65 FLRA No. 143

UNITED STATES
DEPARTMENT OF THE ARMY
DEFENSE LANGUAGE INSTITUTE
MONTEREY, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1263
(Union)

0-AR-4531

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DECISION

March 31, 2011

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

I. Statement of the Case

The matter is before the Authority on exceptions to an award of Arbitrator Walter N. Kaufman filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.[1]

The Arbitrator concluded that the Agency violated the parties' agreement by failing to rate properly the grievant's job performance. He ordered the Agency to raise the grievant's rating. For the reasons set forth below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency utilizes a five-tier numerical rating system to determine its employees' annual performance rating (overall rating). *See* Award at 3-4. The highest possible number an employee can receive is a one and the lowest number is a five. *Id.* at 4 & n.1. The Agency determines an employee's overall rating by adding together the scores of eight performance standards (standards). *Id.* at 3. As with the overall rating, the Agency relies on a five-tier numerical scale to determine the score for each standard. Standards receiving a score of one are labeled with an "exceed"; twos and threes are labeled "successful"; fours are labeled as "fair" or "needs improvement"; and fives are labeled "unsuccessful" or "fails." *Id.* at 4 & n.1 (internal quotation marks omitted).

The grievant, a language teacher within the Agency, received a score of "exceed" for five standards for the 2006-07 rating period and a "successful" for the remaining three standards. *Id.* at 4. The standards rated as "successful" were "Teaching: Quality and Quantity," "Teaching: Use of Target Language" (Target Language), and "Technology[.]" *Id.* The Agency added the grievant's standard scores and determined that her overall rating was a two. *Id.* In her previous performance appraisal, the grievant received an "exceed" for all eight standards and a one for her overall rating. *Id.*

The Union filed a grievance arguing, as relevant here, that the grievant's three "successful" scores and her overall rating were a violation of Article 25, Sections 4[2] and 7(A)(2)[3] of the parties' agreement. *Id.* at 1 (citation

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1. In its opposition, the Union asserts that it did not receive a complete copy of the Agency's exceptions. Opp'n at 1 n.1. The Agency filed a supplemental submission pursuant to § 2429.26 of the Authority's Regulations requesting leave solely to respond to the Union's assertion. *See* Agency Supplemental Submission at 1. The Union has not averred that it was prejudiced by the Agency's supposed error; thus, this error is not at issue. *See, e.g., IFPTE, Local 77, Prof'l & Scientists Org.,* 65 FLRA 185, 188 (2010) (where agency did not "claim that it was prejudiced" by alleged procedural deficiencies, Authority denied agency's motion to strike the exceptions). Because this error is not at issue, it is unnecessary to consider the Agency's supplemental submission addressing it. *See, e.g., U.S. Dep't of Homeland Sec., Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Wash., D.C.,* 63 FLRA 406, 407 (2009) (citation omitted) (denying party's request to file supplemental submission because submission was deemed unnecessary), *reconsid. denied* 63 FLRA 600 (2009).

2. Article 25, Section 4 of the parties' agreement states:

> The employee's performance will be evaluated on a continuing basis. When there are indications that an employee is not meeting the established performance standards (i.e., the expressed measures of achievement[)] a meeting will be arranged with the employee to discuss the performance in question, and determine the efforts and/or training required to improve the employee's performance.

Exceptions, Attach. 3 at 38.

omitted). The Arbitrator framed the issue as "whether [the] [g]rievant's performance appraisal for the October 1, 2006-September 30, 2007 period was . . . in violation of applicable law or the [parties' agreement]; and if so, what the remedy should be."[4] Award at 2.

The Arbitrator concluded that the Agency violated the parties' agreement by scoring the grievant's Target Language standard as successful. *Id.* at 17. According to the Arbitrator, Article 25, Section 4 of the parties' agreement placed a duty on the Agency to inform the grievant if her performance was not "meeting the established performance standards[.]" *Id.* at 15 (quoting Article 25, Section 4). Similarly, the Arbitrator found that, under Article 25, Section 7(A)(2), the Agency was required to counsel the grievant if it discovered any shortcomings in her performance. *Id.* at 15 (quoting Article 25, Section 7(A)(2)). The Arbitrator found that the Agency had knowledge that the grievant's Target Language score could drop one level. *See id.* at 16. The Arbitrator, accordingly, determined that the Agency should have counseled the grievant about her performance. He further concluded that, had the Agency counseled the grievant, she would have taken steps to improve her score. *Id.* at 17.

In reaching the above conclusion, the Arbitrator rejected the Agency's claim that the parties' agreement does not mandate counseling when an employee's standard score drops one level. According to the Arbitrator, the agreement requires counseling when *any* "shortcomings" are identified; it is not limited to situations involving "imminent failure[.]" *Id.* at 15-16. The Arbitrator also found that Article 25, Sections 4 and 7(A)(2) are procedures and appropriate arrangements as defined in § 7106(b)(2) and (3) of the Statute, respectively. *Id.* at 16.

