64 FLRA No. 13

FEDERAL DEPOSIT INSURANCE COMPANY
(Agency)

and

NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 207
(Union)

0-AR-3997

DECISION

September 23, 2009

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 Irving N. Tranen filed by the Agency under § 7122(a) 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.

The Arbitrator sustained a grievance challenging the denial of a Corporate Success Award (CSA) for the grievant, and directed the Agency to award him one retroactively. For the reasons that follow, we deny the Agency's contrary to law exception, and, as we are unable to determine whether the award fails to draw its essence from the parties' Compensation Agreement, we remand to the parties, absent settlement, for resubmission to the Arbitrator.

II. Background and Arbitrator's Award

The parties agreed through a Compensation Agreement, a Memorandum of Understanding (MOU), and an Agency Circular (the Circular) that CSAs would be established that would provide an additional three percent increase in basic pay for those bargaining unit employees recognized as "top contributors." [2] Award at 19 (quoting Compensation Agreement). Under the Compensation Agreement, the Agency's "Chairman has sole discretion to set the percentage of bargaining unit employees who will be recognized as top contributors[,]" but "the percentage of bargaining unit employees to receive the CSA shall be no less than 33 1/3 percent." *Id.* at 19-20 (quoting Compensation Agreement). As relevant here, the Agency's Chairman determined that CSAs would be given to no more than 33 1/3 percent of bargaining unit employees. *Id.* at 20. The parties further agreed that "CSA's will be distributed to employees in a fair and equitable manner and in accordance with the terms of th[e] MOU and FDIC Circular 2420.1." *Id.* at 2 (quoting MOU between FDIC and NTEU (March 13, 2003)).

During the year in question, the grievant was employed as an Examination Specialist, Information and Automation within the Applied Technology Section (ATS) of the Agency's Division of Supervision and Compliance, and had worked on the ViSION computer project. The grievant's supervisor directed that no CSAs be given to members of the ATS ViSION team that year because the project had been implemented late and had gone over budget. *Id.* at 8. Thus, no one in ATS who had worked on the ViSION project, including the grievant, received a CSA. *Id.*

The Union filed a grievance alleging that the grievant had not been properly considered for a CSA. The matter was not resolved and was submitted to arbitration. The Arbitrator framed the issue as follows: "Did the [Agency] violate Chapter 11 of [the] Circular . . . , [the] Compensation Agreement or the [MOU] when it failed to select the [g]rievant for a [CSA]? If so, what shall the remedy be?" Award at 2.

As an initial matter, the Arbitrator stated that, under the MOU, CSAs were to be distributed in a "fair and equitable" manner. *Id.* at 20 (quoting MOU). He further found that the parties agreed that "the essence of fair and equitable treatment is that like situated employees should be treated in a similar matter." *Id.* The Arbitrator determined that the grievant had not received fair and equitable consideration for a CSA.

In this regard, the Arbitrator found that, by failing to consider the grievant for a CSA because his supervisor had "issued an order that [he] [c]ould not be considered . . . solely because he had been a member of a team that had failed to meet its anticipated goals[,]" *id.* at 21 (emphasis omitted), the Agency violated the Circular. *Id.* at 22. Specifically, the Arbitrator determined that the Agency had violated Section 11-2 of the Circular, which mandates that "[a]ll non-executive employees who have current performance ratings of record from the [Agency] of 'Meets Expectations' are eligible" for CSA's, and that "[i]ndividuals, not teams, are eligible for the Corporate Success Award." *Id.* at 21, 22 (emphasis omitted).

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1. Chairman Pope's separate opinion, dissenting in part, is set forth at the end of this decision.

2. Pertinent provisions of the Compensation Agreement, the MOU, and the Circular are set forth in the attached Appendix.

As a remedy, the Arbitrator directed the Agency to award the grievant a CSA retroactively.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to law because, under prong II of the framework set forth in *United States Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C.*, 53 FLRA 146, 152-53 (1997) (*BEP*), the award does not reflect a reconstruction of what the Agency would have done if it had not violated the parties' agreement. [3] Exceptions at 8-9 (citations omitted).

