73 FLRA No. 175

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 68
(Union)

0-AR-5702

_____

DECISION

June 25, 2024

_____

Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Ann R. Gosline issued an award finding the Agency violated the parties' collective-bargaining agreement by failing to provide an employee (the grievant) adequate counseling before lowering her overall performance rating. As a remedy, the Arbitrator directed the Agency to raise the grievant's rating. The Agency filed exceptions arguing the award is contrary to § 7106(a) of the Federal Service Labor-Management Relations Statute (the Statute)[1] and fails to draw its essence from the parties' agreement. For the reasons below, we find the award is contrary to law and set it aside.

II. Background and Arbitrator's Award

The grievant works as a customer-service representative. During 2018-2019 mid-year performance evaluations, the Agency notified the grievant she was not performing at the exceeds-expectations level in three critical job elements. Four months later, the Agency gave the grievant a counseling memorandum detailing her errors and offering recommendations and assistance. The grievant's supervisor met with the grievant to discuss the counseling memorandum on March 1, 2019, and met with her on March 13, 2019, to review a report that "provides written feedback on both appropriate actions taken and errors made, with references to [an Agency manual] where appropriate."[2] The supervisor sent the grievant a follow-up email on March 15, 2019, asking how she could help the grievant and offering further performance feedback, "time off the phone to do research," and guidance sessions with a "lead" customer-service representative.[3] During the final two months of the rating period, the Agency offered various forms of assistance, some of which the grievant refused. Despite improvements, the grievant made additional errors before the end of the rating period.

In the final performance evaluation, the Agency rated the grievant as "meets" expectations in two critical job elements.[4] Consequently, her overall rating dropped from outstanding – which she received the previous year – to exceeds fully successful. The Union grieved the evaluation, alleging that the Agency failed to provide the grievant the counseling required by Article 12, Section 4.L. of the parties' agreement (Article 12).

Article 12 states, in relevant part:

> [T]he Employer will counsel employees in relation to their overall performance rating on an as needed basis. Such counseling will normally take place when a supervisor notices a decrease in performance, defined as a drop in the average [critical job element] score and include advice or recommendations on better communicating job requirements and providing additional coaching, monitoring, mentoring, and other developmental activities, as appropriate, to help improve employee performance until the employee shows improvement. Special emphasis should be given to those cases when an employee's performance indicates a decrease in the overall rating (e.g.[,] exceeds fully successful to fully successful). Written feedback will not be the sole means to deliver counseling. Feedback will also be provided by oral communication between the employee and the supervisor.[5]

The grievance proceeded to arbitration, where the parties submitted the issues of whether the Agency violated the parties' agreement by lowering the grievant's

[1] 5 U.S.C. § 7106(a).
[2] Award at 8.
[3] *Id.*
[4] *Id.* at 2.
[5] *Id.* (quoting Collective-Bargaining Agreement Art. 12, § 4.L.).

overall performance rating "without complying with the requirements of Article 12," and, if so, what is the remedy?[6]

The Arbitrator interpreted Article 12 as the Agency's "commit[ment] to providing assistance through a multi-pronged approach to support employees in regaining and maintaining their job performance."[7] The Arbitrator found that the Agency failed to meet this commitment because its assistance was neither "timely" nor of the "type . . . required."[8] The Arbitrator determined that, despite noting the grievant's declining performance in the midyear evaluations, the Agency offered her no "special assistance" until issuing the counseling memorandum four months later.[9] At that point, the Arbitrator found, the Agency gave the grievant only sixty days to improve without "commit[ting] any additional errors."[10] The Arbitrator interpreted Article 12 as requiring the Agency to provide assistance that was "intensive or [a] different type" than that normally offered to employees.[11] Accordingly, the Arbitrator did not find it significant that the grievant did not accept some offered assistance, because the Arbitrator found that the offered assistance was "routine" and not focused on specific aspects of the grievant's performance.[12] She also noted "the Agency has both the right and the obligation to direct an employee to participate in coaching that it has determined to be appropriate" and could have directed the grievant to participate if the offered assistance was "part of its coaching effort."[13]

