

71 FLRA No. 202

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY
DISTRIBUTION WARNER ROBINS
WARNER ROBINS AFB, GEORGIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 987
(Union)

0-AR-5495

DECISION

October 27, 2020

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

I. Statement of the Case

Arbitrator Linda S. Byars found that the Agency violated the parties’ collective-bargaining agreement when it rated the grievant “fully successful” rather than “outstanding” in her performance review.¹ Because the Agency does not demonstrate that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement, or that a central fact underlying the award is clearly erroneous, we deny the Agency’s essence and nonfact exceptions.

II. Background and Arbitrator’s Award

In May 2018, the Agency provided the grievant with her performance rating for the previous year. The grievant received ratings on two elements: (1) “Process Compliance” and (2) “Work Output.”² She received an “outstanding” rating for process compliance, but only received a “fully successful” rating for work output.³ Disputing the grievant’s fully successful rating on the

second element, the Union filed a grievance, which went to arbitration.

At arbitration, the parties agreed that the issue was whether the grievant “should have been given an outstanding rating for the ‘Work to Standard – Work Output (Quality and Quantity[()])’ element of her performance appraisal.”⁴

The Arbitrator noted that, pursuant to the Agency’s “benchmark descriptors,” an employee should be awarded an outstanding rating for a particular element when the quality and quantity of the employee’s work substantially exceed the performance standard for that element.⁵ She found that the performance narrative completed by the grievant’s rating official indicated that the grievant exceeded her performance standards for the disputed element. The Arbitrator noted that the Agency did not deny that the grievant had saved the Agency \$1,452,326.67 in her efforts to reduce inventory loss. And she found that when the Union informally spoke with the grievant’s rating official, he stated that he was willing to change her rating to outstanding, but that a formal grievance had to be filed to make the change.

Based on these findings, the Arbitrator concluded the record credibly demonstrated that the grievant performed at an outstanding level in both of her elements. She therefore sustained the grievance and directed the Agency to adjust the grievant’s rating for the second element to outstanding.

On April 10, 2019, the Agency filed exceptions to the award, and on May 10, 2019, the Union filed an opposition to the Agency’s exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar two of the Agency’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.⁶

¹ Award at 2.

² *Id.*

³ *Id.*

⁴ *Id.* at 7.

⁵ *Id.* at 8. The benchmark descriptors “provide the common framework developed by [the Department of Defense] to consistently describe the three levels of performance under [the Agency’s performance plan].” Exceptions, Joint Ex. 9, Benchmark Descriptors (Benchmark Descriptors) at 1.

⁶ 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)).

In its exceptions, the Agency argues that the award is based on a nonfact and fails to draw its essence from the parties' agreement because the Arbitrator credited the grievant with saving the Agency \$1,452,326.67. Specifically, the Agency contends that those savings actually occurred outside of the rating period.⁷ But as the Agency acknowledges,⁸ and the record reflects, the Agency failed to raise this argument to the Arbitrator.

The Agency argues that it did not raise this argument at the hearing because it did not realize that the grievant's cost-saving work occurred outside of the rating period until the Arbitrator issued her award.⁹ However, the grievant testified at the hearing about these specific cost-savings and how they supported her position that she deserved an outstanding rating.¹⁰ Therefore, the Agency could have, but did not, dispute the time period in which that work occurred before the Arbitrator.

Consequently, we dismiss the Agency's nonfact and essence exception related to this issue.¹¹

IV. Analysis and Conclusions

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

The Agency argues that the Arbitrator's award fails to draw its essence from Article 18 of the parties' agreement.¹² This provision requires an employee's performance ratings to reflect the standards created by the Agency.¹³

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 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.¹⁴

⁷ Exceptions at 8, 12-13.

⁸ *Id.* at 9, 13.

⁹ *Id.*

¹⁰ Award at 9; Exceptions at 9, 13; *see also* Exceptions, Joint Ex. 1, Grievant's Appraisal (Appraisal) at 3.

¹¹ 5 C.F.R. §§ 2425.4(c), 2429.5; *Local 3627*, 70 FLRA at 627; *BOP*, 70 FLRA at 343; *AFGE, Council 215*, 66 FLRA 771, 773 (2012).

