68 FLRA No. 158

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 32
(Union)

0-AR-5003

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DECISION

September 30, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

Arbitrator Herbert Fishgold found that the Agency violated applicable law when the Agency rated the grievant as exceeds fully successful (EFS) for two critical elements in her performance plan. The Arbitrator concluded that the performance standards under which the Agency rated the grievant were invalid because they were not based on objective criteria. As a remedy, the Arbitrator cancelled the Agency's rating for the two critical elements, and directed the Agency to change the grievant's rating for critical element two (CE2) from EFS to outstanding, and to reevaluate the grievant's performance for critical element three (CE3) according to the clarified performance plan. There are three substantive questions before us.

The first question is whether the Arbitrator erred as a matter of law by: (1) impermissibly affecting the Agency's management rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Federal Service Labor-Management Relations Statute (the Statute)[1] when he directed the Agency to change the grievant's performance rating; or (2) misapplying the Merit Systems Protection Board's (MSPB) holding in *Greer v. Department of the Army* (*Greer*).[2] Because the Agency does not demonstrate that the Arbitrator's findings are inconsistent with applicable legal standards, the answer is no.

The second question is whether the award fails to draw its essence from the parties' agreement because: (1) the Arbitrator awarded a remedy without finding a violation of the parties' agreement; or (2) the award contradicts Article 8 of the parties' agreement. Because the Arbitrator found that the Agency violated an applicable law, he was not required to find a violation of the parties' agreement in order to award a remedy. Therefore, the answer is no.

The third question is whether the award is incomplete, ambiguous, or contradictory so as to make the implementation of the award impossible. Because the Agency has not demonstrated that the meaning and effect of the award is contradictory or that the award is impossible to implement, the answer is no.

II. Background and Arbitrator's Award

The grievant is an Agency senior accountant. Her performance plan lists various duties assigned to her for the performance period, and her performance of those duties is assessed under four critical elements in her performance plan. These critical elements are: (1) customer service; (2) workload and project management; (3) technology and operational analysis; and (4) president's management agenda and annual performance.

In each critical element, the grievant can achieve a rating of outstanding, EFS, fully successful, minimally successful, or unacceptable. She can also achieve an overall rating of outstanding, EFS, fully successful, minimally successful, or unacceptable, based on the critical elements' aggregate rating.

When the Agency issued the grievant her annual performance appraisal, the grievant disagreed with the Agency's rating of her performance. As relevant here, the Agency rated her EFS for CE2, CE3, and for the overall rating. Although the grievant was rated outstanding for critical elements one and four, only employees receiving overall ratings of outstanding are eligible for cash awards. Thus, the grievant did not receive a cash award. The Union filed a grievance challenging the grievant's performance rating of EFS for CE2, CE3, and her overall rating. The parties did not resolve the grievance, and submitted it to arbitration. The parties stipulated to the following issues:

> Was the Agency's . . . overall [EFS] . . . appraisal rating in which the grievant . . . received [the rating of EFS] in . . . [CE2 and CE3] . . .

[1] 5 U.S.C. § 7106(a)(2)(A), (B).
[2] 79 M.S.P.R. 477, 483 (1998).

> consistent with . . . applicable law, rule, and regulation and terms of the parties' . . . agreement? If not, what is the appropriate remedy?[3]

The Union challenged the validity of the grievant's performance standards. Conversely, the Agency argued that it has the right to set performance requirements and that it is "within management's rights to determine the quality, type, and amount of work to be assessed under each critical element."[4]

The Arbitrator focused his analysis on the validity of the grievant's performance standards. Identifying the legal standard he intended to apply, the Arbitrator relied on *Greer*. Quoting *Greer*, the Arbitrator explained that "performance standards must, to the maximum extent feasible, permit the accurate appraisal of performance based on objective criteria, and must be reasonable, realistic, attainable, and clearly stated in writing," and that performance standards should be "specific enough to provide an employee with a firm benchmark toward which to aim [the employee's] performance."[5]

Applying these performance-standard requirements, the Arbitrator compared the grievant's actual duties to those stated in her performance plan. The Arbitrator found that the Agency reassigned the grievant's main duty under her performance plan – working on intra- and inter-agency agreements – to another employee "without any clarification of [the grievant's performance p]lan or how the performance standards would then be applied."[6] However, the Arbitrator found that when evaluating her performance, the Agency "only considered [the g]rievant's work on intra[-] and inter-agency agreements," and did not consider her work on the manual "aging" reports or with the cash team.[7] The Arbitrator found that "there was a disconnect between what [the Agency] thought [the g]rievant was doing and what, in fact, [the] grievant did."[8]

The Arbitrator sustained the grievance, finding that the grievant's performance standards were invalid under *Greer* because "[they] . . . did not permit an accurate appraisal of performance based on objective criteria [that are] reasonably and realistically attainable, and clearly stated in writing."[9] He concluded that the "[g]rievant was not provided with a firm benchmark to aim her performance[,] and, [that], once [the grievant] was reassigned to the manual aging reports . . . there was . . . no degree of objectivity . . . in [the grievant's performance p]lan or performance standards."[10]

As a remedy, the Arbitrator canceled the grievant's rating for CE2 and CE3. For CE2, the Arbitrator directed the Agency to change the grievant's rating to outstanding because "but for [the supervisor's] failure to consider [the g]rievant's work with the cash team . . . [the g]rievant would have received . . . [the rating of o]utstanding."[11] For CE3, the Arbitrator concluded that it was more appropriate for the Agency to reevaluate the grievant under the performance plan as the Arbitrator clarified it. Consequently, the Arbitrator directed the Agency to reevaluate CE3 and retained jurisdiction to consider any challenge to CE3's reevaluation.

