

67 FLRA No. 5

UNITED STATES
DEPARTMENT OF THE ARMY
ARMY TANK-AUTOMOTIVE COMMAND
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1658
(Union)

0-AR-4851

DECISION

October 24, 2012

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester, Member

I. Statement of the Case

The Agency filed exceptions to an award of Arbitrator Paul E. Glendon 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 failing to provide performance standards to the grievant within ten days of the beginning of his appraisal period. For the reasons set forth below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant is employed by the Agency as a computer engineer. Award at 2. The parties' agreement that was in effect at the beginning of the grievant's appraisal period required the Agency to provide the grievant with his performance standards within ten days of the beginning of the appraisal period.¹ *Id.* The Agency provided the grievant with proposed performance

¹ Article 28, Section F(1) of the parties' agreement provides: "A copy of the major job elements, identified as critical or noncritical, and corresponding performance standards shall be given to the [bargaining unit] employee no later than ten (10) days after the beginning of the appraisal period and at subsequent revisions, if any." Award at 2.

standards eighty-one days after the appraisal period began, which became finalized standards 152 days into the appraisal period. *Id.* at 3.

At the end of the appraisal period, the Agency issued the grievant a Level 4, or "needs improvement," rating. *Id.* at 4. The Union filed a grievance alleging that, because the Agency violated the parties' agreement by delaying issuance of the grievant's performance standards, the grievant's rating should be raised from a Level 4 to a Level 3. *Id.* The matter was not resolved and was submitted to arbitration. The parties stipulated to the following issue: "Did the [Agency] unfairly give [the grievant] a Level 4 rating on his . . . performance evaluation? Should that evaluation be revised to an overall Level 3 rating?" *Id.* at 1.

The Arbitrator found that the Agency's actions "clearly did not satisfy Article 28, Section F(1)" of the parties' agreement, which mandated that the Agency give an employee performance standards within ten days of the beginning of the employee's appraisal period. *Id.* at 4-5. The Arbitrator also rejected the Agency's argument that, because the grievant had performance standards for at least 120 days, the tardy issuance of such standards was not a violation of the parties' agreement. *Id.* at 5.

Further, the Arbitrator found that the Agency violated Article 28, Section F(3)(d) of the parties' agreement² when it failed to give the grievant formal notice that his performance was unsatisfactory. *Id.* According to the Arbitrator, a performance improvement plan is mandated by the parties' agreement if an employee's performance is unsatisfactory. *Id.* at 6.

As a remedy, the Arbitrator ordered the Agency to remove the grievant's performance evaluation from his record because the Agency's violations of the parties' agreement made the rating "null and void." *Id.* The Arbitrator found that "the proper remedy . . . [was] not to amend the evaluation by raising the overall rating to Level 3." *Id.*

² Article 28, Section F(3)(d) of the parties' agreement provides: Should an appraisal discussion indicate a less than satisfactory, or equivalent, performance rating or denial of a within-grade increase, a performance improvement plan will be developed to assist the [bargaining unit] employee in bringing his/her performance to a fully satisfactory, or its equivalent, level. Such plan will be in writing and include specific provisions which may include counseling, training, and/or setting short term specific actions to be accomplished within a set time limit.

Award at 2.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to law and Agency regulation. Exceptions at 3. According to the Agency, Article 4, Section B(2)(b) of the parties' agreement provides that nothing in the parties' agreement "shall affect the authority of the [Agency] to assign work." *Id.* at 4 (quoting parties' agreement (internal quotation marks omitted)). The Agency alleges that the grievant's performance standards carried over from previous appraisal periods because they were not substantively different. *Id.* The Agency further claims that the delay in finalizing the performance standards was, in part, caused by the Agency's attempt to accommodate the grievant's objections to the standards. *Id.* The Agency also contends that it notified the grievant on seven occasions that his performance was not satisfactory. *Id.* at 5. The Agency asserts that the revocation of the grievant's performance rating "abrogate[s] [m]anagement's right to evaluate [the g]rievant." *Id.* In addition, the Agency argues that the Arbitrator's remedy was unreasonable, and that the only reasonable remedy would be to amend the start of the grievant's performance appraisal period. *Id.* at 5-6.

