

65 FLRA No. 44

FEDERAL DEPOSIT
INSURANCE CORPORATION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 273
(Union)

0-AR-4184

DECISION

October 29, 2010

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 Edna E. J. Francis 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 Arbitrator found that the Agency failed to fairly and equitably process the grievant's nomination for a Corporate Success Award (CSA). As a remedy, the Arbitrator ordered the Agency to award the grievant a CSA, with appropriate backpay and interest.

For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

A CSA is an annual award that provides Agency employees recognized as "top contributors" with a three percent increase in basic pay. Award at 8; Opp'n, Attach. 3, "Compensation Agreement Between FDIC and NTEU for the Years 2003-2005" (Compensation Agreement)). The percentage of "top contributors" recognized in 2004 for their 2003 contributions, as set by the Chairman of the Agency

under the Compensation Agreement, constitutes "33 1/3 percent of eligible bargaining unit employees." *Id.* at 15-16.

The Agency's CSA procedures for identifying top contributors as CSA recipients are set forth in the Agency's "Procedures for Processing [CSAs]" Memorandum (the Memorandum) and "FDIC Directive System Circular 2420.1," Chapter 11, § 5 (Circular 2420.1). *See id.* at 10-13; Opp'n, Attach. 5, Circular 2420.1; Opp'n, Attach. 6, the Memorandum. These procedures require supervisors to numerically rank all nominated employees under their command and to submit CSA ranked nominations to the Assistant Regional Director (ARD) for their territory. Award at 13. The ARD then consolidates and prepares those forms for evaluation by a first-level review panel, consisting of ARDs and the Deputy Regional Director (DRD) - Compliance. *Id.* The first-level review panel evaluates each CSA recommendation, prioritizes the top one-third by assigning a numerical ranking to the nominees, and submits those rankings to a second-level review panel consisting of DRDs and Area Directors (DRD Panel). *Id.* The DRD Panel evaluates and/or re-ranks each CSA nominee and submits the results to the Regional Director (RD) for approval. *Id.* The RD reviews the recommendations and submits the results to the Division Director. *Id.*

Circular 2420.1 is incorporated by reference in a Memorandum of Understanding between the parties (MOU). *Id.* at 9. The Compensation Agreement, the Memorandum, Circular 2420.1, and the MOU all require that CSAs be processed and distributed in a fair and equitable manner.¹

When the grievant was nominated to receive a CSA, but was not selected, he filed a grievance. The grievance was not resolved and was submitted to arbitration. The Arbitrator framed the issues as follows: "Did the Agency violate Circular 2420.1 or the MOU when it failed to award [the grievant] a [CSA] in 2004? If so, what is the appropriate remedy?" *Id.* at 45.

The Arbitrator found that the process for considering the grievant's CSA nomination "was not fair and equitable" and thus violated the MOU and Circular 2420.1. *Id.* at 48. According to the Arbitrator, up to the point where the grievant's nomination was submitted to the DRD Panel, the

1. The relevant provisions of the Compensation Agreement, the Memorandum, Circular 2420.1, and the MOU are set forth in the appendix to this decision.

grievant ranked 64th on a list of 113 nominees who were in the top 33 1/3 percent of employees. *Id.* at 52. At the DRD phase of the process, the Arbitrator found irregularities which led him to conclude that “the DRD Panel did not, in any meaningful sense, re-rank the nominees.” *Id.* Among the irregularities that she found, were the removal of the grievant’s nomination from consideration, as well as that of eight other nominees. In this connection, the Arbitrator found that, although the DRD Panel was not required to keep the grievant on the list, it “should have been able to offer sound rationale for removing [the grievant] from consideration” *Id.* Having found that the “record lack[ed] such evidence[.]” the Arbitrator determined that this suggested that the DRD Panel “wanted to reach certain preconceived results.” *Id.* Other irregularities found were the unexplained addition of one nominee, and, in the case of one CSA recipient, the consideration of contributions not corresponding to the 2003 work year for which the CSAs were being awarded. *Id.*

The Arbitrator thus concluded that the evidence established that, “except for the flawed and arbitrary process at the DRD Panel’s level,” the grievant’s nomination would have remained among the top 33 1/3 percent of nominees and would have been forwarded to the RD for signature and ultimately submitted to the Director for approval. *Id.* at 56. Accordingly, the Arbitrator sustained the grievance and directed the Agency to award the grievant a CSA, effective 2004, for work performed in 2003, with backpay and interest.