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

III. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law because the award impermissibly affects its rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.[12] 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.[13] 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.[14] In making that assessment, the Authority defers to the arbitrator's underlying factual findings,[15] unless a party demonstrates that the findings are deficient as nonfacts.[16]

In resolving exceptions that contend that an award impermissibly affects a management right, the Authority first assesses whether the award affects the

[3] Exceptions Br. at 3-4.
[4] Award at 14 (quoting Agency's Post Hr'g Br. at 23).
[5] *Id.* (quoting *Greer*, 79 M.S.P.R. at 483) (internal quotation marks omitted).
[6] *Id.* at 17.
[7] *Id.* at 16.
[8] *Id.* at 17.
[9] *Id.* at 23.
[10] *Id.* (internal quotation marks omitted).
[11] *Id.* at 25 (internal quotation marks omitted).
[12] Exceptions Br. at 11.
[13] *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)).
[14] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[15] *Id.*
[16] *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (*NAGE*) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).

exercise of the right under § 7106(a) of the Statute.[17] The Authority has consistently held that an arbitrator's cancellation of a grievant's performance rating affects management's rights to direct employees and assign work.[18] Because the Arbitrator cancelled the grievant's performance rating for CE2 and CE3,[19] we find that the award affects the Agency's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.

If an award affects a management right, then the Authority examines whether the arbitrator was enforcing either a contract provision negotiated pursuant to § 7106(b), or – as relevant here – an "applicable law," within the meaning of § 7106(a)(2).[20] The Authority has held that an "applicable law" within the meaning of § 7106(a)(2) includes not only statutes, but also the U.S. Constitution, judicial decisions, executive orders, and regulations having the force and effect of law.[21]

The Arbitrator was enforcing an "applicable law" within the meaning of § 7106(a)(2) when he found that the grievant's performance standards were invalid because they were not based on objective criteria.[22] The Arbitrator applied the MSPB's decision in *Greer*. *Greer* enforces the objectivity requirement for performance standards under 5 U.S.C. § 4302(b)(1).[23] Section 4302(b)(1) requires that a performance appraisal system "shall provide for establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria."[24] Thus, by relying on *Greer* when he considered the validity of the grievant's performance standards, we find that the Arbitrator was enforcing § 4302(b)(1)'s objectivity requirement for those standards.

Under the legal framework set forth above, the award and remedy are valid only if § 4302(b)(1) constitutes an "applicable law" under § 7106(a)(2).[25] As mentioned previously, statutes are "applicable laws" within the meaning of § 7106(a)(2).[26] Therefore, as the award is based on the Arbitrator's enforcement of an "applicable law," the Agency fails to establish that the award impermissibly affects its management rights to direct employees and assign work.

The Agency also argues that Arbitrator misapplied *Greer*.[27] Specifically, the Agency argues that the Arbitrator "did not identify a specific section, critical element, or particular wording of the [performance] standard[s] that he found to be unreasonable or unduly subjective."[28]

The Agency's argument lacks merit. In applying *Greer* to the grievant's performance standards, the Arbitrator concluded that "there was a disconnect between what [the Agency] thought [the g]rievant was doing and what, in fact, [the g]rievant did."[29] The Arbitrator found that "once [the grievant] was reassigned to the manual aging reports . . . there was no degree of objectivity . . . in her [performance p]lan or performance standards" and the grievant's duties were not "specifically classified" in her performance plan.[30] The Arbitrator explained, for example, "that [the grievant's supervisor] never clarified [for the grievant] how the [grievant's performance p]lan and [p]erformance [s]tandards would be considered after removing [the g]rievant from the intra/inter-agency agreements and reassigning her to do the manual aging reports."[31] As noted above, the Authority defers to an arbitrator's underlying factual findings, unless the appealing party establishes that those factual findings are deficient as nonfacts.[32] The Agency does not argue that these underlying factual findings are nonfacts and, therefore, we defer to them.[33] Moreover, these factual findings are consistent with *Greer*'s enforcement of § 4302(b)(1)'s requirement that a performance-appraisal system "shall provide for establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria."[34] The Agency does not address these arbitral findings or otherwise demonstrate that the award misapplies *Greer*.