In this respect, the Agency contends that the Arbitrator failed to find that the grievant's performance would have been rated within the top one-third of employees, a requirement for receiving a CSA. The Agency also asserts that the Arbitrator did not find that, if the grievant had been considered "fairly and equitably[,]" he would have received a CSA. *Id.* at 10. Further, the Agency states that the grievant's first-line supervisor testified that the grievant was not in the top one-third of employees and the supervisor would not have nominated the grievant for an award in any event. *Id.* In addition, the Agency argues that the Arbitrator did not find that the grievant's contributions were "more significant than the contributions of any co-worker who received a CSA[.]" *Id.* (emphasis omitted). Accordingly, the Agency argues that, at most, the record shows that the grievant "*might*" have received a CSA if the Agency had properly considered him, but that this is not enough to sustain the Arbitrator's award. *Id.* at 11 (emphasis in original). Based on the foregoing, the Agency asserts that the award does not reflect a reconstruction of what the Agency would have done if it had not violated the Compensation Agreement and the Circular.

The Agency further contends that the award fails to draw its essence from the Compensation Agreement. *Id.* at 14. In this regard, the Agency asserts that, absent a finding that the grievant was in the top one-third of performers, the Arbitrator has ignored the express terms of the Compensation Agreement, which does not obligate the Agency to provide CSAs to an employee who is not in the top one-third of performers. In addition, the Agency alleges that the award violates the portion of the Compensation Agreement that allows the Agency's Chairman to limit CSAs to the top one-third of Agency employees. In this connection, the Agency asserts that awarding the grievant a CSA would increase the overall distribution of CSAs to more that 33 1/3 of employees. [4] *Id.* at 14-16.

B. Union's Opposition

The Union argues that the Agency has failed to demonstrate that the award is contrary to law because it has not established that the award affects any of its management rights under § 7106 of the Statute. Opposition at 3. In this connection, the Union asserts that, although the establishment of performance elements and standards affect management's rights to direct and assign work, here, the Agency has conceded that CSAs are unrelated to performance. *Id.* at 3-4. Accordingly, the Union argues that, as the Agency has failed to demonstrate that the award affects any of its management rights, there is no need to apply the *BEP* framework and the Agency's exception should be denied. *Id.* at 4 (citing *United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Otisville, N.Y.*, 58 FLRA 307, 309 (2003)).

The Union further asserts that the award is not inconsistent with the Compensation Agreement because, although the Compensation Agreement specifically prohibits the Agency from awarding CSAs to less than 33 1/3 of bargaining unit employees, there is nothing in the agreement that prohibits the Agency from awarding CSAs to more than 33 1/3 of employees. As such, the Union contends that the award does not fail to draw its essence from the Compensation Agreement.

IV. 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*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States 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 standard of law. *See United States Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, North-*

3. The Agency concedes that the award satisfies prong I of *BEP*. Exceptions at 9 n.5.

4. The Agency also argues that the Arbitrator "exceeded his authority" by substituting his judgment for that of the Agency and by ordering a remedy that fails to draw its essence from the parties' agreement. Exceptions at 11. As these arguments are restatements of its contrary to law and essence claims, we do not address them separately. *See SSA, Balt., Md.*, 57 FLRA 690, 693 n.6 (2002); *see also AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009).

port, Ala., 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Agency argues that the award is contrary to law because it does not constitute a reconstruction of what the Agency would have done if it not violated the MOU and the Circular. Exceptions at 8-9 (citing *BEP*, 53 FLRA at 152-53). However, before applying *BEP*, the Authority first determines whether the award affects a management right. *See United States Small Bus. Admin.*, 55 FLRA 179, 184 (1999). If it does not affect a management right, then *BEP* does not apply and the exception will be denied. *See, e.g., United States Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Gulf Coast, Pascagoula, Miss.*, 62 FLRA 328, 330 (2007); *United States Dep't of Transp., FAA*, 61 FLRA 54, 56-57 (2005); *United States Dep't of the Navy, Norfolk Naval Shipyard, Portsmouth, Va.*, 55 FLRA 1103, 1105 (1999).

