69 FLRA No. 38

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3937
(Union)

0-AR-5130

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DECISION

March 28, 2016

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

I. Statement of the Case

The Agency issued the grievant an annual performance appraisal. The Agency employs a three-tier rating system of Level 1, Level 3, and Level 5. The Agency gave her a mid-tier rating – a "Level 3" – in one of the grievant's four performance elements. The Union filed a grievance alleging that the Agency violated the parties' agreement by issuing the rating, rather than the highest rating for the element, a "Level 5." Arbitrator John R. Swanson issued an award ordering the Agency to raise the grievant's appraisal for the element to a Level 5. This case presents the Authority with four questions.

The first question is whether the award is based on nonfacts. The Agency's nonfact claims either challenge a factual matter that the parties disputed at arbitration, or do not show that the Arbitrator clearly erred in making a central factual finding underlying the award, but for which he would have reached a different result. Because such arguments do not provide bases for finding an arbitration award deficient on nonfact grounds, the answer is no.

The second, third, and fourth questions hinge on whether the Arbitrator found a contract violation. Specifically, the second question is whether the Arbitrator exceeded his authority because he allegedly failed to resolve the stipulated issue, and awarded a remedy without finding a contract violation. The third question is whether the award is contrary to law because, absent a finding of a contract violation, the award impermissibly affects management's rights under the Federal Service Labor-Management Relations Statute (the Statute).[1] The fourth question is whether the award fails to draw its essence from the parties' agreement because the Arbitrator allegedly did not find a violation of any of the contract provisions listed in the stipulated issue, and because the Agency's actions that the Arbitrator set aside were consistent with the parties' agreement. Because there is a sufficient basis in the record to conclude that the Arbitrator may have intended to find a contract violation – and because clarification on this point is necessary in order to resolve the Agency's exceeded-authority, contrary-to-law, and essence exceptions – we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for such clarification.

II. Background and Arbitrator's Award

The dispute arose when the Agency issued the grievant an annual performance appraisal under its Performance Assessment and Communication System (PACS). Under PACS, the Agency rates employees on a three-tier scale – Level 1 (not successful), Level 3 (successful contribution), and Level 5 (outstanding contribution) – in each of four performance elements. The Agency rated the grievant at Level 3 for the Interpersonal Skills performance element (Interpersonal Skills). The Agency rated the grievant at Level 5 for her other three performance elements.

The Union filed a grievance alleging that the Agency violated Articles 3 and 21 of the parties' agreement by rating the grievant at Level 3 – rather than at Level 5 – in Interpersonal Skills. The grievance was not resolved and was submitted to expedited arbitration.

As relevant here, the parties stipulated to the following issue: "Did the [A]gency violate Article 21 . . . or Articles 1, 3[,] or 38 of . . . [the parties' agreement] when it rated [the grievant] in . . . PACS . . . ? If so, what is the remedy?"[2] Article 21, entitled "Performance," is the contractual embodiment of PACS, and deals with PACS-implementation issues. For example, Article 21, Section 6.B provides for "[o]ngoing two-way communication between the manager and the employee" during the appraisal period to "improve[] performance" by "provid[ing] the employee the opportunity to seek . . . guidance and understanding of his/her work performance, to surface needs, [and] to participate in a dialogue about

[1] 5 U.S.C. §§ 7101-7135.
[2] Award at 1.

his/her contribution."[3] Article 3 provides that "[a]ll employees shall be treated fairly and equitably in all aspects of personnel management."[4] Articles 1 and 38 have less direct application to this case. Article 1 states that matters covered by the agreement are governed by existing or future laws. And Article 38 provides, in part, that the Agency will "consider the additional effort that may be required by multilingual/bilingual employees."[5]

