65 FLRA No. 120

UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
SUBSTANCE ABUSE AND MENTAL
HEALTH SERVICES ADMINISTRATION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4626

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DECISION

February 28, 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 Irwin Kaplan 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 determined that the Agency improperly rated the grievant's job performance. Award at 19, 20-22, 25-26. As a result, he canceled the Agency's ratings of two critical elements and ordered the Agency to raise those ratings to "exceptional."[1] *Id.* For the reasons set forth below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency utilizes a four-tier rating system to review its employees' annual performance. *Id.* at 2 n.4, 3. Under the four-tier system, employees are rated on various elements critical to their positions and then given an overall rating of exceptional, fully successful, minimally successful, or unacceptable. *See id.* at 2 n.4, 3-4.

The grievant works for the Agency as a General Schedule (GS)-14 statistician. *Id.* at 3. During the performance period in question, the grievant received only positive feedback from her first-line supervisor, was commended on the quality of the quarterly reports that she produced, and was awarded a Superior Internal Service Award. *Id.* at 5. At the end of the performance period, the grievant's first-line supervisor gave the grievant an exceptional rating on critical Element 2, a rating of fully successful on the remaining elements, and an overall performance rating of fully successful.[2] *Id.* According to the grievant's first-line supervisor, her "reports and work on certain projects did not show . . . sufficient innovation or creativity to warrant an exceptional rating for Elements 1 ("Transform the Healthcare System") and 4 (Collaborative Work Relationship)." *Id.* at 8. With regard to Element 3, the grievant's first-line supervisor rated her performance as fully successful because she did not thoroughly check errors on one of her reports and "did not 'do [anything] beyond her regular assignment of doing a regular statistical budget . . . and taking the lead on the quarterly reports' to warrant an exceptional rating[.]"[3] *Id.* (quoting Tr. at 207).

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1. The critical elements used to evaluate the grievant's performance are as follows:

> (Element 1) Transform the Healthcare System; (Element 2) Lead and enhance [Center for Substance Abuse Treatment (CSAT)] projects and activities related to State performance management data systems development, [National Outcome Measures (NOMS)] reporting, and electronic health record (EHR); (Element 3) Services as CSAT statistical and data expert; (Element 4) Teamwork, Personal Growth, Collaboration; (Element 5) Program Management of Contracts[;] . . . and . . . (Element 6) Procurement Planning and Award Phase.

Award at 4 n.5.

2. During the previous rating period, the grievant received an exceptional rating on critical Element 4, a rating of fully successful on the remaining elements, and an overall fully successful rating. *Id.* at 3-4. After receiving the performance appraisal, the grievant met with her first-line supervisor and second-line supervisor to determine how she could receive a higher performance rating in the future. *Id.* at 4.

3. The grievant's second-line supervisor believed that the grievant deserved an exceptional rating on Element 3 because the work that she did on the quarterly reports went above and beyond what was expected of her. *Id.* at 8. At the second stage of the grievance procedure, the grievant's

The grievant was disappointed with her performance appraisal and met with her first-line supervisor to discuss what she could have done differently to have received a higher performance rating. *Id.* at 4, 5-6. According to the grievant, her first-line supervisor did not give her any constructive feedback during the meeting, and a follow-up meeting was canceled at the grievant's request because her first-line supervisor would not allow a Union representative to be present at the meeting. *Id.* at 6.

The Union presented a grievance over the grievant's performance appraisal. *Id.* at 4. The matter was unresolved and was submitted to arbitration. The principal issues were: (1) whether the Agency properly evaluated the grievant's performance in accordance with Article 30 of the parties' agreement . . . ?[4] (2) If so, what shall be the remedy?[5] *Id.* at 2-3.