The Agency also contends that the Arbitrator exceeded his authority. *Id.* at 6. According to the Agency, the Arbitrator "disregarded the [p]arties' stipulated issue" and based the removal of the grievant's performance appraisal on the timeliness of the Agency's issuance of the grievant's performance standards, a factor that was "unrelated and immaterial" to the question presented to him. *Id.* The Agency further asserts that the Arbitrator "failed to resolve" whether the grievant's performance rating should be elevated for the remainder of the appraisal period. *Id.* at 7.

Finally, the Agency argues that the award fails to draw its essence from the parties' agreement. *Id.* According to the Agency, when considering Article 4, Section B(2)(b) of the parties' agreement in conjunction with an Agency regulation providing for a minimum appraisal period of 120 days, the Arbitrator's award showed a manifest disregard of the parties' agreement. *Id.* at 8. The Agency alleges that the Arbitrator's interpretation of the parties' agreement is implausible because the Agency has a "legal right to rate" the grievant's performance and that, by cancelling the grievant's final rating, the award abrogates its rights to direct employees and assign work. *Id.* Accordingly, the Agency requests that the grievant's appraisal be reinstated. *Id.* at 8-9.

B. Union's Opposition

The Union argues that the award is not contrary to law or Agency regulation. Opp'n at 4. The Union contends that none of the parties at arbitration "made any effort to 'restrict' management's right[s] to 'direct employees and assign work.'" *Id.* at 5. The Union opposes the Agency's claim that the grievant's performance standards were carried over from a previous appraisal period and then officially revised. *Id.* According to the Union, the standards were not finalized until almost halfway into the appraisal period. *Id.*

The Union also asserts that the Arbitrator did not exceed his authority by removing the grievant's performance appraisal from his record. *Id.* at 6. According to the Union, the Arbitrator simply applied Article 28 of the parties' agreement. *Id.* The Union claims that the grievant's final rating was called into question by the Agency's violations of the process by which the Agency issues performance standards. *Id.* at 7.

Finally, the Union argues that the award draws its essence from the parties' agreement. *Id.* The Union asserts that the award does not restrict management's rights to direct employees and assign work because the issue was "how and when the[] objectives were implemented and *not* what the[] objectives were." *Id.* The Union contends that the award enforces the parties' agreement by holding the Agency accountable for violations of that agreement. *Id.* at 8-9.

IV. Analysis and Conclusions

A. The award is not contrary to § 7106 of the Statute.

The Agency argues that the award is contrary to law and Agency regulation.³ Exceptions at 3. 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). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

³ As discussed below, because the Agency regulation is incorporated into the parties' agreement, we analyze whether the Arbitrator's interpretation of the Agency regulation fails to draw its essence from the parties' agreement.

1. The award does not abrogate management's rights to direct employees and assign work.

In resolving exceptions that contend that an award is contrary to a management right, the Authority first assesses whether the award affects the exercise of a right set forth in § 7106(a) of the Statute. *U.S. EPA*, 65 FLRA 113, 115 (2010) (*EPA*) (Member Beck concurring). The Authority has consistently held that an arbitrator's cancellation of a grievant's performance rating affects the rights to direct employees and assign work. *U.S. Dep't of Justice, Exec. Office for Immigration Review, Bd. of Immigration Appeals*, 65 FLRA 657, 662 (2011); *U.S. Dep't of the Treasury, IRS, Greensboro, N.C.*, 61 FLRA 103, 106 (2005). Therefore, as the Arbitrator cancelled the grievant's performance rating, we find that the award affects management's rights to direct employees and assign work. *See id.*

If the award affects a management right, then the Authority examines whether the arbitrator was enforcing either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision negotiated pursuant to § 7106(b) of the Statute. *See FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 104 (2010) (*FDIC*) (Chairman Pope concurring). As relevant here, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Prison Camp, Duluth, Minn.*, 65 FLRA 588, 590 (2011) (citing *EPA*, 65 FLRA at 116-18) (applying § 7106(b)(3) analysis when the agency argued that the award effectively abrogated management's rights). The Authority has previously described an award that abrogates the exercise of a management right as an award that precludes an agency from exercising the right. *See U.S. Dep't of Agric., Farm Serv. Agency, Kansas City, Mo.*, 65 FLRA 483, 485 (2011) (*Farm Serv.*).