The Arbitrator decided in the grievant's favor and awarded a remedy. Finding that the grievant was an "exemplary employee," the Arbitrator focused on "the grievant's desire to attain her goal of being rated a Level 5 in all categories of her annual PACS appraisal."[6] The Arbitrator found that "[t]he grievant was convinced by her ongoing Level 5 . . . performance in other areas . . . [that] she was doing what was required" by the Agency's Personnel Policy Manual (PPM) to receive a Level 5 in Interpersonal Skills.[7] Nevertheless, the grievant had made "ongoing efforts to seek guidance, direction[,] and information from her . . . [s]upervisor in reaching . . . Level 5 . . . in Interpersonal Skills."[8] But, the Arbitrator found, despite the "numerous occasions" on which "the grievant requested guidance from her . . . [s]upervisor regarding her goal of attaining a Level 5 rating. . . none was provided other than to keep doing her job."[9]

The Arbitrator found that the supervisor's failure to provide guidance was an error. Specifically, the Arbitrator found that it was "undisputed [that] the . . . [s]upervisor did not comply with the spirit and intent of . . . the [PPM]" provision that "emphasizes the importance of effectively communicating expectations" to employees – § 5.1 of the PPM.[10] Under § 5.1, PACS "emphasizes the importance of effectively communicating expectations" by, among other things, "[d]ifferentiat[ing] between levels of performance in a way that recognizes the high performer" and "[u]s[ing] objective data to [provide] context to expectations."[11]

Finding on this basis that "[t]he grievant's performance appraisal in the Interpersonal Skills category was flawed," and finding further that "the grievant did meet most, if not all, . . . expectations" for a Level 5 rating in Interpersonal Skills, the Arbitrator ordered her rating in Interpersonal Skills raised to a Level 5.[12]

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

III. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency argues that the award is based on two nonfacts.[13] To establish that an award is based on a nonfact, the appealing party must show that a central factual finding underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[14] The Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[15]

The Agency's first nonfact exception challenges the Arbitrator's finding that the Agency never provided the grievant with guidance on attaining a Level 5 rating.[16] As noted above, the Authority will not find that an award is deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[17] The record indicates that the parties disputed at arbitration whether the Agency provided the grievant with guidance on attaining a Level 5 rating in Interpersonal Skills.[18] Accordingly, as the parties disputed this matter at arbitration, the Agency's nonfact claim does not provide a basis for finding that the award is based on a nonfact.[19]

The Agency's second nonfact exception challenges the Arbitrator's finding that "it is undisputed [that] the [r]ating [s]upervisor did not comply with the spirit and intent of" § 5.1 of the PPM.[20] Specifically, the Agency asserts that it did not *concede* that the supervisor violated PPM § 5.1.[21]

We assume, without deciding, that the Arbitrator clearly erred in this finding. But, given the Arbitrator's other findings supporting his conclusion, there is no basis for concluding that, but for the alleged error, the Arbitrator would have reached a different result. These other findings, discussed above in Section II., include, for

[3] Exceptions Br., Tab 4 at 131.
[4] Opp'n at 6.
[5] *Id.* at 9.
[6] Award at 2.
[7] *Id.* at 3.
[8] *Id.* at 2.
[9] *Id.* at 3.
[10] *Id.* at 2.
[11] *Id.* at 2-3.
[12] *Id.* at 3.
[13] Exceptions Br. at 18-22.
[14] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).
[15] *Id.* (citation omitted).
[16] Exceptions Br. at 20-21.
[17] *U.S. Dep't of the Treasury, IRS*, 66 FLRA 528, 529 (2012) (*IRS*).
[18] Exceptions Br., Tab 8 at 2; Tab 3 at 060, 076, 079.
[19] *IRS*, 66 FLRA at 529.
[20] Exceptions Br. at 19 (quoting Award at 2).
[21] *Id.* at 20.

example, that: the grievant "was convinced by her ongoing Level 5 . . . performance in other areas . . . [that] she was doing what was required" to receive a Level 5 in Interpersonal Skills;[22] the grievant had made "ongoing efforts to seek guidance, direction[,] and information from her . . . [s]upervisor in reaching . . . Level 5 . . . in Interpersonal Skills;"[23] despite the "numerous occasions" on which the grievant requested guidance from her supervisor "regarding her goal of attaining a Level 5 rating," "none was provided other than to keep doing her job."[24] In these circumstances, the Agency's claim does not establish that the award is based on a nonfact.[25]

Accordingly, we deny the Agency's nonfact exceptions.