The Arbitrator determined that the grievant was entitled to an exceptional rating for Element 4 and that the Agency's rating should be canceled. *Id.* at 21-22, 25. The Arbitrator found that, by not issuing the grievant an exceptional rating for Element 4, the Agency violated Article 30 of the parties' agreement. *Id.* at 21, 25. The Arbitrator noted that "Article 30, Section 6 of the [parties' agreement] mandates that 'when there is sufficient indication that performance is below the expected level, additional steps including meetings should be taken to provide feedback.'" *Id.* at 21. The Arbitrator determined that, "[g]iven the importance that [the grievant] conveyed to both [her first-line and second-line supervisors] in terms of getting an exceptional rating, the [A]gency was on notice of her expectation, particularly with regard to this element where the previous year the [g]rievant received an exceptional rating." *Id.* Moreover, the Arbitrator found that, because "the [g]rievant reasonably believed she was performing at the exceptional level, but was eyed as performing 'below' that level by her [first-line] supervisor, he was obligated to take measures, including meetings to provide negative feedback." *Id.* Finally, according to the Arbitrator, the record demonstrated that, if the Agency had acted in accordance with the standards set forth in Article 30, Section 6 of the parties' agreement, the grievant would have received an exceptional rating for Element 4.[6] *Id.* at 21, 22, 25.

III. Positions of the Parties

A. Agency's Exceptions

The Agency claims that the award is contrary to law. Exceptions at 1. According to the Agency, the award does not reflect a reconstruction of what it would have done had it not violated the parties' agreement. *See id.* at 4-5.

The Agency asserts that "the Arbitrator clearly overstepped his authority when he directed that the [g]rievant's appraisal for . . . Critical Element 4 be based on [her] reasonable belief and not the standards set out in the parties' agreement . . . ." *Id.* at 5. The Agency claims that, in making this finding, the Arbitrator not only misinterpreted, but also expanded, various provisions of the parties' agreement. *Id.*

The Agency asserts that, in accordance with Article 30, Section 2, the grievant was put on notice of the Agency's performance standards and that she never indicated that the performance standards were unclear in any way. *Id.* at 5-6.

Also, the Agency claims that the parties' agreement does not require that a rating be determined based on an employee's reasonable belief; rather, the agreement "stipulates that performance standards established by management . . . be used in regard to employee appraisals." *Id.* at 6 (emphasis omitted). According to the Agency, because "the award inserts the [g]rievant's reasonable belief as the major determining factor for the performance rating[,]" the award conflicts with the parties' agreement. *Id.*

The Agency asserts that, by obligating the grievant's first-line supervisor to take measures such

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second-line supervisor changed her rating for Element 3 from fully successful to exceptional. *Id.* n.6.

4. Pertinent provisions of Article 30 are set forth in the attached appendix.

5. Another issue raised below was whether the Agency retaliated against the grievant for filing the instant grievance. Award at 3. Because the Agency did not except to the Arbitrator's findings regarding this issue, they are not before us.

6. The Arbitrator also determined that, while the grievant deserved an exceptional rating for Element 3, the record failed to demonstrate that the grievant was entitled to an exceptional rating for Element 1. *Id.* at 19-21, 25-26. Because the Agency has not excepted to the Arbitrator's findings regarding these elements, they are not before us.

as meetings to provide the grievant with negative feedback, the award contradicts the plain language of Article 30, Section 6 of the parties' agreement which "requires only one 'progress review during the rating period[.]'" *Id.* at 7; *see also id.* at 6. Finally, the Agency claims that the award conflicts with Article 30, Section 6 of the parties' agreement because a fully successful rating cannot reasonably be considered to be below the "expected level." *Id.* at 7.

B. Union's Opposition

The Union contends that, although the Agency correctly summarizes case law indicating that an arbitrator must reconstruct "how the [a]gency would have rated the grievant had it not acted improperly[,]" it does not point to anything "in the Arbitrator's [award] that reflects any misapplication of that law." Opp'n at 3. Moreover, the Union argues that, after considering the entire record, the Arbitrator properly reconstructed the grievant's rating for Element 4 and concluded that, but for the contract violations, the Agency would have given her an exceptional rating. *Id.* at 3-5.