We find no support for the dissent's assertion that "no [independent] right exists" for an employee to grieve § 4302(b)(1)'s objectivity requirement under the

[17] *U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs.*, 67 FLRA 665, 666 (2014) (*HHS*) (citing *U.S. EPA*, 65 FLRA 113, 115 (2010)).
[18] *U.S. Dep't of the Army, Army Tank-Automotive Command*, 67 FLRA 14, 16 (2012) (citing *U.S. DOJ, Exec. Office for Immigration Review, Bd. of Immigration Appeals*, 65 FLRA 657, 662 (2011)).
[19] Award at 19, 23.
[20] *HHS*, 67 FLRA at 666 (citing *U.S. EPA*, 65 FLRA 113, 115 (2011) (*EPA*)).
[21] *Fed. Prof'l Nurses Ass'n, Local 2707*, 43 FLRA 385, 390 (1991) (*Local 2707*).
[22] Award at 23.
[23] *See U.S. DOL, Bureau of Labor Statistics*, 67 FLRA 77, 80 (2012).
[24] 5 U.S.C. § 4302(b)(1).
[25] *See EPA*, 65 FLRA at 115.
[26] *Local 2707*, 43 FLRA at 390.
[27] Exceptions Br. at 8-11.
[28] *Id.* at 9.
[29] Award at 17.
[30] *Id.* at 23.
[31] *Id.* at 22.
[32] *NAGE*, 67 FLRA at 6.
[33] *Id.*
[34] 5 U.S.C. § 4302(b)(1).

negotiated grievance procedure.[35] To the contrary, the legislative history of § 4302 indicates that its purpose was to require agencies to establish a "single interrelated framework for performance appraisals . . . [which] would be the basis for multiple personnel actions *including promotions, pay increases*[,] *and awards* as well as adverse actions."[36] Because Congress recognized the "inadequacies" and "potential for arbitrariness" in appraisal systems, one way it "sought to protect against those risks [was] by requiring objective performance criteria."[37] Here, the Arbitrator found that the grievant's appraisal, which determined her eligibility for a cash award, was invalid because her standards "did not permit the accurate appraisal of performance based on objective criteria," as required by § 4302(b)(1).[38]

We also disagree with the dissent's claim that performance standards can be challenged under § 4302(b)(1) *only* in conjunction with a removal or demotion action.[39] The dissent may have been misled by focusing on MSPB and Federal Circuit cases dealing with employees' terminations or other adverse actions for performance reasons. But this "simply reflects the jurisdictional limitations on what sorts of cases can come before the MSPB and the Federal Circuit; it does not demonstrate that an inquiry by a third-party into the legal validity of performance standards can occur only in that context."[40] And the Authority has long held that "like the MSPB and the Federal Circuit, arbitrators have the power to consider whether performance standards comply with applicable legal requirements" under § 4302.[41] As the MSPB and the Federal Circuit do not, and cannot, consider promotions, pay actions, awards, or certain disciplinary actions, including suspensions of fourteen days or less, it is axiomatic that the resulting case law of these bodies only addresses challenges to performance appraisals under § 4302 that arise in the context of removals or demotions.

Finally, the dissent erroneously asserts that the Authority "abruptly changed direction"[42] in 2012 when it upheld an arbitrator's finding that the agency violated § 4302(b)(1)'s objectivity requirement.[43] This statement misinterprets Authority precedent; all the cases that the dissent cites in support of this proposition are inapposite. Rather, if anything, the cases the dissent cites affirm the grievability of challenges to performance standards based on § 4302(b)(1)'s objectivity requirement.[44] Therefore, the dissent's assertion lacks merit.

Accordingly, we deny the Agency's contrary-to-law exceptions.

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

When 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.[45] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' 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

[35] Dissent at 14 (emphasis omitted).
[36] *Wells v. Harris*, 1 M.S.P.R. 208, 230 (1979) (emphasis added) (quoting the legislative history of § 4302).
[37] *Id.*
[38] Award at 23.
[39] Dissent at 14.
[40] *U.S. Dep't of Transp., FAA, Wash., D.C.*, 48 FLRA 1091, 1096 (1993) (*FAA*) (quoting *Newark Air Force Station*, 30 FLRA 616, 630 (1987) (*Newark*)) (internal quotation marks omitted).
[41] *Newark*, 30 FLRA at 630; *see also FAA*, 48 FLRA at 1096.
[42] Dissent at 16.
[43] *U.S. DOL, Bureau of Labor Statistics*, 67 FLRA 77, 80-82 (2012).
[44] *POPA*, 66 FLRA 247, 252 (2011) (holding that union did not support its assertions claiming a violation of § 4302(b)(1) and that arbitrator's factual findings show arbitrator evaluated the performance standard consistent with the requirements of § 4302(b)(1)); *AFGE, Local 2206*, 59 FLRA 307, 309 (2003) (holding that § 4302(b)(1) does not require an arbitrator to order the reinstatement of a removed probationary employee); *U.S. Dep't of HHS, SSA, Boston Region*, 48 FLRA 943, 948-49 (1993) (holding that union failed to establish that award violated § 4302(b)(1) because arbitrator improperly required the grievant to define the level of performance needed to attain the ratings sought); *GSA, Region 2, N.Y., N.Y.*, 46 FLRA 485, 490 (1992) (rejecting agency's nonfact exception claiming that award was based on § 4302(b)(1)); *U.S. Dep't of HHS, SSA, Office of Hearings & Appeals*, 39 FLRA 407, 411 (1991) (holding that union failed show that the award was contrary to § 4302(b)(1)); *U.S. Dep't of VA Med. Ctr., New Orleans, La.*, 36 FLRA 718, 723 (1990) (rejecting union's claim that performance standards and their application for the "exceptional" level of performance were contrary to § 4302(b)(1)); *U.S. Dep't of HHS, SSA, Chi., Ill.*, 35 FLRA 1180, 1184-85 (1990) (holding that union did not show that the award is contrary to § 4302(b)(1) because arguments concerning § 4302(b)(1) were nothing more than disagreement with arbitrator's evaluation of the evidence); *George C. Marshall Space Flight Ctr., NASA, Huntsville, Ala.*, 34 FLRA 348, 351-53 (1990) (rejecting union's contrary to law exception because it failed to contend that the performance standards were improper under § 4302(b)(1)); *NTEU, Chapter 229*, 32 FLRA 826, 830-31 (1988) (holding that union's claim that award was contrary to § 4302(b)(1) constituted mere disagreement with arbitrator's findings and conclusions and did not constitute a basis on which to set aside the award).
[45] *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

