the enforcement of a contractual just cause standard presents two questions: whether discipline was warranted, and if so, whether the penalty assessed was appropriate. U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz., 63 FLRA 241, 243-44 (2009) (citing *U.S. Dep't of Justice, INS, N.Y. Dist. Office*, 42 FLRA 650, 658 (1991)). Further, the Authority has held that "[t]he requirement that discipline be for the efficiency of the service is 'functionally identical' to the requirement that discipline be for 'just cause.'" Army, 65 FLRA at 445 (quoting FAA, 63 FLRA at 385).

Contrary to the Agency's argument, the parties' agreement does not mandate that an employee be disciplined with at least a written reprimand. In this regard, the parties' agreement requires that disciplinary actions "will be taken only for such cause as will 'promote the efficiency of the service.'" Exceptions, Attach. I, Article 10.1 of the parties' agreement at 13. The Arbitrator concluded that, if the Agency were to discipline the grievant, that discipline would violate Article 10.1 of the parties' agreement, i.e., no penalty would promote the "efficiency of the service." Award at 30. In so finding, the Arbitrator relied on his findings that the suspension: (1) was untimely, id. at 17-22; (2) was imposed as a punishment rather than to correct the grievant's misconduct, id. at 22-24; and (3) was

inappropriate given his analysis of the Douglas factors, id. at 24-30. The Authority has previously denied essence exceptions when the arbitrator made similar findings. See U.S. Dep't of the Navy, Naval Training Ctr., Orlando, Fla., 53 FLRA 103, 104, 107 (1997) (upholding the arbitrator's rescission of a suspension when it would be punitive, rather than corrective in nature).

In rescinding the discipline in its entirety because the suspension was unreasonable, Award at 31, the Arbitrator determined that the penalty assessed was not appropriate and, therefore, not for just cause. See Soc. Sec. Admin., Huntington Park Dist. Office, Huntington Park, Cal., 63 FLRA 391, 392 (2009) (upholding the rescission of a suspension where the arbitrator found that the discipline was unreasonable even though the grievant engaged in misconduct). This case is distinguishable from those cited by the Agency, in which the arbitrators found just cause. See SSA, Lansing, 58 FLRA at 95 ("the [a]rbitrator . . . [found] that the [a]gency had just cause to discipline");[4] INS, 45 FLRA at 933 ("the [a]rbitator found that there was just cause for such discipline").

The Agency has failed to show that the Arbitrator's interpretation of the parties' agreement – that the suspension would not promote the efficiency of the service – is irrational, unfounded, implausible, or in manifest disregard of the agreement. Accordingly, we deny this exception. See U.S. Dep't of the Interior, Nat'l Park Serv., Gettysburg Nat'l Military Park, 61 FLRA 849, 853 (2006) (then-Member Pope writing separately as to another matter) (denying an essence exception where the arbitrator revoked the grievant's discipline because it was not taken for the efficiency of the service).

V. Decision

The Agency's exceptions are denied.

APPENDIX

Article 10.1 of the parties' agreement provides:

PURPOSE: Disciplinary and adverse actions will be taken only for such cause as will "promote the efficiency of the service."

Exceptions, Attach. I, parties' agreement at 13.

Article 10.2.a of the parties' agreement provides:

Disciplinary action for the purpose of this Article is defined as a formal written reprimand or a suspension from employment for fourteen (14) calendar days or less.

Id.

Article 10.2.c of the parties' agreement provides:

PROGRESSIVE DISCIPLINE: The Parties agree that under the concept of progressive discipline, discipline and adverse actions are used to correct employee misconduct rather than as a form of punishment. The effective use of progressive discipline requires timely application of sanctions to deal with employee misconduct. However, the Parties recognize that circumstances may arise where the concept of progressive discipline may not be appropriate (e.g. egregious conduct which might endanger the health or safety of coworkers) or where the timely application of any discipline or adverse action may not be possible, (i.e. an investigation by the [OPR] or the Office of Inspector General) and that the decision and timing of any discipline or adverse action rests with the Employer. Id.

[1] Although the Arbitrator cites Article 19.2.c, that language is actually provided in Article 10.2.c of the parties' agreement. See Exceptions, Attach. I, parties' agreement at 13. The relevant portions of the parties' agreement are set forth in the appendix to this decision.

[2] The Douglas factors include:

(1) The nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities;

(2) The employee's job level and type of employment, including supervisory or fiduciary role;

(3) Any past disciplinary record;

(4) The past work record, including length of service, performance, ability to get along with fellow employees, and dependability;

(5) The effect of the reasons for action on the employee's ability to perform satisfactorily and on supervisors' confidence;

(6) Consistency of the penalty with those imposed on other employees for the same or similar offenses;

(7) Consistency of the penalty with any applicable agency table of penalties;

(8) The notoriety of the offense or its impact on the agency's reputation;

(9) The clarity with which the employee was on notice of any rules violated in committing the

offense or had been warned about the conduct in question;

(10) Any potential for rehabilitation;

(11) Mitigating circumstances surrounding the offense; and

(12) The adequacy and efficacy of alternative sanctions to deter such conduct in the future by the employee or others.

Douglas, 5 M.S.P.R. at 305-06.

[3] For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the contract provision is an appropriate arrangement. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. See EPA, 65 FLRA at 120 (Concurring Opinion of Member Beck); FDIC, S.F. Region, 65 FLRA at 107; SSA, Office of Disability Adjudication & Review, 65 FLRA 477, 481 n.14 (2011); U.S. Dep't of the Air Force, Air Force Materiel Command, 65 FLRA 395, 398 n.7 (2010); U.S. Dep't of Health & Human Servs., Office of Medicare Hearings & Appeals, 65 FLRA 175, 177 n.3 (2010); U.S. Dep't of Transp., Fed. Aviation Admin., 65 FLRA 171, 173 n.5 (2010).

[4] Chairman Pope agrees that the Authority's decision in SSA, Lansing is distinguishable based on the fact that, in that case, the arbitrator found that some form of discipline was warranted. However, for the reasons set forth in her dissenting opinion in that case, Chairman Pope affirms that, in her view, that case was wrongly decided. See SSA, Lansing, 58 FLRA at 97 (Dissenting Opinion of then-Member Pope). See also SSA, 63 FLRA 691, 693 n.2 (2009); U.S. DHS, Customs & Border Prot., 63 FLRA 495, 500 n.7 (2009); SSA, Huntington Park Dist. Office, Huntington Park, Cal., 63 FLRA 391, 392 n.1 (2009); U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz., 63 FLRA 241, 244 n.4 (2009).