65 FLRA No. 199

SOCIAL SECURITY ADMINISTRATION
FREDERICKSBURG DISTRICT OFFICE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1923
(Union)

0-AR-4445

_____

DECISION

June 29, 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 William W. Lowe 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 Union filed a grievance alleging that the Agency's performance rating of the grievant was contrary to law, rule, and/or the parties' collective bargaining agreement (CBA). The Arbitrator upheld the Agency's evaluation of the grievant as to one performance element, but determined that its evaluation as to a second element was contrary to the CBA. The Arbitrator thus sustained the grievance in part and denied it in part. For the reasons set forth below, we dismiss the Agency's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

A. Background

The grievant worked as a Claims Representative. Award at 2. In the grievance, the Union alleged that the Agency improperly rated the grievant on three out of four of her performance elements. *Id.* at 4. The performance management and appraisal system that applies to the grievant has three tiers: Level 1 (Not Successful), Level 3 (Successful), and Level 5 (Outstanding). *Id.* at 3. The Agency rated the grievant at Level 3 (Successful) on all four of the performance elements: (1) Interpersonal Skills, (2) Participation, (3) Demonstrates Job Knowledge, and (4) Achieves Business Results. *Id.* at 2. This resulted in a summary performance rating of Successful Contribution. The Agency also gave her a performance award. *Id.* at 4, 23.

In the grievance, the Union claimed that the Agency should have rated the grievant at Level 5 on the Interpersonal Skills, Participation, and Achieves Business Results performance elements. The grievance also claimed that the Agency violated Article 3 of the CBA by not giving the grievant a rating that was fair and equitable when considering the quality and quantity of her work.[1] *See* Exceptions, Ex. 3 at 1; *see also* Opp'n, Exs. 1 & 2. Finally, the grievance argued that the grievant's performance award should be adjusted based on the change that the grievant sought in her performance rating. Exceptions, Ex. 3 at 1.

At the second step of the grievance process, the Agency raised the grievant's Achieves Business Results performance rating from Level 3 to Level 5. Opp'n, Ex. 1 at 3. However, the Agency did not raise the grievant's rating on the Interpersonal Skills and Participation performance elements. The parties then submitted the matter to arbitration to resolve the dispute concerning the two remaining performance elements.

The Arbitrator framed the issue as:

> Were the performance ratings given to [the grievant] in the elements Participation and Interpersonal Skills . . . a violation of the law, regulation and/or contract? If so, what is the appropriate remedy?

Award at 2.

1. Article 3, Section 2.A. provides, in pertinent part, that "[a]ll employees shall be treated fairly and equitably in all aspects of personnel management and without regard to political affiliation, race, color, religion, national origin, sex, sexual orientation, marital status, age, parental status or disabling condition, and with proper regard and protection of their privacy and constitutional rights." Exceptions, Ex. 5 at 3-1.

B. Arbitrator's Award

The Arbitrator sustained the grievance in part and denied it in part. As relevant here, the Arbitrator made several specific findings concerning the Union's claim that the Agency improperly rated the grievant on the Interpersonal Skills and Participation performance elements.

With regard to the Interpersonal Skills element, the Arbitrator determined that the evidence submitted by the grievant purporting to support a higher rating on that performance element did not address her interpersonal skills. *Id*. at 16. The Arbitrator further found that other evidence presented at arbitration demonstrated that the grievant's performance on the Interpersonal Skills element did not rise to Level 5. *Id*. at 17. The Arbitrator therefore concluded that the record did not support a change to the grievant's Interpersonal Skills performance rating from Level 3 to Level 5. *Id*.

With regard to the Participation element, the Arbitrator credited the testimony of several witnesses demonstrating that the grievant has a productive working relationship with others, that she is a team player, and that she regularly volunteers to help others when assistance is needed. *Id.* at 19-20. The Arbitrator found that this testimony showed that the grievant makes "significant and continuing contributions" above what is required by the Level 3 performance rating. *Id.* at 21-22. Accordingly, the Arbitrator determined, the Agency violated Article 3 of the CBA because it did not treat the grievant "fairly and equitably." *Id.* at 22.

The Arbitrator also cited Article 5 in his determination.[2] *Id.* Without any prior reference or further discussion, the Arbitrator similarly found that the Agency violated Article 5 by not treating the grievant fairly and equitably.[3]

For these reasons, the Arbitrator concluded that the record supported a change to the grievant's Participation performance rating from Level 3 to Level 5. *Id.* at 23. As this increased the grievant's overall element average from a three to a four, the Arbitrator directed the Agency to give the grievant a higher award, for which she was now eligible. Specifically, the Arbitrator ordered the Agency to give the grievant a Recognition of Contribution (ROC) award as a substitute for the performance award the grievant originally received. *Id.* The Arbitrator also ordered the Agency to pay the grievant the difference between the two awards. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency excepts to the Arbitrator's award on the bases that it is contrary to law and fails to draw its essence from the CBA. Exceptions at 5, 10.