manifest disregard of the agreement.[46] 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."[47]

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator awarded a remedy without finding that the Agency violated the parties' agreement.[48] However, the Agency's argument lacks merit because, as discussed above in the contrary-to-law section, the Arbitrator found that the Agency violated an applicable law,[49] and the Agency has not otherwise demonstrated that the Arbitrator was required to find a violation of the parties' agreement to support the remedy he awarded.

The Agency also argues that the award fails to draw its essence from the parties' agreement because "the award directly contradicts Article 8."[50] The Agency challenges the Arbitrator's finding that the Agency failed to notify the grievant before the end of the performance period of a "performance[-]related problem" that would result in a rating below outstanding.[51] Article 8 requires the Agency to "verbally inform" an employee of a performance-related problem that would result in the employee receiving a rating below fully successful in any critical element.[52]

Even assuming that the Arbitrator misapplied Article 8's verbal notification requirement, the Agency's essence exception still lacks merit. As the award is based on the Agency's violation of § 4302(b)(1) and not on a violation of Article 8 of the parties' agreement, this Agency argument does not provide a basis for finding that the award is deficient on essence grounds.

Accordingly, we deny the Agency's essence exceptions.

C. The award is not incomplete, ambiguous, or contradictory so as to make the award impossible to implement.

The Agency argues that the award is "inherently contradictory" because the Arbitrator found that the performance standards are "unreasonable and unduly subjective," and directed the Agency to change the grievant's rating in CE2, but also directed the Agency to reevaluate CE3 under "those same performance standards."[53] The Authority will set aside an award that is "incomplete, ambiguous, or contradictory so as to make implementation of the award impossible."[54] In order to prevail on this ground, "the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain."[55]

The Agency's argument lacks merit. As discussed above, the Arbitrator clarified the grievant's performance plan to reflect her duties – working on manual aging reports and with the cash team.[56] Having clarified "the circumstances of the [g]rievant's work," the Arbitrator found it necessary for the Agency to reevaluate her performance under CE3.[57] In this regard, the Agency has not explained how the meaning and effect of the award is contradictory or why the award will be impossible to implement.[58] Accordingly, we deny the Agency's impossible-to-implement exception.

IV. Decision

We deny the Agency's exceptions.

[46] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[47] *Id.* at 576.
[48] Exceptions Br. at 3-5.
[49] Award at 23.
[50] Exceptions Br. at 6.
[51] *Id.* at 7.
[52] *Id.* at 6.
[53] *Id.* at 14.
[54] 5 C.F.R. § 2425.6(b)(2)(iii) (emphasis added).
[55] *U.S. DOD, Def. Logistics Agency*, 66 FLRA 49, 51 (2011) (citing *NATCA*, 55 FLRA 1025, 1027 (1999)).
[56] Award at 25-26.
[57] *Id.* at 26.
[58] *See U.S. DHS, U.S. CBP*, 65 FLRA 373, 377 (2010).

Member Pizzella, dissenting:

Management guru, Tom Peters, once observed, "[i]f you're not confused, you're not paying attention."[1]

Here, aside from the irony that an employee of the Office of Personnel Management (OPM), the federal agency responsible for ensuring the fairness of personnel-management programs across the Federal government,[2] would grieve a performance rating just because it was less than outstanding, this case will undoubtedly send a confusing message to any one of the 2.1 million federal employees who has ever disagreed with the annual performance rating they received from their supervisor.

With today's decision, my colleagues turn the concept of performance management on its head and ignore how Chapter 43 of Title 5 of the U. S. Code has been applied by the U. S. Court of Appeals for the Federal Circuit and the Merit Systems Protection Board (MSPB) for thirty-eight years.

