**64 FLRA No. 89**

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1916
(Union)

and

UNITED STATES
DEPARTMENT OF ENERGY
NATIONAL ENERGY
TECHNOLOGY LABORATORY
PITTSBURGH, PENNSYLVANIA
(Agency)

0-AR-4348

DECISION

February 25, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

## I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Clarence D. Rogers, Jr. filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator concluded that the Agency's implementation of a new performance standard did not violate the parties' agreement. For the reasons that follow, we dismiss the exception relating to § 7116(a)(7) of the Statute, and we deny the remaining exceptions.

## II. Background and Arbitrator's Award

The Agency notified the Union that it intended to implement a new pass/fail performance standard pertaining to safety. The Union responded that: (1) performance-appraisal matters are covered by the agreement; (2) the proposed standard conflicted with the agreement; and (3) the proposed standard could not be implemented without bargaining. Award at 6-7. In reply to the Union, the Agency disagreed with the Union's position and advised the Union that it intended to implement the new standard. After the Agency implemented the new standard, the Union filed a grievance that was submitted to arbitration. *Id.* at 7.

The Arbitrator stated the merits issue to be whether the Agency's implementation of the new standard violated the agreement. [1] He first found that the Agency had provided the Union with the opportunity to bargain over the impact and implementation of the new standard, but that, by its actions, the Union had constructively refused to bargain. In addressing the Agency's implementation of the new standard, the Arbitrator noted that the Union "concede[d] that the Agency has the right to modify or add to performance standards during the term of the agreement as long as the modifications or additions are consistent with the current [agreement]." *Id.* at 14. He further noted that the Agency argued that it has a basic management right to establish performance standards and determine an employee's work performance. The Arbitrator found that the subject matter of the change was not covered by the agreement, and he concluded: "The Management Rights clause contained in Article 4 [of the agreement [2]], coupled with the finding that the new . . . standard is not covered by the existing [agreement], requires me to conclude that the Agency did not violate" the agreement. *Id.* at 16. Based on the foregoing, he denied the grievance. *Id.* at 17.

## III. Positions of the Parties

### A. Union's Exceptions

The Union contends that the award is deficient because it is contrary to the Statute. In particular, the Union asserts that the award is contrary to § 7116(a)(7) [3] because the new standard conflicts with the agreement and was implemented by means of an Agency regulation during the term of that agreement. Exceptions at 3. The Union also asserts that the award is contrary to the Statute because the Arbitrator "misappl[ied] the 'covered by' analytical framework[.]" *Id.* The Union notes that, under the Authority's "covered by" doctrine, further bargaining over a matter is not appropriate when the parties have already bargained and reached agreement on the matter or when the matter is inseparably bound up with a matter covered by the agreement. The Union

1. As a threshold matter, the Arbitrator found that the grievance was arbitrable. Neither party disputes this finding, and it will not be addressed further.

2. Article 4, Section A of the agreement provides, in pertinent part: "Management retains the rights set forth in 5 USC 7106[.]" Award at 3.

3. Section 7116(a)(7) makes it an unfair labor practice for an agency "to enforce any rule or regulation (other than a rule or regulation implementing [5 U.S.C. § 2302]) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date of the rule or regulation was prescribed[.]"

argues that the Agency's change is covered by the agreement and could not be implemented during its term. *Id.* at 7-8.

The Union also contends that the award fails to draw its essence from the agreement. In particular, the Union notes that Article 25 of the agreement [4] provides that employees will be rated by assigning one of four specified rating levels to the employee's performance. The Union claims that Article 25 necessarily means that employees will not be rated under a pass/fail standard and that the award "is a complete nullification of the language of the agreement." *Id.* at 15.

B. Agency's Opposition

The Agency contends that the award is not contrary to the "covered by" doctrine because that doctrine operates as a defense to an alleged unlawful refusal to bargain and does not apply in this case. Opp'n at 6-7. The Agency further contends that the award is not deficient because the Arbitrator "correctly" applied "the contract language found in Article 4, Management Rights[.]" *Id.* at 8. In this connection, the Agency asserts that management's rights to direct employees and assign work encompass the right to establish performance standards and that it exercised that statutory right when it promulgated the new standard. *Id.* at 5.

