74 FLRA No. 38

NATIONAL LABOR
RELATIONS BOARD UNION
(Union)

and

NATIONAL LABOR RELATIONS BOARD
(Agency)

0-AR-5973

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DECISION

April 9, 2025

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Before the Authority: Colleen Duffy Kiko, Chairman, and Susan Tsui Grundmann, and Anne Wagner, Members

I. Statement of the Case

The Union filed a grievance alleging that a probationary employee's (the grievant's) performance appraisal and rating violated performance-management provisions in the parties' collective-bargaining agreement. At arbitration, the Agency moved to dismiss the grievance on the ground that the parties' agreement does not permit the Union to grieve the Agency's evaluation of probationary employees' performance. Agreeing that the parties' grievance procedure excludes such grievances, Arbitrator Samuel Spencer Stone issued an award granting the motion to dismiss.

The Union filed exceptions to the award, arguing it is contrary to government-wide regulations, is based on a nonfact, and fails to draw its essence from the parties' agreement. Because the Union did not raise its regulatory arguments before the Arbitrator, but could have, we dismiss these arguments under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.[1] And because the Union does not demonstrate the award is based on a nonfact or fails to draw its essence from the agreement, we deny these exceptions.

II. Background and Arbitrator's Award

In June 2022, the Agency hired the grievant as a General Schedule (GS)-11 law clerk, subject to a two-year probationary period. Seven months later, the grievant submitted documentation confirming his admission to the bar, and the Agency approved his promotion to a GS-12 general attorney. The Agency made this promotion retroactive to the date of his bar admission in November 2022.

In May 2023, the Agency conducted a performance appraisal for the five-month period in which the grievant was a law clerk. In this appraisal, the Agency rated him fully successful in the critical element of efficiency (the efficiency element), but noted he "need[ed] to learn to focus on completing investigations and timely writing" the required reports "to submit for review."[2] The Agency cited multiple "examples demonstrating where [the grievant] need[ed] to learn to manage his cases in order to be able to work independently."[3]

One month later, the Agency conducted a second performance appraisal for the six-month period from the grievant's retroactive conversion in November 2022 through May 2023 (attorney appraisal). In the attorney appraisal, the Agency cited similar efficiency issues, including multiple cases in which resolution was "delayed" by the grievant's failure to timely complete necessary assignments.[4] Based on these timeliness issues during the appraisal period, the Agency rated the grievant minimally successful in the efficiency element. As a result of this rating, the Agency approved the grievant for a step increase, rather than a grade increase.

The Union filed a step-two grievance challenging the attorney appraisal, "wherein [the grievant] received a rating of [m]inimally [s]uccessful in" the efficiency element.[5] In that grievance, the Union argued that the Agency violated the parties' agreement after it promoted the grievant by failing to (1) provide him with a new performance plan and (2) explain the expectations for the attorney position. Additionally, the Union claimed that the appraisal narrative was inaccurate because it failed to consider extenuating circumstances that contributed to his

[1] 5 C.F.R. §§ 2425.4(c), 2429.5.
[2] Exceptions, Exs. 1, Law-Clerk Appraisal at 50.
[3] *Id.*
[4] Exceptions, Exs. 1, Attorney Appraisal at 65; *see also id.* ("Notably, there is a significant delay in the length of time it takes [the grievant] to complete the affidavit [for an investigation] and [to] send it to [c]harging [p]arties for their review. Specifically, at least twelve affidavits have remained in drafted, pending status since about the beginning of March through the end of this appraisal period.").
[5] Exceptions, Exs. 2, Step-Two Grievance (Step-Two Grievance) at 1.

lower efficiency. According to the Union, the Agency "arbitrarily downgraded the grievant's performance rating" in the efficiency element as a result of those deficiencies.[6] As remedies, the Union requested "[r]escission, modification[,] and correction of the grievant's performance[-]appraisal ratings, up to and including his rating in" the efficiency element.[7] After the Agency denied the step-two grievance, the Union filed a step-three grievance reiterating the same relevant arguments.[8] The Agency denied the step-three grievance, and the dispute proceeded to arbitration.