The Agency claims that the award is contrary to law because it affects management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute. In this respect, the Agency argues that the arbitration award does not satisfy the two-prong test used by the Authority to determine whether an award resolving a performance appraisal grievance impermissibly affects management's rights to direct employees and assign work. Exceptions at 5-6 (citing *U.S. Dep't of the Treasury, Bureau of Engraving & Printing, Wash., D.C.*, 53 FLRA 146 (1997) (*BEP*)). Specifically, the Agency claims that the award fails to satisfy prong I of *BEP* because the Arbitrator erroneously failed to base his decision on a violation of the CBA. *Id.* at 7-8. The Agency also claims that the award fails to satisfy prong II of *BEP* because the Arbitrator did not reconstruct what management would have done had it not violated the CBA. *Id.* at 9-10.

Further, the Agency contends that the award fails to draw its essence from Article 3 of the CBA. *Id.* at 10. The Agency argues that the Arbitrator erred by finding that the grievant was not treated fairly and equitably under the CBA without comparing her performance rating to those of other similarly situated employees. Moreover, the Agency claims the Arbitrator did not base this finding on "any concrete evidence" that the grievant was discriminated against based on the protected classes set forth in the CBA. *Id.* at 11.

In addition, the Agency argues that the Arbitrator's finding that it violated Article 5 of the CBA fails to draw its essence from the CBA. *Id.* According to the Agency, Article 5 pertains to when the Union can request mid-term bargaining over certain negotiable subjects. The Agency claims that Article 5 has no relationship to this case and notes that the Union did not allege a violation of Article 5

2. Article 5 addresses Union-initiated mid-term bargaining, including the process and rules applicable to that activity. *See* Exceptions, Ex. 6.

3. As discussed below in Section V., we find it unnecessary to resolve the Agency's exception that the award fails to draw its essence from Article 5.

in its grievance. Therefore, the Agency claims, the award cannot in any rational way be derived from Article 5.

B. Union's Opposition

The Union argues that the award does not affect management's rights to assign work or direct employees under the Statute. Opp'n at 5. According to the Union, the award does not fail to meet the requirements of *BEP*. *Id.* at 8-10.

The Union further contends that the award does not fail to draw its essence from the CBA. *Id.* at 11. The Union claims that the Arbitrator's interpretation of Article 3 is entirely plausible. Accordingly, the Union argues, the Agency has not established that the award fails to draw its essence from the CBA. *Id.* at 14. Therefore, the Union requests that the Authority deny the Agency's exceptions.

IV. Preliminary Issue

The Agency claims for the first time in its exceptions that its rating of the grievant (1) was an exercise of its management rights to direct employees and assign work under § 7106(a)(2)(A) and (B), and (2) is consistent with Article 3's requirement that employees be treated fairly and equitably in personnel management matters.

Exceptions are barred by 5 C.F.R. § 2429.5 of the Authority's Regulations when they pertain to issues that could have been, but were not, presented to an arbitrator.[4] *See U.S. Dep't of Justice, Fed. Bureau of Prisons, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA 1168, 1170 (2010) (exception dismissed under § 2429.5 where agency had notice of specific remedy sought by union at arbitration and could have but did not present its argument to arbitrator disputing that remedy); *U.S. Dep't of Homeland Security, U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008) (same); *cf. U.S. Dep't of Labor*, 60 FLRA 737, 738 (2005) (Chairman Cabaniss concurring as to another matter) (motion for reconsideration granted where agency challenged decision dismissing exception on § 2429.5 grounds where agency had no notification prior to union's post-hearing brief of argument under collective bargaining agreement).

The record indicates that the Agency did not raise either of its management rights arguments or its Article 3 argument before the Arbitrator even though it could have done so. At the arbitration hearing, the Union requested that the Arbitrator raise the grievant's performance rating and direct the Agency to consider the grievant for an ROC, an award higher than the award that she had originally received. *See* Award at 13. Although the Agency had notice of these requested remedies, it failed to present its management rights arguments to the Arbitrator and dispute the requested remedies on that basis. In addition, the record establishes that the Agency was on notice that the Union claimed, both in its grievance and before the Arbitrator, that the Agency violated Article 3 of the CBA because its ratings of the grievant on the Participation and Interpersonal Skills elements were unfair and inequitable. *Id.* at 12; *see also* Exceptions, Ex. 3 at 1; Opp'n, Exs. 1 & 2. However, the Agency failed to respond to the Union's argument, merely arguing to the Arbitrator that it "met all contractual and regulatory provisions" in evaluating the grievant. Award at 13.

