65 FLRA No. 141

UNITED STATES
DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3525
(Union)

0-AR-4558

_____

DECISION

March 30, 2011

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Robert T. Moore filed by the Agency under § 7122 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.[2]

The Arbitrator found that the Agency violated its Performance Appraisal Program (PAP) in preparing the grievant's annual performance appraisal and denying her a within-grade increase (WIGI). The Arbitrator directed the Agency to rescind the erroneous appraisal, issue a new appraisal, provide the grievant a retroactive WIGI, provide supervisors training on performance appraisals, and post a notice. For the reasons discussed below, we deny the exceptions in part, and grant them in part.

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of the grievant when she received an overall performance rating of "[u]nacceptable" on her annual performance appraisal and was denied a WIGI. Award at 10-11. The grievance was unresolved and was submitted to arbitration.

After the arbitration hearing, the grievant entered into a settlement agreement (SA) with the Agency to resolve a case pending before the Merit Systems Protection Board (MSPB). *Id.* at 6. Although the Agency provided the SA to the Arbitrator prior to the issuance of the arbitration award, the Arbitrator found that the SA had no "force or effect" in the pending arbitration. *Id.* at 7. He based this finding on: (1) the SA's statement that it "shall not be used, cited[,] or relied upon by any party in connection with any other judicial or administrative proceeding[;]" (2) the facts that the Union, rather than the grievant, was technically a party to the arbitration and that only the Union could withdraw the grievance; and (3) the fact that the SA was "so heavily redacted" that he could not determine whether it related to the arbitration or whether the grievant had received adequate consideration to make the SA binding. *Id.*

In his award, the Arbitrator stated the issues, in pertinent part, as: "Did the Agency comply with the requirements of the [parties' agreement] and Agency regulations in giving the grievant her annual performance appraisal . . . and if not what should the remedies be?" *Id.* at 1. Addressing the merits of the

1. Member Beck's concurring opinion is set forth at the end of this decision.

2. In its opposition, the Union argues that the Agency's exceptions should be dismissed for failure to comply with Article 7.7 of the parties' agreement, which states: "Prior to filing for an exception to the [Authority], written notification must be provided to the other party." Opp'n at 9. However, the Authority has held that a procedural requirement in a collective bargaining agreement does not provide a basis for dismissing exceptions that comply with the Authority's statutory and regulatory requirements. *See U.S. Army Aviation Sys. Command*, 22 FLRA 379, 379 n.* (1986) (*AASC*) (Authority did not dismiss exceptions for failure to comply with contract provision requiring ten-day notice prior to filing exceptions). The Union attempts to distinguish *AASC* on the basis that compliance with the ten-day notice requirement in that case would have deprived the excepting party of the entire thirty-day filing period, unlike the contractual provision here, which merely requires "prior" notice. Opp'n at 9 n.16. However, the Authority's decision to consider the exceptions in *AASC* was based upon the exceptions' compliance with Authority filing requirements, not the length of the contractual notice period at issue. *See AASC*, 22 FLRA at 379 n.*. Thus, *AASC* applies here, and, as the Agency's exceptions were timely filed in accordance with the requirements of § 7122(a) of the Statute and the Authority's Regulations, we consider the exceptions.

grievance, the Arbitrator found that the grievant was on detail outside the Agency to the Office of General Counsel (OGC) for the first six months of the relevant rating period and that she received an overall rating of "outstanding" from her supervisor there. *Id.* at 8-9. The Arbitrator also found that there was no "significant difference" between the grievant's duties on detail and her duties upon her return to the Agency. *Id.* at 11.

In addition, the Arbitrator found that when the grievant returned to the Agency, her supervisor directed her to undergo training to reacquaint her with the routines and procedures of the Agency. *Id.* at 9. The Arbitrator also found that after the grievant completed training, the grievant's trainer assessed her as being successful in all training elements and needing no further training before resuming her duties. *Id.* at 9-10, 13.

Further, the Arbitrator determined that when the grievant's supervisor prepared the grievant's annual appraisal at the end of the rating period, the appraisal covered only the period after the grievant's return to the Agency from her detail. *Id.* at 10. The Arbitrator found that, in preparing the appraisal, the supervisor "exclud[ed] from her consideration" the grievant's performance during both her training and her detail to the OGC. *Id.* at 13. The Arbitrator also found that the supervisor denied the grievant a WIGI "to which she was otherwise entitled by the length of time in her then current pay step, provided [that] her job performance was acceptable." *Id.* at 11.