Also, the Union contends that the Arbitrator did not overstep his authority by "simply impos[ing] the rating that [the grievant] expected to receive." *Id.* at 6. According to the Union, the Arbitrator simply found that, because the Agency violated Article 30, Section 6, the grievant was entitled to an exceptional rating for Element 4. *Id.*

The Union argues that the Agency's assertion that the grievant was on notice of the Agency's performance standards is a non sequitur because the grievant did not grieve the content of the performance standards. *Id.*

Furthermore, the Union contends that several of the Agency's claims constitute essence exceptions. *Id.* at 7. The Union argues that the award does not fail to draw its essence from the parties' agreement because it does not require the Agency to consider an employee's reasonable belief in addition to the standards set forth in the agreement when evaluating that employee's performance. *See id.* Also, the Union contends that the Arbitrator's finding that Agency management could not have issued the grievant a lower rating in Element 4 without providing her with negative feedback is not contrary to Article 30, Section 6 of the parties' agreement. *Id.* at 8. According to the Union, while Article 30, Section 6 only requires "that the supervisor 'conduct *at least* one (1) *documented* face-to-face progress review,'" the Article also "mandates that, 'when there is sufficient indication that performance is below the expected level, additional steps including meetings, should be taken to provide feedback.'" *Id.* (quoting Article 30, Section 6(A)(1), (3)) (emphasis in original). Finally, the Union contends that the Arbitrator's interpretation of the phrase "expected level" contained in Article 30, Section 6(A)(1) is reasonable considering that the grievant expected to receive the same rating as before, and her supervisors provided her with only positive feedback. *Id.* at 9.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Authority reviews questions of law raised by exceptions to an arbitrator's 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 a standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *Id.*

The Authority recently revised the analysis that it will apply when reviewing management-rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC, S.F. Region*). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, the Authority examines whether the award provides a remedy for a violation of either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision that was negotiated pursuant to § 7106(b) of the Statute. *Id.* In setting forth its revised analysis, the Authority specifically rejected the continued application of the reconstruction standard set forth in *United States Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*). *FDIC, S.F. Region*, 65 FLRA at 106-107.

Applying this analysis, we reject the Agency's exception that the award's remedy is contrary to law. This exception is based entirely on the assertion that the remedy does not reflect a reconstruction of what the Agency would have done had it not violated the parties' agreement. Exceptions at 4-5. As discussed

above, such reconstruction is not the standard to be applied to a remedy directed by an arbitrator. Moreover, the Agency concedes that the award enforces a properly negotiated contract provision. *See id.* (implying only that the remedy does not satisfy prong II of the *BEP* framework); *see also FDIC*, 65 FLRA 179, 181 (2010) (noting that the agency conceded that the award enforced a properly negotiated contract provision); *FDIC, S.F. Region*, 65 FLRA at 103, 107 (finding that the award enforced a properly negotiated contract provision when the agency only challenged the award under prong II of the *BEP* framework and it conceded that prong I was satisfied). Accordingly, we find that the award does not impermissibly affect management rights by failing to reconstruct what the Agency would have done if it had not violated the contract and deny the Agency's contrary to law exception.[7] *See, e.g.*, *FDIC, S.F. Region*, 65 FLRA at 107.

B. The Arbitrator did not exceed his authority.

The Agency asserts that "the Arbitrator clearly overstepped his authority when he directed that the [g]rievant's appraisal for . . . Critical Element 4 be based on [her] reasonable belief and not the standards set [forth] in the parties' agreement . . . ." Exceptions at 5. We construe this argument as a contention that the Arbitrator exceeded his authority. *See AFGE, Local 933*, 58 FLRA 480, 482 (2003) (construing the union's assertion that the arbitrator "strayed far outside his authority" as a claim that the arbitrator exceeded his authority); *AFGE, Local 1668*, 51 FLRA 714, 718 (1995) (construing the union's claims that the award was deficient because the arbitrator failed to address specific provisions of the parties' agreement as contentions that the arbitrator exceeded 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 the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. *See U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).

The Agency's assertion does not establish that any of the circumstances set forth above are present here; specifically, the Agency has not demonstrated that the Arbitrator failed to resolve an issue submitted, resolved an issue not submitted, disregarded any specific limitations on his authority, or awarded relief to anyone other than the grievant. *See U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995) (finding that the award was not deficient on the ground that the arbitrator exceeded his authority where the excepting party did not establish that the arbitrator failed to resolve an issue submitted to arbitration, disregarded specific limitations on his authority, or awarded relief to persons not encompassed by the grievance).

Accordingly, we deny the Agency's exception.

