67 FLRA No. 110

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 190
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
BUREAU OF THE PUBLIC DEBT
PARKERSBURG, WEST VIRGINIA
(Agency)

0-AR-4935

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DECISION

May 20, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Jay M. Siegel issued an award finding that: (1) the Agency was not required to counsel the grievant before rating her at the "meets" level in the customer service element of her performance evaluation; and (2) the grievant received a fair and objective performance evaluation for the appraisal period in question. We must decide two substantive questions.

First, we must determine whether the award fails to draw its essence from the parties' agreement because "the [A]rbitrator allowed the [A]gency's subjective comparison of the grievant to that of her co-workers."[1] Because no provision of the parties' agreement on which the Union relies would prevent either the Arbitrator or the Agency from comparing the grievant's performance to that of her co-workers, we find that the Union has not demonstrated that the award fails to draw its essence from the parties' agreement.

Second, we must determine whether the award is based on a nonfact because the Arbitrator found that the grievant did not display a pattern of decrease in her performance and that her overall performance had not declined. Because the Union is merely challenging the Arbitrator's interpretation of the parties' agreement, we find that the Union has failed to demonstrate that the award is based on a nonfact.

II. Background and Arbitrator's Award

The grievant is a senior customer service specialist employed by the Agency. The Agency evaluates its employees using a three-tiered rating system of "[e]xceeds," "[m]eets," and "[d]oes [n]ot [m]eet."[2] An employee's overall rating is based on four elements: (1) professional application; (2) job knowledge/technical skills; (3) teamwork; and (4) customer service. Under the parties' agreement, an employee is assigned a certain number of points based on the ratings he or she receives in each of these four categories. Both overall ratings and performance awards are based on the total number of points an employee receives.

In her performance appraisal from the year before the one at issue here, the grievant received an overall rating of "meets" and a rating of "exceeds" in the customer-service job element. Based on her overall points, she also received a performance award.

During the appraisal year at issue here, the grievant went on approved leave under the Family and Medical Leave Act[3] (FMLA), for approximately sixteen weeks. She had a mid-year performance review, at which she received a "meets" rating for each job element. In her year-end performance appraisal, the grievant again received a "meets" rating for each job element, as well as a "meets" rating overall. In comparison with her previous year-end appraisal, the grievant's customer-service rating had declined from "exceeds" to "meets." This decline in the customer-service element caused a decline in the grievant's overall number of points. As a result, she did not receive a performance award.

The Union filed a grievance alleging that: (1) the Agency was obligated under the parties' agreement to counsel the grievant before lowering her rating in the customer-service element from "exceeds" to "meets"; and (2) the grievant did not receive a fair and objective appraisal. The grievance was unresolved, and the parties proceeded to arbitration.

The Arbitrator concluded that the Agency was not required to counsel the grievant, and that the grievant received a fair and objective performance appraisal. Regarding the counseling requirement, the Arbitrator found that Sections 12(D) and (E) of Article 18 of the parties' agreement do not require the Agency to counsel an employee when an employee's performance declines

[1] Exceptions at 9.

[2] Award at 3.

[3] 5 U.S.C. §§ 6381-6387.

in one job element from "exceeds" to "meets." Section 12(D) provides that "the supervisor shall counsel employees in relation to their overall performance on an as[-]needed basis."[4] Section 12(E) provides that "[c]ounseling shall take place as soon as a manager notices a decrease in performance. Special emphasis should be given to those cases where an employee's performance indicates a decline in the overall rating."[5] Interpreting these sections, the Arbitrator found that the Agency was not required to counsel the grievant because her "overall performance did not decline."[6] He reasoned that although she "may not have received as glowing an appraisal in 2011," her overall performance did not decline because "the [g]rievant's overall rating in 2010 was [m]eets and her overall rating in 2011 was the same."[7] The Arbitrator further interpreted Section 12(E) as mandating counseling when a manager notices a "pattern of decrease in [an employee's] performance."[8] He concluded that a lower rating in only one performance element would not constitute a pattern of decrease that would trigger the Agency's obligation to counsel.

With respect to whether the grievant received a fair and objective appraisal, the Arbitrator found that the evidence showed that her performance did not rise to an "exceeds" level based on her written performance standards. He noted, for example, that "during the time period in question, the [g]rievant's work had to be reassigned from her 233 times."[9] On ninety-three of those occasions, "the reassignment was attributable to the [g]rievant not completing her work within the established time frames."[10] In addition, "the [g]rievant had [sixty] occurrences of not allowing one day for back[end] processing."[11] Finally, the Arbitrator found that during the time when the grievant was at work during the appraisal period, she ranked seventh out of eight among her co-workers with respect to the number of cases produced per hour. Based on these findings, the Arbitrator concluded that the grievant's performance was not as strong in terms of timeliness and productivity as it had been the previous year. Accordingly, the Arbitrator found that she received a fair and objective appraisal when she was rated at the "meets" level overall.