Here, the Agency does not argue that the award affects a management right; instead, it cites a case in which the Authority stated that it applies the *BEP* framework where a party challenges an arbitrator's cancellation of a performance rating and the arbitrator's substitution of a specific performance rating in its place. Exceptions at 12-13 (citing *United States Dep't of Health & Human Servs., Health Resources Servs. Admin., Rockville, Md.*, 60 FLRA 118 (2004)). However, the Agency is not challenging the cancellation of a performance rating, but the failure to award a CSA. Thus, this precedent is inapposite.

The Authority has previously determined that a provision establishing an employee's eligibility for an "incentive pay bonus" did not affect management's rights to direct employees or assign work because it did not "prescribe the type of work unit employees will perform nor does it establish the performance level necessary to avoid disciplinary action." *Int'l Org. of Masters, Mates & Pilots*, 36 FLRA 555, 566 (1990); *see also NTEU v. FLRA*, 793 F.2d 371, 375 (D.C. Cir. 1986). Applying this precedent here, the Agency has failed to demonstrate that the award affects management's rights to direct employees and assign work, and, as such, we do not apply *BEP*. *See, e.g., United States Dep't of Transp., FAA*, 61 FLRA at 56-7 (no application of *BEP* where agency provided no basis for finding that the award affected management's right to assign employees or work under § 7106(a)(2) of the Statute). Accordingly, the award is not contrary to § 7106 of the Statute and we deny the Agency's exception. *See id.*

B. We are unable to determine whether the award fails to draw its essence from the Compensation 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. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). 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. *See United States Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990). 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." *Id*. at 576.

Applying private sector precedent, the Authority has determined that, where there is an inconsistency between an agreement provision and the award at issue, but the relevant contract language was not interpreted by the arbitrator, the Authority will remand the award in order for the arbitrator to address the disputed provision. *See AFGE, Council 220*, 54 FLRA at 160.

Here, the Arbitrator determined that the grievant was not considered for a CSA in violation of the MOU and the Circular. The Agency argues that the award is inconsistent with the Compensation Agreement, which was not addressed by the Arbitrator in his findings sustaining the grievance.

Under the terms of the Compensation Agreement, CSAs are to be awarded to those bargaining unit employees who are recognized as "top contributors." Award at 2 (quoting Compensation Agreement). Further, under the Compensation Agreement, the Agency's Chairman has "sole discretion" to set the percentage of bargaining unit employees who will be recognized as top contributors, but such percentage "shall be no less than 33 1/3 percent." *Id.* at 19-20 (quoting Compensation Agreement). The Arbitrator noted that the Chairman of the Agency set the percentage of employees to receive CSAs at 33 1/3 percent. *Id*. Accordingly, under the terms of the Compensation Agreement, it appears that only "top contributors" may receive CSAs, and only

a maximum of one-third of employees qualify as top contributors.

Here, the Arbitrator failed to determine whether the grievant was a "top contributor" within the meaning of the Compensation Agreement. Under the Compensation Agreement, such a finding appears to be required in order to award a CSA. Accordingly, in the absence of a finding that the grievant was a "top contributor," we remand this matter to the parties, absent settlement, for resubmission to the Arbitrator. On remand, the Arbitrator should determine whether the grievant was a "top contributor" within the meaning of the Compensation Agreement, or state why such finding is not required for awarding a CSA.

V. Decision

The Agency's contrary to law exception is denied. The award is remanded, absent settlement, for further proceedings consistent with this decision.

APPENDIX

Memorandum of Understanding Between FDIC and NTEU (March 13, 2003)

> 1. CSAs will be distributed to employees in a fair and equitable manner and in accordance with the terms of this MOU and FDIC Circular 2420.1.

