68 FLRA No. 142

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 15
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
HEADQUARTERS, JOINT MUNITIONS COMMAND
ROCK ISLAND, ILLINOIS
(Agency)

0-AR-4962

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DECISION

August 31, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The grievant was a general schedule (GS)-7 logistics management specialist, occupying a career-ladder position with promotion potential to the GS-11 level. Citing performance concerns, the Agency reassigned her to a GS-7 position without promotion potential. The Union filed a grievance alleging that the Agency violated the parties' agreement and Agency regulations by reassigning the grievant from a position with promotion potential to a position without promotion potential. Arbitrator Andrea M. Kircher denied the grievance. This case presents three substantive questions.

The first question is whether the award: (1) is contrary to an Agency regulation that is incorporated into the parties' agreement; and (2) fails draw its essence from the agreement. Because we apply an essence analysis to assess an award's consistency with agency regulations that are incorporated into a collective-bargaining agreement, and the Union fails to establish that the Arbitrator's award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, the answer is no.

The second question is whether the award is contrary to law. Because the Union's claim – that the grievant did not receive procedural protections to which she was entitled – is based on the faulty premise that the Agency rated the grievant's performance "unacceptable," the answer is no.

The third question is whether the Arbitrator exceeded her authority because she disregarded a provision in the parties' agreement that prohibits arbitrators from adding to or altering the agreement. Because the Arbitrator did not add to or alter the parties' agreement and the Union misinterprets the award, the answer is no.

II. Background and Arbitrator's Award

The grievant originally occupied a career-ladder position as a GS-7 logistics management specialist with non-competitive promotion potential to the GS-11 level. During her mid-point performance review, the grievant's supervisor "concluded that she was not demonstrating sufficient progress in her work to receive a promotion to the GS-9 pay grade at the scheduled time."[1] At the end of the grievant's performance-review period, the Agency issued the grievant a "fair" or "needs improvement" rating under the Total Army Performance Evaluation System (TAPES), the Agency's performance management system for civilian personnel.[2] Within TAPES, the Agency rated the grievant under the TAPES Senior System (Senior System). The Agency did not promote the grievant to a GS-9 position. Instead, the Agency reassigned the grievant to a non-career-ladder GS-7 administrative-support position.

The Union filed a grievance alleging that the Agency improperly reassigned the grievant from a career-ladder position to a non-career-ladder position. As a career-ladder position, the grievant's former position had non-competitive-promotion potential. The position to which she was reassigned did not. The Union also claimed that the Agency improperly rated the grievant under the Senior System, rather than a different Agency rating system with different standards, the TAPES Base System (Base System). The Agency denied the grievance, and the parties submitted the matter to arbitration.

The Arbitrator framed the following issue: "When the Agency reassigned the grievant to a job at the same pay level[,] but without promotional opportunities, did the reassignment process violate the agreement or appropriate statutory or regulatory provisions? If so, what shall the remedy be?"[3]

[1] Award at 3.
[2] *Id.* at 4 (internal quotation marks omitted).
[3] *Id.* at 2.

Before the Arbitrator, the Union claimed that the Agency's use of the Senior System violated Article 15 of the parties' agreement. Article 15 states, as relevant here, that "T[APES] will be administered according to the instructions in . . . Pamphlet 690-400."[4] The Union alleged that Pamphlet 690-400 restricts application of the Senior System to employees at the GS-9 level or above, and that the grievant should have been rated under a different system, the Base System. The Union also alleged that the grievant's performance was rated "unacceptable in one or more critical elements,"[5] and argued that the Agency violated the procedures set forth in Article 15 and applicable Office of Personnel Management (OPM) regulations that provide procedural protections for employees rated "unacceptable."[6] Finally, the Union claimed that "the [g]rievant was given less opportunity to improve than a similarly situated employee."[7]

The Arbitrator denied the Union's grievance. She rejected the Union's argument that the Agency erroneously evaluated the grievant's performance under the Senior System. In this regard, the Arbitrator relied on a 2004 Agency memorandum (the 2004 memorandum) that provides that "all new employees hired into career-ladder . . . positions with a target grade of GS-09 and above . . . . will be rated using the TAPES Senior System."[8] The Arbitrator also found that a subsequent 2005 Agency memorandum (the 2005 memorandum), that discusses the rating cycle for career-ladder employees, "does not conclude that the Base [S]ystem should supplant the Senior System for career[-]ladder employees like the [g]rievant whose target grade was above GS-09."[9] Further, the Arbitrator determined that the Agency did not violate Article 15 of the parties' agreement or OPM regulations regarding employees rated "unacceptable," finding that the grievant was rated more highly – "marginal" – rather than "unacceptable."[10] Finally, the Arbitrator found that the grievant was not treated disparately because the other similarly situated employee's "employment picture was very different than the [g]rievant's."[11]

The Union filed exceptions to the Arbitrator's award. The Agency filed an opposition to the Union's exceptions.

