65 FLRA No. 137

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 220
(Union)

0-AR-4327

DECISION

March 25, 2011

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 Gail R. Smith 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.[1]

The Union filed a grievance alleging that the Agency violated the parties' collective bargaining agreement (CBA) when more than one management official (official) participated in mid-year performance discussions (mid-year discussions) with individual employees. The Arbitrator sustained the grievance and directed the Agency to conduct future mid-year discussions with only one management official participating. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency's bargaining-unit employees (employees) receive annual performance ratings. Award at 6-7. During each performance evaluation year (year), each individual employee has a mid-year discussion with management. *Id.* at 7. The Union filed a grievance alleging that the Agency violated the CBA when, in some instances, more than one official attended an employee's mid-year discussion. *Id.* at 8. When the grievance was unresolved, the parties proceeded to arbitration, where the Arbitrator defined the issue in dispute as follows: "Is Article 21[2] of the [CBA] [(Article 21)] violated when more than one individual participates on the Agency's behalf during a mid-year performance discussion with a[n employee]?" *Id.* at 9.

Before the Arbitrator, the Union asserted that, under the parties' previous agreement, "it was extremely rare" for more than one official to participate in a performance discussion with an employee and that, during negotiations for the new CBA, "the Agency never informed the Union that it wanted to have more than one management official involved in any of the performance discussions." *Id.* at 15-16. Thus, the Union argued that Article 21 should be read as an expression of the parties' continuing agreement that, except in rare circumstances, only one official would participate in mid-year discussions. *See id.* However, at the arbitration hearing, an Agency witness who had participated in negotiating the CBA "insisted that the Agency informed [the Union] that more than one . . . official [c]ould appear during the . . . mid-year . . . discussion[s]." *Id.* at 13. Moreover, the Agency contended that interpreting Article 21 in a manner that prohibited the attendance of multiple officials at such discussions would "violate[] management's right to assign work under [§] 7106(a)(2)(B) of . . . the Statute." *Id.* at 20 (internal quotation marks omitted).

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1. A related matter involving these same parties is currently pending before the Authority on exceptions to an award of Arbitrator Charles Feigenbaum, and the exceptions to that award have been docketed as Case No. 0-AR-4509.

2. Article 21 of the CBA provides, in pertinent part:

> At least once during the appraisal period, management will have a documented performance discussion with each employee regarding the employee's performance. During the discussion, management should discuss the employee's contributions and results achieved . . ., reinforce expectations, and identify needs for performance management.
> . . . .
> Managers should document the content of performance discussions. . . .
> Employees and supervisors will sign the performance plan to acknowledge that the [mid-year] discussion was held.

Exceptions, Attach., Joint Ex. 1 at 131-32 (Art. 21, § 6.C.).

The Arbitrator found that Article 21 employed both singular and plural word forms – "including 'manager' or 'managers,' 'management,' 'the appraising official,' and 'supervisors'" – when referencing officials who would participate in performance discussions, and "there is no consistency as to when or how those terms are used." *Id.* at 17; *see also id.* at 17-19 (analysis of ambiguity in singular and plural contract terms). In light of the bargaining history and the parties' prior conduct, the Arbitrator concluded that "if the parties . . . had intended to allow for more than one [official] to attend [mid-year discussions]," then that intention would have been stated in "unambiguous language." *Id.* at 19. In the absence of such an unambiguous statement, she found that the parties "never jointly agreed . . . during the negotiations" that more than one official could participate in mid-year discussions. *Id.*

With regard to the Agency's contention that prohibiting more than one official from participating in mid-year discussions would violate management's rights, the Arbitrator found that, because management still "'retains discretion to choose who will evaluate an employee's performance'" and participate in the discussions, she was not interpreting Article 21 in a manner that would "adversely impact management's right to assign work[.]" *Id.* at 20-21 (quoting *NTEU*, 46 FLRA 696, 746 (1992)). Therefore, the Arbitrator concluded that the attendance of more than one official at mid-year discussions violated Article 21, and she directed the Agency "to cease from perpetuating this practice . . . in the future[.]" *Id.* at 21.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to management's rights to assign work and direct employees under § 7106(a) of the Statute and that management was "acting well within its right to assign work when it assigned more than one [official] to be present during" mid-year discussions. Exceptions at 3-7. In this regard, the Agency contends that the award precludes the assignment of particular duties to certain officials – including the assignment of "'additional supervisory duties to an employee who is already a supervisor[,]'" *id.* at 4 – which, according to the Agency, the Authority has found to be contrary to the right to assign work. *Id.* at 4-8 (citing *U.S. Dep't of VA, Alaska VA Healthcare Sys., Anchorage, Alaska*, 60 FLRA 968, 970 (2005) (*Alaska VA*); *U.S. Dep't of HHS, Health Care Fin. Admin.*, 57 FLRA 462, 463 (2001) (*HCFA*)). The Agency further contends that, although contract provisions negotiated pursuant to § 7106(b) of the Statute may not "completely prevent management from exercising its right to assign work[,]" the Arbitrator interpreted Article 21 so that it operates in such a manner. *Id.* at 9. Finally, the Agency asserts that the award fails to draw its essence from the plain wording of Article 21 of the CBA, which the Agency claims "does not prohibit or explicitly limit" the number of officials who may participate in mid-year discussions. *Id.*