III. Positions of the Parties

A. Agency’s Exceptions

The Agency asserts that the Arbitrator’s remedy is contrary to law because it affects management’s rights to direct employees and to assign work under § 7106(a)(2)(A) and (B) of the Statute. Citing *United States Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*), the Agency first acknowledges that “Prong [I of the *BEP* framework] is not at issue” in this case because the “[a]ward provides a remedy for a purported violation of the parties’ MOU and Circular [2420.1.]” Exceptions at 11 n.10. However, the Agency contends that the remedy does not “satisfy Prong [II]” of the *BEP* framework because it does not reflect a reconstruction of what the Agency would have done if it had not violated the contractual CSA nomination process. *Id.* at 11. The Agency asserts that the Arbitrator did not find that

the grievant would have been recommended for a CSA by the RD. The Agency contends that the Arbitrator did not compare the grievant’s contributions to those of other nominees and that, without making the requisite finding that the grievant should have received a CSA, the Arbitrator substituted her judgment for that of the Agency. The Agency requests that the Authority modify the remedy portion of the award to require the Agency to reconsider the grievant for a CSA. *Id.* at 16.

The Agency also argues that a remand is warranted because the Arbitrator exceeded her authority by substituting her judgment for that of the Agency when she granted the grievant a CSA without making the necessary findings under the CSA nomination process. *Id.* Additionally, the Agency asserts that the remedy fails to draw its essence from the “express language” of the Compensation Agreement and should be set aside because it requires the Agency to give the grievant a CSA “despite the absence of any findings as to how the [g]rievant’s contribution compared with any of his co-workers or with any other CSA nominee.” *Id.* at 19.

B. Union’s Opposition

The Union argues that the Arbitrator did not exceed her authority and that she correctly reconstructed what the Agency would have done if the Agency had not violated the CSA nomination process. The Union also contends that the award does not fail to draw its essence from the Compensation Agreement because the Arbitrator found that, except for the flawed and arbitrary process at the DRD Panel’s level, the grievant’s nomination would have “remained among the top 33 1/3 percent of nominees[.]” Opp’n at 13 (quoting Award at 56). In addition, the Union asserts that the remedy is consistent with the parties’ collective bargaining agreement (CBA), which specifically grants the Arbitrator “the authority to make an aggrieved employee whole to the extent such remedy is not limited by law.” *Id.* (citing Article 48, Section 4).² The Union asserts that, if the Authority

2. Article 48, Section 4.B provides, in pertinent part:

The arbitrator shall have no power to add to, subtract from, or modify the terms of this Agreement. The award will be limited to the issues presented at arbitration. The arbitrator’s decision will be final and binding and the arbitrator will have the authority to make an

finds that the remedy is deficient, the award should be remanded to the Arbitrator for clarification.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Authority reviews questions of law raised by exceptions to an arbitrator's award *de novo*. See *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a standard of *de novo* review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. See *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *Id.*

The Authority recently revised the analysis that it will apply when reviewing management-rights exceptions to arbitration awards. See *EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC, S.F. Region*). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, then the Authority examines whether the award provides a remedy for a violation of either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision that was negotiated pursuant to § 7106(b) of the Statute. *Id.* In setting forth its revised analysis, the Authority specifically rejected the continued application of the reconstruction standard set forth in *BEP. FDIC, S.F. Region*, 65 FLRA at 106-107.

Applying this analysis, we reject the Agency's exception that the award's remedy is contrary to law. This exception is based entirely on the assertion that the remedy does not reflect a reconstruction of what the Agency would have done if it had not violated the agreed-upon CSA nomination process. As discussed above, such reconstruction is not the standard to be applied to the remedy directed by an arbitrator. Moreover, the Agency concedes that the award enforces a properly negotiated contract provision. See Exceptions at 11 n.10. Accordingly, we conclude that the award does not impermissibly affect

aggrieved employee whole to the extent such remedy is not limited by law.

Opp'n, Attach. 2.

management rights by failing to reconstruct what the Agency would have done if it had not violated the contract, and we deny the Agency's contrary to law exception.³ See, e.g., *FDIC, S.F. Region*, 65 FLRA at 107.

