

64 FLRA No. 207

UNITED STATES
DEPARTMENT OF ENERGY
NATIONAL ENERGY TECHNOLOGY
LABORATORY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1916
(Union)

0-AR-4357

DECISION

July 30, 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 Richard W. Dissen 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 found that the Agency violated the parties' agreement when it failed to provide the Union with a list of award recipients' names correlated with their respective award amounts. For the following reasons, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

Under the Agency's performance-award system, employees who receive summary performance rating scores between 70 and 100 are eligible to receive an award. Award at 2-3. Pursuant to Article 26, Section G of the parties' agreement, the Union requested from the Agency information concerning

performance awards for a particular year.¹ *Id.* at 4. The Agency provided the Union with a report that did not include names, but identified employees by gender, summary performance rating, summary performance rating score, award by dollar amount, and percentage of salary represented by the award. *Id.*

The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to provide the names of award recipients. *Id.* The grievance was unresolved and submitted to arbitration, where the Arbitrator framed the issues as: "[Did] the refusal by the [Agency] to furnish the Union with the names of bargaining unit workers who received performance awards violate the ... agreement between the parties? If so, what shall the remedy be?" *Id.* at 10.

The Arbitrator noted the Union's argument that Article 26, Section 6 had not been disapproved on Agency-head review of the agreement. *See id.* at 6. The Arbitrator also noted the Agency's claim that the Privacy Act precluded disclosure of award recipients' names. *See id.* at 13. In addition, he acknowledged the Agency's reliance upon Authority decisions addressing requests made pursuant to the Freedom of Information Act (FOIA), but found that reliance misplaced because the Union requested information pursuant to the parties' agreement, rather than FOIA. *Id.* at 13-14. The Arbitrator then stated that:

[T]he fact that, by naming performance award recipients, the [Agency] would necessarily disclose that each named employee *likely* received a performance *rating* of "significantly exceeds expectations" does not, in itself, provide a basis on which to deny the Union a list of performance-award recipients.^[2] That is particularly so where, as in this case, pursuant to a perceived need that the regular

1. Article 26, Section G of the parties' agreement states, in pertinent part: "On a quarterly basis, the Union will be provided with a list of Bargaining Unit employees who have received awards, the type of award, the amount of the award, the organization and the site location." Award at 3.

2. We note that the Arbitrator frequently uses the term "ranking." *See, e.g., id.* at 14-15. However, the Arbitrator's reference to a "ranking of 'significantly exceeds expectations'[,]" *id.* at 15, which is described as a "rating" in the parties' agreement, Exceptions, Attach., Jt. Ex. 1 at 52, suggests that he uses the terms "rating" and "ranking" interchangeably. We use the term "rating" for the purposes of this decision.

disclosure of such information was vital to the integrity of the awards program and harmony within the workplace, a collective bargaining agreement expressly dictates that a list of employees who have received awards must be provided to the Union[.]

Id. at 15 (emphasis added).

The Arbitrator concluded that the Agency violated the parties' agreement by failing to provide the Union with the award recipients' names, and he directed the Agency to provide the Union with that information. *Id.* at 16.

III. Positions of the Parties

A. Agency's Exceptions

First, the Agency argues that the award is "unclear on its face" because providing a list of award recipients' names would not satisfy the Union's request for a list of names correlated with award amounts. Exceptions at 24. Second, the Agency argues that the award is based on nonfacts because the Arbitrator erred by: (1) finding that release of award recipients' names would only "likely" reveal their performance ratings, *id.* at 18; and (2) "plac[ing] emphasis on" the fact that Article 26, Section G was not disapproved on Agency-head review, *id.* at 21. Third, the Agency asserts that the award is contrary to law because identifying award recipients by name would constitute an unwarranted invasion of personal privacy under FOIA Exemption 6, and would therefore be protected from disclosure under the Privacy Act.³ *Id.* at 10-17. In this regard, the Agency contends that it was "common knowledge" that only employees who were rated as significantly exceeding expectations received awards during the year at issue. *Id.* at 9 & 19. Finally, the Agency asserts that by requiring an unlawful disclosure of information, the award fails to draw its essence from the parties' agreement, which requires "due regard for the obligations imposed by applicable laws[.]" *Id.* at 22-23.