Award at 2.

Compensation Agreement Between FDIC and NTEU for the Years 2003-2005

II. ANNUAL PAY

. . . .

C. Annual Pay Adjustment

Year 2003

> Effective 2003, the [Agency] will provide an increase in basic pay of 3.2 percent for all employees who received a rating of "meets expectations" during the prior year's rating period. In addition, 2003 shall be a transition year for the Corporate Success Award, which is described below. . . .

Years 2004 and 2005

. . . .

> A Corporate Success Award (CSA) will be established which provides that an additional 3.0 percent increase be made in basic pay for those employees recognized as top contributors. The Chairman has sole discretion to set the percentage of bargaining unit employees who will be recognized as top contributors under the CSA program. However, the percentage of bargaining unit employees to receive the CSA shall be no less than 33 1/3 percent. These awards shall be made on an annual basis. . . . .

Opposition, Jt. Ex. 3 at 2.

FDIC Circular 2420.1, Chapter 11, "Corporate Success Awards"

11-1. Definition.

> The Corporate Success Award is an annual award that provides for a 3.0% increase in basic pay (in addition to the annual pay adjustment) for those employees who are recognized as the top contributors within the Corporation. The purpose of this award is to recognize an employee's individual initiative, exceptional effort and/or achievements that reflect important contributions to the Corporation and/or its organizational components. An employee recognized with this award will have made important contributions that are within or outside of the scope of his/her job[.] However, when within the scope of the employee's job, such contributions must reflect initiative, effort or achievement beyond that normally expected from an employee in that position and gra[de].
>
> This award is effective for 2004 and 2005 and will be implemented during the first full pay period of each year, respectively. This award will be issued on an annual basis to acknowledge contributions made during the year. Corporate Success Awards shall be distributed to employees in a fair and equitable manner.
>
> . . . .

11-4. Criteria.

> The criteria below are intended to be achievable by any eligible employee in any position . . . .
>
> Nominations will be evaluated based on one or more of the following criteria. These are the only

criteria permitted under the Corporate Success Award Program. Nominations will provide specific statements of the contributions by the employee that meet the identified criteria. Meeting one or more of these criteria does not entitle employees to be nominated to receive the Corporate Success Award.

A. Business Results: Consistently displays a high level of initiative, creativity, and innovation to produce results that reflect important contributions to the [C]orporation and/or its organizational components.

B. Competency: Demonstrates an exceptional degree of competency within his/her position, and is frequently relied upon by others for advice, assistance, and/or judgment that reflect important contributions to the Corporation and/or its organizational components.

C. Working Relationships: Builds extremely productive working relationships with co-workers, other Divisions/Offices, or other public or private sector agencies based on mutual respect that reflect important contributions to the Corporation and/or its organizational components.

D. Learning and Development: Takes an active part in developing personal skills and competencies and applies newly acquired skills and competencies that reflect important contributions to the Corporation and/or its organizational components.

11-5. Procedures

. . . .

F. The Chairman has sole discretion to set the percentage of bargaining unit and non-bargaining employees who will be recognized as top contributors under the [C]orporate Success Award [P]rogram . . . . However, the percentage of bargaining unit employees to receive the Corporate Success Award will [be] no less than 33 1/3 percent.

. . . .

Award at 3-5.

Chairman Carol Waller Pope, dissenting in part:

I agree with my colleagues in all respects but one. Specifically, rather than remanding the award on the ground that we cannot determine whether the award draws its essence from the parties' agreements, I would deny the Agency's essence exception.