As a result of these findings, the Arbitrator concluded that the grievant's supervisor violated the clear "mandate" of the PAP, which "unmistakably requires" that employees be reviewed on the basis of their performance over the entire performance year. *Id.* at 13. In this regard, the Arbitrator found that, under Section B of the PAP,[3] the Agency's appraisal period ran from April 1 to March 31 and was intended to create a record of an employee's performance for "*the entire rating period*[.]" *Id.* at 8 (quoting PAP) (emphasis added by Arbitrator). In addition, the Arbitrator found that the supervisor did not take into account that another manager had credited the grievant with "clearing out a substantial backlog of matters" upon her return to the Agency, and that this work entitled the grievant to a rating of at least "fully satisfactory" on individual rating elements and overall. *Id.* at 13-14. The Arbitrator concluded that the Agency had not overcome the "strong *prima facie* case" that the grievant would have received an overall rating of "outstanding" if she had been properly evaluated according to the PAP's requirements. *Id.* at 14.

To remedy the violations of the PAP, the Arbitrator directed the Agency to remove the performance appraisal from the grievant's file and replace it with an appraisal that rated her "fully successful" on all job elements and on her overall rating. *Id.* The Arbitrator also directed that an "assessor" "at the highest level of the personnel and labor relations structure of the Agency" should determine whether the grievant's appraisal rating for "any or all of her job elements and overall job performance" should be further elevated to "excellent" or "outstanding[.]" *Id.* In addition, the Arbitrator awarded the grievant the WIGI that she did not receive for the appraisal period, with interest. *Id.* at 14-15. The Arbitrator also directed the Agency to provide training on the PAP to the grievant's supervisor "and all other supervisors who serve as rating or reviewing officials under the PAP[.]" *Id.* at 15. Finally, the Arbitrator directed the Agency to post a notice regarding its adherence to the PAP requirements.[4] *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the Arbitrator erred in issuing an award after learning that, in the SA, the grievant had "agreed to dismiss any pending claim against the Agency[.]" Exceptions at 7. In this regard, the Agency contends that general waivers of claims, such as that included in the SA, apply to grievances unless grievances are "unambiguously excluded by the language of the agreement." *Id.* at 7-8 (citing *AFGE, Local 987*, 61 FLRA 245, 246

3. The pertinent wording of the PAP is set forth below.

4. The notice provides, in relevant part:

> The Agency will fairly and faithfully comply with all requirements of the . . . PAP and not allow the animus of any supervisor towards any employee to influence the job performance rating of that employee.
>
> The Agency has provided and, as necessary, will continue to provide training for all members of management and supervisors on their duties and obligations in their relations with subordinate employees including recognizing and respecting their rights to fair treatment under the . . . PAP and the [parties' agreement].

Award at 17.

(2005)). According to the Agency, because the Union has no claims independent from those that the grievant waived in the SA, the SA resolved all of the issues before the Arbitrator. *Id.* at 8.

The Agency also argues that the award violates an Agency regulation – the PAP – and that the PAP governs the matter in dispute because the Arbitrator was not enforcing any pertinent provisions in the parties' agreement. *Id.* at 11. In this regard, the Agency asserts that the Arbitrator's finding that there is a "mandatory" twelve-month appraisal period is contrary to the PAP, and that the Agency complied with the PAP's requirement that any appraisal be based on a minimum period of performance of ninety days. *Id.* at 12 (citing Section B.4 of the PAP). The Agency also asserts that the PAP does not require a reviewing official to consider an interim rating issued to an employee at the end of a detail to an office outside the Agency. *Id.* at 12-13 (citing Sections B.10 and B.12 of the PAP).