At arbitration, the Agency moved to dismiss the grievance, arguing that the Agency's evaluations of probationary employees' performance are not grievable or arbitrable under the parties' negotiated grievance procedure. The Agency noted that § 7121(c)(4) of the Federal Service Labor-Management Relations Statute (the Statute) precludes grievances related to "any examination, certification[,] or appointment" of employees.[9] The Agency further noted that "[t]his exclusion from the negotiated grievance procedure is also found in Article 15, Section 2" of the parties' agreement (Article 15(2)), which provides that the grievance procedure "shall not apply with respect to any grievance concerning . . . any examination, certification[,] or appointment."[10] Additionally, the Agency contended that the grievance was not grievable or arbitrable under Article 17, Section 3 of the parties' agreement (Article 17(3)), which provides, as relevant here, that the "denial of [a] promotion . . . based upon [an] employee's performance[,] . . . or other non[-]disciplinary reasons during the probationary year or [two-]year administrative trial period, shall not be subject to the grievance . . . procedure[] of [the parties' a]greement."[11]

The Union filed a response to the Agency's motion (the response). The Union argued that, although the Agency framed the issue for arbitration as involving the grievant's "performance[-]appraisal *rating*," the issue was "better stated as" involving the grievant's "performance appraisal."[12] Further, the Union claimed that "[t]he crux of the grievance is that the grievant . . . was given a performance appraisal that was unfair and arbitrary, in violation of" the parties' agreement.[13] The Union argued that the Agency violated various provisions of Article 9 of the parties' agreement (Article 9) by failing to: give the grievant notice of his performance deficiencies; provide him with timely notice of his performance plan; and have his supervisor timely meet with him to review and answer questions regarding the performance plan. The Union stated that the Agency's grievability and arbitrability arguments were "too broad a reading of the parties' contract and the law[] relating to 'any examination, certification[,] or appointment' of employees."[14] The Union also stated that, "[h]ad the parties intended to exclude probationary employees from [Article 9's] coverage, the contract language would reflect that."[15] Finally, the Union contended that Article 17(3) bars probationary employees from challenging certain Agency actions, but does not prohibit "challenge[s] to *the appraisal or rating of record*."[16]

The Agency filed a reply to the Union's response (the reply). The Agency characterized the Union's response as arguing that "the [g]rievance concerns the appraisal process[,] not the appraisal rating."[17] According to the Agency, that argument was "inconsistent with the record"[18] because, in its step-two and step-three grievances, the Union challenged the rating, and "the only substantive remedy requested" was "modification of the performance rating."[19] In any event, the Agency contended that "whether it is called the performance appraisal, performance rating, or performance[-]appraisal rating, the Agency's appraisal of a probationary employee's performance is excluded from the negotiated grievance procedure and is not arbitrable."[20] The Agency noted that "[t]he terms at issue" – "[a]ppraisal," "[p]erformance rating," "[r]ating of record," and "appraisal program" – "are defined in federal law."[21] Citing court and Authority precedent,[22] the Agency argued that "[m]anagement's assessment of [the grievant's] performance during the probationary period, including the recording of that assessment as a rating in a performance

[6] *Id.* at 5.
[7] *Id.*
[8] *See generally* Exceptions, Exs. 2, Step-Three Grievance (Step-Three Grievance) at 8-13.
[9] Exceptions, Exs. 1, Agency's Mot. to Dismiss at 6 (quoting 5 U.S.C. § 7121(c)(4)).
[10] *Id.*
[11] Award at 6.
[12] Exceptions, Exs. 5, Resp. (Resp.) at 32.
[13] *Id.* at 33.
[14] *Id.* at 36 (quoting 5 U.S.C. § 7121(c)(4)).
[15] *Id.* at 37.
[16] *Id.* at 38.
[17] Exceptions, Exs. 5, Reply (Reply) at 98.
[18] *Id.*
[19] *Id.* at 100.
[20] *Id.*
[21] *Id.* at 101 (citing 5 C.F.R. §§ 430.203, 430.206, 430.207).
[22] *Id.* at 101-02 (citing *U.S. DOJ, INS v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983) (*INS*); *U.S. Dep't of the Air Force, Nellis Air Force Base, Las Vegas, Nev.*, 46 FLRA 1323 (1993); *AFGE, AFL-CIO, Loc. 1625*, 30 FLRA 1105 (1988)).

appraisal, is not subject to the negotiated grievance procedure and is not arbitrable."[23]

The Arbitrator gave the Union an opportunity to respond to the Agency's reply. However, the Union did not do so.

