

72 FLRA No. 20

UNITED STATES
SMALL BUSINESS ADMINISTRATION
BIRMINGHAM, ALABAMA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 228
(Union)

0-AR-5522

DECISION

February 25, 2021

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and James T. Abbott, Members
(Chairman DuBester concurring)

I. Statement of the Case

In this case, we deny the Agency's nonfact exception where the exception merely challenges the Arbitrator's evaluation of evidence.

Arbitrator Roger C. Williams sustained the Union's grievance protesting, among other things, the grievant's performance rating and denial of a pay increase. The main question before us is whether the Arbitrator's award is based on nonfacts. We deny the Agency's nonfact exception because it challenges the Arbitrator's evaluation of evidence.

II. Background and Arbitrator's Award

The grievant's supervisor issued an overall level-two (marginal) rating on the grievant's annual performance appraisal, and withheld the grievant's within-grade pay increase on the basis of that appraisal. Subsequently, the Union filed a grievance alleging, as relevant here, that the Agency violated the parties' agreement by rating the grievant's performance as marginal and withholding her within-grade pay increase. Because the parties were unable to resolve the grievance, the dispute proceeded to arbitration.

The Arbitrator issued a two-page award under the expedited arbitration procedures in the parties'

agreement. In the abbreviated award, the Arbitrator noted that the parties' agreement requires that supervisors "communicate with the employee throughout the annual review period" about their performance, and, if a supervisor observes that an employee is performing below level three (meets expectations), then the supervisor must "address the deficiencies at the earliest opportunity by informing the employee about the specific deficiencies with reference to job elements, discussing how she can improve her performance, and providing coaching, mentoring and other development activities to help improve the employee's performance."¹

Without providing specific examples, the Arbitrator found that the grievant "fell short of expectations on isolated occasions," but "the evidence [wa]s insufficient to prove that [the] [g]rievant's overall performance was marginal."² In addition, the Arbitrator held that "the evidence prove[d]" that the supervisor failed to comply with the above-cited provisions of the parties' agreement.³ As a result, the Arbitrator sustained the grievance.

As remedies, the Arbitrator directed the Agency to change the overall rating of the grievant's performance from marginal to meets expectations; retroactively award the grievant the within-grade pay increase with interest; and otherwise make the grievant whole under the Back Pay Act.⁴

The Agency filed an exception to the award on July 11, 2019, and the Union filed its opposition on August 7, 2019.

III. Analysis and Conclusion: The Agency fails to establish that the award is based on nonfacts.

The Agency argues that the award is based on nonfacts. 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.⁵ Disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.⁶ In this regard, the Authority has held that the

¹ Award at 2.

² *Id.*

³ *Id.*

⁴ 5 U.S.C. § 5596.

⁵ *AFGE, Local 1594*, 71 FLRA 878, 880 (2020) (*Local 1594*) (citing *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010)).

⁶ *AFGE, Local 12*, 70 FLRA 582, 583 (2018) (citing *U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015)).

“absence of facts does not support a nonfact exception”⁷ and a claim that a factual finding was not sufficiently supported does not establish that the finding was a nonfact.⁸

The Agency contends that the Arbitrator based his decision to award the grievant a level-three rating on nonfacts because (1) there was “no evidence in the record” to establish that the grievant performed at level three, and (2) there is “no factual basis for the Arbitrator to conclude that the [g]rievant’s performance rating would have been different in the absence of the contract violation[s].”⁹ These arguments challenge the Arbitrator’s evaluation of the evidence, and are based on an alleged absence of facts – specifically, that there is “no evidence,”¹⁰ and “no factual basis,”¹¹ to support the award. Consistent with the above principles, the Agency’s nonfact exceptions do not demonstrate that a central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different result. Accordingly, we deny the exceptions.¹²

IV. Decision

We deny the Agency’s exception.

Chairman DuBester, concurring:

I agree with the Decision to deny the Agency’s exception.

⁷ *U.S. DOJ, Fed. BOP*, 68 FLRA 546, 547 (2015).

⁸ *AFGE, Local 1923*, 67 FLRA 392, 393 (2014).

⁹ Exceptions Br. at 9, 13-14. As part of its nonfact exception, the Agency also referenced an inapplicable test from *U.S. Dep’t of HHS, SSA*. Exceptions Br. at 8 (citing 34 FLRA 323, 328 (1990)). In addition to citing an outdated test, the Agency failed to: argue that the award is contrary to law; reference 5 U.S.C. § 7106 or the three-part framework for analyzing whether an award excessively interferes with a management right in *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 405-06 (2018) (then-Member DuBester dissenting); or implicate any specific management right. The Authority is constrained to resolve only those exceptions before us. See 5 C.F.R. § 2429.5.

¹⁰ Exceptions Br. at 10-12.

¹¹ *Id.* at 12-13.

¹² *U.S. Dep’t of VA, Nashville Reg’l Off., Nashville, Tenn.*, 71 FLRA 1042, 1043 (2020) (Member Abbott concurring) (denying nonfact exception where excepting party argued there was “no evidence” to support award); see also *U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 836, 842 (2000) (claim that “no evidence has been presented” to support alleged factual finding did not demonstrate that a central fact underlying the award was clearly erroneous, but for which arbitrator would have reached a different result); see generally *Local 1594*, 71 FLRA at 880 (“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.”).