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

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. See 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining 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 collective bargaining 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 *U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Agency asserts that the award fails to draw its essence from the Compensation Agreement because it requires the Agency to grant a CSA to the grievant without a finding that the grievant would have remained in the top one-third of contributors once he was compared with other nominees. Exceptions at 18.

Contrary to the Agency's assertion, the Arbitrator specifically found that, absent the Agency's violation of Circular 2420.1 and the MOU, the grievant's nomination "would have remained among the top 33-1/3 percent of nominees[.]" Award at 56. The Arbitrator further found that, "as a matter of course," the grievant's nomination, like those of others "listed among the top 33 1/3 percent," would have been submitted to the RD for signature and to the Director for approval and that the grievant would

3. For the reasons set forth in her concurring opinion in *FDIC, S.F. Region*, 65 FLRA at 112, Chairman Pope agrees that the award is not deficient because the remedy is reasonably related to the negotiated provision and the harm being remedied.

have received a CSA. *Id.* As such, the Agency has not demonstrated that the award is irrational, implausible, unfounded, or evidences a manifest disregard of the Compensation Agreement. *See, e.g., FDIC, S.F. Region*, 65 FLRA at 108 (agency failed to show that award directing agency to award grievant a CSA was deficient on essence ground); *FDIC*, 62 FLRA 356, 359 (2008) (agency failed to show award finding agency failed to process grievant's CSA nomination form properly deficient on essence ground). Accordingly, we find that the Agency has failed to show that the award is deficient on essence grounds.

C. The award does not exceed the Arbitrator's authority.

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 persons who are not encompassed within the grievance. *See AFGF, Local 1617*, 51 FLRA 1645, 1647 (1996). When the parties fail to stipulate the issues, the arbitrator may formulate them on the basis of the subject matter of the grievance. *See U.S. Dep't of Def., Educ. Activity, Arlington, Va.*, 56 FLRA 887, 891 (2000) (citations omitted).

The Agency claims that the Arbitrator exceeded her authority by directing the Agency to award a CSA to the grievant. As stated above, the issue framed by the Arbitrator was whether the Agency violated Circular 2420.1 or the MOU when it failed to award the grievant a CSA in 2004, and if so, "what is the appropriate remedy?" Award at 45. The Arbitrator found a violation of Circular 2420.1 and the MOU and concluded that, had it not been for the violation, the grievant's nomination would have been submitted to the RD and the grievant would have received a CSA. As such, the Arbitrator's remedy directing the Agency to grant the grievant a CSA is responsive to the issue before her and is based on her evaluation of the evidence. Consequently, the Agency has not demonstrated that the Arbitrator exceeded her authority by ordering a CSA as a remedy.

Further, with respect to the Agency's claim that the Arbitrator exceeded her authority by ordering a remedy that fails to draw its essence from the Compensation Agreement, such claim does not provide a basis for finding the award deficient. When the Authority denies an exception claiming that an award fails to draw its essence from an agreement, and the appealing party essentially

reiterates its essence arguments in contending that the arbitrator exceeded his or her authority, the Authority denies the exceeded-authority exception consistent with the denial of the essence exception. *See, e.g., NTEU*, 62 FLRA 45, 48 (2007) (citing *U.S. Dep't of Educ., Wash., D.C.*, 61 FLRA 307, 311 (2005) (Chairman Cabaniss concurring as to other matters); *U.S. Dep't of the Treasury, IRS., Austin, Tex.*, 60 FLRA 360, 362 (2004)). Consistent with the above conclusion that the award does not fail to draw its essence from Circular 2420.1 and the MOU, we find that the Agency has not demonstrated that the Arbitrator exceeded her authority and deny this exception.

V. Decision

The Agency's exceptions are denied.

APPENDIX

Compensation Agreement Between FDIC and NTEU for the Years 2003-2005

II. ANNUAL PAY

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C. Annual Pay Adjustment

Year 2003

Effective 2003, the Employer will provide an increase in basic pay of 3.2 percent for all employees who received a rating of "meets expectations" during the prior year's rating period. In addition, 2003 shall be a transition year for the Corporate Success Award, which is described below. . . .

Years 2004 and 2005

....

A Corporate Success Award (CSA) will be established which provides that an additional 3.0 percent increase be made in basic pay for those employees recognized as top contributors. The Chairman has sole discretion to set the percentage of bargaining unit employees who will be recognized as top contributors under the CSA program. However, the percentage of bargaining unit employees to receive the CSA shall be no

less than 33 1/3 percent. These awards shall be made on an annual basis.

