64 FLRA No. 126

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3911
(Union)

and

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
NEW YORK, NEW YORK
(Agency)

0-AR-4526

DECISION

April 27, 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 Martin Ellenberg filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the exceptions.

As relevant here, the Arbitrator denied the grievance, which alleged that the Agency violated the Statute and the parties' agreement by issuing a discriminatorily motivated performance rating. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Union's local chief steward (grievant) filed a grievance alleging that his performance was not evaluated according to the proper performance standards, and that he received an unfair performance evaluation as a result of his supervisor's discrimination. Award at 2-3. The grievant alleged that his supervisor discriminated against him for his Union activities in violation of the Statute and that the Agency violated numerous provisions of the parties' agreement, including a provision prohibiting discrimination based on "race, color, creed, national origin, sex, age, sexual preference, Union affiliation, lawful political affiliation, marital status, or qualifying handicapping condition." *Id.*

As relevant here, at arbitration, the parties stipulated the issues as:

> Was the [g]rievant's 2006 rating arbitrary and capricious?
>
> . . . .
>
> [W]as the [g]rievant discriminated against because of his gender, race, or other prohibited personal practice when issued his performance rating?
>
> . . . .
>
> Was the [g]rievant discriminated against because of his membership in a labor organization and/or his Union activities in violation of 5 U.S.C. [§] 7116 (a)(1), (a)(2) and/or (a)(8) when issued his 2006 performance rating? *

Id. at 6.

The Arbitrator evaluated whether the grievant's "Fully Successful" rating — rather than the "Exceeds Expectations" rating to which the grievant testified he was entitled — was arbitrary and capricious. *Id.* at 8-9. The grievant had been evaluated under a pass/fail rating system for the nine years prior to the challenged rating. *Id.* at 8. The Arbitrator noted that the grievant's supervisor testified about occasions when, "despite being the 'lead' person[,]" the grievant's performance "showed a lack of initiative, failure to provide 'input, guidance and suggestions on policies and procedures' and failure to 'consistently communicate . . . effectively . . . to enhance the understanding of the Agency's policies and programs.'" *Id.* at 9. In contrast, the Arbitrator stated that the Union "introduced little testimony or evidence to demonstrate that [the grievant's] performance exceeded the 'Fully Successful' rating." *Id.* In this connection, the Arbitrator determined that the Union did not present evidence of the grievant's outstanding performance, but, instead, focused on criticizing the performance of the grievant's supervisor. *Id.* at 10.

Based on the foregoing, the Arbitrator concluded that the Union had not demonstrated that the grievant's performance exceeded the "Fully Successful" level. *Id.* at 9-10. The Arbitrator found that the rating was not

*. The Arbitrator also addressed arbitrability issues regarding the grievant's challenges to the performance standards and to his rating. Specifically, he found that the challenge to the performance standards was not arbitrable because it was untimely, and that the challenge to the rating was timely and arbitrable. Award at 8. As no exceptions were filed to these findings, we will not discuss them further.

arbitrary and capricious, and stated that, consequently, "the questions regarding discrimination are moot." *Id.* at 10. Accordingly, he denied the grievance. *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is contrary to law because the Arbitrator's finding that the grievant's performance rating was not arbitrary and capricious "cannot moot the questions of Title VII discrimination and discrimination under [the Statute.]" Exceptions at 5-6. According to the Union, the Arbitrator failed to apply the required "standards and burdens" because, in cases involving racial and gender discrimination and alleged violations of the Statute, Agency decisions are subject to review based upon the preponderance of the evidence standard, not under the more deferential "arbitrary and capricious" standard. *Id.* at 6.

In addition, the Union asserts that the Arbitrator exceeded his authority by concluding that the discrimination claims were moot and improperly failing to consider those claims. *Id.* The Union also asserts that the Arbitrator failed to rule on the "predicate legal issue" of whether the supervisor's alleged failure to keep records documenting the basis for the grievant's rating — in violation of the performance evaluation standards in the parties' agreement — rendered the rating "per se arbitrary and capricious." *Id.* at 6-9.

B. Agency's Opposition

The Agency argues that the Arbitrator did not exceed his authority or issue a decision contrary to law because, "once the Arbitrator determined that the Union failed to present evidence that the grievant should have received a higher rating, there was no further analysis required." Opp'n at 3. In addition, the Agency argues that the Arbitrator did not fail to address a "predicate legal issue" because the Arbitrator ruled on all of the stipulated issues before him. *Id.* at 5 n.3 (quoting Exceptions at 7).

IV. Analysis and Conclusions

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

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the 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 the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable legal standard. *See U.S. Dep't of Def. Dep'ts of the Army & the Air Force, Ala. Nat'l Guard Northport, Ala.*, 55 FLRA 37, 40 (1998) (*DOD*). In this regard, an arbitrator's failure to apply a particular legal analysis "does not render [an] award deficient because . . . in applying the standard of *de novo* review, the Authority assesses whether the arbitrator's legal *conclusions* are consistent with law, based on the underlying factual findings." *AFGE, Nat'l Border Patrol Council*, 54 FLRA 905, 910 n.6 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *DOD*, 55 FLRA at 40.

The Arbitrator made factual findings that the Union had not demonstrated that the grievant's performance was rated improperly. Award at 9-10. As noted above, in analyzing whether the award is contrary to law, we defer to the Arbitrator's underlying factual findings. *See DOD*, 55 FLRA at 40. The Arbitrator's finding that the grievant's rating was not improper establishes that the Agency had a legitimate basis for its rating of the grievant. In this context, it follows that the Arbitrator's statement that the discrimination claims were "moot" is, effectively, a conclusion that the rating was not discriminatory. Award at 9-10. The Union provides no basis for finding this conclusion contrary to law. Accordingly, we deny the exception.

B. The Arbitrator did not exceed his authority.

An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed by the grievance. *See U.S. Dep't of Def., Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996). However, the Authority does not require arbitrators to address every argument raised by the parties. *See U.S. Dep't of Homeland Sec., Customs & Border Prot. Agency N.Y., N.Y.*, 60 FLRA 813, 816 (2005) (*DOHS*) (arbitrator did not exceed her authority by failing to specifically address argument not implicated by the parties' stipulated issues).

The Union asserts that the Arbitrator exceeded his authority by improperly failing to consider the discrimination claims before him. Exceptions at 6. As discussed above, we find that the Arbitrator effectively resolved the Union's discrimination claims when he upheld the propriety of the performance rating. Thus, the Union's assertion does not demonstrate that the Arbitrator failed to resolve an issue submitted to arbitration.

In addition, we construe the Union's exception that the Arbitrator failed to resolve the "predicate legal issue" of the Agency's alleged failure to maintain required documentation of the grievant's performance as a contention that the Arbitrator exceeded his authority by failing to resolve an issue before him. *Id.* at 7. Contrary to the Union's contention, however, the Arbitrator resolved all of the stipulated issues, which did not include the issues of whether the Agency violated the parties' agreement by failing to keep required records and whether this violation, if proven, would establish that the rating was per se arbitrary and capricious. As the award is directly responsive to the stipulated issues, the Union's exception does not demonstrate that the Arbitrator failed to resolve an issue submitted to arbitration. *See DOHS*, 60 FLRA at 816.

For the foregoing reasons, we find that the Arbitrator did not exceed his authority, and deny these exceptions.

V. Decision

The Union's exceptions are denied.