B. Union's Opposition

With regard to the Agency's contrary-to-law exception, the Union argues that the Agency merely

restates arguments previously rejected by the Arbitrator. Opp'n at 1. With respect to the Agency's nonfact exception, the Union asserts that the issue of whether providing the employees' names would reveal their performance ratings was disputed at the hearing and, therefore, does not provide a basis for finding the award deficient. *Id.* at 2. Finally, the Union asserts that Agency has not demonstrated that the award fails to draw its essence from the agreement. *Id.* at 3.

IV. Analysis and Conclusions

A. The award is not incomplete, ambiguous, or contradictory.

We construe the Agency's assertion that the award is unclear on its face as a claim that the award is ambiguous. The Authority will find an award deficient when it is incomplete, ambiguous, or so contradictory as to make implementation of the award impossible. *See U.S. Dep't of Labor, Mine Safety & Health Admin., Se. Dist.*, 40 FLRA 937, 943 (1991). The Arbitrator ordered the Agency to "provide the Union with a list, by name, of bargaining unit employees who received performance awards[.]" Award at 16. The Agency does not argue, or provide any basis for finding, that the award is impossible to implement. Accordingly, we deny the exception.

B. The award is not based on nonfacts.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.*

The Agency asserts that the award is based on a nonfact because the Arbitrator erroneously found that identifying award recipients by name would only "likely" reveal their performance ratings. Exceptions at 18. However, the Union contends that this matter was disputed before the Arbitrator, *see* Opp'n at 2, and the Agency does not argue to the contrary. As such, the Agency does not provide a basis for finding the award based on a nonfact in this regard, and we deny this exception. *See NFFE, Local 1984*, 56 FLRA at 41.

3. Exemption 6 of the FOIA provides that information contained in "personnel and medical files and similar files" may be withheld if disclosure of the information would result in a "clearly unwarranted invasion of personal privacy[.]" 5 U.S.C. § 552(b)(6).

With regard to the Agency's assertion that the Arbitrator "place[d] emphasis on" the fact that Article 26, Section G was not disapproved on Agency-head review, Exceptions at 21, the Agency does not demonstrate that the Arbitrator made a clearly erroneous factual finding or that, but for such a finding, the Arbitrator would have reached a different conclusion. Accordingly, the Agency does not demonstrate that the award is based on a nonfact in this regard, and we deny the exception.

C. 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 *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 standard of law. 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 making that assessment, the Authority defers to the arbitrator's underlying factual findings. See *id.*

As a general matter, the Privacy Act does not bar disclosure of award recipients' names. See *U.S. Dep't of Transp., FAA, New Eng. Region, Bradley Air Traffic Control Tower, Windsor Locks, Conn.*, 51 FLRA 1054, 1064-66 (1996) (*Bradley*). However, the Authority has held that where the disclosure of award recipients' names would necessarily reveal those recipients' performance ratings, the Privacy Act bars disclosure of their names. See *Dep't of Health & Human Servs., Soc. Sec. Admin., N.Y. Region, N.Y., N.Y.*, 52 FLRA 1133, 1142 (1997); *U.S. Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 599, 605-06 (1995). Nevertheless, an employer does not violate the Privacy Act by disclosing information that is already public knowledge. See, e.g., *Barry v. U.S. Dep't of Justice*, 63 F. Supp. 2d 25, 27-28 (D.D.C. 1999) (*Barry*).

Here, the Arbitrator found that the parties' agreement entitled the Union to the names of award recipients. As discussed above, the Privacy Act does not prohibit disclosure of that information. See *Bradley*, 51 FLRA at 1064-66. Although the Arbitrator found that disclosure of name-identified awards information would "likely" result in revealing individual employees' performance ratings, Award at 15, the disclosure itself would not cause such a result.

Rather, the Agency contends, and there is no dispute, that it is "common knowledge" that only employees who have been rated as significantly exceeding expectations received a performance award during the year at issue. Exceptions at 9, 19. As this information is already public knowledge, the disclosure of award recipients' names would not violate the Privacy Act. See *Barry*, 63 F. Supp. 2d at 27-28. Accordingly, we deny the Agency's contrary-to-law exception.

D. The award does not fail to draw its essence from the parties' agreement.

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. 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. *U.S. 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.

Here, the Agency asserts that the award is contrary to the parties' agreement, which requires the Agency to consider requests for information with "due regard for . . . applicable laws[.]" Exceptions at 22-23. However, as noted above, the Agency has failed to demonstrate that the award is contrary to law. Accordingly, there is no basis on which to find that the Arbitrator's interpretation of the agreement is implausible, irrational, or unconnected to the wording of the agreement, and we deny the exception.

V. Decision

The Agency's exceptions are denied.