

71 FLRA No. 104

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2846
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE CONTRACT MANAGEMENT AGENCY
(Agency)

0-AR-5454

DECISION

January 30, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

Arbitrator Linda S. Byars found that the Agency did not violate the parties' collective-bargaining agreement when it rated the grievant "fully successful" – rather than "outstanding" – on his performance review, and she denied the grievance. The main questions before us are whether the award: (1) is incomplete, ambiguous, or contradictory as to make implementation of the award impossible; and (2) is based on nonfacts. Because the Union does not demonstrate that the award is impossible to implement, or demonstrate that a central fact underlying the award is clearly erroneous, we deny the Union's exceptions.

II. Background and Arbitrator's Award

In October 2017, the grievant became a full-time representative for the Union. This required the Agency to complete a closeout rating for his performance in his Agency position during the January 1 through October 25, 2017 period. The Agency gave the grievant an overall "fully successful" rating.¹ Disagreeing with the grievant's rating, the Union filed a grievance.

At arbitration, the parties stipulated that the issue was whether the Agency violated "Article 10[,] Section 1, Article 19[,] Section 1, Article 26[,"

Section 10C, and Article 26[,] Section 10D" of the parties' agreement when rating the grievant's performance.²

The Arbitrator found that the Union did not demonstrate that the grievant fulfilled the requirements for an "outstanding" rating in several critical job elements where he was rated as "fully successful." She therefore concluded that the Agency did not violate the parties' agreement by rating the grievant "fully successful" rather than "outstanding," and denied the Union's grievance.

On December 28, 2018, the Union filed exceptions to the award, and on January 31, 2019, the Agency filed an opposition to the Union's exceptions.³

¹ Award at 3.

² *Id.* at 5.

³ The Authority extended the filing and service time limits for responsive briefs during the lapse in appropriations from December 22, 2018 to January 25, 2019. Therefore, the Agency's opposition was timely filed.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar two of the Union's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the Arbitrator.⁴

In its exceptions, the Union argues that the award is contrary to law because certain criteria for two critical job elements are invalid "backwards standards . . . because they describe what the employee should not do."⁵ As the Union acknowledges,⁶ and the record reflects, the Union failed to raise this argument to the Arbitrator.

The Union argues that it did not have the opportunity to raise this argument *at the hearing* because the Arbitrator "claimed that the Agency had the right to determine performance standards" and that "the time to discuss" the standards' wording had therefore passed.⁷ But the Union could have responded to any such assertions by the Arbitrator and contested the elements' validity in its post-hearing brief – particularly since the stipulated issue included whether the Agency violated the parties' agreement when rating the grievant's performance using these critical job elements.⁸

Because the Union could have, but did not, raise this argument before the Arbitrator, we will not consider it as part of the Union's exceptions. Consequently, we dismiss the Union's contrary-to-law exception.⁹

The Union also argues that the Arbitrator's erroneous reliance on certain Agency testimony to find that the grievant did not meet a criterion of an element fails to draw its essence from Article 26, Section 2A of the parties' agreement.¹⁰ Although the Union raised issues at arbitration concerning that testimony,¹¹ and was aware that the element the Agency used to rate the grievant was at issue, it did not make any arguments regarding Article 26, Section 2A. As the Union could

⁴ 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Local 3627*, 70 FLRA 627, 627 (2018) (*Local 3627*); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 343 (2017) (*BOP*) (citing *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012)).

⁵ Exceptions at 4.

⁶ *Id.*

⁷ *Id.*

⁸ Award at 5.

⁹ 5 C.F.R. §§ 2425.4(c), 2429.5; *Local 3627*, 70 FLRA at 627; *BOP*, 70 FLRA at 343.

¹⁰ Exceptions at 9.

¹¹ *Id.*; Exceptions, Attach. 2, Union Post-Hr'g Br. (Union Brief) at 5; *see also* Exceptions, Attach. 1, Agency Post-Hr'g Br. (Agency Brief) at 9-10.

have, but did not, raise Article 26, Section 2A to the Arbitrator, we dismiss the Union's essence exception.¹²

IV. Analysis and Conclusions

- A. The award is not incomplete, ambiguous, or contradictory as to make it impossible to implement.¹³

The Union argues that the award is incomplete, arbitrary, or contradictory as to make it impossible to implement because the Arbitrator arbitrarily considered certain evidence "as a reflection of the entire performance evaluation period, instead of only considering it as a reflection of a shared workload between the [g]rievant and another teammate."¹⁴ However, the Union fails to explain how the award, which denied the grievance in its entirety, is impossible to implement because the meaning and effect of the award are too unclear or uncertain.¹⁵ Therefore, we deny this exception.

- B. The award is not based on nonfacts.¹⁶

The Union argues that the award is based on several nonfacts.¹⁷ Specifically, the Union claims that the Arbitrator erred in her factual findings because she: (1) disregarded evidence that the grievant satisfied a criterion for the "outstanding" level in one element¹⁸ and (2) incorrectly assessed a different element.¹⁹ However, the Union's arguments simply constitute a disagreement with the Arbitrator's evaluation of the evidence.

¹² *AFGE, Council 215*, 66 FLRA 771, 773 (2012).

¹³ In order for an award to be found deficient on these grounds, the excepting party "must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain." *AFGE, Local 1395*, 64 FLRA 622, 624 (2010) (*Local 1395*); *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1074 (2001) (*Army Depot*).

¹⁴ Exceptions at 5.

¹⁵ *Local 1395*, 64 FLRA at 624; *Army Depot*, 56 FLRA at 1074.

¹⁶ To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015) (*NLRB*). 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. *Id.* Moreover, disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be given such evidence, provides no basis for finding the award deficient. *See, e.g., Int'l Bhd. of Elec. Workers, Local 2219*, 69 FLRA 431, 433-34 (2016) (*IBEW*) (citations omitted); *U.S. DHS, CBP*, 68 FLRA 157, 160 (2015) (*DHS*) (citing *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 461 (2012) (*NLRB Cincinnati*)).

¹⁷ Exceptions at 6-8.

¹⁸ *Id.* at 6; *see also* Union Brief at 6; Agency Brief at 7-9.

¹⁹ Exceptions at 7 (quoting Award at 13).

Accordingly, they do not provide a basis for finding that the award is based on a nonfact.²⁰

Additionally, the Union contends that the Agency erroneously based the grievant's rating for two elements on statements made by outside parties – including a party first mentioned in the Agency's post-hearing brief – rather than an actual assessment of his level of customer engagement.²¹ But the Union does not identify any factual finding made by the Arbitrator regarding these statements. Consequently, the Union's argument does not demonstrate that the award is based on a nonfact.²²

Accordingly, we deny the Union's nonfact exceptions.

V. Decision

We dismiss, in part, and deny, in part, the Union's exceptions.

²⁰ *E.g.*, *IBEW*, 69 FLRA at 433-34 (citation omitted); *NLRB*, 68 FLRA at 555; *DHS*, 68 FLRA at 161 (citing *NLRB Cincinnati*, 66 FLRA at 461).

²¹ Exceptions at 8.

²² *E.g.*, *NLRB*, 68 FLRA at 555.