Unlike the majority, therefore, I cannot subscribe to the notion that a supervisor must redefine the standards against which an employee will be rated each and every time the employee is asked to assume new responsibilities or to do duties they have done before.

Mary Krebs Devine is a GS-13 Senior Accountant, who holds an MBA degree, in the Reimbursable Business Office[3] (Business Office) of the Chief Financial Officer (CFO) at the OPM. She has served in that position since at least 2002 and has performed essentially the same duties,[4] which involves the review and preparation of "manual aging reports"[5] for various customers of OPM.[6] Devine's perception of the quality of her performance, as far back as 2000, has frequently differed from that of her supervisors.[7] Consequently, she has fallen into an unfortunate pattern of filing grievances any time her supervisor does not rate her as "outstanding" in her annual performance review.[8]

In 2010, Devine was rated as *exceeds fully successful*, which is the second-highest rating that an employee can receive at OPM. The only higher possible rating is *outstanding.* And, even though she was awarded the "director's award[] for excellence" (her third such award since 2004),[9] she filed another grievance.[10] That tactic worked for her in 2009, when OPM changed her rating to "outstanding," but it did not work for her in 2010. That is how this case went to Arbitrator Herbert Fishgold.

Without a doubt, 2010 was a difficult year for Devine. She was on sick leave[11] for several weeks in March and then again in June.[12] After she had used all of her sick leave, she was donated sick leave by other employees, and when the donated leave was exhausted, her supervisor, Wendy Crawford, permitted Devine to telework from home to ensure that Devine did not have to "go on leave without pay."[13] All told, Devine was away from the office for nearly one-half of the performance year[14] which ended on September 30.[15]

But, 2010 was a challenging year for the Business Office as well. Around October 2009 (the beginning of the rating and fiscal years), the CFO rolled out a new accounting system[16] – "CBIS."[17] CBIS was intended to eliminate, or reduce, the reliance on accountants performing manual reviews of aging reports.[18] In the transition process, however, "glitches" were identified in the reports that were generated by CBIS.[19] Therefore, her supervisor determined that it was necessary for Devine to continue the manual review of the aging reports in addition to working with the reports that were generated by CBIS.[20]

As part of her duties for 2010, Devine was assigned responsibility to review the reports that were generated by CBIS, which involved work related to the "accounts receivable" for "intra[-] and inter[-]agency agreements."[21] Her responsibilities *also* included the responsibility to continue the manual review of "aging reports," a function she had performed since 2002.[22] Both of these duties were included in her work plan for

[1] Tom Peters, *Wisdom Quotes*, http://www.wisdomquotes.com/quote/tom-peters.html (last visited June 23, 2015).
[2] U.S. OPM, *Our Mission, Role & History*, https://www.opm.gov/about-us/our-mission-role-history/what-we-do/ (last visited June 23, 2015).
[3] Tr. at 97:11; 99.
[4] *Id.* at 46.
[5] Award at 3.
[6] Tr. at 101.
[7] *Id*. at 18.
[8] *Id.* at 163; *see also id*. at 59.
[9] *Id.* at 11.
[10] *Id.* at 7.
[11] *Id.* at 8.
[12] *Id.* at 12.
[13] *Id.* at 80.
[14] *Id*. at 146.
[15] Joint Ex. 9.
[16] Tr. at 105.
[17] *Id.* at 19.
[18] Award at 3.
[19] Tr. at 36, 41, 104.
[20] *Id*. at 104.
[21] *Id.* at 19; 12; 100; 104.
[22] *Id.* at 46; 101.

2010 (which covered October 2009 through September 2010).[23]

Upon receipt of her work plan at the beginning of the performance year, Devine acknowledged that she was aware of her responsibilities and raised no concerns to her supervisor about what was expected of her or about what she was supposed to be doing.[24] At the "mid-year" "progress review," Devine's supervisor advised that her performance "exceeded . . .fully successful" up to that point.[25] Again, Devine did not raise any concern about or objection to that interim assessment.[26]

In March, when it became clear that Devine would be away from the office for an extended period of time, the supervisor assigned another accountant to work on the intra- and inter-agency agreements because the work associated with those agreements required "a lot of interaction with employees [on the team and] throughout the building"[27] and the supervisor had a "limited [number of] accountants and . . . technicians" to perform all of the work in her division.[28]

When Devine was rated in October 2010, her supervisor evaluated only the time periods that Devine *actually worked* (either at the office or on telework) and excluded from consideration any time periods Devine was on sick leave.[29] Her supervisor rated her "exceeds fully successful" ("outstanding" in at least one critical element – "customer service" − and "exceeds fully successful" in two others – "workload and project management" and "technical and operational analysis").[30]

But, following her now-predictable pattern, Devine filed another grievance alleging a myriad of grievous affronts − that she was discriminated against because of her absences from work, that the appraisal was not fair, and that she was never asked to provide a list of accomplishments for the year. (There is no indication in the record that Devine prepared, or offered to prepare, a list of accomplishments).