B. We remand the award to the parties for resubmission to the Arbitrator, absent settlement, for clarification regarding whether he found a contract violation.

The Agency argues that the Arbitrator exceeded his authority because he allegedly failed to resolve the stipulated issue and awarded a remedy without finding a contract violation.[26] As to its contrary-to-law exception, the Agency argues that because the Arbitrator did not find a contract violation, the award impermissibly affects management's rights under 5 U.S.C. § 7106.[27] Further, the Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator allegedly did not find a violation of any of the contract provisions listed in the stipulated issue,[28] and because the Agency's actions that the Arbitrator set aside were consistent with the parties' agreement.[29]

There is a sufficient basis in the record to conclude that the Arbitrator *may* have intended to find that the Agency violated the parties' agreement when the Agency rated the grievant a Level 3 in Interpersonal Skills. In this regard, the Union's Step 1 grievance alleged, among other things, that the grievant's "appraisal violates Article 21, . . . Section 6 a-c in that [the grievant] was not told at any earlier time that [she] was not performing at a Level 5 standard and not told of specific ways to improve on [her] supposed shortcomings."[30] And the Union's Step 3 grievance alleged, among other things, that "[t]he appraising official did not comply with the communication commitments of Article 21, Section[] 6.B."[31] Further, as the Union argues, the parties submitted the PPM to the Arbitrator as a joint exhibit, [32] and labeled it as containing "elements and standards *applicable to Article 21*."[33] And the Arbitrator expressly found that the Agency violated the PPM.[34] In addition, the Arbitrator stated the issue he was going to decide – stipulated by the parties – as "[d]id the [A]gency violate Article 21" of the parties' agreement.[35] And finally, the nature of the Agency actions that the Arbitrator found objectionable – a failure to communicate with the grievant[36] – are addressed in Article 21.

However, the award is not sufficiently clear as to whether the Arbitrator intended to find a contract violation. Therefore, clarification on this point is necessary in order to resolve the Agency's exceeded-authority, contrary-to-law, and essence exceptions. Consequently, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for clarification as to whether he found that the Agency violated the parties' agreement.

Our dissenting colleague's objection to a remand in this case is based on an inaccurate view of the record. The dissent rejects our interpretation of the award because "the Arbitrator . . . makes no mention of Article 21 . . . in his award."[37] To substantiate the dissent's claim that "the Arbitrator makes no mention of Article 21," the dissent purports to "repeat the entirety of the Arbitrator's brief award" in the dissent.[38] But the dissent's quotation of the award is incomplete. It omits language from the award that contradicts the dissent's claims. As the dissent, quoting the award elsewhere in his opinion, recognizes, the Arbitrator expressly "acknowledged that he was supposed to address whether 'the [A]gency violated Article 21 [of the parties' agreement]'"[39] As discussed above, this is significant. For this and other reasons, we find the dissent's view of the case unpersuasive.

Also without merit is our dissenting colleagues' claim that he is "not convinced that [his] colleagues forge a common rationale to support a remand."[40] The dissent overlooks Authority and judicial precedent to the contrary. The reasoning that we have set forth above *is* a