The Agency also challenges several of the Arbitrator's awarded remedies. Citing *United States Department of Treasury, Bureau of Engraving & Printing, Washington, D.C.*, 53 FLRA 146, 153 (1997) (*BEP*), the Agency asserts that the Arbitrator's cancellation of the grievant's performance rating is contrary to § 7106 of the Statute and that the PAP is not an "applicable law" for purposes of the Statute. Exceptions at 15. In addition, the Agency argues that the award of a WIGI is contrary to 5 C.F.R. § 531.404(a)[5] because the award requires the Agency to "prepare a rating of record that is inconsistent with the [Agency's] WIGI determination" and award the grievant a WIGI "even though her performance was not at an acceptable level of competence at the end of the waiting period for the WIGI." *Id.* at 9-11. Finally, the Agency argues that the Arbitrator exceeded his authority by awarding remedies that are too broad, specifically, his directions that the Agency: (1) post a notice to all employees regarding adherence to the PAP; (2) train its supervisors on the PAP; and (3) cancel the grievant's performance rating. *Id.* at 15-17.

B. Union's Opposition

The Union contends that the Arbitrator properly concluded that the SA had no bearing on the arbitration case. Opp'n at 10-11. In this connection, the Union argues that it was not a party to the SA and that the issue in the arbitration – whether the Agency must consider interim appraisals of employees on detail – is of continuing interest to the Union beyond the settlement of the grievant's individual MSPB claim. *Id.* at 12-13.

The Union also contends that the parties' agreement, rather than the PAP, governs the matter in dispute because Article 17 of the agreement[6] "clearly addresses performance evaluations, which is why the . . . PAP was developed in consultation with the Union." *Id.* at 17. In any event, the Union argues that the Arbitrator's decision is not contrary to the PAP, and that the Arbitrator correctly held "that the Agency simply cannot arbitrarily ignore the [grievant]'s performance on detail[.]" *Id.* at 20, 19.

In addition, the Union argues that the Arbitrator properly cancelled and replaced the grievant's performance appraisal, and that the award of a WIGI is not contrary to regulation because the Arbitrator found that the performance appraisal was not valid and, thus, that the denial of a WIGI was not valid. *Id.* at 14-16. The Union further argues that the Arbitrator had the authority to fashion remedies "specifically intended to benefit all members of the bargaining unit" because the issue before him had a "potential impact" on the entire bargaining unit. *Id.* at 21.

IV. Analysis and Conclusions

A. The Arbitrator did not err in failing to dismiss the grievance on the basis of the SA.

In finding that the SA had no "force or effect" in the arbitration, the Arbitrator interpreted the terms of the SA. Award at 7. Because settlement agreements are considered to be contracts, the Authority applies the deferential "essence" standard to review an arbitrator's interpretation of a settlement agreement. *AFGE, Local 12*, 61 FLRA 507, 508 (2006). *See, e.g., U.S. Dep't of the Army, Corps of Eng'rs, Nw. Div. & Seattle Dist.*, 64 FLRA 405, 409 (2010). Under the "essence" standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the settlement 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

[5] The pertinent wording of 5 C.F.R. § 531.404 is set forth below.

[6] The wording of Article 17 is set forth below.

(4) evidences a manifest disregard of the agreement. *AFGE, Local 12*, 61 FLRA at 508. 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."[7] *U.S. Dep't of* Labor *(OSHA)*, 34 FLRA 573, 576 (1990) (*OSHA*).

The SA provides, in pertinent part, that it "shall not be used, cited[,] or relied upon by any party in connection with any other judicial or administrative proceeding[.]" Award at 7. The Arbitrator interpreted this as meaning that it resolved only those issues currently or potentially before the MSPB and, therefore, found that it was not a sufficient basis for dismissing the grievance. *Id.* at 6-7. This interpretation is not inconsistent with the terms of the SA. *See AFGE, Local 12*, 61 FLRA at 509 (upholding arbitrator interpretation that "comports with the plain wording" of agreement). Although the Agency's contention that the agreement is a "general waiver[] of claims," Exceptions at 7, is one possible interpretation of the agreement, it does not establish that the Arbitrator's interpretation is irrational, unfounded, implausible, or manifestly in disregard of the agreement.

The precedent cited by the Agency is inapposite because it does not involve Authority review of an arbitrator's interpretation of a settlement agreement. *See AFGE, Local 987*, 61 FLRA at 246. As stated above, where an arbitrator has interpreted an agreement between the parties, the Authority will defer to that interpretation as long as it draws its essence from the agreement. *See OSHA*, 34 FLRA at 576.

