72 FLRA No. 34

UNITED STATES
DEPARTMENT OF THE AIR FORCE
EDWARDS AIR FORCE BASE, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1406
(Union)

0-AR-5532

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DECISION

April 13, 2021

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

I. Statement of the Case

Arbitrator Ronald Hoh issued an award finding that the Agency violated Article 15 of the parties' collective-bargaining agreement and an Agency policy by failing to, among other things, train employees how to use a new performance-management system. The Arbitrator directed the Agency to return to the status quo ante, and he gave the Agency a six-month compliance deadline to take other remedial measures. In addition, the Arbitrator directed the Agency to provide cash or time-off awards to employees who would have achieved a performance level of exceeds standards or outstanding in the 2017-18 performance year (2018 performance year) had the Agency not violated the parties' agreement and the Agency policy.

The Agency's exceptions argue that the award requires the Agency to assess employees' performance during the 2018-19 performance year (2019 performance year) to determine those employees' entitlement to cash or time-off awards for the 2018 performance year. We conclude that the Agency's exceptions are based on a remedy that the Arbitrator did not award. Thus, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency is a subcomponent of the Department of Defense (DOD). On February 4, 2016, the Agency issued Instruction 1400.25 (DODI 1400.25) announcing a new performance-management system called DOD Civilian Personnel Management System: Performance Management and Appraisal Program (DPMAP System). The Agency implemented this system in the 2018 performance year.

In May 2018, the Union filed a grievance, alleging that the Agency violated Article 15 of the parties' agreement and DODI 1400.25 when it failed to communicate and train employees how to properly input their performance into the DPMAP System. The parties could not resolve the dispute and proceeded to arbitration.

The Arbitrator framed the issues, in relevant part, as "(1) Did the Agency violate Article . . . 15 . . . or DODI . . . 1400.25[] when it provided the annual performance ratings and corresponding awards for the 2017-18 performance [year]? (2) If so, what shall the remedy be?"[1]

The Arbitrator noted that Article 15 required employees to "have access to training on writing effective self-assessment statements and contribution objectives."[2] And he observed DODI 1400.25's requirement that "employees and supervisors engage in ongoing communication concerning performance expectations and organizational goals throughout the appraisal cycle."[3] Applying those requirements, the Arbitrator concluded that "employees never received . . . necessary training for [the] new DPMAP [S]ystem"[4] and the Agency failed to inform employees how to achieve an exceeds standards or outstanding performance rating.[5] Therefore, he determined that the Agency violated Article 15 and DODI 1400.25 when it provided the annual performance ratings and corresponding awards for the 2018 performance year.

The Arbitrator directed a status quo ante remedy to return the parties to where they were when the DPMAP System was issued (February 4, 2016).[6] He also directed the Agency within six months to take five actions:

[1] Award at 2.
[2] *Id.* at 10 (quoting Article 15, Section 15.02(n)).
[3] *Id.*
[4] *Id.* at 11.
[5] In relation to the DPMAP System, the Arbitrator also found that the Agency failed to inform employees: "what they needed to present in work performance . . . to meet the DPMAP [S]ystem requirements"; "if . . . that program would . . . change the prior existing performance evaluating system"; or how to "access and navigate the D[O]D website to demonstrate how [they] could have input into the DPMAP performance evaluation system." *Id.* The Arbitrator also noted that "the Agency chose not to provide any evidence or testimony at the hearing." *Id.*
[6] *Id.* at 13.

> (1) follow all of the requirements of the DPMAP [S]ystem; (2) assure that both covered employees and their supervisors receive the necessary training in the DPMAP System; (3) improve communication between employees and supervisors concerning work performance, including allowing employees greater input into their workplace performance, as required in both the contract and DPMAP; (4) assure that supervisors provide to eligible employees the necessary information on how employees may achieve the DPMAP System's "[e]xceeds [s]tandards" or "[o]utstanding" rating level, thereby potentially entitling such employees to earn cash rewards or additional paid time off; and (5) assure that eligible employees are trained in accessing the D[O]D website concerning how they may demonstrate how such employees can have the input into their performance evaluations envisioned by DPMAP.[7]

The Arbitrator also ordered the Agency to give cash awards or additional paid time off retroactive to the 2018 performance year to those employees who achieved an exceeds standards or outstanding rating.[8]

On August 13, 2019, the Agency filed exceptions to the award, and on September 18, 2019, the Union filed its opposition to the Agency's exceptions.[9]