B. Union's Opposition

The Union maintains that Article 21, as interpreted by the Arbitrator, is not contrary to management's rights. Opp'n at 1-2. According to the Union, Article 21, Section 6.C. of the CBA (Section 6.C.) is an enforceable procedure under § 7106(b)(2) of the Statute because: (1) it does not specify which official must participate in a mid-year discussion, *id.* at 4 n.1; and (2) although it provides "'the manner or guidelines'" for performance discussions between an official and an employee, it does not limit communications among officials, *id.* at 3. Finally, the Union argues that the Authority should reject the Agency's essence exception because it constitutes a request that the Authority reinterpret Article 21 of the CBA. *Id.* at 7.

IV. Analysis and Conclusions

A. The award is not contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute.[3]

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

3. Although the Agency also contends that the award is contrary to its right to direct employees, Exceptions at 3, 9, it provides no supporting arguments for this contention. Therefore, we deny the contention as a bare assertion. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Port of Seattle, Seattle, Wash.*, 60 FLRA 490, 492 n.7 (2004) (where a party does not provide any arguments or authority to support its exception, the Authority will deny it as a bare assertion).

37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See 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) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC*). Under the revised analysis, the Authority assesses whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115.[4] If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b).[5] *Id.*

The right to assign work under § 7106(a)(2)(B) of the Statute includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. *See U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 558 (1999) (citation omitted). For example, the Authority has held that a contract provision limiting the number of agency representatives at meetings with employees affects management's right to assign work. *See Alaska VA*, 60 FLRA at 970 (citing *HCFA*, 57 FLRA at 463 (award interpreting contract provision as restriction on agency's ability to assign more than one representative to Step 1 grievance meetings affected right to assign work)). The award limits the number of officials that the Agency may assign to conduct a mid-year discussion. Therefore, consistent with *Alaska VA* and *HCFA*, we find that the award affects the right to assign work.

The Union contends that Section 6.C. constitutes a procedure under § 7106(b)(2) of the Statute. The Authority has found that contract provisions affecting the number of employees, including officials, who perform a task may constitute procedures under § 7106(b)(2), so long as the provisions do not specify the particular persons or positions who will perform the task. *Compare Nat'l Ass'n of Indep. Labor*, 62 FLRA 1, 1-3 (2007) (Chairman Cabaniss concurring) (finding provision that required "supervisors," "peer panel," and "higher level management" to participate in review of performance plans constituted procedure, where management chose who would serve in those capacities), *and NFFE, Local 2099*, 35 FLRA 362, 363-68 (1990) (*Local 2099*) (finding provision that required use of rating and ranking panel, rather than single rating and ranking official, constituted procedure, where "[a]gency retain[ed] its ability to designate" members of the panel), *with AFGE, Local 2298*, 35 FLRA 1128, 1135-36 (1990) (finding proposal for rating and ranking panel did not constitute procedure, where proposal prohibited the assignment of selecting official to panel). The Arbitrator found, and the Union concedes, that the Agency retains the authority to choose any official to conduct any given mid-year discussion. *See* Award at 20-21; Opp'n at 4 n.1; *cf. Local 2099*, 35 FLRA at 363-68. Thus, consistent with the foregoing precedent, the fact that Section 6.C. affects the number of officials who may attend mid-year discussions does not preclude a finding that Section 6.C. constitutes a procedure under § 7106(b)(2).