III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar two of the Union's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the Arbitrator.[12]

As part of its contrary-to-law exceptions, the Union contends that the award is contrary to the "DOD performance management policy" because it requires the Agency to provide assistance to employees with a performance rating below "fully successful."[13] In addition, as part of its exceeded-authority exception, the Union argues that the award "violated" § 7117 of the Federal Service Labor-Management Relations Statute (the Statute) because the Agency had issued the 2004 memorandum on which the Arbitrator relied without bargaining with the Union as required by the Statute.[14]

Regarding the contrary-to-law claim, the record does not demonstrate that the Union argued before the Arbitrator that the "DOD performance management policy"[15] required the Agency to provide assistance to employees with a performance rating below "fully successful." Because the grievant's performance, and whether the Agency was required to provide assistance, are in dispute, the Union could have raised this argument below. As it did not, the Union may not raise the argument now.[16]

Regarding the exceeded-authority claim, the Agency cited the 2004 memorandum when it argued before the Arbitrator that the Agency properly rated the grievant under the Senior System.[17] But the record does not demonstrate that the Union argued in response that § 7117 precluded her from relying on the 2004 memorandum that the Agency cited.[18] Consequently, because the Union could have made this argument before the Arbitrator, but did not do so, it may not raise the argument now.[19]

[4] Exceptions, Attach. 12 (parties' agreement) at 36.
[5] Award at 10 (internal quotation marks omitted) (citing 5 C.F.R. § 430.207(d)(1)).
[6] *Id.*
[7] *Id.* at 5.
[8] Exceptions, Attach. 8 (2004 memorandum).
[9] Award at 8.
[10] *Id.* at 10-11.
[11] *Id.* at 11.
[12] 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g., Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011).
[13] Exceptions at 3.
[14] *Id.* at 7 (citing 5 U.S.C. § 7117).
[15] *Id.* at 3.
[16] *AFGE, Local 1164*, 66 FLRA 74, 77 (2011).
[17] Award at 7.
[18] *AFGE, Local 3937*, 64 FLRA 1113, 1114 (2010) (dismissing exception under § 2429.5 where union failed to raise § 7117 before arbitrator).
[19] *See id.*

Accordingly, we dismiss these exceptions under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.[20]

IV. Analysis and Conclusions

A. The award does not violate an Agency-wide regulation, or fail to draw its essence from the parties' agreement.

The Union argues that the Arbitrator should have found that the Agency rated the grievant under the wrong appraisal system. Specifically, the Union argues that the award is contrary to Pamphlet 690-400, which the Union alleges restricts application of the Senior System to employees at the GS-9 level or above.[21] The Union also argues that the award fails to draw its essence from the parties' agreement, which the Union alleges imposes the same restriction on the Agency as Pamphlet 690-400.[22] Therefore, as the Union interprets the requirements of Pamphlet 690-400 and the parties' agreement, the Senior System should not have been applied to the grievant.

The Union claims, and the Agency does not dispute, that Article 15 of the parties' agreement expressly incorporates Pamphlet 690-400 – the Agency regulation used to administer TAPES. When a collective-bargaining agreement incorporates the agency regulation with which an arbitration award allegedly conflicts, the matter becomes one of contract interpretation because the agreement, not the regulation, governs the matter in dispute.[23] Consistent with the Union's claim, we find that Pamphlet 690-400 is incorporated into the parties' agreement. Accordingly, we apply an essence analysis to assess the Union's argument.[24]

In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard that federal courts use in reviewing arbitration awards in the private sector.[25] 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.[26] 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."[27]

The Union asserts that Pamphlet 690-400 requires the Agency to rate employees in career-ladder positions under the Base System until they reach the GS-9 level.[28] Therefore, the Union argues, the Arbitrator erred by finding that the Agency properly evaluated the grievant, a GS-7 employee, under the Senior System, rather than the Base System.[29]

