

63 FLRA No. 152

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 900
(Union)

and

UNITED STATES DEPARTMENT OF THE ARMY
HUMAN RESOURCE COMMAND
ST. LOUIS, MISSOURI
(Agency)

0-AR-4177

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DECISION

July 9, 2009

Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on exceptions to the award of Arbitrator Bennett S. Aisenberg filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The grievance challenged the Agency's duty to bargain on the changes to employees' performance standards and the impact and implementation of those changes on employees' performance ratings. The Arbitrator concluded that the Agency had no obligation to bargain. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance claiming that the Agency violated Articles VI and XXX¹ of the parties' agreement (CBA) when it changed its business processes and the performance standards of bargaining unit employees without notifying, or bargaining with the Union on the impact and implementation of the changes. When the grievance was not resolved it was submitted to arbitration. The Arbitrator framed the issues to be: "1) Did the Employer unilaterally change its business

process/procedure which resulted in a change in performance requirements in violation of Articles VI and XXX? 2.) Did the Employer fail to notify the Union of th[e] changes in violation of Article XXX?" Award at 2.

The Arbitrator found that under Article VI, Section 3, the Agency "retained the right to determine the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work-product or tour of duty, and to determine the technology, methods and means of performing work *without the obligation to negotiate with the Union.*" Award at 5. (emphasis in original). The Arbitrator also found that, under Article VI, Section 4, the Agency recognized its obligation to bargain in good faith "and agreed that nothing in [s]ection[s] 2 or 3 of this Article should preclude the [Agency] and the Union from negotiating on various matters." *Id.* Reconciling the language of these two sections, the Arbitrator determined that Article VI, Section 4 was permissive -- that is, that the Agency could choose, but was not required, to bargain on matters related to management's rights. *See id.* Consequently, the Arbitrator concluded that under Article VI, the Agency could adopt reasonable performance standards without the obligation to bargain. *See id.* The Arbitrator concluded that the performance standards adopted by the Agency were not unreasonable and that "standing by themselves, do not violate Article VI." *Id.*

The Arbitrator further found that Article XXX, subsection 2d(4) of the parties' CBA supported his conclusion that Article VI authorized the Agency to unilaterally adopt reasonable performance standards. *See id.* at 6. The Arbitrator found that Article XXX, subsection 2d(4) specifically provided that the identification of major critical elements and the content of performance standards were not negotiable and were "not *even grievable* by the Union." *Id.* (emphasis in original). The Arbitrator further found that, under the same provision, the Union could request negotiations on the impact and implementation of performance standards. *See id.* However, when the Arbitrator contrasted the language of Section 2c with the language of subsection 2d(4), he found that Section 2c made it mandatory for the Agency to negotiate, upon request, over access to studies prepared by management that could be used in the establishment of employee performance standards, and that the language in subsection 2d(4) was not mandatory. Therefore, the Arbitrator concluded that, pursuant to subsection 2d(4), the Agency "has the prerogative to permit negotiation on the impact and implementation of [subject] standards, or not, at its sole discretion" and is

1. The pertinent sections of Articles VI and XXX are set forth in the Appendix to this decision.

not required to bargain over the impact and implementation of the performance standards. *Id.* at 7.

Finally, the Arbitrator concluded that the Agency complied with the requirements of Article XXX, “with the exception of the signed and dated statement required by subsection 2d(6).” *Id.* As a remedy, the Arbitrator ordered that “with any future change of performance standards” the Agency comply in full with the provisions of Article XXX. *Id.* The Arbitrator added that, because the Union gave up “a very fundamental right in subsection d(4) to negotiate with the [Agency] with regard to these standards,” the Agency “must afford the Union the protections of the other obligations set forth in Article XXX.” *Id.* at 7. The Arbitrator found that the Union filed the grievance as a “Union grievance” and that even though Article XXX precluded the Union from grieving performance standards, individual employees who were dissatisfied with their performance ratings could file individual grievances under Article XXX, Section 11 of the parties’ agreement. *Id.* at 7-8.