In addition, when determining whether a contract provision involving performance discussions constitutes a procedure under § 7106(b)(2), the Authority has noted that agencies have a statutory duty, under 5 U.S.C. § 4302(a)(2) (§ 4302(a)(2)), to "encourage employee participation in establishing performance standards[.]" *E.g.*, *Patent Office Prof'l Ass'n*, 47 FLRA 10, 30-31 (1993); *Patent Office Prof'l Ass'n*, 29 FLRA 1389, 1389-92 (1987); *AFGE, AFL-CIO, Local 32*, 3 FLRA 783, 788-89 (1980) (*Local 32*). This duty includes an obligation "to bargain on procedures which management officials will observe in the development *and implementation* of performance standards[,]" *NTEU*, 35 FLRA 254, 256 (1990) (emphasis added), such as "the form of the employee participation" required by § 4302(a)(2), *Local 32*, 3 FLRA at 789. For example, in *NFFE*, 13 FLRA 426, 426-28 (1983), the Authority

4. For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the award affects the exercise of the asserted management right. 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); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Terre Haute, Ind.*, 65 FLRA 460, 462 n.2 (2011); *Soc. Sec. Admin., Dallas Region*, 65 FLRA 405, 408 n.5 (2010); *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). Member Beck would conclude that the Arbitrator's award is a plausible interpretation of the parties' agreement and deny the exception.

5. When an award affects a management right under § 7106(a)(2) of the Statute, the Authority may also examine whether the award enforces an applicable law. *EPA*, 65 FLRA at 115 n.7.

examined a proposal that required a supervisor to discuss a performance appraisal with an employee before discussing it with other higher officials. In finding that the proposal constituted a procedure under § 7106(b)(2), the Authority noted that the requirement to hold a discussion did not preclude the agency from taking whatever actions it deemed appropriate before or after that discussion occurred. *NFFE*, 13 FLRA at 426-28. Similarly, in *NTEU*, 42 FLRA 964, 972-79 (1991), the Authority found that a sentence of a provision requiring that the "establishment of performance standards and the documentation of accomplishments should be a joint planning and communication process between [the Union,] the employee, and his[or]her supervisor" was a procedure because it did not affect the content of performance standards, but merely established the "manner in which an agency meets the requirement of [§ 4302(a)(2)]."

As interpreted and applied by the Arbitrator, Section 6.C. does not preclude management from assigning the task of assessing an employee's performance, or developing feedback based on that assessment, to more than one official. Instead, it sets forth the parameters for a discussion with an employee of the conclusions *already reached* by whomever the Agency has previously assigned to assess the employee's performance and construct appropriate feedback based on that assessment. In that respect, Section 6.C. is similar to the proposal found to be a procedure in *NFFE*, 13 FLRA at 426-28. Moreover, Section 6.C. does not alter the content of performance standards. Rather, in keeping with the requirements of § 4302(a)(2), Section 6.C. regulates the manner in which the "joint planning and communication process" concerning performance standards will occur between management and an employee, and, in that respect, it is similar to the sentence of the provision in *NTEU*, 42 FLRA at 972-79, that the Authority found to be a procedure. Therefore, consistent with the precedents discussed above, we find that Section 6.C., as interpreted and applied by the Arbitrator, constitutes a procedure under § 7106(b)(2) and that, as a result, the award is not contrary to the right to assign work.

For the foregoing reasons, we deny the contrary-to-law exception.

B. The award draws its essence from the CBA.

The Agency contends that the award's restriction on the number of officials participating in mid-year discussions fails to draw its essence from the CBA. 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.

Although the Agency contends that the award ignores the CBA's plain wording, the Arbitrator found that the contractual wording is not plain because Article 21 employs both singular and plural word forms – "including 'manager' or 'managers,' 'management,' 'the appraising official,' and 'supervisors'" – when referencing officials who would participate in performance discussions, and "there is no consistency as to when or how those terms are used." Award at 17. Therefore, the Arbitrator determined that interpreting Article 21 required her to consider other contractual provisions and the parties' past conduct, including her findings that "it was extremely rare" for more than one official to participate in a performance discussion under the parties' previous agreement and that, "if the parties . . . had intended to allow for more than one [official] to attend [mid-year discussions]," then that intention would have been stated in "unambiguous language." *Id.* at 15-19. The Agency does not demonstrate that the Arbitrator's findings in this regard are irrational, unfounded, implausible, or in manifest disregard of the CBA. *See OSHA*, 34 FLRA at 575. Accordingly, we deny the essence exception.

V. Decision

The Agency's exceptions are denied.