[22] Award at 3.
[23] *Id.* at 2.
[24] *Id.* at 3.
[25] *NLRB Prof'l Ass'n*, 68 FLRA 552, 555 (2015) (citing *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014)).
[26] Exceptions Br. at 15-17.
[27] *Id.* at 8-11.
[28] *Id.* at 23-24.
[29] *Id.* at 23-26.
[30] *Id.*, Tab 3, Step 1 Grievance at 034.
[31] *Id.*, Tab 3, Step 3 Grievance at 080.
[32] Opp'n at 10-11.
[33] Exceptions Br., Tab 3 at 012 (emphasis added).
[34] Award at 2.
[35] *Id.* at 1.
[36] *Id.* at 2.
[37] Dissent at 10.
[38] *Id.*
[39] *Id.* (quoting Award at 1).
[40] *Id.* at 12 (citation omitted).

common rationale for our decision in this case, including our decision to remand. That one Member joins that reasoning "to form a majority opinion . . . and avoid an impasse in the resolution of this case"[41] does not change that he *joins that reasoning*. We note, in this regard, that it is not uncommon for Authority Members to take such an approach,[42] and courts have approved it.[43]

IV. Decision

We deny the Agency's nonfact exceptions and remand the award to the parties for resubmission to the Arbitrator, absent settlement, for clarification as to whether the Arbitrator found in his award that the Agency violated the parties' agreement.

[41] Concurrence at 8-9.

[42] *See, e.g.*, *SSA, Louisville, Ky.*, 65 FLRA 787, 789 n.6 (2011) (Chairman Pope joining majority to avoid impasse in resolution of the case); *U.S. Dep't of the Air Force, 12th Flying Training Wing, Randolph Air Force Base, San Antonio, Tex.*, 63 FLRA 256, 262 (2009) (Separate Opinion of Member Beck); *DHS, Bureau of ICE*, 60 FLRA 131, 138 (2004) (Separate Opinion of Member Armendariz); *AFGE, Local 2031*, 56 FLRA 32, 36 (2000) (Separate Opinion of Member Segal).

[43] *Pub. Serv. Comm'n v. Fed. Power Comm'n*, 543 F.2d 757, 777 (D.C. Cir. 1974) (federal "[c]ommissioners, no less than judges, may cast their votes solely to avoid an impasse"); *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 861 (D.C. Cir. 1970) ("[e]ven assuming that [a particular commissioner] voted [a certain way] solely to avoid an impasse and to provide an effective order, that is a perfectly sound reason for his vote").

Member DuBester, concurring:

I agree that the Agency's nonfact exceptions should be denied. Although I also agree with the decision to remand the award to the Arbitrator for clarification, and the rationale for doing so, I note the following.

Reasonably interpreted, it is evident from a review of the Arbitrator's expedited decision that the Arbitrator found that the Agency violated Article 21 of the parties' collective-bargaining agreement when it rated the grievant at Level 3 in Interpersonal Skills. In addition to the factors cited in our decision, the Arbitrator's discussion of the relevant Agency shortcomings focuses on the grievant's supervisor's failure to provide the grievant with appropriate guidance and effectively communicate with the grievant concerning how to attain a Level 5 rating in Interpersonal Skills. These findings echo Article 21, Section 6.B's requirements that the Agency implement its Performance Assessment and Communication System by engaging in "[o]ngoing two-way communication between the manager and the employee" during the appraisal period to "improve performance" by "provid[ing] the employee the opportunity to seek . . . guidance and understanding of his/her work performance, to surface needs, [and] to participate in a dialogue about his/her contribution."[1]

Consequently, because in my view, reasonably interpreting the award, the Arbitrator found that the Agency violated one of the contract provisions identified in the stipulated issue, and did not grant a remedy without finding a contract violation, the Agency's exceeded-authority exception lacks merit.

Consistent with the foregoing, also without merit is the Agency's contrary-to-law exception, which is premised on a misinterpretation of the award. Contrary to the Agency's interpretation that the Arbitrator did *not* find a contract violation, the Arbitrator *did* make such a finding.