Accordingly, we find that the Arbitrator's interpretation draws its essence from the SA. We note that the Agency also challenges the other bases for the Arbitrator's decision that the SA had no "force or effect" in the arbitration, specifically, his findings that: (1) only the Union could withdraw the grievance because the Union, not the grievant, was a party to the arbitration; and (2) the SA was so heavily redacted that the Arbitrator could not determine whether it related to the arbitration or whether the grievant had received adequate consideration to make it binding. *See* Award at 7; Exceptions at 7-9. The Authority has held that 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.*, *AFGE, Council of Prison Locals 33, Locals 1007 & 3957*, 64 FLRA 288, 291 (2009). Because the Arbitrator's interpretation of the SA constitutes a separate and independent ground for his decision not to apply the SA, and the Agency has not shown that the award fails to draw its essence from the SA, we find that there is no need to consider the Agency's remaining arguments regarding the SA. *See id*.

B. The PAP governs the matter in dispute.

Under § 7122(a)(1) of the Statute, an arbitration award will be found deficient if it conflicts with any law, rule or regulation. *Overseas Educ. Ass'n*, 51 FLRA 1246, 1251 (1996). However, agency rules and regulations may govern the disposition of matters to which they apply only when the rules and regulations do not conflict with provisions of an applicable collective bargaining agreement. *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 195 (1990).

The parties dispute whether the PAP or their agreement governs the resolution of this exception. The Agency asserts that, because there is no contract provision addressing the issue submitted to arbitration, the PAP governs the dispute. Exceptions at 11. The Union counters that Article 17 of the parties' agreement "clearly addresses" the matter in dispute: performance evaluations.[8] Opp'n at 17.

7. The decisions cited in the concurrence are inapposite. In particular, none involves judicial review of an arbitrator's interpretation of a settlement agreement; all involve appellate court review of either a lower court's or an administrative agency's interpretation. It is well-established, in this regard, that judicial review of arbitral interpretations is deferential and not de novo. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36-38 (1987).

8. Article 17, "Performance Evaluation[,]" provides as follows:

> 17.1 PRIMARY OBJECTIVE: The Parties agree that the primary objectives of the annual performance evaluation are to: recognize job requirements and standards and keep employees aware of them; improve individual performance; make and keep employees aware of their supervisor's judgment of their work performance; acknowledge employee accomplishments and good work; and strengthen supervisor-employee relationships.
>
> 17.2 SUPERVISOR/EMPLOYEE DISCUSSION: Unless mutually agreed otherwise by the relevant supervisor and employee, all supervisors are required to discuss

The Arbitrator found that the grievant's supervisor violated specific provisions of the PAP; he did not find that the supervisor violated the parties' agreement. *See* Award at 13-14. Further, Article 17 of the parties' agreement does not reference incorporation of the PAP,[9] and does not set forth the kind of procedural requirements that the Arbitrator found had been violated. *See* Exceptions, Attach. Q, Collective Bargaining Agreement (CBA) at 28. Thus, there is no basis for finding that the Arbitrator implicitly relied on Article 17. Accordingly, we find that the PAP, rather than the parties' agreement, governs the dispute.

C. The award is not contrary to law, rule, and/or regulation.

In reviewing arbitration awards for consistency with law, rule, or regulation, the Authority reviews questions of law raised by exceptions to an arbitrator's award de novo. *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 the 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. *See id.*

1. The PAP

Section B.4 of the PAP pertinently provides that the appraisal period "shall cover one year" and that "[t]he minimum appraisal period shall be no less than [ninety] days." Exceptions, Attach. R, PAP at 2 (PAP). Section B.9 provides that the purpose of performance appraisals is "to document the employee's performance over the entire rating period, and to assign an overall rating level." *Id.* at 3. In arguing that the award is contrary to the PAP, the Agency cites §§ B.10 and B.12, which concern, respectively, details and reassignments within the Agency. *Id.* at 4, 5.

