

65 FLRA No. 30

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
HAMPTON, VIRGINIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2328
(Union)

0-AR-4656

—
DECISION

September 29, 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 Louis J. D'Amico 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 by changing the method for calculating employees' performance awards without providing the Union with advance notice or an opportunity to bargain over the impact and implementation of the change. For the reasons that follow, we deny, in part, and dismiss, in part, the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency grants cash payments as "Superior Performance Awards" (performance awards) to deserving employees at one of the Agency's Medical Centers (the Center). Award at 5-6. When the Center's Director (the Director) reduced employees' performance awards based on patient surveys about the Center, the Union filed a grievance alleging that

the reductions violated the parties' agreement. *See id.* at 7, 14. The grievance went unresolved, and the parties moved to arbitration. *See id.* at 16.

The Arbitrator stated that the grievance concerned only "Title 5 and [h]ybrid Title 38 employees" represented by the Union, and, consequently, it did not encompass employees belonging to a different union or "[p]ure Title 38 [e]mployees[.]" who were appealing their award reductions in a different forum.¹ *See id.* at 5, 10, 22. As to the covered group of employees, the Arbitrator framed the following issue for resolution:

Did the Agency violate the collective bargaining agreement [(CBA)] by failing to notify the Union in advance of its decision to utilize the [Survey of Health Experiences of Patients (SHEP)] scores . . . [to] adjust[] the previously designated . . . Performance Award[s] . . . by 25% for employees encompassed by th[is] grievance?

Id. at 4.

The Agency argued that its regulations, rather than the CBA, controlled the administration of performance awards. *See id.* at 9. However, the Arbitrator found that both parties had previously acknowledged that the CBA concerned "the monetary awards under discussion[.]" *Id.* at 10, 12. Nevertheless, the Agency contended that the Director possessed unreviewable discretion to set the amount of performance awards, and, therefore, decisions on that particular issue could not be "appealed" at arbitration. *E.g.*, Agency's Closing Brief at 5 n.6. To the contrary, the Arbitrator determined that "[t]he Union was right to protest" reductions in performance awards through the CBA's negotiated grievance procedure because those reductions implicated employment conditions governed by the CBA; accordingly, "the Agency [h]andbook policy of

1. Title 38 refers to the portion of the United States Code that establishes an independent personnel system for many of the Agency's employees. *See generally* 38 U.S.C. Chapter 74. Title 5 is the portion of the United States Code that contains, among other provisions, the Statute. *See generally* 5 U.S.C. Chapter 71. "Hybrid Title 38" employees are those "who are subject to both title 38 and title 5 [of the United States Code]," and who, consequently, retain certain rights provided by title 5. *U.S. Dep't of Veterans Affairs v. FLRA*, 9 F.3d 123, 126 (D.C. Cir. 1993). By comparison, as relevant here, "pure Title 38 employees," i.e., *nonhybrid* employees, are those who are subject solely to the title 38 personnel system. *Id.* at 125-26.

no right to appeal . . . performance awards does not bar the arbitration of th[e] grievance.” Award at 13, 16.

The Agency also argued that the Union had previously acquiesced in the Director’s award determinations, and, thus, the parties had not established a past practice regarding the awards. *See id.* at 8. However, the Arbitrator explained that past practices may include those that are “followed by one party and not challenged by the other[.]” *Id.* at 9 (internal quotation marks omitted). After setting forth the remaining criteria for a past practice, *see id.* at 11, the Arbitrator found that “for over 20 years,” the Director determined award amounts and recipients on the basis of “(1) the employees’ performance appraisal[s] . . . and (2) the availability of funds in the Agency’s Budget[.]” and “nothing had been said before [the Director reduced the grievants’ awards] . . . about . . . SHEP scores . . . affect[ing] . . . the awards[.]” *Id.* at 13.

Turning to the particular CBA provisions applicable to the dispute, the Arbitrator found that, because SHEP scores reflect the Center’s *overall* performance and not that of *individual* employees, the Agency violated Article 26, Section 8(E) of the CBA when the Director reduced employees’ performance awards based on a factor beyond their control.² *See* Award at 13, 22. Further, because the Arbitrator concluded that performance awards concerned conditions of employment, *id.* at 15, he found that the Agency violated Article 46, Section 4 of the CBA by using SHEP scores, in addition to performance ratings, as a factor in determining performance awards, without providing the Union with notice or an opportunity to bargain over the change in award criteria.³ *See id.* at 14-15, 22.