Finally, also consistent with the foregoing, the Agency's essence exceptions lack merit as well. The Agency's first essence exception, like the Agency's contrary-to-law exception, is premised on the mistaken interpretation that the Arbitrator did not find that the Agency violated any provisions of the parties' collective-bargaining agreement. As to the Agency's second essence exception, even if, as the Agency argues, the Agency's actions were consistent with Article 21, Sections 1 and 5, this does not address whether the Agency's actions were consistent with Article 21, Section 6.B. Because the award is based on a finding that the Agency violated Article 21, Section 6.B, this exception also lacks merit.

However, notwithstanding the opinions I have expressed, in order to form a majority opinion as to how properly to resolve the Agency's exceptions, and avoid an impasse in the resolution of this case, I agree with the decision to remand the award to the Arbitrator for clarification, and the rationale for doing so stated in the majority opinion.[2]

[1] Exceptions Br., Tab 4 at 131.

[2] *See, e.g., U.S. Dep't of the Air Force, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 68 FLRA 460, 462 n.25 (2015) (Chairman Pope, joining majority opinion in order to avoid impasse).

Member Pizzella, dissenting:

One of the most famous movie quotes of all time – "Play it again, Sam" – is attributed to actor Humphrey Bogart in the film *Casablanca*. There is just one small problem – that line was never spoken, by Mr. Bogart or anyone else, in the 1942 classic.[1]

In this case, the grievant was rated at "[l]evel 5" (out of a possible 1, 3, or 5) in three of four performance elements.[2] But the grievant complained because her supervisor rated her at "[l]evel 3" in the fourth element.[3] The Arbitrator ordered that "[the performance appraisal for] Appraisal Year 2012, of Laura J. Novakoski category **1. Interpersonal Skills** will be adjusted from Final Rating: Level 3 to a Final Rating: Level 5."[4]

There is one small problem.

The Arbitrator never found that the Agency violated any provision of the parties' agreement – a step that is necessary in order to award a remedy. Despite the fact that the Arbitrator acknowledged that he *was supposed to address* whether "the [A]gency violate[d] Article 21 [of the parties' agreement],"[5] the Arbitrator never answered that question and makes no mention of Article 21, or any other provision, in his award.

Just as it may be necessary to play snippets of *Casablanca* to dissuade a skeptical-movie buff of the "play-it-again" misconception, I repeat the entirety of the Arbitrator's brief award below:

> In this expedited process the Arbitrator was provided the necessary information by knowledgeable Counsel and Representative of the parties. The record, testimony and exhibits together allowed for a reasonable decision.
>
> The record places great emphasis on the grievant's desire to attain her goal of being rated a Level 5 in all categories of her annual PACS Appraisal and is an exemplary employee whose day-to-day work performance demonstrates this desire. The record supports her ongoing efforts to seek guidance, direction[,] and information from her Rating Supervisor in reaching outstanding contribution (Level 5) performance standard in Interpersonal Skills.
>
> The Rating Supervisor referred the grievant to 5.6.1.2 of the Personnel Policy Manual.
>
> [Arbitrator quotes 5.6.1.2 of the Personnel Policy Manual verbatim.]
>
> From the perspective of the Rating Supervisor, this language speaks for itself[,] requiring no specific direction or examples of necessary actions for the grievant's attainment of these expectations. In her discussions with the grievant, it is undisputed the Rating Supervisor did not comply with the spirit and intent of 5.1 of the Personnel Policy Manual.
>
> [Arbitrator quotes 5.1 of the Personnel Policy Manual verbatim.]
>
> The grievant was convinced by her ongoing Level 5 (Outstanding) performance in other areas, she was doing what was required in 5.6.1.2. The record indicates that on numerous occasions the grievant requested guidance from her Ratings Supervisor regarding her goal of attaining a Level 5 rating in the Interpersonal Skills Standard and none was provided other than to keep doing her job.
>
> The grievant's performance appraisal in the Interpersonal Skills category was flawed. The record indicates the grievant did meet most, if not all, 5.6.1.2. expectations.[6]