The Arbitrator found that the Agency violated the clear "mandate" of the PAP, which "unmistakably requires" that employees be reviewed on the basis of their performance over the entire performance year. Award at 13. In this regard, the Arbitrator found that the grievant's supervisor erred by "excluding from her consideration" the grievant's performance during her detail and training. *Id.* Although the PAP does not directly address performance appraisals for employees who are on detail outside the Agency for part of the rating period, the PAP indicates that the appraisal should evaluate the employee's performance over the entire rating period, and none of the PAP provisions cited by the Agency states that a reviewing official may decline to consider an employee's performance on detail outside the Agency. In this regard, although Section B.4 states that the minimum appraisal period is ninety days, that does not establish that where, as here, an employee was working for the entire year-long rating period, the Agency may exclude a portion of the employee's performance so long as it considers the employee's performance over the ninety-day minimum appraisal period. *See* PAP at 2; Exceptions at 12.

The Agency also cites Section B.10, which provides that employees on details within the Agency to positions with "substantially different duties" shall receive an interim rating at the end of the detail. PAP at 4. However, there is no dispute that the grievant received an interim rating of "outstanding" from her supervisor while on detail. Award at 8. Thus, the issue here is not whether the grievant was entitled to an interim rating, but whether the grievant's supervisor violated the PAP by failing to *consider* the grievant's interim rating in preparing her annual performance appraisal.

The Agency also cites Section B.12, which provides that where an employee is reassigned within the Agency "to a position with substantially the same duties and responsibilities, the losing rating official will provide an interim rating to the gaining rating official . . . [and] [t]his rating will be considered in determining the annual appraisal." PAP at 5. Although Section B.12 requires consideration of interim ratings of performance during reassignments within the Agency, and the grievant returned from a detail outside the Agency, Section B.12 does not state that a reassignment within the Agency is the *only* circumstance in which a reviewing official should consider an interim rating. Thus, Section B.12 does not establish that the Arbitrator's finding that the Agency violated the PAP by failing to consider the

directly with the employee the annual performance rating.

Exceptions, Attach. Q, Collective Bargaining Agreement at 28.

9. In this regard, we note that although the Union contends that the PAP was "developed in consultation with the Union[,]" Opp'n at 17, the Union does not argue that the PAP itself is a negotiated agreement.

grievant's performance on detail in preparing her annual appraisal is deficient.

For the foregoing reasons, we find that the Agency has not demonstrated that the award is contrary to the PAP.

2. Section 7106(a)(2)(A) and (B) of the Statute

In resolving exceptions that contend that an award is contrary to a management right, the Authority first assesses whether the award affects the exercise of a right set forth in § 7106(a) of the Statute. *U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring). If the award affects the right, then the Authority examines whether the arbitrator was enforcing either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision negotiated pursuant to § 7106(b) of the Statute. *See FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 104 (2010) (Chairman Pope concurring).

The Agency cites *BEP*, 53 FLRA at 153, which involves the effect of an arbitrator's cancellation of performance ratings on an agency's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute. The Authority has held that an arbitrator's cancellation of a performance appraisal affects these management rights. *See, e.g., U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Carderock Div., Acoustic Research Detachment, Bayview, Idaho*, 59 FLRA 763, 765 (2004) (Chairman Cabaniss concurring). As the Arbitrator directed the Agency to rescind the performance appraisal challenged by the grievant, we find that the award affects management's rights to direct employees and assign work.

As discussed above, the Arbitrator found that the Agency violated the PAP, but did not find any violations of the parties' agreement. *See* Award at 13-14. Because the Arbitrator's cancellation of the grievant's performance rating is based solely on the Agency's violations of the PAP, this remedy is valid only if the PAP constitutes an applicable law under § 7106(a)(2) of the Statute.[10]

An agency regulation constitutes an "applicable law" within the meaning of § 7106(a)(2) when it has "the force and effect of law." *NTEU*, 42 FLRA 377, 390-91 (1991), *enforcement denied on other grounds*, 996 F.2d 1246 (D.C. Cir. 1993); *see also U.S. Dep't of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 55 FLRA 687, 690 (1999) (*Navy*). Regulations have the force and effect of law when they: (1) affect individual rights and obligations; (2) were promulgated pursuant to an explicit or implicit delegation of legislative authority by Congress; and (3) were promulgated in conformance with any procedural requirements imposed by Congress. *Navy*, 55 FLRA at 690; *NTEU*, 42 FLRA at 391-93. Applying this standard, the Authority has held that agency performance appraisal regulations enacted under 5 U.S.C. § 4302 and corresponding Office of Personnel Management (OPM) regulations constitute "applicable law" under § 7106 of the Statute. *Navy*, 55 FLRA at 690-91.