The Arbitrator found the evidence "sufficient to reconstruct that if the Agency had provided timely, intensive[,] and tailored coaching and mentoring as required," the grievant would have received a higher performance rating.[14] Therefore, she sustained the grievance and directed the Agency to raise the grievant's overall rating to outstanding and provide any compensation that may have accompanied that rating.[15]

The Agency filed exceptions to the award on February 1, 2021, and the Union filed an opposition on March 2, 2021. On September 26, 2023, the Authority issued *Consumer Financial Protection Bureau* (*CFPB*),[16] which revised the test the Authority applies in cases where parties file management-rights exceptions to arbitration awards finding collective-bargaining-agreement violations. The Authority allowed the parties to file additional briefs concerning how the *CFPB* test should apply in this case. However, neither party filed a supplemental brief.

III. Analysis and Conclusion: The award is contrary to § 7106(a) of the Statute.

The Agency argues the Arbitrator's award is contrary to management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B), respectively, of the Statute.[17] 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.[18] 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.[19]

In *CFPB*, the Authority revised its test for resolving management-rights exceptions in cases where an arbitrator has found a collective-bargaining-agreement violation.[20] Under the four-part *CFPB* framework, the first question is whether the excepting party establishes the arbitrator's interpretation and application of the parties' agreement, and/or the awarded remedy, affects a management right.[21] If the answer to that question is yes, then the Authority will determine whether the arbitrator correctly found, or the opposing party demonstrates, that the pertinent contract language – as interpreted and applied by the arbitrator – is enforceable under § 7106(b).[22]

The Agency argues the Arbitrator's interpretation and application of Article 12, as well as the remedy, affect management's rights to direct employees and assign work because (1) the award limits the Agency's ability to determine appropriate counseling for employees[23] and (2) the remedy improperly raised the grievant's performance rating.[24] The Authority has held the "evaluation of employee performance is an exercise of management's rights to direct employees and assign work,"[25] which extends to management's determination of

[6] *Id.* at 1.
[7] *Id.* at 14.
[8] *Id.*
[9] *Id.* at 15.
[10] *Id.*
[11] *Id.* at 16-17.
[12] *Id.* at 17.
[13] *Id.* at 17-18.
[14] *Id.* at 18.
[15] *Id.* at 18-19.
[16] 73 FLRA 670 (2023).
[17] Exceptions Br. at 30-36.
[18] *See U.S. DHS, U.S. CBP, U.S. Border Patrol, Rio Grande Valley Sector, Edinburg, Tex.*, 73 FLRA 784, 785 (2024) (*CBP*) (citing *U.S. Dep't of the Interior, U.S. Park Police*, 73 FLRA 276, 278 (2022)).
[19] *Id.* (citing *U.S. Dep't of the Navy, Naval Med. Ctr., Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 140 (2022)).
[20] *CFPB*, 73 FLRA at 676-81.
[21] *Id.* at 676-77.
[22] *Id.* at 677-80.
[23] Exceptions Br. at 31-32 (citing *SEIU, Fed. Emps. Metal Trades Council of Charleston, Loc. 696*, 38 FLRA 10 (1990); *SSA, Ne. Program Serv. Ctr.*, 18 FLRA 437 (1985) (*SSA*)).
[24] *Id.* at 33, 36.
[25] *AFGE, Loc. 12*, 73 FLRA 603, 605 (2023) (quoting *NTEU*, 47 FLRA 705, 709 (1993) (Member Armendariz concurring in part and dissenting in part)).

the rating to assign an employee.[26] Consistent with this precedent, we find the award affects management's rights to direct and employees and assign work. Therefore, we conclude the answer to the first *CFPB* question is yes.[27]