III. Positions of the Parties

A. Union’s Exceptions

The Union claims that the award is contrary to law on two grounds. First, the Union claims that the award is contrary to 5 U.S.C. § 7117 because the Arbitrator erred when he concluded that the Agency had no obligation to bargain on the impact and implementation of the changes made to the employees’ performance standards. Exceptions at 3. Second, the Union claims that the award violates § 7121(b)(1)(C)(i)² of the Statute. The Union asserts that, under § 7121(b)(1)(C)(i) of the Statute, an exclusive representative has the right “in its own behalf[,] or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances.” *Id.* at 5. The Union argues that the Arbitrator erred when he refused to acknowledge the Union’s right to grieve the impact and implementation of the changes made to the performance standards. *See id.* at 5. The Union also argues that the Arbitrator “misframed” the grievance by treating it as the individual grievances of “five employees who were adversely affected.” *Id.*

The Union also claims that the award fails to draw its essence from the parties’ agreement. According to

the Union, the Arbitrator misinterpreted Article VI, Section 4 when he concluded that the Agency had no obligation to negotiate with the Union over the impact and implementation of the performance standards. *See id.* at 6. In addition, the Union argues that the Arbitrator erred when “he refused to recognize Section 18 of Article XXVIII[,]” which concerns Union grievances. *Id.* at 15. The Union asserts that the Arbitrator erroneously framed the Union’s grievance as the individual grievances of five employees. According to the Union, the Arbitrator “refused to recognize the Union as the grievant[,]” and instead recognized five individuals as the grievants. *Id.*

In addition, the Union argues that the Arbitrator exceeded his authority because the award did not provide a remedy to the employees who were affected by the Agency’s violation of the agreement. *See id.* at 16. The Union also argues that the Arbitrator framed the issues in an order dated September 28, 2006 and later “changed the issues when he issued his award[.]” *See id.* at 17. The Union argues that the Arbitrator erred when he misinterpreted the testimony of a management official regarding the number of changes made to the performance standards and the reasons given for the changes. *See id.* at 16. The Union further argues that the Arbitrator failed to list joint exhibits in his decision, as well as the Union’s objections concerning statements made by the Arbitrator regarding impact and implementation bargaining. In addition, the Union asserts that the Arbitrator did not reference settlement agreements submitted by both the Agency and Union and that his decision fails to state “whether or not the grievance was denied or granted.” *Id.* at 17.

B. Agency’s Opposition

The Agency asserts that the Union has not shown that the award violates law. Opposition at 5. Regarding the alleged violation of 5 U.S.C. § 7117, the Agency argues that the Arbitrator resolved the issues under the parties’ collective bargaining agreement and that, throughout the grievance, the Union did not raise any statutory obligation, and instead “focused exclusively on contract[] language.” *Id.* The Agency maintains that the Union has not shown how the Arbitrator’s finding that the Agency did not have an obligation to bargain under the parties’ agreement violates law. *See id.* Regarding the alleged violation of § 7121(b)(1)(C)(i) of the Statute, the Agency asserts that the Union failed to show how the Arbitrator’s finding that the grievance was a Union grievance violates law. *See id.* at 8.

2. The Union cites to § 7121(b)(3). Exceptions at 5. However, in its allegation, the Union refers to the language of § 7121(b)(1)(C)(i) of the Statute. Therefore, we construe the Union’s exception as an allegation that the award violates § 7121(b)(1)(C)(i).

The Agency also asserts that the Union failed to show that the award fails to draw its essence from the parties' agreement. The Agency argues that the Union's arguments are mere disagreement with the Arbitrator's findings in an attempt to relitigate the grievance. *See id.* at 9. As to the Union's exceeded authority claim, the Agency asserts it appears that the Union is claiming that the Arbitrator exceeded his authority because no remedy was ordered. The Agency asserts that the award provides a remedy which requires the Agency to comply with the requirements of Article XXX, Section 2d(6) of the parties' agreement in the future. *See id.* at 10.

IV. Analysis and Conclusions

A. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See United States Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. § 7117

The Union claims that the award is contrary to 5 U.S.C. § 7117 because the Arbitrator erred when he concluded that the Agency had no obligation to bargain on the impact and implementation of the changes made to the performance standards.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented to the arbitrator. *See, e.g., United States Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003). A review of the record supports the Agency's claim that the Union did not raise before the Arbitrator arguments related to 5 U.S.C. § 7117. Consequently, because this issue could have been, but was not, presented to the Arbitrator we will not consider the Union's exception concerning § 7117 of the Statute. *See id.* at 544. Based on the foregoing, we dismiss this exception.

2. § 7121(b)(1)(C)(i)

With respect to § 7121(b)(1)(C)(i) of the Statute, the Union claims that the Arbitrator erred: 1) when he refused to acknowledge the Union's right to grieve the impact and implementation of the changes to the performance standards; and 2) when he denied the Union the right to represent each of the 60 employees and by treating the grievance as the individual grievances of five individual employees.