The first requirement – that a regulation affect individual rights – is satisfied where the regulation is mandatory and establishes the obligations of agencies and the rights of employees. *Navy*, 55 FLRA at 690; *NTEU*, 42 FLRA at 391. As in *Navy*, the PAP regulations "oblige the agency to conduct the performance appraisal process in a particular manner and affect the rights of individual employees to obtain a particular summary performance rating." 55 FLRA at 690-91. Specifically, the section of the PAP violated by the Agency states that the "appraisal period *shall* cover one year[.]" PAP at 2 (emphasis added). This wording affects the obligation of the Agency and the right of the employees. Thus, the first requirement has been met.

The second requirement is that the regulation was promulgated pursuant to a Congressional delegation of legislative authority. *Navy*, 55 FLRA at 690; *NTEU*, 42 FLRA at 392. Under 5 U.S.C. § 4302, each agency is required to establish performance appraisal systems that are consistent with OPM regulatory requirements. *See Navy*, 55 FLRA at 691. The PAP lists both 5 U.S.C. chapter 43 and the OPM regulations as authority for its creation and references the OPM regulations throughout. PAP at 1, 2, 10-11. In addition, there is no claim that the PAP is inconsistent with either the requirements of 5 U.S.C. § 4302 or corresponding OPM regulations. Accordingly, the PAP meets the second requirement. *See Navy*, 55 FLRA at 691.

The final requirement is that the regulation was "promulgated in conformance with the procedural requirements imposed by Congress." *Id.* Section 553(a)(2) of Title 5 excepts agency rulemaking relating to agency management and personnel, such as the PAP, from the notice and comment requirement of the Administrative Procedure Act. *Id.*

10. As noted previously, there is no claim that the PAP is a negotiated agreement.

However, performance appraisal regulations must be promulgated under OPM regulations, which require agencies to submit their performance appraisal regulations to OPM for approval. *Id.*; 5 C.F.R. § 430.209. If OPM determines that an agency performance appraisal regulation does not meet statutory or regulatory requirements, then "it shall direct the agency to implement an appropriate system or program or to take other corrective action." 5 C.F.R. § 430.210. As a result, the Authority has held that where performance appraisal regulations have existed for an extended period of time and OPM has not directed an agency to take corrective action, the Authority may reasonably conclude that the regulations were promulgated in conformance with the appropriate procedural requirements. *See Navy*, 55 FLRA at 691. Here, neither party addresses this issue. However, the PAP had been in effect for over four and a half years at the time of the Arbitrator's award. *See* PAP at 2; Award at 16. Thus, we conclude that the PAP was promulgated in conformance with OPM requirements, and we find that the PAP was validly promulgated. *See Navy*, 55 FLRA at 691.

For the foregoing reasons, we find that PAP is an "applicable law" within the meaning of § 7106(a)(2), and that the award is not contrary to § 7106(a). Consequently, we deny this exception.

3. 5 C.F.R. § 531.404

The Agency argues that by requiring the Agency to "prepare a rating of record that is inconsistent with the [Agency's] WIGI determination" and award the grievant a WIGI "even though her performance was not at an acceptable level of competence at the end of the waiting period for the WIGI" the award is contrary to 5 C.F.R. § 531.404. Exceptions at 11. That regulation provides, in pertinent part, that: (1) an employee's performance must be rated as at least "[f]ully [s]uccessful" in order to receive a WIGI; and (2) when a WIGI decision is not consistent with the employee's most recent rating of record, "a more current rating of record must be prepared." 5 C.F.R. § 531.404(a).

As discussed previously, the Arbitrator determined that "had [the grievant] been properly judged in accordance with the requirements of the . . . PAP," she would have been rated "outstanding[.]" Award at 14. Moreover, as a remedy for the Agency's violations of the PAP, the Arbitrator directed the Agency to remove the grievant's most recent rating of record from her file and replace it with one rating her as "fully successful[.]" *Id.* Thus, as directed by the Arbitrator, the grievant's most recent rating of record will be at least "fully successful," and the corresponding award of a WIGI is not contrary to 5 C.F.R. § 531.404. Accordingly, we deny the exception.

