

**73 FLRA No. 37**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 038

NATIONAL CITIZENSHIP AND IMMIGRATION  
SERVICE COUNCIL  
(Union)

and

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
U.S. CITIZENSHIP AND IMMIGRATION SERVICES  
(Agency)

0-AR-5801

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DECISION

August 23, 2022

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Before the Authority: Ernest DuBester, Chairman, and  
Colleen Duffy Kiko and Susan Tsui Grundmann,  
Members

**I Statement of the Case**

Arbitrator Shari B. Broder issued an award denying the Union's grievance because the Union did not demonstrate that the Agency's failure to follow contractual procedures when issuing a performance appraisal harmed the grievant. The Union filed exceptions to the award on contrary-to-law and essence grounds. Because the Union's exceptions fail to demonstrate that the award is deficient, we deny them.

**II Background and Arbitrator's Award**

The Agency hired the grievant in September 2019. In March 2020, the Agency closed offices due to the COVID-19 pandemic and the grievant started teleworking. As relevant here, in October 2020, the supervisor and grievant met in person and the supervisor asked the grievant to sign an end-of-year performance appraisal. The two did not discuss the appraisal at that time and the supervisor advised the grievant they would

discuss it after the grievant received a final signed copy. The grievant signed the appraisal, which rated the grievant at level 3 – "achieved expectations."<sup>1</sup>

The grievant received a copy of the appraisal on December 4. The Union filed a grievance alleging that the Agency violated Article 37 of the parties' agreement (Article 37) by failing to discuss the appraisal with the grievant and provide a copy when the grievant signed it. The grievance also alleged that the Agency rated the grievant lower than it should have because the grievant teleworked full time during the appraisal period. In a response to the grievance, the Agency's district director acknowledged the alleged procedural errors but asserted that those errors had been corrected. The district director also reviewed documentation regarding the grievant's work and determined that the rating was accurate and not based on the grievant's telework status. The grievance proceeded to the next step, where the regional director agreed with the district director, noting the Union "provided very little about [the grievant's] work."<sup>2</sup> The matter was not resolved and the Union invoked arbitration.

The Arbitrator framed the issue as whether "the Agency violate[d] the [parties' agreement] with respect to [the grievant's] performance appraisal."<sup>3</sup> In resolving that issue, the Arbitrator determined that the manner in which the grievant's performance rating was conveyed and the substance of the rating "were two separate issues."<sup>4</sup> The Arbitrator further determined the Union had the burden to demonstrate "by a preponderance of the evidence" that any Agency error in procedure "was harmful, meaning that it substantially harmed or prejudiced the [g]rievant's rights."<sup>5</sup>

As to the procedural issue, the Arbitrator noted that Article 37 provides that "[w]hen a copy of the rating is given to the employee, the rating official will discuss it with the employee" and "the employee will sign the performance rating to indicate that the discussion occurred and that the employee received a copy of the rating."<sup>6</sup> The Arbitrator found there was no dispute that the Agency failed to comply with those requirements.<sup>7</sup> But the Arbitrator rejected the Union's argument that the grievant was harmed by these "procedural irregularities."<sup>8</sup>

On this point, the Arbitrator found the grievant was "deprived of the interactive process" when given the appraisal in October 2020.<sup>9</sup> But the Arbitrator also found the grievant's supervisor had both engaged with the grievant throughout the performance year and considered

<sup>1</sup> Award at 5.

<sup>2</sup> *Id.* at 8.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 18.

<sup>5</sup> *Id.* at 14-15 (citing *Handy v. U.S. Postal Serv.*, 754 F.2d 335 (Fed. Cir. 1985)).

<sup>6</sup> *Id.* at 14 (quoting Art. 37(g)(8), (9)).

<sup>7</sup> *Id.* at 15.

<sup>8</sup> *Id.* at 20.

<sup>9</sup> *Id.* at 17.

the grievant's work when assigning the rating, and the grievant had the opportunity to engage with higher-level management about entitlement to a higher rating during the grievance process.<sup>10</sup> Ultimately, the Arbitrator determined that there was "no evidence" that the Agency's procedural errors affected the grievant's rating and concluded that the Agency had rectified the errors.<sup>11</sup>

Regarding the appropriateness of the grievant's rating, the Arbitrator found that the Agency presented "considerable" evidence that the grievant's work "was thoroughly reviewed and that the rating was fair," and that "the Union failed to offer any evidence" other than the grievant's opinion to support its claim that the rating was inappropriate.<sup>12</sup> The Arbitrator also rejected the Union's argument that the rating was in retaliation for the grievant's telework status, finding "no evidence" of such retaliation.<sup>13</sup>

The Arbitrator considered the Union's requested remedies and concluded they were either moot, resolved, or unwarranted. In relevant part, the Arbitrator denied the Union's request that the Agency change the grievant's rating to an "achieved excellence" because the Union failed to prove "that [the grievant's] work performance warranted a higher rating."<sup>14</sup> Therefore, the Arbitrator denied the grievance, concluding that the Agency's contract violation did not cause the grievant "substantial harm," or affect the grievant's rating "in any way."<sup>15</sup>

The Union filed exceptions to the award on March 23, 2022, and the Agency filed an opposition on April 11, 2022.