C. The award does not fail to draw its essence from the parties' agreement.

The Agency notes that, in accordance with Article 30, Section 2, it put the grievant on notice of the Agency's performance standards and that the grievant never indicated that the performance standards were unclear in any way. Exceptions at 5-6. Also, the Agency asserts that, because "the award inserts the [g]rievant's reasonable belief as the major determining factor for the performance rating[,]" the award contradicts the parties' agreement. *Id.* at 6. The Agency claims that the award is contrary to Article 30, Section 6(A)(1) because a fully successful rating cannot reasonably be considered as below the "expected level." *Id.* at 7. Finally, the Agency asserts that, by obligating the grievant's first-line supervisor to take measures such as additional meetings to provide the grievant with negative feedback, the award conflicts with Article 30, Section 6(A)(3) which "requires only one 'progress review during the rating period[.]'" *Id.*; *see also id.* at 6. We construe these assertions as claims that the award fails to draw its essence from the agreement. *See NTEU, Chapter 193*, 65 FLRA 281, 282, 283 (2010) (construing the union's argument as an essence exception despite the fact that the union only maintained that the award was contrary to law).

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,*

7. For the reasons set forth in her concurring opinion in *FDIC, S.F. Region*, 65 FLRA at 112, Chairman Pope agrees that the Agency provides no basis for finding the Arbitrator's remedy deficient because the remedy is reasonably related to Article 30 and the harm being remedied.

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) (*U.S. DOL (OSHA*). 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.

Although the Agency implies that the Arbitrator found that it violated Article 30, Section 2 of the parties' agreement, the Arbitrator did not find that the Agency violated the agreement because the grievant was unaware of the standards and elements used in her performance appraisal. *See* Exceptions at 5-6. Instead, the Arbitrator found that the grievant was unaware that her first-level supervisor viewed her performance as fully successful rather than excellent. *See* Award at 21. Moreover, the Arbitrator determined that, because the grievant's supervisor was aware that she expected to be rated at the exceptional level, the Agency violated Article 30, Section 6 of the parties' agreement by not taking necessary measures to provide the grievant with negative feedback. *Id.* Consequently, because its assertion is based upon a misunderstanding of the Arbitrator's award, it does not demonstrate that the award fails to draw its essence from the parties' agreement. *See NAGE, Local R4-45*, 55 FLRA 789, 794 (1999) (determining that, because the agency's exception was based on a misstatement of the arbitrator's award, the agency failed to demonstrate that the remedy failed to draw its essence from the agreement).

Similarly, the Agency's claim that the award conflicts with the parties' agreement because it "inserts the [g]rievant's reasonable belief as the major determining factor for the performance rating" is without merit. Exceptions at 6. As noted previously, the Arbitrator did not find that the Agency should have considered the grievant's evaluation of her own performance when issuing her a rating for Element 4. Award at 21. Rather, the Arbitrator simply took into account the grievant's reasonable expectation and the Agency's awareness of her expectation in determining that the Agency violated Article 30, Section 6 of the parties' agreement. *Id.* Therefore, because this assertion also is based upon a misunderstanding of the Arbitrator's award, it provides no basis for finding that the award fails to draw its essence from the parties' agreement. *See NAGE, Local R4-45*, 55 FLRA at 794.