D. The Arbitrator exceeded his authority in part.

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. *U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995). The Authority has held that if a grievance is limited to a particular grievant, then the remedy must be similarly limited.[11] *See U.S. EPA*, 57 FLRA 648, 651-52 (2001) (*EPA*); *U.S. Dep't of the Air Force, Air Force Logistics Ctr., Tinker Air Force Base, Okla.*, 45 FLRA 1234, 1240-41 (1992) (*Tinker AFB*).

The issue before the Arbitrator was limited to whether the Agency acted improperly "in giving *the grievant* her annual performance appraisal[.]" Award at 1 (emphasis added). That is, the grievance was limited to the Agency's actions toward the grievant. Thus, as explained below, we find that the award is deficient to the extent that two of the Arbitrator's remedies extend to additional employees. *See Tinker AFB*, 45 FLRA at 1240-41.

Turning to the notice posting remedy, the Authority has held that where the parties submitted to an arbitrator the issue of whether the agency had violated the parties' agreement in its actions towards one employee, the arbitrator exceeded his authority by directing the agency to post a notice defining the rights of all bargaining unit employees. *EPA*, 57 FLRA at 651-52. Similarly, here, because the notice that the Arbitrator directed the Agency to post promises employees that the Agency will adhere to the PAP and that supervisor animus will not influence future performance appraisals for any employee, it defines rights for individuals who were not included in the grievance. *See* Award at 17.

11. However, where an agency's treatment of a grievant constitutes an unfair labor practice (ULP) in violation of the Statute, the Authority has upheld notice posting remedies. *See, e.g., U.S. Dep't of Housing & Urban Dev., L.A. Field Office, L.A., Cal.*, 64 FLRA 383, 386 (2010) (upholding notice posting where arbitrator found agency's discipline of union president was a ULP). Neither party has alleged that this case involves a ULP.

Accordingly, we find that this remedy is deficient because it exceeds the Arbitrator's authority. *See EPA*, 57 FLRA at 651-52.

The Agency also challenges the training remedy imposed by the Arbitrator. Exceptions at 17. The Authority has upheld a remedy requiring training for the supervisor(s) whose actions impermissibly affected a grievant's conditions of employment. *See, e.g., U.S. Dep't of the Air Force, Air Force Flight Test Ctr., Edwards Air Force Base, Cal.*, 48 FLRA 74, 87 (1993) (Member Talkin concurring) (arbitrator awarded sexual harassment training for the supervisor who sexually harassed grievant and the supervisor who failed to investigate the grievant's harassment complaints); *U.S. Dep't of Justice, U.S. Fed. Bureau of Prisons, U.S. Penitentiary, Lewisburg, Pa.*, 39 FLRA 1288, 1300-01, 1305 (1991) (arbitrator awarded "sensitivity training" for supervisor who violated parties' agreement by failing to give proper attention to grievant's medical concerns), *petition for review dismissed sub nom. U.S. Dep't of Justice v. FLRA*, 981 F.2d 1339 (D.C. Cir. 1993). Here, however, the awarded remedy of training for the grievant's supervisor *and* "all other supervisors who serve as rating or reviewing officials under the PAP" would affect the working conditions of employees beyond the grievant. *See* Award at 15. Accordingly, we find that the remedy of training is deficient to the extent that it applies to individuals other than the grievant's supervisor. *See Tinker AFB*, 45 FLRA at 1240-41.

In regard to the Arbitrator's cancellation of the grievant's performance rating, the Agency does not argue that the Arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, or awarded relief to persons who are not encompassed within the grievance. *See* Exceptions at 15. To the extent that the Agency argues that the Arbitrator disregarded a specific limitation on his authority, the authority cited by the Agency is § 7106 of the Statute, and we have found that the award is not contrary to § 7106. Accordingly, we find that the Arbitrator did not exceed his authority in directing the Agency to cancel the grievant's performance rating.

For the foregoing reasons, we grant the Agency's exceeded authority exceptions in part, and deny them in part.

V. Decision

The portions of the award directing the Agency to post a notice and train supervisors other than the grievant's supervisor are set aside, and the Agency's remaining exceptions are denied.