The Arbitrator then issued his award. In the award, the Arbitrator quoted Article 15(2) and its footnote 38, which provides that the grievance procedure shall not apply to "any matter the grievability of which is specifically excluded by this [a]greement, including but not limited to certain matters pertaining to employees during their probationary year or administrative trial period as set forth in" Article 17, Section 2 of the parties' agreement.[24] The Arbitrator also quoted Article 17(3) and its footnote 37, which states that "[t]he provisions of this [a]rticle do not affect any right under any applicable law or government-wide rule or resolution, which any [e]mployee may have . . . to appeal an Agency action based upon grounds other than performance, conduct, or lack of work or funds or other non-disciplinary reasons, by filing a grievance."[25] Further, the Arbitrator quoted: § 7121(c)(4) of the Statute; 5 C.F.R. § 315.803(a);[26] and court and Authority precedent regarding probationary employees and term appointments, respectively.[27] The Arbitrator then noted that the grievant is a probationary employee, and stated:

> The grievance involves a performance appraisal. A performance appraisal is non-disciplinary. Any distinction between a performance appraisal, performance rating[,] or performance[-]appraisal rating is a distinction without a difference for purposes of the [a]greement. Non-disciplinary reasons during the probationary year or two[-]year administrative trial period are not subject to the grievance . . . procedure[] . . . .[28]

Consequently, the Arbitrator found that he lacked jurisdiction over the grievance, and he granted the Agency's motion to dismiss.

The Union filed exceptions on June 18, 2024, and the Agency filed an opposition on July 16, 2024.

III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar several of the Union's arguments.

The Union argues that the award conflicts with the Agency's obligation "to provide performance plans to employees at the beginning of each appraisal period[] under applicable [Office of Personnel Management (OPM)] regulations."[29] The Union also argues that the award is based on a nonfact, which caused the Arbitrator to misapply the same OPM regulations.[30] In its opposition, the Agency contends that Authority Regulations bar the Union's regulatory arguments "[b]ecause the Union could have[,] but did not[,] raise th[ese] argument[s] before the Arbitrator."[31] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments or evidence that could have been, but were not, presented to the arbitrator.[32]

In the response, the Union argued that Article 17(3) did not bar its grievance because the Agency failed to comply with its contractual obligation to provide the grievant with his performance plan.[33] Although the Union argued in the grievance[34] and at arbitration[35] that the Agency did not properly provide the grievant with his performance plan, it did not allege that the Agency violated the OPM regulations – or even cite the OPM regulations.[36] Because the Union could have raised these

[23] *Id.* at 102.
[24] Award at 7-8. Article 17, § 2 of the parties' agreement sets forth certain processes that the Agency will follow in connection with probationary employees' performance and conduct. *See* Exceptions, Exs. 3 at 76.
[25] Award at 8.
[26] Title 5, § 315.803(a) of the Code of Federal Regulations provides that "[t]he agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his or her services during this period if the employee fails to demonstrate fully his or her qualifications for continued employment."
[27] *INS*, 709 F.2d at 728-29; *U.S. DOL*, 70 FLRA 903 (2018) (Member DuBester dissenting).
[28] Award at 11.
[29] Exceptions Br. at 8 (citing 5 C.F.R. § 430.206).
[30] *Id.* at 12-13 (arguing that the Arbitrator's reliance on an alleged nonfact caused the Arbitrator to "conflate[] an agency's ability to terminate a probationary employee under 5 [C.F.R.] § 315.803(a), with the responsibility to provide a copy of performance plans to its employees[] under 5 [C.F.R.] § 430.206(b)(2)").
[31] Opp'n Br. at 2; *see also id.* at 4.
[32] 5 C.F.R. §§ 2425.4(c), 2429.5.
[33] Resp. at 37-38.
[34] Step-Two Grievance at 2, 5 (alleging Agency violated Art. 9, § 6 by failing to provide grievant with performance plan and review its expectations with him).
[35] Resp. at 36-38 (reiterating contractual arguments concerning performance plan).
[36] Exceptions Form at 5 (acknowledging Union did not raise OPM regulation at arbitration).