Just four days ago, in *U.S. DHS, U.S. CBP, El Paso, Texas* (*CBP El Paso*), the majority returned a deficient arbitrator's award back to the same arbitrator to give him a second chance "to find a different violation of the parties' agreement because . . . a second look *just might* '*require a result opposite* to the award.'"[7] I noted, therein, that I was not aware that the Authority had adopted a "Mulligan-style[-]do-over" precedent to give arbitrators two tries to get an award right.[8]

[1] http://www.tcm.com/this-month/article/90473%7C0/Play-It-Again-Sam.html.
[2] Majority at 2.
[3] *Id.*
[4] Award at 3.
[5] *Id.* at 1.
[6] *Id.* at 2-3.
[7] 69 FLRA 261, 268 (2016) (Dissenting Opinion of Member Pizzella) (quoting Majority at 12).
[8] *Id.*

The majority apparently agrees that the Arbitrator's award is deficient otherwise there would be no point in remanding the case back to the Arbitrator for him to "fill in the gaps that [he] left open [when he] failed to finish [his] job."[9]

On the one hand, the "majority" assumes that "the Arbitrator ***may*** *have intended* to find that the Agency violated the parties' agreement when the Agency rated the grievant a Level 3 in Interpersonal Skills."[10] But that assumption is not reasonable or plausible given these circumstances. I would even go so far as to say that this assumption borders on the preposterous. Even the majority acknowledges that the Arbitrator ***knew*** that he *was supposed to address* an alleged violation of Article 21 and stated as much in his statement of the issue. Therefore, the only plausible conclusion, under these circumstances, is that the Arbitrator purposefully did not address and find a violation of Article 21.

On the other hand, our concurring colleague goes one step further and concludes "that the Arbitrator [*actually*] found that the Agency violated Article 21 of the parties' collective-bargaining agreement."[11] (In effect, then, only one Member believes that a remand is truly warranted, and I am not convinced that my colleagues forge a common rationale to support a remand.)[12] But, our concurring colleague is willing, nonetheless, to go along "with the decision to remand the award"[13] in order to "avoid an impasse in the resolution of this case"[14]

As I noted in *CBP El Paso*, I do not believe that the Authority should remand a case simply to get a different result.[15] There is *no need* to remand, but there is a *need* for the majority to make a decision.

The Arbitrator exceeded his authority when he awarded a remedy without finding a contract violation. The award is deficient. And I would vacate the award.

Before closing, however, recognition is in order for Arbitrator John Swanson. No one else who is involved in this case – not the Social Security Administration, not AFGE, Local 3937, and certainly not the American taxpayers who are left to foot the bill – benefits from this remand. But Arbitrator Swanson, for failing to answer a key question that was submitted to him for resolution, gets a second chance to correct his deficient award and to give a different decision that just ***may*** be more to the liking of the majority. Arbitrator Swanson, you get to bill the parties all over again for your redo – it's a great country!!

This is not a charity golf tournament. Therefore, I see no reason to give Arbitrator Swanson a Mulligan do-over.

Thank you.

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[9] *U.S. DHS, U.S. CBP Brownsville, Tex.*, 67 FLRA 688, 693 (2014) (Dissenting Opinion of Member Pizzella).
[10] Majority at 5 (some emphasis added).
[11] Concurring Opinion of Member DuBester at 8.
[12] *See U.S. EPA*, 65 FLRA 113, 117 (2010) (Member Beck concurring) (citing *U.S. DOJ, Fed. BOP, Fed.Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 116 (2002) (Chairman Cabaniss, Member Armendariz, then-Member Pope concurring) (Concurring Opinion of then-Member Pope) (majority "scraps over [twelve] years of precedent . . . without a common rationale")) (rejecting prior decision which "lacked a common rationale").
[13] Concurring Opinion of Member DuBester at 8.
[14] *Id.* at 8-9.
[15] 69 FLRA at 268-70 (Dissenting Opinion of Member Pizzella).