

**67 FLRA No. 149**

UNITED STATES  
DEPARTMENT OF HEALTH  
AND HUMAN SERVICES  
CENTERS FOR MEDICARE AND MEDICAID  
SERVICES  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1923  
(Union)

0-AR-4903

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DECISION

September 18, 2014

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

**I. Statement of the Case**

Arbitrator Seymour Strongin found that the Agency violated the parties' collective-bargaining agreement (dated December 10, 2010) and the Agency's Performance Management and Appraisal Program (PMAP) when the Agency rated the grievant as fully successful – rather than exceptional – in one of her critical elements. As a remedy, the Arbitrator directed the Agency to change the grievant's rating for the critical element from fully successful to exceptional. And because increasing the grievant's critical-element rating would raise the grievant's summary rating, the Arbitrator also directed the Agency to change the grievant's summary rating from fully successful to exceptional.

This case presents the Authority with four substantive issues. The first is whether directing the Agency to change an employee's performance rating is contrary to the Agency's management rights under § 7106(a)(2)(A) and (B) of the Federal Service Labor-Management Relations Statute (the Statute).<sup>1</sup> Because the Agency has not established that the award is contrary to the Statute, we deny this exception.

The second issue is whether the award fails to draw its essence from the parties' agreement because the Arbitrator awarded a remedy without finding a violation of the parties' agreement. Although the Arbitrator did not specifically state that the Agency violated Article 21 of the parties' agreement, it is clear that the Arbitrator found that the Agency violated that article. We therefore deny this exception.

The third issue is whether the Arbitrator exceeded his authority by failing to resolve an issue that was submitted to arbitration: whether the Agency violated Article 21 when it rated the grievant. Because the award is directly responsive to the stipulated issue, we deny this exception.

The fourth issue is whether the Arbitrator's direction to change the grievant's critical-element and summary ratings to exceptional is so incomplete, ambiguous, or contradictory as to make implementation of the award impossible. Because the Agency has not demonstrated that implementation of the award is impossible, we deny this exception.

**II. Background and Arbitrator's Award**

Article 21 of the parties' agreement sets forth the requirements of the Employee Performance System, which is implemented through the Agency's PMAP. The PMAP provides for four ratings that an employee can achieve in each critical element – exceptional, fully successful, minimally successful, and unacceptable – and for a summary rating based on the employee's critical element ratings.

The grievant's performance plan established five critical elements – one administrative and the other four related to her substantive work. At the end of the grievant's 2011 performance appraisal period, the Agency rated her as fully successful on two critical elements – the administrative element and one of the substantive elements (specifically, critical element 4, which relates to the analysis and resolution of issues pertaining to congressional correspondence) – and exceptional in the other three elements. Based on the formula used to calculate summary ratings, the grievant needed to be rated as exceptional on at least four critical elements in order to receive a summary rating of exceptional. But, because the Agency rated her as exceptional on only three critical elements, the grievant received a summary rating of fully successful.

The grievant disagreed with the rating of fully successful on element 4, and the Union filed a grievance alleging that the Agency violated Article 21 of the parties' agreement. As a remedy, the Union requested that the grievant's rating be increased to exceptional and that her performance award be adjusted accordingly. The

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<sup>1</sup> 5 U.S.C. § 7106(a)(2)(A)-(B).

grievance was unresolved, and the Union invoked arbitration. The parties stipulated that the issue before the Arbitrator was: “Did management violate Article 21 of the [parties’] [a]greement . . . when it rated the [g]rievant [f]ully [s]uccessful in [c]ritical [e]lement #4 of her 2011 performance rating?”<sup>2</sup>

The Arbitrator sustained the grievance, finding that the Agency violated Article 21 when it rated the grievant fully successful in critical element 4. In reaching this conclusion, the Arbitrator noted that the grievant’s first-line supervisor retired at the end of 2011, and that the grievant’s second-level supervisor – who worked at a different location than the grievant – prepared her evaluation. The Arbitrator also found that during the grievant’s mid-year evaluation, her former supervisor told her, “You’re doing a good job, you know your work, everything’s fine,” and that the same supervisor rated the grievant as exceptional on critical element 4 on her 2010 evaluation.<sup>3</sup>

The Arbitrator faulted the Agency for its reliance on the second-level supervisor’s testimony, finding that the supervisor “had little opportunity, and apparently little need, to observe [the grievant’s] work”<sup>4</sup> and provided “largely hearsay testimony.”<sup>5</sup> The Arbitrator also found that the Agency unfairly penalized the grievant for taking on fewer voluntary assignments even though the situation that “gave rise to much of the available volunteer work[] was not repeated in 2011.”<sup>6</sup> The Arbitrator also observed that “ambiguities and generalities found in the PMAP and the absence of [quantitative] work[-]measurement evidence”<sup>7</sup> made it difficult for him to evaluate the evidence presented by the Agency.