regulations in support of its performance-plan arguments at arbitration, but did not, we do not consider them.[37]

However, to the extent the Union argues that the Arbitrator's reliance on an alleged nonfact caused him to ignore the Agency's *contractual* performance-plan obligations, we find that the Union raised this argument at arbitration.[38] Thus, we consider this portion of the nonfact exception.[39]

IV. Analysis and Conclusions

A. The Union does not demonstrate that the award is based on a nonfact.

The Union argues the award is based on a nonfact.[40] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[41] An arbitrator's contractual interpretations cannot be challenged as nonfacts.[42]

According to the Union, the Arbitrator erred in finding that any distinction between performance appraisals, performance ratings, and performance-appraisal ratings is a "distinction without a difference for purposes of the [a]greement."[43] While acknowledging that the Arbitrator "used slightly different language than" the terms in the parties' agreement, the Union states that it "understands the [award] to be referring to the following definitions in Article 9": (1) "[a]ppraisal," which is "the process under which performance is reviewed"; (2) "[p]erformance [r]ating," which is "the written, or otherwise recorded, appraisal of performance," and which "may include the assignment of a summary level"; and (3) "[s]ummary [r]ating," which is "the written record of the appraisal," including "a resultant summary rating level" – and which "is intended to have the identical meaning as 'performance rating.'"[44]

According to the Union, "[i]n making the determination that there is no difference between these three parts of the appraisal system, the Arbitrator failed to recognize that the parties specifically negotiated and agreed on the definition for each."[45] To the extent that the Union's arguments challenge the Arbitrator's interpretation of the agreement, as noted above, such challenges do not provide a basis for finding an award deficient on nonfact grounds.[46] Further, while the Union argues the Arbitrator erred in conflating the appraisal process and the resulting rating, the Union challenged *both* the appraisal process and the resulting performance rating in its grievance.[47] Thus, even assuming the Arbitrator's challenged statement constitutes a "factual" finding – and that it is clearly erroneous – the Union provides no basis for finding that, but for that error, the Arbitrator would have reached a different result. As such, the Union does not demonstrate that the award is based on a nonfact. Accordingly, we deny it.[48]

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[37] *See AFGE, Loc. 228*, 74 FLRA 1, 2 (2024) (dismissing contrary-to-law exception where union argued at arbitration that agency violated the parties' agreement without raising related statutory argument from exception); *NATCA*, 72 FLRA 299, 300 (2021) (dismissing exception where excepting party did not raise the underlying argument before the arbitrator, but could have).

[38] Resp. at 36 (arguing that Art. 9, § 6 requires the Agency to provide employees a copy of their current performance plan and to meet with the employee to review the plan).

[39] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Ashland, Ky.*, 74 FLRA 13, 15 (2024) (dismissing an exception not raised at arbitration but considering another exception based on arguments raised in post-hearing brief); *AFGE, Council of Prisons Locs., Council 33*, 70 FLRA 191, 192 (2017) (dismissing only portion of exception that relied on arguments not raised at arbitration).

[40] Exceptions Br. at 12.

[41] *AFGE, Loc. 310*, 74 FLRA 22, 23-24 (2024).

[42] *Id.* at 24 (citing *NTEU, Chapter 149*, 73 FLRA 133, 135 (2022)); *NTEU, Chapter 149*, 73 FLRA 413, 416 (2023) (*Chapter 149*).

[43] Exceptions Br. at 3 (quoting Award at 11) (internal quotation mark omitted).

[44] *Id.* at 12.

[45] *Id.*

[46] *Chapter 149*, 73 FLRA at 416.