Pamphlet 690-400 defines the Base System, in relevant part, as the Agency's "performance appraisal system covering employees in the following pay plans and grades: . . . GS-8 and below."[30] Pamphlet 690-400 defines the Senior System, in relevant part, as the Agency's "performance appraisal system covering employees in the following pay plans and grades: . . . GS-9 and above."[31] Finally, the 2004 memorandum provides, in relevant part, that "all new employees hired into career[-]ladder . . . positions with a target grade of GS-09 and above . . . . will be rated using the . . . . TAPES Senior System."[32]

Pamphlet 690-400's plain wording does not address which rating system covers employees in career-ladder positions with a promotion potential at the GS-9 level and above, such as the grievant's. Conversely, as both parties agree, the 2004 memorandum expressly directs the Agency to rate employees in *career-ladder positions* with a *target grade* of GS-9 or above, such as the grievant's (prior to her reassignment), under the Senior System.[33] In these circumstances, it was not irrational or implausible for the Arbitrator to interpret Pamphlet 690-400's requirements in light of the express requirements of the 2004 memorandum, concerning the appropriate rating system to use in evaluating the grievant.

The Union's further argument, that the 2005 memorandum "rescind[ed]" the 2004 memorandum,[34] also does not demonstrate that the Arbitrator erred. The 2005 memorandum does not by its

[20] *See, e.g., AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).
[21] Exceptions at 5-6.
[22] *Id.* at 7-8.
[23] *E.g., SSA*, 65 FLRA 523, 527 (2011); *AFGE, Council of Prison Locals 33*, 59 FLRA 381, 382 (2003).
[24] *See SSA*, 65 FLRA 523, 527 (2011); *AFGE, Council of Prison Locals 33*, 59 FLRA 381, 382 (2003).
[25] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[26] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[27] *Id.* at 576.
[28] Exceptions at 6.
[29] *Id.* at 5-6.
[30] *Id.*, Attach. 5 (Pamphlet 690-400) at 2.
[31] *Id.* at 4.
[32] 2004 memorandum.
[33] Award at 7-8.
[34] Exceptions at 5.

terms "rescind" anything.[35] Rather, as the Arbitrator found, the memorandum "merely announces"[36] an "exception" to Pamphlet 690-400's requirements "to change the rating cycle for career[-ladder] interns."[37] It was therefore also not irrational or implausible for the Arbitrator to reject the 2005 memorandum as useful guidance in interpreting Pamphlet 690-400's requirements concerning the appropriate rating system to use in evaluating the grievant.

Finally, *U.S. Department of the Air Force, Air Force Material Command, Ogden Air Logistics Center, Hill Air Force Base, Utah* (*Hill Air Force Base*),[38] on which the Union relies, is inapposite. In *Hill Air Force Base*, the Authority discussed remedy issues relating to arbitral findings that an agency failed to properly appraise a grievant. As the Arbitrator does not find in this case that the Agency failed to properly appraise the grievant, and we do not find that the Arbitrator erred, we do not reach issues concerning the appropriate remedy. *Hill Air Force Base* is therefore inapposite.

Accordingly, because the Union fails to establish that the Arbitrator's award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, which incorporates Pamphlet 690-400, we deny these exceptions.

B. The award is not contrary to law.

The Union argues that the award is contrary to law because the Arbitrator failed to order the Agency to provide the grievant with procedural protections to which she was entitled by law and regulation, prior to her reassignment to the non-career-ladder GS-7 position.[39] The Union refers in this connection to procedural protections set forth in 5 C.F.R. part 430, and related laws.[40]

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.[41] 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.[42] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that those findings are deficient as nonfacts.[43] Absent a nonfact, challenges to an arbitrator's factual findings cannot demonstrate that an award is contrary to law.[44]

The Union premises its claim, that the grievant was entitled to procedural protections that she did not receive, on the claim that the Agency rated the grievant's performance "unacceptable."[45] The procedural protections the Union seeks for the grievant are protections that agencies are required to provide employees with an "unacceptable" rating.[46]