Arbitrator Herbert Fishgold found no merit to any of these arguments, but he saw fit, nonetheless, to order OPM to "cancel[]" the rating and upgrade it to "outstanding."[3130] Despite the fact that neither the grievant nor AFGE, Local 32 raised the allegation in either the informal[32] or formal grievance,[33] Arbitrator Fishgold determined that Devine's performance standards lacked "objectivity" and "a firm 'benchmark' [at which] to aim her performance[]."[34] (I have heard of Papal infallibility, but I am unfamiliar with any comparable notion of arbitral infallibility.)

In other words, Arbitrator Fishgold concluded that a thirteen (13)-year veteran[35] − who held an MBA degree, who had performed the same duties for eight (8) years, and whose work plan for 2009 and 2010 contained "similar[]" and "recurring duties" − *suddenly* could not understand what she was supposed to be doing or what was expected of her.

The Arbitrator and the majority ignore entirely that just one year earlier (in 2009), Devine understood the distinction between an exceeds-fully-successful rating and an outstanding rating sufficiently to be able to argue that her rating was wrong and to explain why an upgrade from exceeds fully successful to outstanding was warranted.[36]

By embracing this erroneous award, the majority thoroughly confuses the purpose and intent of 5 U.S.C. Chapter 43 and misapplies Federal Circuit, MSPB, and Authority precedent, all of which explicitly reject the notion that 5 U.S.C. § 4302(b)(1) creates a distinct obligation that may be grieved as a stand-alone violation.

Congress did not enact the Civil Service Reform Act of 1978 (CSRA)[37] to create a *personal nanny* for federal employees. It certainly never envisioned that millions of federal employees would be able to run to the Authority simply because they do not like the annual performance rating which they are assessed by their supervisor.

The U. S. Court of Appeals for the Ninth Circuit (the Ninth Circuit) had one of the earliest opportunities to interpret the scope, purpose, and intent of the CSRA.[38] In *Lovshin v. Department of the Navy* (*Lovshin*), the court

[23] *Id.* at 21; 100; 10; Joint Ex. 9.
[24] Tr. at 25; 101; 102; Joint Ex. 9.
[25] Award at 4.
[26] Joint Ex. 9.
[27] Tr. at 104.
[28] *Id.* at 99.
[29] *Id.* at 137-38.
[30] Joint Ex. 9.
[31] Award at 23.

[32] *Id.* at 5. ("[T]he Union filed an informal grievance stating that [g]rievant '*does not agree* with her performance evaluation,' *without alleing any violation of law[,] rule, regulation, or CBA*.")
[33] *Id.* at 6 ("[T]he Union filed a [f]irst[-][s]tep [g]rievance, citing *factual disagreements with the appraisal* and a general allegation of *retaliation* . . . [t]he Union filed its [s]econd[-][s]tep [g]rievance . . . again raising *factual agreements* (sic) *with the appraisal*.") (emphases added).
[34] *Id.* at 23.
[35] Tr. at 39.
[36] *Id.* at 59;
[37] Pub.L. 95–454, 92 Stat. 1111, Oct. 13, 1978.
[38] *Lovshin v. Dep't of the Navy*, 767 F.2d 826, 834 (Fed. Cir. 1985) (*Lovshin*).

clarified that "Chapter 43 [of the CSRA][39] originated as *a relief measure for agencies*"[40] to make it "***easier, rather than harder***, for government agencies ***to terminate*** employees whose ***performance was inadequate***."[41] The court noted that Chapter 43 requires federal agencies to "*establish*" "a performance appraisal system"[42] and "*encourage*[s]" federal agencies "to have employees participate in setting reasonable performance standards" and to "*communicate* the performance standards and critical elements of positions to employees at the beginning of each evaluation period."[43]

The take away from these early decisions is that the primary purpose of 5 U.S.C. § 4302(a) and (b) was to give agencies the prerogative to "*demot*[*e*] or *remov*[*e*] [employees] for 'unacceptable performance,'"[44] provided that a "performance appraisal system[]"[45] was first established "*before*" any employee was demoted or terminated.[46]

Despite the majority's protestations to the contrary, it was obvious, and continues to be obvious, to both the Ninth Circuit and the U. S. Court of Appeals for the Federal Circuit that Chapter 43 is all about "*the establishment*" of federal agency "performance appraisal systems" and *the process* by which federal agencies may *remove* or *demote* employees for "*unacceptable performance*."[47]

Chapter 43 has nothing whatsoever to do with the collective-bargaining process and does not create an avenue of relief for an employee who does not like his or her annual performance rating. Chapter 43, quite simply, is concerned with addressing *unacceptable performance*.