Member Beck, Concurring:

I agree with my colleagues that the Arbitrator exceeded his authority when he ordered a remedy – posting and training – directed at supervisors other than those to whom the grievant reported. I also agree that, under the circumstances of this case, the performance appraisal program (PAP) constitutes an applicable law, and that the Agency's remaining exceptions should be denied.

I disagree, however, with the Majority's assertion that we should accord "essence"-type deference to the Arbitrator's interpretation of the settlement agreement. Majority at 5. We grant extraordinary deference to an arbitrator's interpretation of a collective bargaining agreement because the agreement expressly makes the arbitrator the interpreter and enforcer of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 576 (1990) (it is the arbitrator's construction of the agreement for which the parties have bargained). However, this rationale does not apply to other contracts that other parties create outside of the labor relations context -- such as the settlement agreement here. It was an agreement between the Agency and an individual employee (not between the Agency and the Union) about an employment dispute outside of the traditional labor relations context. Under such circumstances, the parties have no particular expectation that the agreement will be subject to arbitration.

The Majority cites several cases where the Authority applied its highly deferential "essence" standard to an arbitrator's interpretation of a settlement agreement and then concludes that "courts defer to arbitrators in this context." Majority at 5 (citing *AFGE, Local 12*, 61 FLRA 507, 508 (2006); *U.S. Dep't of the Army, Corps of Eng'rs, Nw. Div. & Seattle Dist.*, 64 FLRA 405, 409 (2010)).[*] Contrary to this precedent, courts have held consistently and unequivocally that the interpretation of a settlement agreement is a question of law that is subject to de novo review. *Trustees of the 1199/SEIU Greater N.Y. Benefit Fund v. Kingsbridge Heights Rehab. Care Ctr.*, No. 09-4168-CV, 2010 WL 4140312, at *2 (C.A. 2 (N.Y.)) (interpretation of a settlement agreement is a question of law); *City of Emeryville v. Robinson*, 621 F.3d 1251, 1261 (9th Cir. 2010) (interpretation of a settlement agreement is a question of law subject to de novo review but we defer to any factual findings made by the trial court in interpreting the agreement unless they are clearly erroneous); *Greenhill v. United States*, 92 Fed. Cl. 385, 393 (2010) (citing *Mays v. U.S.P.S.*, 995 F.2d 1056, 1059 (Fed. Cir. 1993)) (the settlement agreement is a contract and its interpretation is a matter of law); *Lee v. U.S.P.S.*, 367 F. App'x 137, 139 (Fed. Cir. 2010) (interpretation of a settlement agreement is an issue of law; we review the MSPB's determination of law without deference); *Johnson v. U.S.P.S.*, 315 F. App'x 274, 277 (Fed. Cir. 2009) (interpretation of a settlement agreement is a question of law that we review de novo), (citing *King v. Dep't of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997) (*King*)); *Kieffer v. M.S.P.B.*, 263 F. App'x 881, 883 (Fed. Cir. 2008) (interpretation of a settlement agreement is a matter of law which the court reviews without deference) (citing *King* ,130 F.3d at 1033). (My colleagues' citation, at footnote 7, to *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36-38 (1987), does not support their contention that courts defer to arbitrators' interpretations of settlement agreements. The *Misco* Court was merely reaffirming the axiomatic proposition -- with which I agree -- that courts must defer to arbitrators' interpretations of *collective bargaining* agreements. *Misco* has nothing to say about how to review an arbitrator's interpretation of a different type of agreement that is entered into outside of the traditional labor relations context.)

To be sure, an arbitrator may interpret a settlement agreement when the circumstances of the dispute require him to do so. The Arbitrator here was called upon to determine whether the settlement agreement had any force or effect with respect to the grievance; however, his conclusion in that regard is not entitled to essence-type deference.

I would conclude that this settlement agreement, by which an individual employee released her individual claims against the Agency, did not waive the Union's institutional claims. Accordingly, I agree that the Arbitrator did not err by declining to dismiss the grievance because of the settlement agreement.

[*] The factual circumstances of these cases differ from the instant case in a key respect: The issue in each case directly presented to the arbitrator the question of whether the agency violated the parties' CBA by failing to comply with a prior settlement agreement.