

**67 FLRA No. 41**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
COUNCIL 215  
(Union)

and

SOCIAL SECURITY ADMINISTRATION  
OFFICE OF DISABILITY  
ADJUDICATION AND REVIEW  
REGION VI  
OKLAHOMA CITY, OKLAHOMA  
(Agency)

0-AR-4859  
(67 FLRA 12 (2012))

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ORDER DENYING  
MOTION FOR RECONSIDERATION

January 9, 2014

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Before the Authority: Carol Waller Pope, Chairman, and  
Ernest DuBester and Patrick Pizzella, Members  
(Member Pizzella concurring)

**I. Statement of the Case**

Arbitrator Patrick Halter found that the Agency violated the parties' collective-bargaining agreement in appraising an employee and in denying her grievance. In one award (the original award), the Arbitrator directed the Agency to raise the grievant's performance ratings. But in a later award (the clarified award), he found that the grievant's ratings should not be raised. The Union filed exceptions to the clarified award, and the Authority denied those exceptions in *AFGE, Council 215 (AFGE)*.<sup>1</sup>

The issue before us is whether we should reconsider *AFGE* because, as the Union claims, the Authority disregarded Authority precedent regarding arbitral remedies required in performance-appraisal cases. Because the Authority no longer applies the precedent cited by the Union, we decline to reconsider *AFGE*.

**II. Background**

In the original award, the Arbitrator found that the Agency violated the parties' collective-bargaining

agreement in appraising the grievant and in denying her grievance. As a remedy, the Arbitrator raised the grievant's ratings for three disputed job elements from level 3 to level 4, stating that there was insufficient information for him to raise the ratings to level 5. The Union requested clarification of the original award because the Agency's appraisal system does not have a level-4 rating. In response, the Arbitrator issued the clarified award, which stated, with respect to remedy: "[T]he grievant's ratings for [the disputed job elements] are at [I]level 3 – there is insufficient information to reach [I]level 5."<sup>2</sup> As a further remedy, the Arbitrator directed that a copy of the award be placed in certain management officials' personnel files.

The Union filed exceptions to the clarified award. As relevant here, the Union argued that the clarified award's "non-remedy" was contrary to § 7106 of the Federal Service Labor-Management Relations Statute (the Statute).<sup>3</sup> In a related footnote, the Union added that the Arbitrator's "declaratory" remedy was "inadequate" under Authority precedent,<sup>4</sup> particularly the Authority's decision in *AFGE, Local 3615 (Local 3615)*.<sup>5</sup> Further, the Union asserted that the Arbitrator's refusal to raise the grievant's ratings to level 5 resulted from his mistaken belief that he could not do so because he had insufficient information to "reconstruct" the ratings the Agency would have issued if it had not violated the parties' agreement.<sup>6</sup> Citing Authority precedent concerning § 7106, the Union argued that the Arbitrator should have provided a remedy, "regardless of insufficient record evidence," because the Authority no longer requires arbitrators to fashion remedies that reconstruct what agencies would have done but for their legal or contractual violations (the reconstruction requirement).<sup>7</sup>

In *AFGE*, the Authority rejected the Union's claim that the Arbitrator erred by providing "no remedy" for the Agency's failure to properly appraise the grievant.<sup>8</sup> In particular, the Authority stated that "when law does not require a particular remedy, an arbitrator is not required to remedy a violation of a collective-bargaining agreement."<sup>9</sup>

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<sup>2</sup> Clarified Award at 3.

<sup>3</sup> Exceptions at 9.

<sup>4</sup> *Id.* at 9 n.4.

<sup>5</sup> 45 FLRA 631 (1992).

<sup>6</sup> Exceptions at 6-8.

<sup>7</sup> *Id.* at 7-8 (citing *U.S. Dep't of the Army, Def. Language Inst., Monterey, Cal.*, 65 FLRA 668, 671 (2011) (*Def. Language Inst.*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-08 (2010) (Chairman Pope concurring in part)).

<sup>8</sup> 67 FLRA at 13.

<sup>9</sup> *Id.* (citing *Nat'l Ass'n of Air Traffic Specialists, NAGE, SEIU*, 61 FLRA 558, 559 (2006) (*Air Traffic*)).

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<sup>1</sup> 67 FLRA 12 (2012).

The Authority also rejected the Union's argument that the Arbitrator's erroneous belief that he could not raise the grievant's ratings resulted in a remedy that was contrary to § 7106 of the Statute. Specifically, the Authority found that the Union's exception "misinterpret[ed] the award" as being based on § 7106.<sup>10</sup> Because "there [was] no basis for finding that the Arbitrator relied on § 7106 or Authority precedent concerning the reconstruction requirement when he denied the Union's request to raise the grievant's ratings to level 5," the Authority denied the exception.<sup>11</sup>

The Union has now filed a motion for reconsideration of *AFGE* (motion), and the Agency has filed an opposition to the Union's motion.