Under 5 U.S.C. § 7121(a)(2), parties may exclude any matter from the application of the grievance procedures. *See, e.g., AFGGE, Local 104*, 61 FLRA 681, 683 (2006). In this case, the Arbitrator resolved the grievance based on his interpretation of Articles VI, Section 4 and XXX, subsection 2d(4) of the parties' CBA. In this regard, the Arbitrator found that Article XXX, subsection 2d(4) barred the Union from negotiating or grieving the content of performance standards. Award at 6. Additionally, the Arbitrator found that, while the Union, under Article XXX, subsection 2d(4), could request negotiations over the impact and implementation of performance standards, under Articles VI, Section 4, the Agency was under no obligation to bargain. *See id.* at 7. Thus, the Arbitrator's factual findings show that the parties, in this case, excluded from the negotiated grievance procedure grievances pertaining to the content of performance standards, and that under subsection 2d(4), the Agency could, but was not required to bargain over the impact and implementation of the performance. Consequently, insofar as the Arbitrator's award is based solely on his interpretation of the parties' CBA, the award is not deficient as contrary to § 7121(b)(1)(C)(i). *See AFGGE, Local 104*, 61 FLRA at 683.

The Union also claims that the Arbitrator denied the Union the right to represent its workforce of 60 employees because he framed the grievance as an individual grievance rather than as a Union grievance. The Union misinterprets the award. The Arbitrator specifically found that the grievance was filed as a "Union grievance" and that under Article XXX, subsection 2d(4), the Union was not able to grieve over the content of performance standards. Award at 7-8. Therefore, as the Arbitrator found that the grievance was filed as a Union grievance, the award is consistent with § 7121(b)(1)(C)(i) of the Statute. *See* 5 U.S.C. § 7121(b)(1)(C)(i). Additionally, the Arbitrator noted that Article XXX, Section 11 provided relief for individual employees to grieve their performance ratings. *See id.* Consequently, the Arbitrator's award does not deny the Union the opportunity to represent individual employees who are dissatisfied with their performance ratings. Rather, the award holds that, under Article XXX, sub-

section 2d(4), the Union cannot grieve the content of employee performance standards. *See id.* at 6. Based on the foregoing, we find that the award is not contrary to law.

B. The award does not fail to draw its essence from the parties' CBA.

The Union claims that the Arbitrator misinterpreted Article VI of the parties' CBA when he concluded that the Agency had no obligation to bargain over the impact and implementation of the performance standards. The Union also argues that the Arbitrator failed to recognize the grievance as a Union grievance under Section 18 of Article XXVIII of the parties' CBA.

The Authority will find that an award fails to draw its essence from an agreement when the appealing party establishes that 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. *See United States Dep't of Labor (OSHA)* 34 FLRA 573, 575 (1990) (*OSHA*). The Authority has held that questions concerning the interpretation of collective bargaining agreements are questions for the arbitrator because it is the arbitrator's construction of the agreement for which the parties have bargained. *See id.* at 576.

Here, the Arbitrator interpreted the parties' agreement and concluded that the Union could, under Article VI, Section 4 and Article XXX, subsection 2d(4) of the parties' CBA, request negotiations over impact and implementation of performance standards, but that the Agency was not obligated to bargain over the impact and implementation of the performance standards. Award at 7. As set forth above, the Authority defers to the Arbitrator's interpretation of the agreement "because it is the arbitrator's construction of the agreement for which the parties have bargained." *OSHA*, 34 FLRA at 576. In this regard, the Union's exception fails to establish that the Arbitrator's interpretation and application of Article VI, Section 4 and Article XXX, subsection 2d(4) is unfounded in reason and fact, does not represent a plausible interpretation of the agreement, cannot be derived from the agreement, or evidences a manifest disregard of the agreement. *See, e.g., AFGE, Local 3979 Council of Prisons Locals*, 61 FLRA 810, 815 (2006). Accordingly, we deny the Union's exception.

The Union also claims that the Arbitrator framed the grievance as an individual grievance rather than as a Union grievance under Section 18 of Article XXVIII of the parties' CBA. As noted earlier, the Union misinterprets the award. The Arbitrator specifically found that the grievance was filed as a "Union grievance." Award at 7. Consequently, we find that the award does not fail to draw its essence from the parties' CBA.

C. The Arbitrator did not exceed his authority.

The Union claims that the Arbitrator exceeded his authority because the award did not provide a remedy. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). Further, an arbitrator exceeds his authority in connection with a remedy where the arbitrator awards relief to persons who did not file a grievance on their own behalf and did not have the union file a grievance for them. *United States Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 42 FLRA 680, 685 (1991). Also, in the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. *See United States Dep't of the Navy, Naval Sea Logistics Ctr., Detachment Atlantic, Indian Head, Md.*, 57 FLRA 687, 688 (2002). Furthermore, arbitrators have great latitude in fashioning remedies under the Statute to correct violations of collective bargaining agreements. *See, e.g., Nat'l Labor Relations Bd.*, 50 FLRA 88, 94 (1995) (*NLRB*) (citing *AFGE, Local 2076*, 47 FLRA 1379, 1383 (1993)).