The Arbitrator sustained the Union's grievance in part and denied it in part.[5] "[B]y way of reconstructing" what action the Agency would have taken but for its contractual violation, the Arbitrator cancelled the grievant's "[succeed]" score for the Teaching Language standard and ordered the Agency to raise it to an "[exceed]." *Id.* at 17. Based on this change, the Arbitrator also ordered the Agency to raise the grievant's overall rating from a two to a one. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency first argues that the award fails to draw its essence from the parties' agreement. According to the Agency, Article 25, Sections 4 and 7(A)(2) do not require the Agency to counsel an employee when one of her standard scores could drop from the previous year's score. *See* Exceptions at 4-5. The Agency avers that Section 4 defines the phrase "meeting the established performance standards" as the "expressed measure of achievement." *Id.* at 5 (emphasis omitted). Thus, according to the Agency, Section 4 mandates counseling only when an employee is not performing successfully; it does not address an employee's inability to maintain a higher score. *See id.* The Agency also argues that Section 7(A)(2) requires counseling only when a supervisor identifies "*shortcomings* in [an] employee's performance." *Id.* (emphasis in original). The Agency contends that dropping from an "exceed" score to a "succeed" score logically cannot be considered a "shortcoming"; as such, Section 7(A)(2) did not apply to the grievant. *Id.*

The Agency next asserts that the Arbitrator's award affects management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute, respectively. *See id.* at 6 (citing *U.S. Dep't of the Army, U.S. Army Aviation & Missile Command, Redstone Arsenal, Ala.,* 58 FLRA 400, 403 (2003) (*Redstone*)). Accordingly, the Agency contends that the Authority should apply the two-prong test set forth in *United States Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.,* 53 FLRA 146, 153-54 (1997) (*BEP*) and conclude that the award violates management's rights. *See* Exceptions at 6 (citing *Redstone*, 58 FLRA at 403). The Agency contends that the award does not satisfy prong I of *BEP* because the Agency did not violate the parties' agreement. *See id.* at 7. The Agency further argues that

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3. Article 25, Section 7(A)(2) of the parties' provides in relevant part:

> The evaluation given employees by their supervisors shall be objective and shall be prepared in accordance with the following . . . [i]f the immediate supervisor has identified shortcomings in the employee's performance, the employee will be notified as promptly as possible and at the six months discussion.

Exceptions, Attach. 3 at 39.

4. The Union also contended that the grievant's overall rating was reprisal for Union activities, Award at 6-8, a claim that the Arbitrator rejected, *id.* at 8. Neither party contests this determination. Accordingly, we do not address it further.

5. The Arbitrator found that the Agency scored the grievant's other two standards properly. Award at 13, 19. Neither party disputes these findings. Accordingly, we do not address them further.

the award does not satisfy prong II of *BEP* because the Arbitrator failed to reconstruct what action the Agency would have taken in the absence of its alleged contractual violation. *See id.* at 7-8.

B. Union's Opposition

The Union rejects the Agency's assertion that the award fails to draw its essence from the parties' agreement. The Union contends that Article 25, Section 7(2)(A) clearly requires the Agency to counsel an employee if that employee's standard score drops from the previous year's score, even if it only drops one level. *See* Opp'n at 3. The Union further argues that nothing in the parties' agreement states that the Agency will counsel an employee only when that employee is failing the Agency's performance standards altogether. *See id.* at 4 (citing Exceptions at 5).

The Union also disagrees that the award is contrary to law. The Union does not dispute the Agency's assertion that the award affects management's rights to direct employees and assign work; however, it contends the award was proper because the Arbitrator determined that the Agency violated the parties' agreement. *See id.* at 7. Further, the Union contends that the Arbitrator properly reconstructed what action the Agency would have taken in the absence of its contractual violation. *See id.* at 7-8.

IV. Analysis and Conclusions

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

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, 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 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. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990) (*DOL*). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id*. at 576.

The Agency claims that the award fails to draw its essence from the parties' agreement because Article 25, Sections 4 and 7(A)(2) cannot be interpreted as mandating counseling when a standard score drops one level. Article 25, Section 4 of the parties' agreement states that "a meeting will be arranged with [an] employee to discuss [her] performance" when that "employee is not meeting the established performance standards (i.e., the expressed measures of achievement[)]." Exceptions, Attach. 3 at 38. Similarly, Article 25, Section 7(2)(A) states "[i]f the immediate supervisor has identified shortcomings in [an] employee's performance, the employee will be notified as promptly as possible[.]" *Id.*, Attach. 3 at 39. The Arbitrator interpreted the foregoing as meaning that the Agency must counsel an employee when his or her standard scores could drop from the previous year's scores. He also found that nothing in the foregoing language indicates that these contract provisions apply only when an employee is "failing to meet a standard altogether." Award at 15-16 (citation omitted). Although others may interpret the phrases "not meeting the established performance standards" and "shortcomings in an employee's performance" differently than the Arbitrator, his interpretations are not implausible. *See, e.g., U.S. Dep't of Health & Human Servs., Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 572-73 (2011) (*DHHS*); *DOL*, 34 FLRA at 575-76.