The Union's exception lacks merit because the exception's premise – that the Agency rated the grievant's performance "unacceptable" – lacks support. The Arbitrator's factual findings, which the Union does not challenge as nonfacts, make this clear. First, the Arbitrator found that "[t]he [g]rievant's performance was not deemed unacceptable by any witness."[47] Second, the Arbitrator found that the Agency rated the grievant's performance on the "Senior System [e]valuation scale as 'fair' or 'needs improvement.'"[48] Pamphlet 690-400 defines a "fair" rating in the Senior System as "Level 2 in 5 [C.F.R. part] 430."[49] Level 2 in 5 C.F.R. part 430 is, by definition, above Level 1, and "Level 1 is 'Unacceptable'."[50] Rather, Level 2, which is "above 'Unacceptable'" but "below 'Fully Successful' [Level 3]" is termed "Marginal."[51] The Arbitrator's unchallenged factual findings therefore support her conclusion that the Agency did not rate the grievant "unacceptable." Because the Union's premise in claiming that the grievant was entitled to procedural protections that she did not receive lacks support, we deny the Union's contrary-to-law exception that is based on this claim.

The Union also refers to its argument "before the Arbitrator . . . that another employee was given the identical rating . . . as the grievant . . . by the same supervisor, but she was not reassigned."[52] However, the Union does not explain how this supports a finding that the award is contrary to law. We therefore deny this exception under § 2425.6(e)(1) of the Authority's Regulations, because the Union fails to support its

[35] *See id.*, Attach. 9 (2005 memorandum).
[36] Award at 8.
[37] 2005 memorandum.
[38] 59 FLRA 14 (2003).
[39] Exceptions at 2-5.
[40] *Id.* at 2-5.
[41] *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)).
[42] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[43] *Id.*
[44] *See AFGE, Local 1547*, 65 FLRA 624, 626 (2011).
[45] Exceptions at 3-4.
[46] *See, e.g.*, 5 C.F.R. § 430.204(b)(1)(v).
[47] Award at 10.
[48] *Id.* at 4.
[49] Exceptions, Attach. 5 at 14.
[50] 5 C.F.R. § 430.208(d)(2)(ii).
[51] *Id.* § 430.207(c).
[52] Exceptions at 4.

argument that the award is deficient on the ground on which the Union relies.[53]

C. The Arbitrator did not exceed her authority.

The Union contends that the Arbitrator exceeded her authority by disregarding specific limitations on her authority set forth in the parties' agreement.[54] The Union cites Article 13, Section 7.b, which provides that "[t]he [a]rbitrator shall have no authority to alter, amend, add to or to subtract from the terms of this agreement or any agreement made supplementary hereto."[55] The Union claims that the Arbitrator "changed the terms of the [parties' agreement] by concluding [that] the Agency had effectively changed Article 15 of the agreement without bargaining."[56] The Union contends that the Arbitrator erred when she found that "[t]he . . . 2004 memorandum no longer required that employees in training positions be rated in the Base System."[57]

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.[58] The Authority has found that a party fails to establish that an arbitrator exceeds her or his authority when that party misinterprets the award and relies on that misinterpretation in arguing that the arbitrator exceeded her or his authority.[59]

The Union's claim is based on a misinterpretation of the award. Article 15 provides, as relevant here, that "T[APES] will be administered according to the instructions in . . . Pamphlet 690-400."[60] The Arbitrator did not change the terms of Article 15 when she found that the grievant's performance was appropriately evaluated under the Senior System. Consistent with Article 15, the Arbitrator recognized that Pamphlet 690-400's instructions determined the appropriate rating system to apply to the grievant's performance. Thus, as discussed in section IV.A., above, when the Arbitrator found that the grievant's performance was appropriately evaluated under the Senior System, she did not change the agreement's terms; she simply interpreted Pamphlet 690-400's requirements in light of the express requirements of the 2004 memorandum. Accordingly, because the Arbitrator did not change the terms of the parties' agreement in her award, we deny this exception.

V. Decision

We deny the Union's exceptions.

[53] *E.g., AFGE, Local 31*, 67 FLRA 333, 334 (2014).
[54] Exceptions at 7 (citing Art. 13, § 7.b. of the parties' agreement).
[55] *Id.* (quoting Art. 13, § 7.b. of the parties' agreement).
[56] *Id.*
[57] *Id.*
[58] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[59] *NTEU, Chapter 45*, 52 FLRA 1458, 1463 (1997).
[60] Parties' agreement at 36.