Also, although the Agency asserts that the award conflicts with Article 30, Section 6 because a fully successful rating cannot reasonably be considered as below the "expected level," its assertion does not demonstrate that the award fails to draw its essence from the agreement under any of the pertinent tests. Exceptions at 7. Article 30, Section 6(A)(1) of the parties' agreement states that "when there is sufficient indication that performance is below the expected level, additional steps including meetings, should be taken to provide feedback." Opp'n, Attach. 2 at 100. Here, the Arbitrator considered the meaning of the term "expected level" from the grievant's perspective rather than from the Agency's perspective. *See* Award at 21. The Arbitrator determined that, in the grievant's case, the "expected level" of performance for Element 4 was the exceptional level because the grievant had received an exceptional rating during the prior performance rating period, and the grievant's first-line supervisor was on notice that she hoped to receive another exceptional rating for Element 4. *Id.* Although others likely would interpret the term "expected level" differently than the Arbitrator, his interpretation of "expected level" is not implausible. *See U.S. DOL (OSHA)*, 34 FLRA at 575-76 (determining that the Authority will not find that an award fails to draw its essence from the agreement even if a party believes that the arbitrator misinterpreted the agreement); *Dep't of Health & Human Servs., SSA*, 32 FLRA 79, 88 (1988) (finding that, although the agency or the Authority might have interpreted the agreement differently than the arbitrator, the agency's essence exception should be denied). Moreover, considering that the term "expected level" is not defined by the parties' agreement and that an arbitrator's interpretation of an agreement's provisions is accorded deference, the Agency has failed to demonstrate that the Arbitrator's interpretation of "expected level" is irrational. *See* Opp'n, Attach. 2 (containing no definition of the term "expected level"); *see also AFGE, Local 933*, 65 FLRA 9, 11 (2010) (finding that the union's reliance on a dictionary definition of the word "routine" did not demonstrate that the arbitrator's interpretation of "routine work assignments" was implausible, unfounded, irrational, or in manifest disregard of the agreement); *NTEU*, 63 FLRA 299,

300 (2009) (denying the union's essence exception because the term "Service-wide in nature" was not defined in the agreement and the union provided no basis to conclude that the arbitrator was constrained in his interpretation of the term).

Finally, the Agency's claim that the award expands the terms of Article 30, Section 6 by requiring it to take additional steps, including meetings, to provide feedback to the grievant, is without merit. Exceptions at 6-7. In this case, the Arbitrator found that, in accordance with Article 30, Section 6, the grievant's first-line supervisor was required to take necessary steps, such as meetings, to provide the grievant with negative feedback because he viewed her as performing below the "expected level." Award at 21. The Arbitrator's interpretation of Article 30, Section 6 of the parties' agreement is neither implausible nor irrational. Although Article 30, Section 6(A)(3) only requires that a hiring official conduct *at least* one face-to-face performance review with a subordinate, it does not preclude that hiring official from holding additional meetings. Opp'n, Attach. 2 at 100 (emphasis added). Also, as noted above, Article 30, Section 6(A)(1) of the parties' agreement requires that "when there is sufficient indication that [an employee's] performance is below the expected level, additional steps including meetings . . . be taken to provide [that employee with] feedback." *Id.* Consequently, the Agency has not demonstrated that the Arbitrator's interpretation of the parties' agreement is irrational, implausible, unfounded, or in manifest disregard of the agreement. *See U.S. Dep't of Transp., FAA*, 63 FLRA 15, 18 (2008).

Accordingly, we deny the Agency's exceptions.

V. Decision

The Agency's exceptions are denied.

APPENDIX

Article 30, titled "Performance Management Program," states, in pertinent part:

> Section 2: All employees will receive a performance appraisal based on a comparison of the employee's performance with the standards and elements established for the appraisal period.
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> . . . .
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> Section 6:
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> A. Progress Reviews
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> 1. The rating official shall communicate with the employee throughout the rating period concerning progress toward meeting standards in his/her Performance Plan. Formal face to face conversations are one way this communication can occur. Communication may also include such things as comments on written products the employee has submitted, e-mail comments regarding assignments, suggestions concerning better ways of conducting business, etc. Such feedback coupled with the regular mid year Progress Review will be sufficient for most employees to get feedback on expectations and measure progress toward meeting these expectations. However, when there is sufficient indication that performance is below the expected level, additional steps including meetings, should be taken to provide feedback.
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> 2. The rating official may initiate discussions to provide feedback concerning performance. Each discussion should be candid and forthright and aimed at identifying performance strengths and weakness; barriers to success; methods for improving performance; training needed; etc.
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> 3. The rating official shall conduct at least one (1) documented face-to-face progress review during the period between establishment of the Performance Plan and the end of the rating period, generally at mid-year. During any progress review, the rating official and employee may discuss:
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> . a. the employee's accomplishments;
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> b. performance measures remaining to be accomplished and any barriers which may impede their accomplishment;
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> c. revisions to the plan which may reflect changes in work assignments or program initiatives;
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> d. deficiencies in performance and required improvements,and
>
> e. training and developmental needs.
>
> . . . .

Opp'n, Attach. 2 at 97, 100-01.