We turn next to the second part of the test. The Arbitrator – who issued the award before the Authority issued *CFPB* – did not make any findings, or otherwise discuss, Article 12's relation to § 7106(b) of the Statute.[28] Neither party argues there is any need to remand the case for further development of the record. Absent any arbitral analysis of § 7106(b), the opposing party – the Union, in this instance – "ha[s] the burden to demonstrate" that the Arbitrator's interpretation and application of Article 12 is enforceable under § 7106(b).[29] As the Authority emphasized in *CFPB*, the party raising § 7106(b) "should rely on Authority precedent and standards concerning" the subsection(s) of § 7106(b) it cites.[30]

In its opposition, the Union asserts the Agency may elect to bargain provisions that "determine the technology, methods, or means of performing the [A]gency's work" under § 7106(b)(1) of the Statute.[31] The Union argues the Agency "permissively bargained" the requirements of Article 12[32] and therefore "waived" its management rights.[33] However, the Union provides no support for this claim.[34] Moreover, the Authority has long found that proposals concerning "how an agency evaluates the manner in which its employees perform the work to which they have been assigned" do not concern the methods or means of performing work under § 7106(b)(1).[35] Therefore, in its opposition, the Union has not met its "burden to demonstrate that [Article 12], as interpreted and applied [by the Arbitrator], is enforceable under" § 7106(b)(1).[36]

Also in its opposition, the Union argues that Article 12 is a "permissively bargained agreement on what procedure must occur when management notices a decline in an employee's performance,"[37] and that Article 12 "constitutes bargaining of procedures which management officials of the agency will observe in exercising any authority under [§] 7106(b)."[38] The Union does not cite § 7106(b)(2) of the Statute. However, even assuming the Union sufficiently raises a claim that Article 12 is a procedure within the meaning of that statutory section, the Union does not provide any supporting arguments or cite any precedent involving § 7106(b)(2). As noted above, in *CFPB*, the Authority emphasized that the party raising § 7106(b) "should rely on Authority precedent and standards concerning" the subsection(s) of § 7106(b) it cites.[39] Because the Union has not done so, we find that, in its opposition, the Union has not met its "burden to demonstrate that [Article 12], as interpreted and applied, is enforceable under" § 7106(b)(2).[40]

Further, in its opposition, the Union argues the Arbitrator's interpretation of Article 12 and the remedy do not excessively interfere with management rights.[41] While the "excessive-interference" standard is relevant to determining whether a provision is enforceable as an appropriate arrangement under § 7106(b)(3) of the

[26] *Nat'l Weather Serv. Emps. Org.*, 63 FLRA 450, 452 (2009) (citing *AFGE, AFL-CIO, Loc. 1760*, 28 FLRA 160, 169 (1987)); *see also SSA*, 18 FLRA at 440-41 (rights to direct employees and assign work encompass: right to determine quantity, quality and timeliness of employees' work; right to determine aspects of employees' work which will be evaluated in connection with appraising employee performance; and right to audit employees' work by the methods management deems most appropriate).

[27] *CBP*, 73 FLRA at 786.

[28] *See, e.g.*, Award at 17-18 (stating that, under *arbitral* precedent, "the Agency has both the right and the obligation" to direct employees to participate in appropriate coaching). We note that the Union does not claim the Agency failed to raise its management-rights arguments before the Arbitrator. Opp'n Form at 4, 5.

[29] *See CBP*, 73 FLRA at 786 (explaining, where arbitrator makes no relevant findings, union "ha[s] the burden to demonstrate that the [contract] provision at issue . . . is enforceable under § 7106(b)" (quoting *CFPB*, 73 FLRA at 679)).

[30] *CFPB*, 73 FLRA at 680.

[31] Opp'n Br. at 17.

[32] Opp'n Form at 4.

[33] Opp'n Br. at 20-21 (arguing award and remedy involve rights the Agency waived when it agreed to Article 12).

[34] *See id.* at 17-22; Opp'n Form at 4-5.