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Award at 8; Opp'n, Attach. 3 at 2.

Memorandum: Procedures for Processing Corporate Success Awards (November 17, 2003)

The Regional Office CSA Nomination Procedure is set forth as follows:

1. The supervisor prepares written CSA nominations for eligible employees.
2. The supervisor prioritizes and assigns a numerical ranking for all nominated employees within their span on control.
3. The supervisor submits the CSA nomination forms with numerical rankings to the Regional Office Assistant Regional Director, Administration (RO ARD-Admin).
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4. The RO ARD-Admin consolidates and prepares the CSA nomination forms for evaluation by a first-level review panel consisting of the Assistant Regional Directors and the Deputy Regional Director – Compliance.
5. The first-level review panel evaluates each CSA recommendation and prioritizes the top one-third by assigning a numerical ranking.
6. The first-level review panel forwards their numerically ranked CSA recommendations to the second-level review panel consisting of the Deputy Regional Directors and Area Directors.
7. The second-level review panel evaluates and/or re-ranks each CSA recommendations and submits to the Regional Director for approval.
8. The Regional Director reviews the CSA recommendations, signs the appropriate justification forms, and submits the final Regional CSA recommendations to the Division Director.

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Award at 13.

FDIC DIRECTIVE SYSTEM Circular 2420.1 (July 21, 2003)

Chapter 11
Corporate Success Awards

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11-2. Eligibility

All non-executive employees who have current performance ratings of record from the FDIC of "Meets Expectations" are eligible.

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11-4. Criteria

The criteria below are intended to be achievable by any eligible employee in any position. Nominations for the award effective in 2004 must be based on contributions made between January 1, 2003 and December 31, 2003. . . .

Nominations will be evaluated based on one or more of the following criteria. These are the only criteria permitted under the Corporate Success Award Program [(CSA)]. Nominations will provide specific statements of the contributions by the employee that meet the identified criteria. Meeting one or more of these criteria does not entitle employees to be nominated to receive the CSA.

A. Business Results: Consistently displays a high level of initiative, creativity, and innovation to produce results that reflect important contributions to the Corporation and/or its organizational components.

B. Competency: Demonstrates an exceptional degree of competency within his/her position, and is frequently relied upon by others for advice, assistance, and/or judgment that reflect important contributions to the Corporation and/or its organizational components.

C. Working Relationships: Builds extremely productive working relationships with co-workers, other Divisions/Offices, or other public or private sector agencies based on mutual respect that reflect important contributions to the Corporation and/or its organizational components.

D. Learning and Development: Takes an active part in developing personal skills and competencies and applies newly acquired skills and competencies that reflect important contributions to the Corporation and/or its organizational components.

11-5. Procedures

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B. Supervisors shall nominate their top contributors by preparing the form *FDIC Form 2420/21, Corporate Success Award Nomination*. Forms must be submitted to the designated reviewing official within 15 calendar days after the end of the consideration cycle. Employees may provide input to the appropriate supervisors for other employees to be considered for a CSA.

C. Reviewing Officials, as designated in the Division/Office delegation of authority, will ensure the consistent application of CSA criteria and the fair and equitable treatment of employees. The reviewing official shall sign the nomination form and forward it to the Division/Office Director within 30 calendar days after the end of the consideration cycle.

D. Each Division/Office Director, or his/her designee, will serve as the approving official for all CSA within their Division or Office. Directors are responsible for ensuring that the percentage of bargaining unit and non-bargaining unit employees recognized under the CSA program equals the percentage identified by the Chairman. The Director, or designee, will sign the nomination forms and forward them to the AO for coordination with the DoA, HRB.

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F. The Chairman has sole discretion to set the percentage of bargaining unit and non-bargaining employees who will be recognized as top contributors under the CSA program However, the percentage of bargaining unit employees to receive the CSA will be no less than 33 1/3 percent.

Opp'n, Attach. 5.

Memorandum of Understanding Between FDIC & NTEU (March 13, 2003)

1. CSAs will be distributed to employees in a fair and equitable manner, and in accordance with the terms of this MOU and FDIC Circular 2420.1.

Award at 9; Opp'n, Attach. 4.