As a remedy, the Arbitrator directed the Agency to change the grievant’s rating for critical element 4 from fully successful to exceptional, and to increase her summary rating to exceptional. The Agency filed exceptions to the award, and the Union filed an opposition to the Agency’s exceptions.

### III. 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.<sup>8</sup>

<sup>2</sup> Exceptions, Attach., Stipulated Issue at 1.

<sup>3</sup> Award at 3.

<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *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 assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.<sup>9</sup> In making that assessment, the Authority defers to the arbitrator’s underlying factual findings.<sup>10</sup>

The Agency argues that the award interferes with its rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute. When a party contends that an award is contrary to a management right under § 7106(a),<sup>11</sup> the Authority first assesses whether the award affects the exercise of the asserted right.<sup>12</sup> If it does, then the Authority examines whether the award provides a remedy for the violation of a contractual provision negotiated under § 7106(b) of the Statute<sup>13</sup> or, if the award affects a management right under § 7106(a)(2), whether the award enforces an applicable law.<sup>14</sup> If an award affects a management right, then the award is contrary to law unless it enforces a contract provision negotiated under § 7106(b) or an applicable law.<sup>15</sup>

The Union does not dispute the Agency’s assertion that the award affects management’s rights to direct employees and assign work under the Statute.<sup>16</sup> We therefore assume that the award affects these rights.<sup>17</sup> Thus, we must decide whether the award enforces a properly negotiated contract provision.

<sup>9</sup> *U.S. DOD, Dep’t of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

<sup>10</sup> *Id.*

<sup>11</sup> As he noted in his dissents in *U.S. DOD, Defense Logistics Agency, Defense Distribution Depot Red River, Texarkana, Texas*, 67 FLRA 609, 617-18 (2014) (Dissenting Opinion of Member Pizzella), and *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, Louisiana*, 67 FLRA 597, 605-08 (2014) (Dissenting Opinion of Member Pizzella), Member Pizzella disagrees with how the Authority has applied the framework for review of arbitration awards alleged to interfere with management rights that the Authority announced in *FDIC, Division of Supervision & Consumer Protection, San Francisco Region*, 65 FLRA 102, 104-107 (2010) (*FDIC*) (Chairman Pope concurring in part), and *U.S. EPA*, 65 FLRA 113, 115 (2010) (*EPA*) (Member Beck concurring). He leaves for another day whether the framework itself should be reconsidered.

<sup>12</sup> *EPA*, 65 FLRA at 115 (citing *U.S. Dep’t of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 5 (2007)).

<sup>13</sup> *Id.* (citing *FDIC*, 65 FLRA at 104-105; *Dep’t of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 313-14 (1990)).

<sup>14</sup> *Id.* at 115 n.7 (citing *U.S. Dep’t of Transp., FAA*, 63 FLRA 383, 385 (2009)).

<sup>15</sup> *Id.* at 115.

<sup>16</sup> See Opp’n at 7-9.

<sup>17</sup> See, e.g., *U.S. Dep’t of the Army, Def. Language Inst., Monterey, Cal.*, 65 FLRA 668, 671 (2011) (citing *SSA*, 65 FLRA 339, 341 (2010)).