¹² Exceptions at 10.

¹³ *Id.* at 11.

¹⁴ *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing 5 U.S.C. § 7122(a)(2)); *AFGE, Council 220*, 54 FLRA 156, 159 (1998); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

In support of its essence exception, the Agency contends that the Arbitrator measured the employee's performance against the Agency's "benchmark descriptors" instead of the standards included in the employee's performance appraisal.¹⁵

Article 18 provides that "[t]he performance rating assigned [to an employee] should reflect the level of the employee's performance as compared to the standards established."¹⁶ In considering whether the grievant should have been rated "outstanding" for the "Work Output" element of her performance standard, the Arbitrator noted that the Agency had established the "Defense Performance Management and Appraisal Program (DPMAP)" to evaluate employees' performance.¹⁷ DPMAP, in turn, states that performance standards "describe how the employee's duties are to be accomplished for evaluation at a particular performance level," and establishes benchmark descriptors for evaluating employees to "foster consistency" among employees' ratings.¹⁸

Here, the Arbitrator relied upon the benchmark descriptor stating that employees should be awarded outstanding ratings when the quality and quantity of their work substantially exceed the performance standard pertaining to a particular element.¹⁹ And, applying that standard, the Arbitrator found that the rating official's narrative supporting the grievant's performance appraisal demonstrated that the grievant performed at an outstanding level for her second element.²⁰

The Agency has not demonstrated that the Arbitrator failed to review or apply the correct performance standard in making her determination to adjust the grievant's performance rating. Moreover, the Agency's argument is inconsistent with the position it took in its post-hearing brief to the Arbitrator, in which it cited descriptors from the *same document* relied upon by

¹⁵ Exceptions at 11.

¹⁶ Exceptions, Attach. 5, Collective-Bargaining Agreement at 46.

¹⁷ Award at 8; *see also id.* at 3-4 (both parties proposed the issue as "[w]as the [g]rievant improperly given '3' (instead of '5') evaluation ratings as part of DPMAP"); Benchmark Descriptors at 1-3.

¹⁸ Benchmark Descriptors at 1.

¹⁹ Award at 8; *see also* Benchmark Descriptors at 2 (stating, in part, that an employee is entitled to an outstanding rating when the "[q]uality and quantity of the employee's work substantially exceeds the standard with minimal room for improvement" and the employee's work "[f]ar exceeds targeted metrics, for example in quality, budget, or quantity"). The performance standard for the grievant's "Work Output" element provides that the grievant is to be rated on the timeliness, quantity and quality of her work. Appraisal at 4.

²⁰ Award at 9-10.

the Arbitrator to defend the grievant's fully successful rating.²¹

Because the Agency has otherwise failed to establish that the Arbitrator interpreted Article 18 in a way that is irrational, unfounded, implausible, or in manifest disregard of the agreement,²² we deny the Agency's essence exception.²³

B. The award is not based on nonfacts.

The Agency argues that the award is based on several nonfacts.²⁴ Specifically, the Agency claims that the Arbitrator erred because she: (1) used the wrong standards in support of her decision²⁵ and (2) improperly applied the grievant's input regarding her rating for element one to her rating for element two.²⁶

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.²⁷ 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.²⁸ 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.²⁹

As discussed above, the Agency has failed to show that the Arbitrator used the wrong standards in making her determination to change the grievant's performance rating.³⁰ Further, the record shows that the Union and the Agency provided documentary evidence regarding both nonfact exceptions at arbitration,³¹ and the Arbitrator weighed this evidence to find that the grievant performed at an outstanding level for element two.³² The Arbitrator relied upon additional grounds to sustain the grievance,³³ and the Agency has failed to show that the Arbitrator's consideration of the grievant's input regarding her rating for element one is a central fact but for which she would have reached a different result.³⁴

Accordingly, we deny the Agency's nonfact exceptions.³⁵

V. Decision

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

²¹ Exceptions, Attach. 11, Agency Post-Hr'g Br. at 5; Benchmark Descriptors at 2; see *NTEU, Chapter 190*, 67 FLRA 412, 414 (2014); see also *U.S. DHS, CBP*, 68 FLRA 157, 159 (2015) (*DHS*) (citing *AFGE, Council of Prison Locals, Local 405*, 67 FLRA 395, 396 (2014)) (the Authority will not consider arguments in support of an exception that are inconsistent with a party's arguments to the arbitrator); 5 C.F.R. §§ 2425.4(c), 2429.5.