### III. Analysis and Conclusions

The Union argues that the Authority disregarded Authority precedent and misinterpreted the Union's exceptions and, in doing so, erred in its conclusions of law. The Authority's Regulations permit a party to request reconsideration of an Authority decision.<sup>12</sup> But a party seeking reconsideration "bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action."<sup>13</sup> One recognized ground for granting reconsideration is that the Authority erred in its conclusions of law.<sup>14</sup> For the following reasons, we find that the Union has not demonstrated that reconsideration is warranted on that ground.

In its motion, the Union asserts that the clarified award conflicts with the Authority's precedent, such as *Local 3615*, on the remedies arbitrators must provide in performance-appraisal cases.<sup>15</sup> In the decisions cited by the Union, the Authority addressed the reconstruction requirement, discussed above, as applied in performance-appraisal cases.<sup>16</sup> Under the reconstruction requirement, if an arbitrator is unable to determine what an employee's performance rating would have been but for an agency's improper appraisal, then the arbitrator must order the agency to reevaluate the employee.<sup>17</sup> And

in *Local 3615*, the Authority applied that requirement to find that declaratory relief was an improper remedy for an agency's failure to properly appraise an employee.<sup>18</sup> Thus, the Union argues that the Authority should have applied this precedent and found that the Arbitrator's failure to direct the Agency to raise the grievant's ratings resulted in an unlawful "declaratory remedy."<sup>19</sup>

The Union's assertion relies on precedent that the Authority no longer follows. As the Union recognizes, the Authority no longer requires arbitrators in performance-appraisal cases, or any other type of case, to apply the reconstruction requirement.<sup>20</sup> In *FDIC, Division of Supervision & Consumer Protection, S.F. Region*,<sup>21</sup> the Authority's lead decision on this point, the Authority concluded that the restriction on arbitrators' remedial authority imposed by the reconstruction requirement was not warranted by the Statute's language, structure, or policies.<sup>22</sup> Rather, the Authority reaffirmed the deference due arbitrators' wide-ranging remedial authority under the Statute, so long as an arbitrator's award is reasonably related to the negotiated provisions at issue and the harm being remedied.<sup>23</sup>

Thus, where an arbitrator finds that an agency's performance appraisal violated a collective-bargaining agreement, Authority precedent does not require an arbitrator to award any particular remedy. And the Authority addressed this issue in *AFGE* by stating that "when law does not require a particular remedy, an arbitrator is not required to remedy a violation of a collective-bargaining agreement."<sup>24</sup> Thus, we no longer apply the reconstruction precedent that the Union relies upon, and the Union's argument does not provide a basis for reconsidering *AFGE*.

In addition, the Union asserts that the Authority misinterpreted the Union's exception as arguing that the Arbitrator misapplied § 7106 of the Statute and the reconstruction requirement. Conceding that the Arbitrator did not rely on "[§] 7106 or Authority precedent," the Union nevertheless asserts that his failure to direct the Agency to raise the grievant's ratings conflicts with Authority precedent requiring certain

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 5 C.F.R. § 2429.17.

<sup>13</sup> *NAIL, Local 15*, 65 FLRA 666, 667 (2011).

<sup>14</sup> See, e.g., *U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 59 (2012).

<sup>15</sup> Motion at 3-4 (citing *Local 3615*, 45 FLRA at 634-38; *U.S. Dep't of HHS, SSA*, 34 FLRA 323, 328 (1990) (*SSA II*); *IRS, Indianapolis Dist.*, 32 FLRA 335 (1988) (*IRS*)).

<sup>16</sup> *Local 3615*, 45 FLRA at 637-38; *SSA II*, 34 FLRA at 328; *IRS*, 32 FLRA at 341.

<sup>17</sup> E.g., *U.S. DOD, Def. Logistics Agency, Def. Contract Mgmt. Command, Def. Contract Mgmt. Area Operations Boston, Boston, Mass.*, 53 FLRA 210, 214-17 (1997); *U.S. Dep't of the Treasury, BEP, Wash., D.C.*, 53 FLRA 146, 154 (1997);

see also *Local 3615*, 45 FLRA at 637-38; *SSA II*, 34 FLRA at 328; *IRS*, 32 FLRA at 341.

<sup>18</sup> 45 FLRA at 638.

<sup>19</sup> Motion at 3-4 (citing *Local 3615*, 45 FLRA at 638-39).

<sup>20</sup> See *Def. Language Inst.*, 65 FLRA at 671; *U.S. Dep't of HHS, Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 570-71 (2011); *FDIC Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA at 106-07.

<sup>21</sup> 65 FLRA 102.

<sup>22</sup> *Id.* at 106-07.

<sup>23</sup> *Id.* at 107.