[47] In this regard, we note that: (1) in its step-two and step-three grievances, the Union challenged the grievant's performance rating, not just the process, and treated the rating as part of the "appraisal," Step-Two Grievance at 1, Step-Three Grievance at 8; (2) although portions of the Union's response attempted to distinguish the grievant's "performance[-]appraisal *rating*" from his "performance appraisal," Resp. at 32, other portions of the response implied that the Union was challenging the rating, not just the appraisal process, *see id.* at 38 ("Nowhere in Article 17 is a challenge to the *appraisal or rating of record* excluded from the [g]rievance and [a]rbitration procedure."); (3) in its reply, the Agency argued that the Union's attempt to distinguish appraisals from ratings was inconsistent with the step-two and step-three grievances, Reply at 98, and stated that "whether it is called the performance appraisal, performance rating, or performance[-]appraisal rating, the Agency's appraisal of a probationary employee's performance is excluded from the negotiated grievance procedure and is not arbitrable," *id.* at 100; and (4) the Union chose not to file a response to the Agency's reply, even though the Arbitrator gave it the opportunity to do so.

[48] *AFGE, Loc. 2076, Nat'l Citizenship & Immigr. Serv. Council*, 73 FLRA 368, 369 (2022) (denying nonfact exception where, even assuming the arbitrator's statements were erroneous, the excepting party provided no basis for finding that, but for the alleged errors, the arbitrator would have reached a different result).

B. The Union does not demonstrate that the award fails to draw its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from the parties' agreement because it "vastly and impermissibly expands the topics excluded from" the grievance procedure.[49] In this regard, while acknowledging that the agreement "restrict[s] access to the grievance [procedure] for employees in their probationary period," the Union contends that Article 17(3) only excludes specific "itemize[d] actions" from the grievance procedure.[50] The Union notes that Article 9 requires management to follow certain processes with regard to performance management, and "does not contain any exception for probationary employees."[51]

The Authority will find that an award fails to draw its essence from a collective-bargaining agreement when the excepting party establishes 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 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.[52] Mere disagreement with an arbitrator's interpretation does not establish the award fails to draw its essence from the agreement.[53]

The Arbitrator rejected the Union's claim that Article 17(3) does not expressly exclude grievances concerning the performance-appraisal process.[54] Although the Arbitrator's discussion of this issue was terse, he essentially found that, when a probationary employee challenges a denial of promotion based on a "[n]on-disciplinary reason[]," differentiating between grievances concerning a "performance appraisal" and grievances concerning a "performance rating" constitutes "a distinction without a difference for the purposes of the [parties' a]greement."[55] Though the Union disagrees with the Arbitrator regarding the scope of Article 17(3)'s exclusions, the Union does not identify any contractual wording that *required* the Arbitrator to interpret these exclusions so narrowly that probationary employees must be allowed to challenge the performance appraisals underlying a denial of promotion.[56]

The Union does not demonstrate that the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Therefore, the Union does not establish that the award fails to draw its essence from the agreement, and we deny the essence exception.[57]

V. Decision

We partly dismiss and partly deny the Union's exceptions.

[49] Exceptions Br. at 9.
[50] *Id.* at 10.
[51] *Id.*
[52] *AFGE, Loc. 446*, 73 FLRA 421, 421 (2023).
[53] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Elkton, Ohio*, 74 FLRA 29, 31 (2024) (*Elkton*).
[54] Award at 11; *see* Exceptions Br. at 11 ("The underlying grievance does not challenge a termination or other adverse action – it challenges the Agency's failure to comply with the contract [provision] . . . in its performance[-]rating regime.").
[55] Award at 11.
[56] *See* Exceptions Br. at 11 ("The plain meaning of the [parties' a]greement clearly does not intend to interfere with the Union's ability to enforce its terms as it pertains to probationary or any other employees.").
[57] *See Elkton*, 74 FLRA at 31 (denying essence exception where excepting party did "not cite any contractual wording that required the [a]rbitrator to reach a different conclusion"); *U.S. Dep't of VA, James A. Haley Veterans Hosp. & Clinics*, 73 FLRA 880, 883 (2024) (then-Member Kiko concurring on other grounds) (denying essence exception that "merely argue[d] for [the excepting parties'] preferred interpretation and application" of the parties' agreement).