²² *U.S. Dep't of the Treasury, IRS*, 70 FLRA 539, 542 (2018) (Member DuBester concurring).

²³ Although the dissent would find the award "contrary to law," Dissent at 6, we note that the Agency did not file a contrary-to-law exception in this case and our review is confined to the arguments that the parties raise before us. See *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (noting the general rule that "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the . . . arguments entitling them to relief" (quoting *Castro v. United States*, 540 U.S. 375, 381-38 (2003) (Scalia, J., concurring in part and concurring in judgment))).

²⁴ Exceptions at 5-9.

²⁵ *Id.* at 5-6.

²⁶ *Id.* at 6-8.

²⁷ *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015) (*NLRB*).

²⁸ *Id.*

²⁹ See, e.g., *Int'l Bhd. of Elec. Workers, Local 2219*, 69 FLRA 431, 433-34 (2016) (*IBEW*) (citations omitted); *DHS*, 68 FLRA at 160 (citing *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 461 (2012)).

³⁰ *Indep. Union of Pension Emps. For Democracy & Justice*, 68 FLRA 999, 1010 (2015) (denying exceptions that are premised on arguments previously denied).

³¹ Exceptions at 6; Award at 9.

³² Award at 10.

³³ *Id.* at 8-10 (citing the rating official's narrative, his willingness to change the grievant's rating, and the record as a whole as reasons for concluding that the grievant performed at an outstanding level in the disputed element).

³⁴ *U.S. Dep't of VA, Gulf Coast Veterans Healthcare Sys.*, 69 FLRA 608, 612-13 (2016); *NLRB*, 68 FLRA at 554-55.

³⁵ E.g., *AFGE, Local 2846*, 71 FLRA 535, 536-37 (2020); *IBEW*, 69 FLRA at 433-34 (citation omitted); *NLRB*, 68 FLRA at 554-55.

Member Abbott, dissenting:

For the same reasons that I articulated in my dissenting opinion in *SSA*,¹ I would conclude that the remedy awarded by the Arbitrator is contrary to law and does not draw its essence from Article 18.

As I stated therein, “arbitrators are without authority to direct a specific rating for a past, present, or future performance period.”² Once again, it is worth noting that “[i]t is counter-intuitive . . . to believe that an arbitrator, who hears the testimony of one or several witnesses and looks at one or several submissions, is better positioned than is a supervisor to determine what rating is warranted,”³ specifically as it pertains to the “timel[iness],” “[q]uantity and [q]uality” of her work.⁴

Specifically, it was the supervisor, not the Arbitrator, who had the opportunity to “observe[] all aspects”⁵ of the employee’s performance throughout the rating period. Thus, it is more than presumptuous for the Arbitrator to determine, based on her interpretation of the supervisor’s narrative, that the grievant deserved a rating of “outstanding” rather than “fully successful” concerning the quality and quantity of her work output.

Without a doubt, the Agency is not free “to ignore processes or procedures”⁶ which are set out in Article 18. Even if that were sufficient to establish a violation of Article 18, the appropriate remedy would be a remand to the supervisor to re-evaluate the grievant’s rating in the work output element in accord with the Arbitrator’s remedy. We should not give arbitrators the power to issue a performance evaluation based on a few documents, particularly when there has been no allegation that the supervisor is either unwilling or unable to review the performance elements in light of the remedy.

An award that does not explain how Article 18 was violated cannot draw its essence from the parties’ agreement and an arbitrator’s award that directs a specific rating is contrary to law. Therefore, I dissent.

¹ 71 FLRA 798, 803 (2020) (Dissenting Opinion of Member Abbott).

² *Id.*

³ *Id.*

⁴ Exceptions, Joint Ex. 1, Grievant’s Appraisal at 4.

⁵ *SSA*, 71 FLRA at 803.

⁶ *Id.*