<sup>24</sup> 67 FLRA at 13 (citing *Air Traffic*, 61 FLRA at 559).

remedies in performance-appraisal cases.<sup>25</sup> However, as discussed above, Authority precedent does not require certain remedies in performance-appraisal cases. Thus, it is immaterial whether the Authority misinterpreted the Union's exception; the Union's arguments still provide no basis for finding that the Authority erred in its conclusions of law.

For the foregoing reasons, the Union's motion does not demonstrate extraordinary circumstances warranting reconsideration.

#### IV. Decision

We deny the Union's motion for reconsideration.

#### Member Pizzella, concurring:

The representatives for AFGE, Council 215 would have been well served in this case to remember an old adage – “be careful what you wish for.”

The grievant, a union official, who spends *at least fifty percent* of her work time on official time (performing non-duty work),<sup>1</sup> complained when her supervisor rated her at a level 3 for her performance during the rating period.<sup>2</sup> The Arbitrator found that the supervisor had not considered the amount of time the grievant spent on “official time” in rating the grievant – a response that could have constituted an actionable grievance under the Federal Service Labor-Management Relations Statute or the parties' agreement – but, nonetheless, found that the supervisor had not treated the grievant “fairly and equitably” under a general provision in the parties' agreement.<sup>3</sup> As a remedy, the Arbitrator inexplicably directed the Agency to change the grievant's rating to level 4 *even though the Agency's rating system does not provide for a level 4 under its performance appraisal system.* (Although it is not uncommon for some skyscrapers to omit a “13th” floor for superstitious reasons, I am unaware of any similar superstition involving the number 4 that could cause the Social Security Administration, Office of Disability Adjudication and Review, or its Region VI in Oklahoma City, to exclude level 4 from a multi-tiered rating system that goes up to level 5.)<sup>4</sup>

I am uncertain whether I am more surprised that the Arbitrator would impose a remedy that is impossible to implement or that the Union would ask the Arbitrator to “clarif[y]” his award to direct a level 5 rating after the Arbitrator had already determined that the Union had presented “insufficient information” to support a level 5 rating.<sup>5</sup> Ignoring the Agency's unexplained aversion to the number 4, both actions, under these circumstances, fail to promote “work practices [that] facilitate and

<sup>1</sup> As I noted in my concurring opinion in *U.S. DHS, CBP*, 67 FLRA 107, 112 (2013) (Concurring Opinion of Member Pizzella), “federal employees were paid more than \$155 million of taxpayer dollars on labor union activities that fall outside of representatives' normal government duties.”

<sup>2</sup> See *AFGE, Council 215*, 67 FLRA 12, 12 (2012) (*Council 215*).

<sup>3</sup> *Id.* (quoting Clarified Award at 3) (internal quotation marks omitted).

<sup>4</sup> The record, in neither *AFGE, Council 215*, nor in the instant request for reconsideration, explains the odd structure in the Agency's performance-management system that omits a level 4 between levels 3 and 5 -- a factor that apparently contributed to the disagreement and the impossible remedy imposed by the Arbitrator.

<sup>5</sup> *Id.* (quoting Clarified Award at 3) (internal quotation marks omitted).

<sup>25</sup> Motion at 2-3.

improve . . . the efficient accomplishment of the operations of the Government.”<sup>6</sup>

As I noted in *CBP*, arbitrators should avoid rendering awards that are “incoherent.”<sup>7</sup> It is apparent to me that an award that is impossible to implement fits that classification. But this inconvenient reality does not relieve the Agency and the Union from their responsibilities. Under these circumstances, and facing an award that was clearly impossible to implement, the interests of all parties involved – the grievant, the Union, and the supervisors – would have been better served had they amicably determined among themselves how to implement the award *without returning the matter to the same Arbitrator*.<sup>8</sup>

To that end, I heartily agree with my colleagues that the Union’s request for reconsideration should be denied. But I write separately to emphasize that the foundation of the Union’s actions – requesting the Arbitrator to direct a level 5 rating (from an award in which they had already prevailed)<sup>9</sup> and requesting that the Authority apply a standard that has not been followed since 2010<sup>10</sup> and implement a remedy that is “not required,”<sup>11</sup> in *both* its original exceptions *and again* in this request for reconsideration – does not “encourage[] the amicable settlement[] of disputes between employees and their [agencies].”<sup>12</sup>

Thank you.

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<sup>6</sup> *CBP*, 67 FLRA at 112 (Concurring Opinion of Member Pizzella).

<sup>7</sup> *Id.*

<sup>8</sup> See 5 U.S.C. § 7101(a)(1)(C).

<sup>9</sup> The Arbitrator directed that a copy of his award, finding a violation of Article 3, Section 2A, be placed in the rating supervisor’s and deciding official’s personnel files. *Council 215*, 67 FLRA at 12.

<sup>10</sup> *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2013) (Chairman Pope concurring in part).

<sup>11</sup> See Majority at 2, 4 (quoting *Council 215*, 67 FLRA at 13).

<sup>12</sup> 5 U.S.C. § 7101(a)(1)(C).