## IV. Analysis and Conclusions

A. The Union's claim relating to § 7116(a)(7) of the Statute is barred by § 2429.5 of the Authority's Regulations.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, raised or presented to the arbitrator. *E.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008). In its exceptions, the Union asserts that implementation of the new performance standard was precluded by § 7116(a)(7) of the Statute. However, there is no indication in the record that this issue was raised to the Arbitrator. As this issue could have been, but was not, raised before the Arbitrator, the issue is not properly before the Authority. *AFGE Local 1164*, 54 FLRA 856, 860 n.2 (1998) (claim that award was contrary to § 7116(a)(7) barred by § 2429.5). Accordingly, we dismiss the exception pertaining to § 7116(a)(7).

B. The award is not contrary to the "covered by" doctrine.

The Union contends that the award is contrary to the Statute because the Arbitrator misapplied the "covered by" doctrine. The Authority reviews questions of law raised by exceptions to an arbitrator's award *de novo*. *E.g., NTEU Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of *de novo* review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *E.g., NFFE Local 1437*, 53 FLRA 1703, 1710 (1998).

The "covered by" doctrine excuses parties from an obligation to bargain on the basis that they have already bargained and reached agreement concerning a disputed matter. *E.g., Soc. Sec. Admin., Headquarters, Balt., Md.*, 57 FLRA 459, 460 (2001) (*SSA*). It "applies *only* in cases alleging an unlawful refusal to bargain." *Soc. Sec. Admin.*, 64 FLRA 199, 202 (2009) (Member Beck dissenting as to another matter) (emphasis in original).

The Union does not allege that the Agency unlawfully refused to bargain. Although the Union claims that the agreement did not permit the Agency to implement the new standard, the Union does not seek to bargain over the new standard. Moreover, as specifically noted by the Arbitrator, the Union conceded that the Agency had the right to modify or add to performance standards during the term of the agreement when consistent with the agreement. Accordingly, the "covered by" doctrine does not apply. [5] *Id.* Based on the foregoing, we deny this exception.

C. The award does not fail to draw its essence from the agreement.

For an award to be found deficient as failing to draw its essence from the collective bargaining agreement, it must be established 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; and (4) evidences a manifest disregard of the agreement. *E.g., U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990).

4. Article 25 provides, in pertinent part, that performance appraisal plans shall: "Utilize the following performance level ratings . . . : Significantly Exceeds Expectations (SE), Meets Expectations (ME), Need Improvement (NI), and Fails to Meet Expectations (FME)." Award at 4.

5. Because the "covered by" doctrine does not apply, it is unnecessary for us to address whether the Arbitrator misapplied that doctrine. *SSA*, 57 FLRA at 461 n.4.

The Union contends that the award is deficient because the award nullifies Article 25 of the agreement, which provides for four rating levels. *See* Exceptions at 14-15. However, the Union does not address the Arbitrator's reliance on Article 4 of the agreement, which retains management's right to act in accordance with § 7106 of the Statute.

As discussed previously, in denying the grievance, the Arbitrator noted that the Union conceded that the Agency had the right to modify or add to performance standards during the term of the agreement when consistent with the agreement, and he found that "[t]he Management Rights clause contained in Article 4, coupled with the finding that the new . . . standard is not covered by the existing [agreement], requires me to conclude that the Agency did not violate the [agreement][.]" Award at 16. As asserted by the Agency, management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute encompass the authority to establish performance standards. *E.g.*, *AFGE Council 238*, 62 FLRA 350, 351-52 (2008). As such, it is not contrary to § 7106(a)(2)(A) and (B) for an arbitrator to find that an agency may alter the number of performance-rating levels without bargaining, even if a different number is set forth in an agreement. *Id.* at 352. Given this precedent, and the Arbitrator's reliance on Article 4's retention of management rights under the Statute, it was not irrational, implausible, unfounded, or in disregard of the agreement for the Arbitrator to interpret and apply Article 4 to allow the Agency to alter the four-tier performance appraisal system of Article 25. *See id.* at 352 (award finding that agreement provision requiring two-tier performance appraisal system could be altered by the agency was not contrary to law). Accordingly, we deny this exception.

## V. Decision

The exception pertaining to § 7116(a)(7) of the Statute is dismissed; the remaining exceptions are denied.