In this case, the Arbitrator's factual findings reveal, contrary to the Union's assertion, that the Arbitrator's award provided a remedy. In this regard, the Arbitrator found that the Agency failed to comply with Article XXX, Section 2d(6) and specifically ordered that "As relief to the Union . . . with any future change of performance standards, the [Agency] must comply fully with the provisions of Article XXX . . ." Award at 7. Having concluded that the Agency violated Article XXX, Section 2d(6), the Arbitrator fashioned a remedy designed to correct the violation. The remedy, as fashioned by the Arbitrator, was within his arbitral discretion. *See United States Dep't of the Army, Corps of Engr's, Huntington Dist., Huntington, W. Va.*, 59 FLRA 793, 798-799 (2004) (as arbitrators have broad discretion to fashion remedies, failure to provide a particular remedy does not establish that arbitrator exceeded his authority).

We construe the Union's claim that the Arbitrator "changed the issues . . . [in] his award[.]" as a claim that the Arbitrator failed to resolve an issue that was submitted to arbitration. As noted earlier, the Arbitrator framed the issue as whether the Agency violated the CBA when it unilaterally changed its business processes, or procedures without notifying the Union. *See* Exceptions at 2. The Arbitrator found that the Agency could, but was not required under the CBA, to bargain over the changes to its business processes, and that the Agency complied with all, but one, of the requirements of the CBA regarding the changed procedures. As such, the Arbitrator's award was responsive to the issues as framed. Consequently, the Union has failed to demonstrate that the Arbitrator exceeded his authority. *See United States Dep't of the Air Force*, 61 FLRA 797, 801 (2006) (arbitrator did not exceed his authority when his findings were directly responsive to the issue he framed).

D. The Arbitrator did not deny the Union a fair hearing.

The Authority will find an award deficient on the ground that an arbitrator failed to conduct a fair hearing when it is demonstrated that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding prejudiced a party so as to affect the fairness of the proceeding as a whole. *See, e.g., AFGE, Local 1668*, 50 FLRA 124, 126 (1995). However, an arbitrator has considerable latitude in the conduct of a hearing. The fact that an arbitrator conducted a hearing in a manner that one party finds objectionable does not in and of itself provide a basis for finding an award deficient. *See AFGE, Local 22*, 51 FLRA 1496, 1497-98 (1996).

We construe the Union's claims that the Arbitrator misinterpreted the testimony of a management official, failed to consider evidence and objections presented at the hearing, and that he neither granted nor denied the grievance, as claims that the Arbitrator failed to provide a fair hearing. Those claims challenge the Arbitrator's evaluation of the evidence and testimony and the weight to accord them. In this connection, the Authority has long held that disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient. *See AFGE, Local 3295*, 51 FLRA 27, 32 (1995). Consequently, as the Union challenges the Arbitrator's evaluation of the evidence, the Union's exception does not provide a basis to find that the Union was denied a fair

hearing. Based on the foregoing, we find that the Arbitrator did not deny the Union a fair hearing.

V. Decision

The Union's exceptions are denied.

APPENDIX

Article - VI – RIGHTS AND OBLIGATIONS OF THE EMPLOYER

Section 2. The Employer retains the right:

b. In accordance with applicable laws:

(2) To assign work, make determination with respect to contracting out, and to determine the personnel by which the Employer's operations shall be conducted;

Section 3. The Employer retains the right to act within the following areas of policy and discretion without the obligation to negotiate with the Union:

a. In determining the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty;

b. In determining the technology, methods, and means of performing work.

Section 4. The Employer recognizes its obligation to bargain in good faith.

Nothing in Section 2 or 3 of this Article shall preclude the Employer and the Union from negotiating:

a. Procedures which management officials will observe in exercising any authority under Sections 2 and 3 of this Article.

b. Appropriate arrangement for Employees adversely affected by the exercise of any authority under Sections 2 and 3 of this Article.

....

Article XXX – PERFORMANCE APPRAISAL SYSTEMS

Section 2. Development of Standards.

c. The Union shall be afforded access, upon request, to Management Engineered Standard Studies performed by the Management Division,

Resource Management Directorate, or equivalent, when such studies are utilized by a Supervisor in establishing an Employee's performance Standards.

d. The performance requirements will be developed in draft, identifying the major and critical job elements and determining performance standards.

....

(4) The identification of major/critical elements and the content of performance standards are not negotiable/grievable. However the Union retains the right to request negotiation on impact and implementation of these standards.

....

(6) A signed and dated statement that these standards were coordinated with the Union Representative, will complete the process.

....

Section 11. Employees who are dissatisfied with their performance ratings or other aspects of their performance appraisal process may grieve under the appropriate procedures.

Award at 2-4.