Here, we find that the Agency has failed to establish that the award abrogates the Agency's rights to direct employees and assign work. In this regard, the award does not preclude the Agency from evaluating its other employees under the performance standards, nor does it preclude the Agency from evaluating the grievant under any performance standards that are established in a timely manner. *See Farm Serv.*, 65 FLRA at 485 (finding that the award did not abrogate management's rights to direct employees and assign work because it did not preclude the agency from evaluating employees). Further, although the Arbitrator cancelled the grievant's

performance rating, he did not order the Agency to grant the grievant a higher rating, nor did he forbid the Agency from reevaluating the grievant under new performance standards. Because the award does not preclude the Agency from evaluating employees in all circumstances, the award does not abrogate management's rights to direct employees and assign work. *See NTEU*, 65 FLRA 509, 515 (2011) (finding that, because the provisions only limited management's right to evaluate employees' performance in certain circumstances, it did not abrogate the right to direct employees or to assign work).

2. The Arbitrator's remedy is not deficient.

The Agency also contends that the remedy is unreasonable, and that the "sole reasonably related remedy" would be to amend the start of the grievant's appraisal period. Exceptions at 5-6. In *FDIC*, the Authority held that arbitrators no longer have to "reconstruct" what management would have done but for the violation of the parties' agreement. 65 FLRA at 106-07. A majority of the Authority determined that a party may only challenge a remedy on the grounds Congress established for review of arbitrators' awards, such as that the remedy awarded fails to draw its essence from the parties' agreement. *Id.* at 107. Chairman Pope, in a concurring opinion, concluded that the remedy must also have a "reasonable relation" to the violated contract provision and the harm being remedied. *Id.* at 112 (Concurring Opinion of Chairman Pope).

We find that the Agency has not established that the remedy awarded is contrary to § 7106 of the Statute on any private-sector grounds. Here, the Agency argues that the remedy awarded fails to draw its essence from the parties' agreement. *See* Exceptions at 5-6, 8. 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) (*OSHA*). As the Agency concedes that the Agency regulation is incorporated into the parties' agreement, Exceptions at 8, the issue before us is whether the award draws its essence from the parties' agreement.

See *U.S. Dep't of the Army, U.S. Army Aberdeen Proving Ground, Aberdeen Proving Ground, Md.*, 49 FLRA 950, 953 (1994).

The Agency argues the parties' agreement provides that performance standards will be in accordance with an Agency regulation, which sets the minimum appraisal period at 120 days. Exceptions at 8. According to the Agency, because the grievant was given performance standards with more than 120 days left in the appraisal period, the Arbitrator's award evidenced a manifest disregard of the parties' agreement. *Id.* However, the Arbitrator explicitly rejected the Agency's argument, instead finding that the minimum appraisal period was irrelevant because the grievant's appraisal period was 365 days. Award at 5. As a result, the Arbitrator concluded that the appropriate remedy was to cancel the grievant's performance rating in its entirety. *Id.* The Agency has not established that the Arbitrator's chosen remedy – cancelling the grievant's rating rather than simply amending the start of the grievant's appraisal period – is an irrational or implausible interpretation of the parties' agreement as a whole. Cf. *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 891 (2011) (denying an essence exception because the Authority looks to the entire agreement in resolving essence exceptions).

Accordingly, we find that the award is not contrary to § 7106 of the Statute and deny this exception.⁴ See *U.S. Dep't of the Treasury, IRS, Wage & Investment Div.*, 66 FLRA 235, 242 (2011) (finding that an award was not contrary to law because the agency did not establish that the relevant provisions of the parties' agreement were not appropriate arrangements).

⁴ For the reasons set forth in her concurring opinion in *FDIC*, 65 FLRA at 112, Chairman Pope would analyze whether the Arbitrator's remedy has a "reasonable relation" to the violated contract provisions and the harm being remedied, and would conclude that the Agency provides no basis for finding the Arbitrator's remedy deficient because the Chairman would find that the remedy is reasonably related to Article 28 and the harm being remedied. 65 FLRA at 112 (Concurring Opinion of Chairman Pope). However, as there is currently a vacancy in the membership of the Authority, the issuance of decisions requires agreement between the remaining Members. Therefore, to resolve this case without delay, and consistent with the existing precedent of the Authority, Chairman Pope agrees that the award is not inconsistent with § 7106 of the Statute for the reasons set forth in the decision. See *U.S. Dep't of Justice, Fed. BOP, Metro. Corr. Ctr., Chi., Ill.*, 63 FLRA 423, 431 n.9 (2009) (Chairman Pope agreeing for purposes of resolving the matter); *Fort Bragg Ass'n of Educators, NEA*, 30 FLRA 508, 552 (1987) (Separate Opinion of Chairman Calhoun) (joining the order to provide a disposition to this case).

B. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority because he: (1) "disregarded the stipulated issue" when he cancelled the grievant's performance rating based on the timeliness of the Agency's issuance of the grievant's performance standards, a factor unrelated to the one presented to him, Exceptions at 6; and (2) "failed to resolve" whether the grievant's performance rating should be elevated, *id.* at 7. 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. See *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective-bargaining agreement. See *U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999). Moreover, the Authority grants the arbitrator broad discretion to fashion a remedy that the arbitrator considers to be appropriate. See *U.S. Dep't of the Interior, U.S. Geological Survey, Nat'l Mapping Div., Mapping Applications Ctr.*, 55 FLRA 30, 33 (1998).

We find that the Agency has failed to establish that the Arbitrator exceeded his authority by disregarding the stipulated issue. The first issue before the Arbitrator was: "Did the [Agency] unfairly give [the grievant] a Level 4 rating on his . . . performance evaluation?" Award at 1. The Arbitrator directly addressed that question when he found that the Agency violated the parties' agreement by failing to give the grievant his performance standards within ten days and by failing to notify the grievant that his performance was unsatisfactory, as required by the parties' agreement. *Id.* at 4-5. Further, he found that the violations rendered the grievant's performance rating "null and void." *Id.* at 6. Although the Agency suggests that the timeliness of its issuance of the grievant's performance standards was not before the Arbitrator, the stipulated issue does not contain any specific factors that the Arbitrator could not consider. See *USDA, Forest Serv., Monongahela Nat'l Forest*, 64 FLRA 1126, 1130 (2010) (*USDA*) (denying an exceeds-authority exception arguing that, because the grievance did not contain an issue, the arbitrator erred in considering it). Therefore, because the Agency has not demonstrated that the Arbitrator disregarded the stipulated issue, we deny this exception. See *id.*

The Agency's contention that the Arbitrator failed to resolve the issue of whether the grievant's performance rating should be elevated is similarly without merit. The second stipulated issue was: "Should

[the grievant's] evaluation be revised to an overall Level 3 rating?" Award at 1. The Arbitrator explicitly found that "the proper remedy . . . [was] *not* to amend the evaluation by raising the overall rating to Level 3." *Id.* at 6 (emphasis added). Therefore, because the Arbitrator directly resolved the stipulated issue, we deny this exception. See *NFFE, Local 1804*, 66 FLRA 700, 702 (2012) (denying an exceeds-authority exception because the premise of the agency's exception, that the arbitrator failed to resolve a stipulated issue, was incorrect).

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

The Agency argues that the Arbitrator manifestly disregarded the parties' agreement because his award "abrogates the Agency's legal right to rate [the grievant]." Exceptions at 8. As stated above, an award draws its essence from the agreement unless the excepting party can establish that the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. See *OSHA*, 34 FLRA at 575.

The Agency bases its exception on its belief that the award abrogates its rights to direct employees and assign work under § 7106 of the Statute. However, as discussed above, the Agency has not shown that the award conflicts with its argued § 7106(a) rights to direct employees and assign work. Therefore, as it has not been shown that the award causes the Agency to relinquish any of its § 7106 rights, it cannot be said that the Arbitrator's award or interpretation of Article 28 is irrational, unfounded, implausible, or in manifest disregard of the agreement. As such, we find that the Agency has not shown that the award fails to draw its essence from the parties' agreement and deny this exception. See *U.S. Dep't of Justice, Fed. BOP, Fed. Corr. Inst., Marianna, Fla.*, 56 FLRA 467, 471 (2000) (citing *AFGE, Local 2004*, 55 FLRA 6, 9 (1998)).

V. Decision

We deny the Agency's exceptions.