[35] *AFGE, Council of GSA Locs., Council 236*, 55 FLRA 449, 452 (1999) (*Council 236*); *see also AFGE, Council 238*, 62 FLRA 350, 352 (2008) (finding proposal concerning performance-appraisal system did not concern a "method or means of performing work under § 7106(b)(1)" because it concerned "'how an agency evaluates' the work, rather than 'how employees will do their work'" (quoting *Council 236*, 55 FLRA at 452)); *Ill. Nurses Ass'n*, 27 FLRA 714, 736 (1987) (finding proposal concerning "counseling [for] employees with unsatisfactory performance" did "not concern the methods and means of performing the [a]gency's work within the meaning of [§] 7106(b)(1)" (citing *NFFE, Loc. 541*, 12 FLRA 270, 272-73 (1983))).

[36] *See CFPB*, 73 FLRA at 679 (holding the opposing party has the burden to "demonstrate that one of the subsections of § 7106(b) applies" (emphasis omitted)).

[37] Opp'n Br. at 21; *see also id.* at 23.

[38] Opp'n Form at 5.

[39] *CFPB*, 73 FLRA at 680.

[40] *Id.* at 679; *cf. NAGE, Loc. R1-134*, 73 FLRA 637, 643 (2023) (in negotiability context, rejecting unsupported claim that proposal was a procedure); *NFFE, Loc. 1450, IAMAW*, 70 FLRA 975, 977 (2018) (same).

[41] Opp'n Br. at 20-21.

Statute,[42] the Union does not cite § 7106(b)(3) or assert that Article 12 is an appropriate arrangement. Even assuming the Union has sufficiently raised a § 7106(b)(3) claim, the Authority emphasized in *CFPB* that parties raising § 7106(b)(3) "should apply [a modified version of] the test established in" *NAGE, Local R14-87* (*KANG*).[43] The Union does not discuss that test or explain how it should apply in this case. Therefore, we find the Union has not met its "burden to demonstrate that [Article 12], as interpreted and applied, is enforceable under" § 7106(b)(3).[44]

Based on the foregoing, we find that, in its opposition, the Union has not demonstrated Article 12 – as interpreted and applied by the Arbitrator – is enforceable under any of the subsections of § 7106(b) of the Statute.[45] As noted above, although the Union was given an opportunity to file a supplemental brief addressing how the *CFPB* test applies in this case, the Union did not file such a brief. Therefore, we find that the Union has not met its burden under the second step of the *CFPB* test, the answer to the second *CFPB* question is no, and the Agency has successfully challenged the Arbitrator's finding of an Article 12 violation on management-rights grounds.

Under *CFPB*, where an excepting party "successfully challenges the underlying finding of a [contract] violation," "the Authority will set aside *both* the finding of a violation *and* the remedy for the violation."[46] Consistent with that principle, we set aside the Arbitrator's finding of an Article 12 violation and her awarded remedy – and, thus, the award – as contrary to management's rights to direct employees and assign work. Consequently, we need not consider the third and fourth questions under *CFPB*.[47] Further, because we set aside the award on management-rights grounds, we find it unnecessary to address the Agency's essence exception.[48]

IV. Decision

We grant the Agency's contrary-to-law exception and set aside the award.

[42] *See CFPB*, 73 FLRA at 680 (noting that, "in arbitration cases where § 7106(b)(3) is at issue," the Authority will apply the "excessive-interference standard" established in *NAGE, Loc. R14-87*, 21 FLRA 24, 31-33 (1986) (*KANG*)).
[43] *Id.* at 680.
[44] *Id.* at 679.
[45] *CBP*, 73 FLRA at 786 (finding union failed to meet its burden to demonstrate contractual provisions interpreted by arbitrator were enforceable where union did not make any specific arguments about any § 7106(b) provisions).
[46] *CFPB*, 73 FLRA at 680.
[47] *Id.* (recognizing that it is unnecessary to address the third and fourth *CFPB* questions unless "the answer to the [second] question is yes").
[48] *See* Exceptions Br. at 19 (methods of employee assistance), 24 (timing of assistance), 26 (duration of assistance), 28 (use of non-binding arbitral precedent); *see also CBP*, 73 FLRA at 787 (finding it unnecessary to address remaining exceptions after setting aside relevant portion of award on management-rights grounds).