2. Article 26, Section 8(E) of the agreement states, in pertinent part, “When evaluating performance, the [Agency] shall not hold employees accountable for factors which affect performance that are beyond the control of the employee” Award at 3.

3. Article 46, Section 4 provides in part:

Notification of Changes in Conditions of Employment

The [Agency] shall provide reasonable advance notice to the . . . Union . . . prior to changing conditions of employment. . . . All notifications shall be in writing . . . , with sufficient information to the Union for the purpose of exercising its full right to bargain.

Award at 3.

Consequently, the Arbitrator granted the grievance. *See id.* at 24. Relying on Union Exhibit No. 6 to identify employees whose awards had been reduced, the Arbitrator directed the Agency to pay them compensation in the amount of their award reductions, with interest. *See id.* (citing Union Ex. 6).

III. Positions of the Parties

A. Agency’s Exceptions

The Agency asserts that the Arbitrator erroneously interpreted CBA Articles 26 and 46 as provisions applicable to the parties’ dispute. *See* Exceptions at 6 n.3, 11-12. According to the Agency, none of the CBA’s provisions apply to the disputed performance awards, *see id.*, and, therefore, the regulations in the Agency’s handbook govern the matter, *see id.* at 7-8. In this regard, the Agency argues that the handbook “does not allow an appeal of ‘the amount of a superior performance award[.]’” and, because “an appeal” in this context is “synonymous” with “a grievance[.]” the award violates a governing Agency regulation. *Id.*

In addition, the Agency asserts that the Arbitrator erred in finding that the parties established a past practice regarding performance awards. *Id.* at 9-10. Alternatively, the Agency argues that, even if a past practice did exist regarding performance awards, the Arbitrator should have construed the past practice to allow the Director to determine performance awards in her “complete discretion.” *Id.* at 10 & n.4, 11 n.5.

Consistent with its claim denying the existence of a past practice, the Agency further contends that it had no obligation to notify or bargain with the Union over a change to such a practice. *See id.* at 10-11. Thus, the Agency asserts that it could not have violated its notice or bargaining obligations regarding changes to conditions of employment, under CBA Article 46, Section 4, and that the Arbitrator’s conclusion to the contrary fails to draw its essence from the CBA. *See id.* at 11-12 & n.6. The Agency similarly disputes the Arbitrator’s findings regarding CBA Article 26, Section 8(E). In particular, the Agency contends that this section applies only to performance *appraisals*, and not performance *awards*. *See* Exceptions at 12. According to the Agency, the Arbitrator’s flawed interpretation of this section resulted in his finding that employees’ performance ratings were adjusted based on SHEP scores, which the Agency asserts is a nonfact. *See id.* at 12-13. Moreover, as the Agency contends that

CBA Article 26, Section 8(E) does not concern performance awards, the Agency argues that the Director's use of SHEP scores in connection with performance awards did not violate that section, and that the Arbitrator's conclusion to the contrary fails to draw its essence from the CBA. *See id.* at 11-12.

Finally, the Agency argues that the Arbitrator exceeded his authority by granting relief to non-grievants. *Id.* at 13. The Agency asserts that Union Exhibit No. 6, which the Arbitrator used to identify the employees who were entitled to compensation for award reductions, lists all of the Agency's employees who received performance awards, and not merely the grievants. *Id.* at 14. Therefore, in the event that the Authority denies its other exceptions, the Agency requests that the Authority limit the awarded relief to the grievants. *See id.* at 15 & n.9.

B. Union's Opposition

The Union contends that the Agency is mistaken in its assertion that the CBA does not govern performance awards because, according to the Union, the CBA not only provides for performance-based monetary awards but also specifies that such awards will be based solely on an employee's performance rating. *See Opp'n* at 5-6. In addition, the Union contends that it is unnecessary for the Authority to limit the scope of relief awarded because the Arbitrator clearly stated that only those employee-grievants represented by the Union are covered by the grievance and award. *See id.* at 7.