The Agency acknowledges that Article 21 was negotiated pursuant to § 7106(b).<sup>18</sup> But it claims that “the [a]ward does not reflect an enforcement of that negotiated provision”<sup>19</sup> because the Arbitrator “did not cite a single contract provision which the Agency violated.”<sup>20</sup>

When evaluating exceptions to an arbitration award, the Authority considers the award and the record as a whole.<sup>21</sup> And the fact that an award does not mention an issue does not necessarily establish that the arbitrator did not consider the issue.<sup>22</sup>

Based on the record before us, it is clear that the Arbitrator found a violation of Article 21.<sup>23</sup> First, the grievance exclusively alleged a violation of Article 21.<sup>24</sup> Second, the parties stipulated that the issue before the Arbitrator was solely whether the Agency violated Article 21,<sup>25</sup> and both parties devoted their post-hearing briefs to this issue.<sup>26</sup> Finally, at the beginning of the arbitration hearing, the Arbitrator noted that the “burden . . . of establishing a violation of [A]rticle 21 of the agreement rest[ed] with the [U]nion,”<sup>27</sup> cited Article 21 at the beginning of the award,<sup>28</sup> and concluded his award by “sustain[ing]”<sup>29</sup> the Union’s grievance. Accordingly, the Arbitrator found a violation of Article 21, and his award provides a remedy for that violation. As the Agency acknowledges that Article 21 was negotiated pursuant to § 7106(b), its contrary-to-law exception provides no basis for finding the award deficient.<sup>30</sup>

We therefore deny the Agency’s contrary-to-law exception.

B. The award draws 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.<sup>31</sup> Under this standard, the Authority will find that an award fails to draw its essence from the parties’ agreement if the award: (1) 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”; (2) does not represent a plausible interpretation of the agreement; (3) cannot in any rational way be derived from the agreement; or (4) evidences a manifest disregard of the agreement.<sup>32</sup>

The Agency argues that “the [a]ward does not draw its essence from the parties’ [agreement] under all four prongs of the [essence] test set forth by the Authority.”<sup>33</sup> In support of this contention, it claims that “the Arbitrator did not cite the [agreement] one single time as a basis for his determination.”<sup>34</sup> However, as discussed above, the Arbitrator found that the Agency violated Article 21. Thus, there is no merit to the Agency’s that the Arbitrator did not base his award on the parties’ agreement. Accordingly, the Agency has not established that the award is irrational, unfounded, implausible, or in manifest disregard of the parties’ agreement.

The Agency also claims that “the Arbitrator substituted his judgment for that of the [r]ating [o]fficial without sufficient justification for doing so,”<sup>35</sup> which it claims “shows that his opinion [i]s so far outside the constraints of the [parties’ agreement] that it demonstrates itself to be 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.’”<sup>36</sup> The Agency argues that in *HHS, SSA*,<sup>37</sup> “the Authority held that an arbitrator could not substitute his judgment for that of management if an independent evaluation of performance standards was necessary.”<sup>38</sup> However, the Agency fails to connect the Authority’s holding in *HHS, SSA* to any language in

<sup>18</sup> Exceptions at 10.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *U.S. DOJ, FBP, Fed. Corr. Complex, Terre Haute, Ind.*, 65 FLRA 460, 463 (2011) (citing *U.S. Dep’t of Energy, Oak Ridge Operations Office, Oak Ridge, Tenn.*, 55 FLRA 1293, 1296 (2000)).

<sup>22</sup> See, e.g., *U.S. Dep’t of VA, Cent. Tex., Veterans Health Care Sys., Temple, Tex.*, 66 FLRA 71, 73 (2011) (citing *NATCA, MEBA/NMU*, 52 FLRA 787, 790 (1996)).

<sup>23</sup> But cf. *U.S. DOD, Def. Logistics Agency, Def. Distribution Depot Red River, Texarkana, Tex.*, 67 FLRA 609, 617 (2014) (Dissenting Opinion of Member Pizzella) (finding, based on review of the record, that arbitrator had not found contractual violation).

<sup>24</sup> Exceptions, Ex. J3, Grievance at 1; accord *id.*, Ex. J4, Step-One Grievance Decision at 1-2.

<sup>25</sup> *Id.* Attach., Stipulated Issue at 1.

<sup>26</sup> *Id.*, Attach., Agency’s Post-Hr’g Br. *passim*; *id.*, Attach., Union’s Post-Hr’g Br. *passim*.

<sup>27</sup> *Id.*, Attach., Tr. at 6.

<sup>28</sup> Award at 2.

<sup>29</sup> *Id.* at 8.

<sup>30</sup> *EPA*, 65 FLRA at 118.

<sup>31</sup> *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

<sup>32</sup> *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (citing *U.S. Army Missile Materiel Readiness Command*, 2 FLRA 432, 437 (1980)).

<sup>33</sup> Exceptions at 11; see also *id.* at 12.