III. Analysis and Conclusions: The Agency's exceptions are premised on a remedy the Arbitrator did not award.

The Agency "does not dispute" that it violated Article 15 or DODI 1400.25 when it provided annual performance ratings and awards in the 2018 performance year.[10] Nor does it contest the five numbered remedies that the Arbitrator directed the Agency to implement within six months of the award's issuance.[11] Rather, the Agency challenges the Arbitrator's statement that the Agency provide awards retroactive to the 2018 performance year in the event that employees achieve the exceeds standards or outstanding performance under the DPMAP System.[12] The Agency claims that this remedy requires the Agency to "prospectively" rate employees for their performance during the six-month period following the implementation of the award to determine whether those employees should retroactively receive a cash award or additional time off for the 2018 performance year.[13]

The Agency argues that the award fails to draw its essence[14] from Article 15 of the parties' agreement because that article does not allow an employee's future performance to determine whether an employee should receive an award in a past rating cycle.[15] The Agency also argues that the award is contrary to 5 C.F.R.

[7] *Id.* at 13-14.

[8] *Id.* at 14. Member Abbott notes that the proper remedy for a performance-based violation is to send the matter back to the parties and re-rate the affected employees. *U.S. DOD, Def. Logistics Agency, Distrib. Warner Robins, Warner Robins AFB, Ga.*, 71 FLRA 1029, 1032 (2020) (Dissenting Opinion of Member Abbott) ("[T]he 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 [a]rbitrator'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."). Member Abbott applauds the Arbitrator's requirement that the Agency determine the rating, instead of the Arbitrator determining the ratings based on his limited knowledge of employee performance obtained through the hearing or documentation. Award at 13-14.

[9] The Union argues in its opposition that the Agency untimely filed its exceptions. Opp'n Br. at 3. The award's date of service was July 9, 2019 – the postmark date. Exceptions, Attach. 2. And the Agency filed its exceptions on August 13, 2019. Therefore, in accordance with § 2425.2 of the Authority's Regulations, the Agency timely filed its exceptions. 5 C.F.R. § 2425.2 ("If the award is served by regular mail, then the date of service is the postmark date . . . ; for awards served by regular mail, the excepting party will receive an additional five days for filing the exceptions under 5 C.F.R. [§] 2429.22.").

[10] Exceptions Br. at 2.

[11] *Id.* (acknowledging that within six months of the award, it is required to take the five listed actions from the award).

[12] Award at 14; *see* Exceptions Br. at 3.

[13] Exceptions Br. at 3.

[14] The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting 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. *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (then-Member DuBester concurring, in part, and dissenting, in part).

[15] Exceptions Br. at 3.

§ 430.208(a)(1)[16] because the remedy requires the Agency to apply future performance – the six months after the award – to the past rating cycle.[17]

Contrary to the Agency's claim, we conclude that the award does not direct the Agency to treat the six months following the award as a performance period for rating employees in a past performance year. The Arbitrator directed status quo ante relief to return the parties to where they were when the DPMAP System was issued.[18] The Arbitrator did not, as the Agency otherwise claims, direct the Agency to appraise performance during the 2019 performance period to judge performance in the 2018 performance period.

Because the Agency's exceptions are based on a remedy that the Arbitrator did not award, the exceptions do not demonstrate that the award fails to draw its essence from the parties' agreement or that the award is contrary to law.[19] Accordingly, we deny the exceptions.

IV. Decision

We deny the Agency's exceptions.

Chairman DuBester, concurring:

I agree with the Decision to deny the Agency's exceptions.

[16] 5 C.F.R. § 430.208(a)(1) ("A rating of record shall be based only on the evaluation of actual job performance for the designated appraisal period."). When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo. *Bremerton Metal Trades Council, Int'l Bhd. of Boilermakers, Loc. 290*, 71 FLRA 1033, 1034-35 (2020) (*Loc. 290*). Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* at 1035. In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *Id.*

[17] Exceptions Br. at 3.

[18] Award at 13. We note that the Agency requested the Arbitrator confirm the remedy after the award was issued, but the Agency did not receive confirmation prior to filing exceptions. *See* Exceptions, Attach. 4 at 1-3.

[19] *See AFGE, Loc. 2338*, 71 FLRA 1039, 1041 (2020) (denying the union's exceptions on essence and contrary-to-law grounds because the union's arguments were based on a misunderstanding of the award); *Loc. 290*, 71 FLRA at 1034-35 (finding the union's contrary-to-law exception was based on a finding the arbitrator did not make); *SSA*, 69 FLRA 208, 210 (2016) ("[E]xceptions that are based on a misunderstanding of an arbitrator's award do not provide a basis for finding that the award fails to draw its essence from the agreement.").