IV. Analysis and Conclusions

A. The award is not contrary to Agency regulations.

The Agency argues that the award is contrary to governing regulations contained in the Agency's handbook, which does not allow performance-award appeals and which, as a result, renders the grievance substantively inarbitrable. An arbitration award that conflicts with a governing agency regulation is deficient under § 7122(a)(1) of the Statute. *See U.S. Dep't of Justice, Immigration & Naturalization Serv., Wash., D.C.*, 48 FLRA 1269, 1274-75 (1993). However, parties' agreements, rather than agency rules or regulations, govern the disposition of matters to which they both apply. *See U.S. Dep't of the Navy, Naval Training Ctr., Orlando, Fla.*, 53 FLRA 103, 108-109 (1997); *U.S. Dep't of the Treasury, U.S. Customs Serv., N.Y., N.Y.*, 51 FLRA 743, 746 (1996); *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186,

194 (1990). We note, in this regard, that when an arbitrator's substantive-arbitrability determination is based on law or governing regulations, the Authority reviews that determination *de novo*. *See, e.g., AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 466 (2009). However, in this case, the Arbitrator made his substantive-arbitrability determination on the basis of his findings that: (1) the parties previously acknowledged that the CBA governed "the monetary awards under discussion[.]" Award at 10, 12; (2) CBA Articles 26 and 46, in particular, applied to the parties' dispute; and (3) "the Agency [has not] asserted that the parties agreed to exclude this subject from their negotiated agreement[.]" *Id.* at 16. Because the Arbitrator's substantive-arbitrability determination was based on his interpretation of the parties' CBA, we review the Agency's challenge to this determination under the deferential essence standard, *infra* Part IV.C.⁴ *See NATCA*, 56 FLRA 733, 735 n.3 (2000) (citing *AFGE, Local 1857*, 53 FLRA 1353 (1998)); *EEOC*, 53 FLRA 465, 481 n.20 (1997); *cf. NAGE, Local R4-45*, 55 FLRA 695, 699-700 (1999) (construing allegation that award violated law as claim that arbitrator erroneously interpreted parties' agreement to find that negotiated grievance procedure covered the subject matter of the dispute).

B. The award is not based on nonfacts.

The Agency contends that the award is based on nonfacts, namely, the Arbitrator's alleged determination that the parties established a past practice regarding performance awards,⁵ and the

4. We note that, even if we were to review the Arbitrator's substantive-arbitrability determination *de novo* as a finding based on law, the Authority has held that regulations granting officials authority to make "final decisions" on certain matters do not exclude those matters from the parties' negotiated grievance procedure, unless the regulations provide "clear, specific indications that the . . . [regulatory] procedures were intended to be exclusive[.]" *AFGE, Local 3528*, 53 FLRA 1320, 1325-30 (1998) (quoting *NTEU, Chapter 15*, 33 FLRA 229, 235 (1988)). There are no clear, specific indications of exclusivity in the Agency's handbook regulations concerning performance awards.

5. In arbitration cases, the Authority addresses whether a past practice *exists* under the nonfact framework. *PASS*, 56 FLRA 124, 125 (2000). However, where a party alleges that an arbitrator improperly *interpreted* a past practice, the Authority considers the exception within the essence framework. *U.S. Dep't of Veterans Affairs, Med. & Reg'l Ctr., Togus, Me.*, 55 FLRA 1189, 1192-93 (1999). Thus, we review the Agency's argument that the parties had no past practice regarding performance awards as a nonfact

Arbitrator's alleged finding that employees' performance ratings were adjusted based on SHEP scores. 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 U.S. Dep't of the Air Force, Lowry AFB, Denver, Colo.*, 48 FLRA 589, 594 (1993) (*Lowry AFB*) (citing *Nat'l Post Office Mailhandlers v. United States Postal Serv.*, 751 F.2d 834, 843 (6th Cir. 1985)).

The award does not contain an express finding as to the existence of a past practice regarding performance awards. However, even if the Agency is correct that the Arbitrator made such a factual finding, because the parties disputed this issue at arbitration, *see* Agency's Closing Brief at 8-9, Union's Closing Brief at 17-18, the award is not deficient on that basis. *See Lowry AFB*, 48 FLRA 589. Moreover, although the Agency alleges that the Arbitrator found that employees' performance ratings were adjusted based on SHEP scores, no such finding appears in the award. *Cf. SSA, Office of Hearings & Appeals*, 58 FLRA 405, 407 (2003) (nonfact exception denied because arbitrator did not make the finding alleged to constitute a nonfact). Accordingly, we deny the nonfact exceptions.