The Agency's arguments do not lead us to a different conclusion. The Agency claims that Article 25, Section 4 defines the term "meeting the established performance standards" as the "expressed measure of achievement." Exceptions at 5. According to the Agency, this language mandates that Section 4 applies *only* when an employee is failing at their performance. *See id.* The Agency cites no language in Section 4 that states "meeting the established performance standards," or any other part of Section 4, applies solely to unsuccessful performances. *Id.* The Agency also asserts that "shortcomings," as used in Article 25, Section 7(A)(2), cannot logically be interpreted as referring to any situation where a standard score merely drops one level. *Id*. However, the Agency offers no language from the parties' agreement that defines "shortcomings," or otherwise states what, if any, limits are placed on the use of that word. *Id.* The foregoing, in conjunction with the deference afforded to the Arbitrator's interpretation of the agreement, does not lead to a conclusion that the Arbitrator's interpretation is irrational. *See DHHS,* 65 FLRA at 572-73.

Based on the foregoing, we find that the Agency has not demonstrated that the Arbitrator's interpretation

of Article 25, Sections 4 and 7(A)(2) fails to draw its essence from the parties' agreement.

B. The award is not contrary to law.

The Authority reviews questions of law raised by exceptions to an arbitrator's award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *Id.*

The Agency contends that the Arbitrator's award impermissibly affects management's rights to direct employees and assign work under §§ 7106(a)(2)(A) and (B) of the Statute, respectively. The Authority recently revised the analysis that it will apply when reviewing management-rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC, S.F. Region*). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b). *Id.* Furthermore, in setting forth the revised analysis, the Authority rejected the continued application of the "reconstruction" requirement set forth in *BEP*. *FDIC, S.F. Region,* 65 FLRA at 106-07.

The Union does not dispute the Agency's assertion that the award affects management's right to direct employees and assign work under the Statute. *See* Opp'n at 6-8. We, therefore, assume that the award affects the foregoing rights. *See, e.g., SSA,* 65 FLRA 339, 341 (2010). We next examine whether the award enforced properly negotiated provisions. *See id.*

The Agency asserts that the award is contrary to management's rights under the Statute because the Agency did not violate the parties' agreement. *See* Exceptions at 7. This is not the appropriate inquiry; rather, the Authority looks to whether the Arbitrator enforced properly negotiated contract provisions. *E.g., EPA,* 65 FLRA at 115. The Arbitrator found that Article 25, Sections 4 and 7(A)(2) are procedures and appropriate arrangements as defined in the Statute. *See* Award at 16. The Agency does not dispute this conclusion. Moreover, as stated above, the Arbitrator's determination that the Agency violated the parties' agreement is not deficient. Accordingly, we find that the award enforces properly negotiated contractual provisions.

The Agency next argues that the award is deficient under *BEP* because the Arbitrator failed to reconstruct what management would have done had it complied with the parties' agreement. However, as noted above, the Authority no longer requires that an arbitrator's remedy reconstruct what management would have done had it not violated the contract provision. *FDIC,* 65 FLRA 179, 181 (2010). Moreover, Article 25, Sections 4 and 7(A)(2) are properly negotiated contract provisions. The Arbitrator's award enforces these provisions. Accordingly, we find that the award does not impermissibly affect management's rights by failing to reconstruct what the Agency would have done had it not violated the contract.[6] *See, e.g., SSA,* 65 FLRA at 342 (citation omitted); *FDIC,* 65 FLRA at 181.

Accordingly, we find that the award is not contrary to management's rights to direct employees and assign work.[7]

V. Decision

The Agency's exceptions are denied.

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6. For the reasons set forth in her concurring opinion in *FDIC, S.F. Region*, 65 FLRA at 112, Chairman Pope agrees that the Agency provides no basis for finding the Arbitrator's remedy deficient because the remedy is reasonably related to Article 25, Sections 4 and 7(A)(2) and the harm being remedied.

7. Member Beck agrees with the conclusion to deny the Agency's exception. He does not agree, however, with his colleagues' analysis insofar as they address the question of whether the award affects the exercise of an asserted management right. For the reasons discussed in his concurring opinion in *EPA*, 65 FLRA 113, Member Beck concludes that where, as here, the Arbitrator is enforcing a contract provision that has been accepted by the Agency as a permissible limitation on its management's rights, it is inappropriate to assess whether the provision itself is an appropriate arrangement or whether it abrogates a § 7106(a) right. *Id.* at 120 (Concurring Opinion of Member Beck). The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *Id.*; *see also FDIC, S.F. Region*, 65 FLRA at 107. Member Beck concludes that the Arbitrator's award is a plausible interpretation of the parties' agreement. Accordingly, Member Beck agrees that the Agency's exception should be denied.