71 FLRA No. 224

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF FIELD LABOR LOCALS
(Union)

and

UNITED STATES DEPARTMENT OF LABOR
(Agency)

0-AR-5616

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DECISION

December 11, 2020

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

I. Statement of the Case

Arbitrator William E. Hartsfield denied a Union grievance challenging the substance and application of certain employees' performance standards. The Union filed exceptions on the grounds that the award: is contrary-to-law; fails to draw its essence from the parties' collective-bargaining agreement; is based on nonfacts; is incomplete, ambiguous, or contradictory as to make implementation impossible; and is deficient on other grounds not listed in the Authority's Regulations. Because the Union's exceptions provide no basis on which to find the award deficient, we deny them.

II. Background and Arbitrator's Award

The Agency developed new performance standards for wage and hour investigators (the grievants) effective October 1, 2016. In October 2017, the Agency first applied the new performance standards to rate the grievants. After reviewing the grievants' performance evaluations, the Union filed a grievance claiming that the substance of the performance standards and the results of the grievants' performance evaluations violated the parties' agreement and government-wide regulations (regulations). The grievance proceeded to arbitration.

The Arbitrator framed the issue as whether the Agency violated the parties' agreement or regulations "when it applied new performance [r]esults and [s]tandards for [the grievants]?"[1]

The Arbitrator determined that Article 43, Section 11 (Section 11) of the parties' agreement limited the Union to grieving the performance results and standards "as applied," in a rating of record but not "as written."[2] Therefore, he concluded that he would not consider the Union's claim concerning the substance of the performance standards "as written" because the substance of the standards is not grievable under the parties' agreement.[3]

He found that the grievance "challenged the application of the [performance standards] to [the grievants] as a group and did not name an individual."[4] Considering each element and standard, the Arbitrator concluded that the Agency's application of the performance standards to the grievants was not contrary to the parties' agreement or regulations.[5]

On April 8, 2020, the Union filed exceptions to the award. On May 4, 2020, the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusions

A. The award is not contrary to law.

The Union argues that the award is contrary to law because several critical elements should be non-critical elements under 5 C.F.R. Part 430 and the Arbitrator "did not rule on the merits of the [U]nion's position[,] . . . [but ruled only] that the [U]nion did not

[1] Award at 1-2; *see also id.* at 19.

[2] *Id.* at 19 (internal quotations omitted). Section 11 states: "Performance Standards may only be grieved when they are applied in a rating of record." *Id.* at 6. The parties bifurcated the arbitration into a hearing on jurisdictional issues and merits issues. In the jurisdiction award, the Arbitrator stated that the parties "agreed that . . . Section 11 allowed the Union and members of the bargaining unit to grieve performance standards applied in a rating of record" and he found that under "Articles 2, 43, and 54 [of the parties' agreement], the Union may assert in the [g]rievance that the Agency's performance standards as applied in ratings of record violate applicable laws and regulations." Opp'n, Attach. 3, Jurisdiction Award (Jurisdiction Award) at 14-15. He also found that the grievance "challenged the applied performance standards as violating the [parties' agreement] and as unlawful as applied to records of rating in October 2017." Jurisdiction Award at 15.

[3] Award at 19 (citing Jurisdiction Award at 14-15).

[4] *Id.* at 18.

[5] *Id.* at 19; *see also id.* at 20-29 (discussing the application of each standard).

prove management failed to apply the standards."[6] When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.[7] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[8] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the appealing party establishes that those findings are nonfacts.[9]

Here, the Union acknowledges that the Arbitrator did not decide whether the *substance* of the performance standards violated the parties' agreement or regulations.[10] And although it generally cites certain performance management regulations,[11] the Union does not explain, nor is it otherwise apparent, how the Arbitrator's failure to find that certain performance elements should be non-critical is contrary to those regulations. Accordingly, because the Union fails to explain how the award is contrary to law, we deny this exception.[12]

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

The Union argues that the award fails to draw its essence from Article 43 of the parties' agreement because the Arbitrator "was stuck on 'application' of the elements and standards that he missed the entire thrust of the [U]nion's case."[13] To show that an award fails to draw its essence from the collective-bargaining agreement, the appealing party must establish 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.[14]

The Union argues that Article 43 of the parties' agreement provides a mechanism for employees to engage in "dialogue with management over all parts of performance," but does not reference any particular section of Article 43.[15] To the extent that the Union is challenging the Arbitrator's interpretation of Section 11, this provision states that "[p]erformance [s]tandards may only be grieved when they are applied in a rating of record."[16] The Arbitrator found that this provision meant that only the *application* of the standards to an employee's rating – but not the *substance* of the standards – could be challenged through the negotiated grievance procedure.[17] Although generally presenting its interpretation of Article 43, the Union does not explain how the Arbitrator's interpretation is irrational, unfounded, implausible, or in manifest disregard of the agreement.[18] Consequently, the Union has failed to demonstrate that the award fails to draw its essence from the parties' agreement, and we deny this exception.