As set forth by the majority, the Authority gives deference to arbitral contract interpretations. *See* Majority Opinion at 5 (citing 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998)). This is not a policy choice made by the Authority; it is mandated by the Statute and judicial precedent. Specifically, § 7122 of the Statute provides that the Authority may set aside arbitration awards only on certain specified grounds, including, as relevant here, "grounds similar to those applied by Federal courts in private sector labor-management relations[.]" 5 U.S.C. § 7122(a)(2). In turn, the Federal courts' standard in reviewing arbitral contract interpretations is highly deferential, as evidenced by the Supreme Court's statement that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his error." *United Paperworkers Int'l Union, AFL-CIO v. Misco*, 484 U.S. 29, 38 (1987) (*Misco*). As recently stated by the United States Court of Appeals for the D..C. Circuit, in determining whether an award draws its essence from an agreement, "it does not matter whether the arbitrator's decision on the merits appears to be misguided[;] . . . the arbitrator has the right to be wrong and a court may not second-guess his decision." *United States Postal Serv. v. Am. Postal Workers Union*, 553 F.3d 686, 689, 693 (D.C. Cir. 2009) (*Postal Service*).

Here, the parties' MOU requires that Corporate Success Awards (CSAs) "will be distributed to employees in a fair and equitable manner and in accordance with the terms of this MOU and FDIC Circular 2420.1 [the Circular]." Award at 2. The Circular provides, in pertinent part, that: (1) "[i]ndividuals, not teams, are eligible for" CSAs; and (2) all unit employees "who have current performance ratings . . . of 'Meets Expectations' are eligible[]" for CSAs. *Id.* at 22 (emphasis removed). Applying these provisions, the Arbitrator determined that the Agency did not treat the grievant fairly and equitably, and violated the Circular (and thus the MOU), because it precluded the grievant from receiving a CSA based on his team, rather than his individual, status. *See id.* In addition, the Arbitrator expressly found that the grievant "met all expectations" in his performance. *Id.* at 6. In finding that an appropri-

ate remedy was to order the Agency to grant the grievant a CSA, the Arbitrator concluded that,

> reconsideration [by the Agency] is not an option. The element of trust, as to this award, has been violated. The result of this violation requires that [the grievant] receive . . . the award that he was wrongfully deprived of by initially, wrongfully, being denied consideration.

Id. at 24.

The Arbitrator's findings are not irrational, unfounded, implausible, or in manifest disregard of the agreement. *See AFGE, Council 220*, 54 FLRA at 159. In this regard, the Arbitrator clearly was "construing or applying the contract and acting within the scope of his authority[.]" *Misco*, 484 U.S. at 38.

In effectively finding that the award *might* fail to draw its essence from the parties' Compensation Agreement (the Agreement) without an express finding that the grievant was a "top contributor", the majority relies on wording from the Agreement that provides:

> A [CSA] will be established which provides that an additional 3.0% increase be made in basic pay for those employees recognized as top contributors. The Chairman has sole discretion to set the percentage of Bargaining Unit Employees who will be recognized as top contributors under the CSA program. However, the percentage of Bargaining Unit Employees to receive this CSA shall be no less than 33 1/3 percent.

Award at 2.

In other words, the Agreement requires the establishment of a CSA that is provided to "employees recognized as top contributors." *Id.* However, nothing in the Agreement *prohibits* the granting of a CSA to an employee who has not been expressly recognized as a "top contributor," particularly where, as here: (1) the Agency has improperly excluded the employee from consideration as a top contributor; and (2) the employee has met eligibility requirements ("Meets Expectations") for a CSA.

By effectively finding to the contrary, the majority improperly substitutes its own judgment for that of the Arbitrator. In so doing, the majority ignores the admonition in *Postal Service* that arbitration awards may not be found deficient merely because "the arbitrator's decision on the merits appears to be misguided[,]" and that the courts (and hence the Authority) "may not second-guess" an arbitrator's decision. 553 F.3d at 689, 693. As there is no clear, explicit basis for finding that the Arbitrator was required to make a finding that the grievant was a "top contributor" before he could grant the disputed remedy, and as the Arbitrator is entitled to deference, there is no basis for remanding the award.

For the foregoing reasons, I dissent in part.