### III. Analysis and Conclusions

#### A. The award is not contrary to law.

The Union argues that the award is contrary to law because the Arbitrator applied the wrong burden of

proof.<sup>16</sup> It is well established under Authority precedent that if a standard of proof is set forth in a collective-bargaining agreement or in a law, rule, or regulation, an arbitrator's failure to apply the prescribed standard will constitute a basis for finding the award deficient.<sup>17</sup> However, absent a specified standard of proof, arbitrators have the discretion to establish whatever standard they consider appropriate, and the Authority will not find an award deficient because a party claims that an incorrect standard was used.<sup>18</sup>

Asserting that "the only standard of proof" for a contract violation "is the preponderance of evidence standard," the Union argues the Arbitrator erred by requiring it to prove "harmful error" and "substantial harm."<sup>19</sup> However, the Union does not identify any provision in the parties' agreement or law that required the Arbitrator to apply a particular burden of proof to the grievance. Moreover, the Arbitrator determined that the Union had to "prove by a preponderance of the evidence" that the Agency violated the parties' agreement and that the violation caused the grievant "substantial harm."<sup>20</sup> Thus, the Union's argument does not demonstrate that the Arbitrator failed to apply a "preponderance of the evidence" standard or that, by requiring a showing of harm under that standard, the Arbitrator applied the wrong burden of proof. Accordingly, the Union's argument provides no basis for finding the award contrary to law, and we deny this exception.<sup>21</sup>

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

The Union argues that the award "violates the spirit" of Article 37, which "intends for an interactive process" between the rating supervisor and the employee so that the employee has an opportunity to "give feedback" on whether the employee believes the rating is "fair and accurate."<sup>22</sup> When

<sup>10</sup> *Id.*; see also *id.* at 16 (crediting testimony that the grievant and the supervisor had "regular" discussions concerning the grievant's work, met once a month when in the office, and the supervisor was copied on all of the grievant's work product).

<sup>11</sup> *Id.* at 18.

<sup>12</sup> *Id.* at 17-18.

<sup>13</sup> *Id.* at 18-19.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> *Id.* at 20.

<sup>16</sup> Exceptions at 4-5, 7.

<sup>17</sup> *SSA*, 66 FLRA 6, 8 (2011) (*SSA*) (citing *U.S. Dep't of VA, Med. Ctr., Providence, R.I.*, 49 FLRA 110, 113 (1994)); *SSA, Balt., Md.*, 57 FLRA 181, 184 (2001) (*SSA Balt.*) (citing *AFGE, Loc. 2250*, 52 FLRA 320, 323-24 (1996) (*Local 2250*); *U.S. Dep't of the Navy, Naval Aviation Depot, Norfolk, Va.*, 36 FLRA 217, 222 (1990)); see also *AFGE, Nat'l Border Patrol Council, Loc. 2455*, 69 FLRA 171, 173 (2016) (citing *SSA*, 66 FLRA at 8).

<sup>18</sup> *SSA*, 66 FLRA at 8 (citing *U.S. Dep't of VA, Nat'l Mem'l Cemetery of the Pac.*, 45 FLRA 1164, 1171 (1992)); *SSA Balt.*, 57 FLRA at 184 (citing *Local 2250*, 52 FLRA at 324).

<sup>19</sup> Exceptions at 4-5.

<sup>20</sup> Award at 14-15.

<sup>21</sup> *SSA Balt.*, 57 FLRA at 184.

<sup>22</sup> Exceptions at 7. The Union also reiterates its arguments regarding the appropriate burden of proof, which we have rejected in Section III.A., above.

reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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.<sup>23</sup>

The Arbitrator found it undisputed that the supervisor failed to comply with some requirements of Article 37.<sup>24</sup> However, the Arbitrator also found that, although the supervisor failed to discuss the appraisal with the grievant before issuing it, the supervisor had discussed performance and work-product matters with the grievant throughout the performance year, and the grievant engaged in an interactive process with higher-level management during the grievance process regarding the rating.<sup>25</sup> The Arbitrator further determined that the Agency had rectified its noncompliance with Article 37's procedures such that the grievant ultimately was not harmed.<sup>26</sup> Therefore, the Arbitrator concluded that the violations did not affect the grievant's rating, and awarded no remedy.<sup>27</sup>

The Union has not explained how the Arbitrator's findings and conclusion conflict with any specific language in Article 37. Nor has it demonstrated that any provision of the parties' agreement required the Arbitrator to reach a different result. Accordingly, the Union has not established that the Arbitrator's interpretation of Article 37 is irrational, unfounded, implausible, or evidences a manifest disregard of the parties' agreement.<sup>28</sup>

Accordingly, we deny this exception.

#### **IV. Decision**

We deny the exceptions.

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<sup>23</sup> *U.S. Dep't of VA, John J. Pershing VA Md. Ctr., Poplar Bluff, Mo.*, 73 FLRA 67, 69 (2022) (Member Kiko concurring) (citing *SSA, Off. of the Gen. Couns.*, 72 FLRA 554, 555 (2021)).

<sup>24</sup> Award at 15 (stating that the grievant's supervisor's failure to discuss the grievant's rating and provide a copy before requiring the grievant to sign the appraisal violated Art. 37(g)(8)).

<sup>25</sup> *Id.* at 17-18.

<sup>26</sup> *Id.* at 18.

<sup>27</sup> *Id.* at 16-17.

<sup>28</sup> *Broad. Bd. of Governors, Off. of Cuba Broad.*, 66 FLRA 1012, 1018 (2012) (denying essence exception where party failed to

explain how findings conflicted with collective-bargaining agreement). Additionally, the Union's disagreement with the Arbitrator's findings, by itself, does not establish that the award fails to draw its essence from the parties' agreement. *See, e.g., U.S. Dep't of the Air Force, Mar. Air Rsv. Base, Cal.*, 71 FLRA 906, 909 (2020) (then-Member DuBester concurring) (denying essence exception where agency merely disagreed with arbitrator's finding as to whether agency complied with parties' agreement, and failed to specify how the award was otherwise irrational, unfounded, implausible, or in manifest disregard of the agreement (citing *SSA*, 71 FLRA 580, 581 (2020) (then-Member DuBester concurring))).