<sup>34</sup> *Id.* at 11.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 12.

<sup>37</sup> 28 FLRA 961 (1987) (Member McKee dissenting), *abrogated by, SSA*, 30 FLRA 1156 (1988).

<sup>38</sup> Exceptions at 11.

the parties' agreement.<sup>39</sup> Thus, the Agency does not identify the "constraints of the [parties' agreement]"<sup>40</sup> that it claims that the Arbitrator disregarded, nor does it explain how the award is "unfounded in reason and fact"<sup>41</sup> or "unconnected with the wording and purposes"<sup>42</sup> of the parties' agreement. Accordingly, the Agency's claim provides no basis for finding the award deficient.

We therefore deny the Agency's essence exception.

C. The Arbitrator did not exceed his 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 those not encompassed within the grievance.<sup>43</sup> The Agency argues that the Arbitrator failed to decide the stipulated issue – whether the Agency violated Article 21 by giving the grievant a fully successful rating in critical element 4. Specifically, it states that "the Arbitrator fail[ed] to link his finding to any part of the [parties' agreement], much less Article 21."<sup>44</sup> But, as discussed above, the Arbitrator considered this issue and found that the Agency violated Article 21. Thus, there is no merit to the Agency's contention that the Arbitrator failed to decide the stipulated issue.

As such, we deny the Agency's exceeds-authority exception.

D. The award is not impossible to implement.

The Authority will set aside an award that is "incomplete, ambiguous, or contradictory as to make implementation of the award impossible."<sup>45</sup> To prevail on this ground, "the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain."<sup>46</sup>

The Agency argues that the award is ambiguous because, although the Union variously requested a

quality-step increase,<sup>47</sup> "a cash award which could be converted to [a] time-off [award],"<sup>48</sup> and "a cash award equal to 1.5% of the [g]rievant's salary which could be converted to" a time-off award,<sup>49</sup> the Arbitrator did not specify "what, if any, award should accompany the [e]xceptional rating."<sup>50</sup> However, the Arbitrator did not order the Agency to pay the grievant a cash award, and the Agency has not established that it will be impossible for it to comply with the award.

We therefore deny the Agency's impossible-to-implement exception.

#### IV. Order

We deny the Agency's exceptions.

<sup>39</sup> See *HHS, SSA*, 28 FLRA at 963-64.

<sup>40</sup> Exceptions at 12.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *E.g.*, *U.S. DOL*, 67 FLRA 287, 289 (2014) (citing *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996)).

<sup>44</sup> Exceptions at 13.

<sup>45</sup> 5 C.F.R. § 2425.6(b)(2)(iii).

<sup>46</sup> *U.S. Dep't of the Air Force, Grissom Air Reserve Base, Ind.*, 67 FLRA 302, 304 (2014) (quoting *U.S. DOD, Def. Logistics Agency*, 66 FLRA 49, 51 (2011)).

<sup>47</sup> Exceptions at 13 (citing *id.*, Attach., Tr. at 7).

<sup>48</sup> *Id.* (citing *id.* Attach., Tr. at 14).

<sup>49</sup> *Id.* at 14 (citing *id.* Attach., Union's Post-Hr'g Br. at 2).

<sup>50</sup> *Id.*

**Member Pizzella, concurring:**

I agree with my colleagues that the Agency's exceptions should be denied. But I write separately to emphasize the following point.

It is surprising that the Agency did not agree to settle this case, given that the Union had a plausible claim and that the arbitration costs surely exceed the value of any cash award to which the grievant may have been entitled. Parties should remember that "[t]he better part of valor is discretion,"<sup>1</sup> and that they should consider the costs and benefits before commencing or advancing litigation, not only in dollars or their representatives' time, but also in terms of the effect on their labor-management relationship and employee morale. Moreover, the Authority's role is "to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector,"<sup>2</sup> not to be an audience for parties wishing to vent their frustrations or a showcase for representatives to demonstrate their tenacity to their leadership or members.

Thank you.

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<sup>1</sup> William Shakespeare, *The First Part of King Henry the Fourth* act 5, sc. 4.

<sup>2</sup> *Veterans Admin. Reg'l Office*, 5 FLRA 463, 466 (1981) (emphasis omitted) (quoting S. Rep. No. 95-1272, at 153 (1978)).