In support of this proposition, the Ninth Circuit notes, "*unacceptable performance*" is one of only three terms which "Congress found appropriate to define in Chapter 43"[48] – the other two are "critical element"[49] and "employee."[50] The U.S. Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) found the three terms which were chosen for definition to be significant as to what matters arising out of Chapter 43 were, and were not, appealable. As the court observed, the term "employee" is defined solely to determine whether an employee, who is subjected to a *removal* or *demotion* for performance reasons, is a "*specified employee*" with "*a right to appeal to the* [*MSPB*] from an 'action based on *unacceptable performance*.'"[51]

I believe, therefore, that I stand on solid ground when three federal circuit courts of appeal – the Federal Circuit, the D.C. Circuit, and the Ninth Circuit − as well as the MSPB, have all held (even though the majority attributes this proposition solely to me) that *§ 4302(b)(2) does not create an independent violation which may be grieved under a negotiated-grievance procedure. Simply put, no such right exists.* A closer read of the Federal Circuit's en banc decision in *Lovshin* should provide the majority with all of the "support" they need, but were unable to "find,"[52] to see that "[i]n the absence of a *removal* or [*demotion*], ***no basis*** *appears in the CSRA* for a challenge to a standard."[53]

The majority, however, seems to take it as a personal affront that Congress did not include the Authority in the review process that is set out in Chapter 43. Sounding out a now common theme, the majority tries to find a role for the Authority where none exists.[54]

Congress specifically *designated the MSPB* (not grievance procedures, not arbitrators, and not the Authority), as the review body with the expertise, authority, and jurisdiction through which federal employees may challenge the validity of a performance

[39] 5 U.S.C. §§ 4301-4305.
[40] *Id.* at 1266 (citing *Wells v. Harris*, 1 M.S.P.R. 208, 236 (1979) (*Wells*).
[41] *Debose v. U.S. Dep't of Agriculture*, 700 F.2d 1262, 1265 (9th Cir. 1983) (*Debose*) (citing *Wells*, 1 M.S.P.R. at 208, 230) (emphasis added).
[42] *Id.* at 1266 (emphasis added).
[43] *Lovshin*, 767 F.2d at 833 (emphasis added).
[44] *Debose*, 700 F.2d at 1265 n.1 (citing *Wells*, 1 M.S.P.R. at 249) (emphasis added).
[45] *Id,* (citing and quoting 5 U.S.C. § 4302(a), (b)(2)).
[46] *Id.* at 1266.
[47] *Id.*; *Lovshin*, 767 F.2d at 834 (emphasis added).
[48] *Lovshin*, 767 F.2d at 834 (emphasis added).
[49] *Id.*
[50] *Perez v. Army and Air Force Exchange Service*, 680 F.2d 779, 787 n.22 (D.C. Cir. 1982).
[51] *Id.* (citing and quoting 5 U.S.C. § 4303(e) (emphasis added)).
[52] Majority at 6.
[53] *Lovshin*, 767 F. 2d at 833 n.7 (citing *Alford v. HEW*, 1 M.S.P.R. 317 (1980)).
[54] *U.S. DHS, U.S. ICE*, 67 FLRA 501, 508 (2014) (Dissenting Opinion of Member Pizzella) (Majority affirms arbitral award which usurps agency's "sole and exclusive discretion" under Federal Information Security Management Act through parties' negotiated-grievance procedure.); *AFGE, Local 1547*, 67 FLRA 523, 532 (2014) (Dissenting Opinion of Member Pizzella) ("[M]ajority reads our Statute more 'expansively' than Congress intended [to] tell the Air Force that its discretion is not sole and exclusive when it comes to determining who will be granted access to its own military exchange."); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R. I. v. FLRA*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) (Court reverses the Authority for injecting its own "organic statute [into] another statute . . . not within [the Authority's] area of expertise.").

standard under Chapter 43.[55] Therefore, it makes sense that the Authority should be led (not "misled" as the majority purports) by the precedent established by the "MSPB and Federal Circuit" in interpreting the parameters of Chapter 43.[56]

It seems to me that process, when allowed to work *as intended*, works quite well. An employee may challenge a performance standard *if* a federal agency initiates a *removal* or *demotion* action. The process does not leave the employee with any recourse as the majority implies. The employee's *recourse* is an appeal *to the MSPB*,[57] unless he or she opts to challenge the *removal* or *demotion* through a negotiated-grievance procedure.[58] And, even if an employee opts to challenge a Chapter 43 removal or demotion through a negotiated-grievance procedure, the arbitrator *must apply* Chapter 43 "in the same manner and under the same conditions as if the matter had been decided by the [MSPB]."[59] The grievance-procedure option, however, does not create an independent right to challenge a performance standard or rating when there has been no *removal* or *demotion*.

The Authority has generally deferred to federal courts on this point.[60] (I find it intriguing that my colleagues *now* assert that the Authority's precedent on this point is not pertinent ("inapposite") to their determination − a point with which I disagree – and yet devote an entire one-half page of text to argue otherwise.)[61] In 2012, my colleagues abruptly changed direction on this point and found that the Department of Labor's Bureau of Labor Statistics violated the "objectivity" requirements of § 4302(b)(1), not because the agency initiated a *removal* or *demotion* of any employees but, because several bargaining-unit employees did not agree with one critical element that was included in their performance plan.[62]

In that case, and again today, the majority misapplies *Greer v. Department of the Army* (*Greer*).[63]

[55] *Debose*, 700 F.2d at 1266 ("The [MSPB] is the administrative body designated by statute to apply the provisions of [Chapter 43]."); see also *Lovshin*, 767 F.2d at 833; *Wilson v. HHS*, 770 F.2d 1048, 1054 (Fed. Cir. 1985) (*Wilson)* (whether the agency has established a valid performance standard under Chapter 43 is a matter for the MSPB to determine); *Perez*, 680 F.2d at 787 n.22 (Sections 4301-4305 "give[] to specified employees a right to appeal to the [MSPB] an action based on unacceptable performance.") (internal quotation marks omitted).