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

[4] Award at 3.
[5] *Id.*
[6] *Id.* at 13.
[7] *Id.*
[8] *Id.* at 14 (internal quotation marks omitted).
[9] *Id.* at 15.
[10] *Id.*
[11] *Id.*

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar certain Union exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[12]

The Union contends that the award is contrary to law because the Arbitrator failed to find that: (1) the grievant made a prima facie case of reprisal by showing that the Agency lowered the grievant's performance appraisal as a direct result of her FMLA absences;[13] and (2) the Agency violated 5 U.S.C. § 4302(b)(1)-(2) by failing to communicate performance standards that were sufficiently specific to provide the grievant with a firm benchmark toward which to aim her performance.[14] However, there is no indication in the record that the Union presented any argument regarding reprisal[15] or 5 U.S.C. § 4302(b)(1)-(2) to the Arbitrator. Because the Union could have, but did not, make these arguments and cite this authority to the Arbitrator, it may not do so now.[16] We therefore find that §§ 2425.4(c) and 2429.5 bar the Union's contrary-to-law exceptions.

IV. Analysis and Conclusions

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

The Union claims that the award fails to draw its essence from the parties' agreement. 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.[17] 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

[12] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).
[13] *See* Exceptions at 6-7.
[14] *See id.* at 7-9.
[15] *See* Opp'n at 3 ("The words 'reasonable accommodation' and 'reprisal' were not uttered during the arbitration, nor are these words contained in [the Union]'s closing brief.").
[16] *See, e.g., U.S. DOD Domestic Dependent Elem. & Secondary Sch.*, 67 FLRA 138, 139 (2013) (holding that arguments based on authority not cited before arbitrator are barred under §§ 2425.4(c) and 2429.5); *NTEU*, 61 FLRA 846, 848 (2006) (holding that discrimination claim not raised before arbitrator was barred under §§ 2425.4(c) and 2429.5).
[17] *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

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.[18] 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."[19]

According to the Union, in concluding that the grievant received a fair and objective performance evaluation, "the [A]rbitrator allowed the [A]gency's subjective comparison of the grievant to that of her co-workers."[20] "In doing so," it contends, "the Arbitrator failed to consider that the [A]gency can only rate [the g]rievant's performance against established job elements."[21] The Union argues that "[t]here is no language in the [parties' agreement] that implies or infers that employee performance will be rated against one[']s peer group."[22] The Union relies on Article 18, Section 12(A) of the parties' agreement, which provides, in pertinent part, that "[a]ppraisals will be made in a fair, objective manner and will reflect actual performance against established written standards."[23] The Union also cites Article 12, Section 5 of the parties' agreement, which states that "the performance of all employees covered by this [a]greement will be measured under . . . four standards," specifically, "[p]rofessional [a]pplication," "[j]ob [k]nowledge and [t]echnical [s]kills," "[t]eamwork," and "[c]ustomer [s]ervice."[24] However, nothing in the sections of the parties' agreement on which the Union relies would prohibit either the Arbitrator or the Agency from comparing the grievant's performance to that of her co-workers. Moreover, nothing in the award indicates that the Agency performed such a comparison at the time it evaluated the grievant. Thus, we find that the Union has failed to demonstrate that the award fails to draw its essence from the parties' agreement under the standards set forth above.

B. The award is not based on a nonfact.

The Union also argues that the award is based on a nonfact. 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.[25] However, a challenge to an arbitrator's interpretation of the parties' agreement cannot be challenged as a nonfact.[26]

The Union claims that the award is based on two nonfacts: (1) the Arbitrator incorrectly found that the grievant did not display a "pattern of decrease"[27] in her performance; and (2) the Arbitrator erroneously determined that the grievant's overall performance had not declined.[28] In fact, the Union argues, the grievant's failure to submit her work within established time frames ninety times "establish[es] a pattern of decrease in performance."[29] And, the Union claims, because "the rating decrease of one job element deprived the [g]rievant of receiving a performance award, . . . her overall performance had, in fact, declined."[30]

The Union does not identify a central fact underlying the award that is erroneous. It merely challenges the Arbitrator's interpretation of the parties' agreement with respect to what triggers the Agency's obligation to counsel. Specifically, the Arbitrator interpreted Article 18, Section 12(E) of the parties' agreement to mean that "a decline in a single element" would not constitute a "pattern of decrease in performance" that would require counseling.[31] Further, the Arbitrator interpreted Article 18, Section 12(D) of the parties' agreement to require counseling only when an employee's "overall performance declines."[32] He interpreted "overall performance" to mean an employee's overall performance rating, and not whether an employee received a performance award.[33] As stated above, challenges to an arbitrator's contract interpretations do not provide a basis for finding nonfacts.[34] We therefore find that the Union has failed to demonstrate that the award is based on a nonfact.

V. Decision

We dismiss the Union's exceptions, in part, and deny them, in part.

[18] *See U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[19] *Id.* at 576.
[20] Exceptions at 9.
[21] *Id.*
[22] *Id.* at 10.
[23] *Id.* at 9.
[24] *Id.* at 9-10.
[25] *E.g., U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).
[26] *E.g., United Power Trades Org.*, 67 FLRA 311, 315 (2014).
[27] Award at 14.
[28] Exceptions at 10-11.
[29] *Id.* at 11.
[30] *Id.*
[31] Award at 14 (internal quotation marks omitted).
[32] *Id.* at 13.
[33] *Id.* at 13-14.
[34] *United Power Trades Org.*, 67 FLRA at 315.