C. The award draws its essence from the parties' agreement.

The Agency contends that the Arbitrator's alleged conclusions regarding a past practice, as well as his interpretation and application of the CBA – including his determination of the substantive arbitrability of the grievance, *see supra* Part IV.A. – fail to draw their essence from the parties' 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 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.

As for the Agency's challenge to the Arbitrator's substantive-arbitrability determination, the award states that, in response to a specific query about whether the CBA governed the performance awards, both parties responded that the CBA governed "the monetary awards under discussion[.]" *See* Award at 10, 12. Because the Agency's exceptions do not deny the accuracy of that characterization, we find that the Arbitrator's substantive-arbitrability determination was not irrational, unfounded, implausible, or in manifest disregard of the CBA.

With regard to the Agency's contention that the award rests on a mistaken interpretation of a past practice concerning performance awards, as mentioned above in Part IV.B., it is not clear from the award that the Arbitrator found that a past practice existed or that he interpreted such a practice. However, even if the Arbitrator did interpret a past practice related to performance awards, that interpretation would not provide a basis for finding the award deficient because it would not affect the Arbitrator's determination that the Agency violated the CBA. *Cf. U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 73 (2009) (finding that any alleged misinterpretation of past practice was "harmless error" because it did not affect the arbitrator's "pivotal finding" that Agency violated parties' agreement). Consequently, the Agency has not established that the Arbitrator's interpretation of a past practice renders the award deficient as failing to draw its essence from the parties' agreement.

With regard to CBA Article 26, Section 8(E), the Agency contends that the provision addresses only performance appraisals, not performance awards. However, the Arbitrator found that the parties agreed to base performance awards on performance ratings, which are the result of performance appraisals. In fact, the introductory paragraphs of Article 26 acknowledge that one purpose of performance

exception, and we analyze the Agency's argument that, even if a past practice did exist, the Arbitrator misinterpreted that practice, as an essence exception, *infra* Part IV.C.

appraisals is to determine performance awards. *See* Opp'n Attach., Agency Ex. 2 at 1-2 (quoting CBA Art. 26, § 1(B), (D), & (G)). Consequently, the Agency has not established that the Arbitrator's interpretation of Article 26, Section 8(E) is irrational, unfounded, implausible, or in manifest disregard of the CBA.

Because the Agency has failed to demonstrate a deficiency in the Arbitrator's finding of a violation of CBA Article 26, Section 8(E), we need not address the Agency's additional argument that it did not violate CBA Article 46, Section 4, because the finding of a violation of either contract provision is sufficient to support the award. *See, e.g., U.S. Dep't of Energy, Office of Scientific & Technical Info., Oak Ridge, Tenn.*, 63 FLRA 219, 220 (2009) (when an arbitrator has based an award on separate and independent grounds, an excepting party must establish that all of the grounds are deficient before the Authority can find that the award is deficient); *AFGE, Local 1546*, 59 FLRA 126, 128 (2003) (same).

For the foregoing reasons, we deny the essence exceptions.

- D. The argument that the Arbitrator exceeded his authority is moot.

The Agency argues that the Arbitrator awarded relief to non-grievants. In this regard, arbitrators exceed their authority when they award relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). Although the Arbitrator repeatedly stated that he was resolving a grievance that covered only those grievant-employees in the bargaining unit represented by the Union, the Agency is correct that the award directly refers to Union Exhibit No. 6 to indicate the employees who are owed compensation, and that exhibit includes non-grievant award recipients.

However, the Union contends that the awarded remedies extend only to those employees covered by the grievance. *See* Opp'n at 7. Where a party in opposition agrees with construing an award in the manner that an excepting party desires, the Authority has dismissed, as moot, exceptions that allege a deficiency based on a different construction of the award. *See, e.g., U.S. Dep't of Veterans Affairs, Veterans Affairs Long Beach Healthcare Sys., Long Beach, Cal.*, 63 FLRA 332, 334 (2009); *U.S. Food & Drug Admin., Detroit Dist.*, 59 FLRA 679, 683 (2004); *U.S. Dep't of Justice, INS, Jacksonville, Fla.*, 36 FLRA 928, 932 (1990). Construing the award

consistently with the Union's contention that the Arbitrator provided relief only to grievant-employees in the bargaining unit represented by the Union, we dismiss the exceeded-authority exception as moot.

V. Decision

The Agency's exceptions are denied, in part, and dismissed, in part.