The case law interpreting 5 C.F.R. § 2429.5 makes clear that the Authority will not consider a contention that could have been, but was not, presented to the Arbitrator. *See, e.g., U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003). Here, the Agency's argument before the Arbitrator, that it followed all the rules, laws and regulations regarding the grievant's performance rating, Award at 13, is too general to sufficiently preserve its claims that its rating of the grievant was (1) an exercise of its management rights to direct employees and assign work under the Statute and (2) consistent with Article 3's requirement that employees be treated fairly and equitably in personnel management matters. *See, e.g., U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 61 FLRA 366, 369 (2005) (then-Member Pope dissenting as to another matter) (internal quotations and citation omitted) (management rights exception dismissed under § 2429.5 because Agency assertion before the arbitrator that the action it took was to "ensure the safety of the crews and the protection of Air Force equipment" was insufficient to preserve ability to raise management rights claims before the Authority). As there is no evidence in the record that

4. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.5, were revised effective October 1, 2010. 75 Fed. Reg. 42,283 (2010). As the exceptions in this case were filed prior to October 1, 2010, we apply the prior version of the Regulations here. *See* 5 C.F.R. § 2425.1. However, we note that, like the revised version of § 2429.5, the prior version of § 2429.5 provides that the Authority will not consider any issue that could have been, but was not, presented to the arbitrator.

the Agency raised the arguments referenced above before the Arbitrator, we conclude that the Agency's exceptions on these bases are not properly before the Authority. Based on the foregoing, we dismiss the Agency's exceptions contending that the award is contrary to law and fails to draw its essence from Article 3 of the CBA.[5]

V. Analysis and Conclusions

One of the CBA's provisions that the Arbitrator found the Agency had violated was Article 5. Award at 22. The Agency claims that the award fails to draw its essence from Article 5 because that article, entitled "Union-Initiated Mid-Term Bargaining," has no relationship to this case. Exceptions at 11. Therefore, the Agency claims, the award cannot "in any rational way" be derived from Article 5. *Id.*

It is unnecessary to resolve this exception. When an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to have the award found deficient. *See, e.g., U.S. Dep't of the Treasury, Internal Revenue Serv., Oxon Hill, Md.*, 56 FLRA 292, 299 (2000). In such circumstances, if an excepting party does not demonstrate that the award is deficient on one of the grounds relied on by the arbitrator, then it is unnecessary for the Authority to resolve exceptions to the other ground. *See id.*

Here, the Arbitrator found that the Agency violated both Articles 3 and 5 of the CBA because the Agency did not treat the grievant fairly and equitably. We have dismissed the Agency's essence exception to the Arbitrator's finding that the Agency violated Article 3 of the CBA. The Arbitrator's Article 3 determination constitutes a separate and independent basis for his decision finding that the Agency violated the CBA in its rating of the grievant. Accordingly, as we uphold the Arbitrator's Article 3 determination, we find it unnecessary to resolve the Agency's Article 5 essence exception and deny that exception. *See id.*

VI. Decision

The Agency's contrary to law exceptions and its Article 3 essence exception are dismissed. The Agency's Article 5 essence exception is denied.

5. Chairman Pope would deny on the merits the Agency's essence exception regarding Article 3. Although it is true enough that the Arbitrator *paraphrased* the Agency's position as arguing that it "met all contractual . . . provisions," Award at 13, the fact remains that the record does not disclose what the Agency *actually argued*. In the Chairman's view, it is reasonable to conclude that the Agency denied violating the same contract provision -- Article 3 -- the Union placed in dispute, especially since the Union makes no claim to the contrary. On the merits, Article 3 requires that employees "be treated fairly and equitably in all aspects of personnel management *and* without regard to" membership in certain protected categories. Exceptions, Attach., Ex. 5 (emphasis added). Contrary to the Agency's claim, nothing in this wording required the Arbitrator either to compare the grievant's performance rating to those of other similarly situated employees or to base his finding on evidence that the grievant was discriminated against based on membership in a protected category. *See* Exceptions at 11. Thus, Chairman Pope would find that the Agency does not demonstrate that the award fails to draw its essence from Article 3.