[56] Majority at 6.

[57] *Id*.; *Rogers v. DOD Dependents Schools, Germany Region*, 814 F.2d 1549 (Fed. Cir. 1987); *Debose*, 700 F.2d at 1266.

[58] 5 U.S.C. § 7121(f).

[59] *Id*.

[60] *POPA*, 66 FLRA 247, 252 (2011); *AFGE, Local 2206*, 59 FLRA 307, 309 (2003) (affirming award that employee's *removal* violated § 4302(b)(1)); *U.S. Dep't of HHS, SSA, Boston Region*, 48 FLRA 943 (1993) (challenge to validity of grievant's performance standards not properly before the Authority); *GSA, Region 2, N.Y., N.Y.*, 46 FLRA 485, 490 (1992) (performance rating violates CBA provision not § 4302(b)(1); *U.S. Dep't of HHS, SSA, Office of Hearings & Appeals*, 39 FLRA 407, 411 (1991); *U.S. Dep't of VA. Med. Ctr., New Orleans, La.*, 36 FLRA 718, 721 (1990) (Grievance "fails to demonstrate that the [performance appraisal system does not] permit accurate evaluation of performance . . . MSPB has held that the requirements of [§] 7302(b)(1) are satisfied by communicating to employees the standards that they must meet in order to be evaluated as demonstrating performance at a level that is sufficient for job retention." (citations omitted)); *U.S. Dep't of HHS, SSA, Chi., Il.*, 35 FLRA 1180, 1184 (1990) (Grievance "fails to demonstrate that the [performance appraisal system does not] permit accurate evaluation of performance . . . MSPB has held that the requirements of [§] 4302(b)(1) are satisfied by communicating to employees the standards that they must meet in order to be evaluated as demonstrating performance at a level that is sufficient for job retention."); *George C. Marshall Space Flight Ctr., NASA, Huntsville, Ala.*, 34 FLRA 348 (1990) (challenge to *agency's performance system* (not employee's individual standards) denied); *NTEU, Chapter 229*, 32 FLRA 826, 828-29 (1988); *contra U.S. Dep't of Transp., FAA, Wash., D.C.*, 48 FLRA 1091, 1094 (1993) (affirming arbitrator finding of violation of 5 U.S.C. § 4302 in challenge to *agency's entire "performance appraisal system*" relying on the Federal Personnel Manual) (emphasis added) (citing *Wilson*, 770 F.2d at 1052).

[61] Majority at 7.

[62] *U.S. DOL, Bureau of Labor Statistics*, 67 FLRA 77 (2012).

[63] *Id.* at 80 (citing 79 M.S.P.R. 477, 483 (1998)); *see also Wilson*, 770 F.2d at 1054 (" if the agency had established a valid performance standard under Chapter 43, appellant might have met the standard and no [demotion] would have been brought.") (citing *Callaway v. Dep't of the Army*, 23 M.S.P.R. 592 (1984)); *Henderson v. NASA*, 116 M.S.P.R. 96, 101 (2011) ("Before initiating an action for unacceptable performance . . . an agency must give the employee a reasonable opportunity to demonstrate acceptable performance.").

In *Greer*, the MSPB reaffirmed its own precedent that performance standards must be "objective[] and specific[]" in order *to sustain* a *removal action* for unacceptable performance.[64] But *Greer's* objective-and-specific standard does not create an independent requirement that may be grieved just because an employee does not like their standards or is upset about the rating that she received.

Unlike the employee in *Greer*, Devine was not subjected to *removal* or *demotion.* In fact, she was not subjected to *any* negative action. To the contrary, she received an exceeds-fully-successful rating and was awarded the prestigious *Director's Award* for her performance during the 2010 performance year.

Again, as in *NTEU, Chapter 83*, my colleagues appear willing to ignore the clearly-established precedent of three federal circuit courts of appeal and the MSPB simply because OPM, like the IRS, has no other appeal.[65] As I noted in *NTEU, Chapter 83*, the Authority is the last level of review because there is no other avenue of appeal from the Authority's determination in arbitration cases, except in a few limited circumstances, which do not apply here.[66]

Thus, this ill-conceived award is bound to go into effect.

I would conclude that the Arbitrator's award is contrary-to-law.

Thank you.

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[64] *Greer*, 79 M.S.P.R. at 480 ("*Before initiating an action for unacceptable performance* . . . an agency must give the employee a reasonable opportunity to demonstrate acceptable performance." (emphasis added)).

[65] *See* 5 U.S.C. § 7122; 68 FLRA 945, 955-59 (2015) (Dissenting Opinion of Member Pizzella).

[66] 5 U.S.C. §§ 7118, 7123.