C. The award is not based on nonfacts.

The Union contends that the award is based on nonfacts.[19] To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[20] However, a challenge to an arbitrator's interpretation of the parties' agreement cannot be challenged as a nonfact.[21] Moreover, a challenge that

[6] Exceptions at 5.

[7] *U.S. Dep't of State, Bureau of Consular Affairs, Passport Servs. Directorate*, 70 FLRA 918, 919 (2018) (citing *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014)).

[8] *Id.* (citing *U.S. DOD, Dep'ts of the Army & Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).

[9] *Id.* (citing *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014)).

[10] Exceptions at 5.

[11] *Id.* (citing 5 C.F.R. §§ 430.203, 430.208). The Union also cites 5 U.S.C. § 4302, but provides no explanation regarding that statutory provision. *Id.*

[12] *See AFGE, Nat'l INS Council*, 69 FLRA 549, 552 (2016). The Union also asserts that the award is contrary to law because critical elements must be within the employee's control and it "could not have known that the [A]rbitrator was going to fundamentally misunderstand the . . . case." Exceptions at 4. The Arbitrator found that the Union "did not show the Agency rated [the grievants] based on matters beyond their control." Award at 20. However, other than citing "an article at opm.gov" that the Union claims is based on 5 U.S.C. § 4302 and 5 C.F.R Part 430, the Union does not explain how the Arbitrator's finding is contrary to a specific law, rule, or regulation. Exceptions at 4; *see also* Exceptions, Union Ex. 20. Consequently, we deny this contrary-to-law claim as unsupported. 5 C.F.R. § 2425.6(e)(1) (an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c)).

[13] Exceptions at 10.

[14] *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

[15] Exceptions at 10.

[16] Award at 6.

[17] *Id.* at 19.

[18] *U.S. Dep't of VA, St. Petersburg Reg'l Benefit Office*, 70 FLRA 1, 3 (2016) (denying essence exception where excepting party fails to explain how arbitrator's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement).

[19] Exceptions at 7-9.

[20] *AFGE, Local 3254*, 70 FLRA 577, 580 (2018) (*Local 3254*); *NAGE, SEIU, Local 551*, 68 FLRA 285, 288 (2015) (*NAGE*).

[21] *NAGE*, 68 FLRA at 288 (citing *United Power Trades Org.*, 67 FLRA 311, 315 (2014)).

fails to identify clearly erroneous *factual* findings does not demonstrate that an award is based on a nonfact.[22]

The Union argues that the Arbitrator misinterpreted Section 11 because that provision "does not limit the scope of the grievance to merely 'the application' of the elements and standards."[23] But the Union's nonfact exception challenges the Arbitrator's interpretation of the parties' agreement, and relies on the same essence argument rejected above. Therefore, we deny this exception.[24]

The Union also argues that the Arbitrator "failed to understand the case," because, although the Union "did grieve management's application of the elements and standards," the Arbitrator focused on and decided that issue, rather than the substance of the performance standards "themselves."[25] But the Union neither identifies a factual finding nor demonstrates how a factual finding is clearly erroneous. Therefore, the Union's claim provides no basis for finding that the award is based on a nonfact, and we deny the exception.[26]

IV. Decision

We deny the Union's exceptions.

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[22] *Local 3254*, 70 FLRA at 580 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 201 (2016) (*BOP*)).
[23] Exceptions at 9.
[24] *NAGE*, 71 FLRA 775, 777 (2020) (citing *NAGE*, 68 FLRA at 288) (rejecting nonfact exception that restates essence exception previously denied); *see also AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009) (citing *Library of Cong., Wash., D.C.*, 63 FLRA 122, 125 (2009)) (essence claim not separately addressed where claim did nothing more than restate claim that arbitrator's substantive arbitrability determination is contrary to law).
[25] Exceptions at 8; *see also id.* at 7.
[26] *See Local 3254*, 70 FLRA at 580; *BOP*, 69 FLRA at 201. Additionally, the Union argues that the award is incomplete, arbitrary, or contradictory as to make it impossible to implement because the Arbitrator addressed application of the elements and standards, rather than the substance of the standards. Exceptions at 6-7. And the Union argues that the award is deficient on other grounds not listed in the Authority's Regulations because the "Arbitrator [m]isunderstood and [m]isapplied the term [a]pplied" and asserts that the grievance was not about the "application" of the elements and standards, but "about the elements and standards themselves." *Id.* at 11 (internal quotations omitted). These exceptions merely restate the Union's essence and nonfact arguments rejected above. And to the extent that the Union contends that it *did not grieve* application of the elements and standards, this is inconsistent with its position taken in its nonfact exception claiming that the Union *did* grieve this issue. Therefore, we deny the Union's exceptions that the award is incomplete, arbitrary, or contradictory as to make it impossible to implement and the award is deficient on other grounds not listed in the Authority's Regulations. *See NAGE*, 68 FLRA at 287.