

65 FLRA No. 196

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 738
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
COMBINED ARMS CENTER AND
FORT LEAVENWORTH
FORT LEAVENWORTH, KANSAS
(Agency)

0-AR-4726

DECISION

June 27, 2011

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 Michael D. Gordon 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 determined that the Agency did not violate applicable law or the parties' agreement in evaluating the grievant's performance, and denied the grievance. For the following reasons, we dismiss the Union's exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of the grievant after he received an "unsuccessful" overall rating on his performance evaluation. Award at 14. The grievance was unresolved and submitted to arbitration, where the Arbitrator framed the issue as: "Did [the] [g]rievant's . . . [p]erformance [e]valuation violate applicable law and/or the [parties' agreement][;] and, if so . . . [w]hat is the appropriate remedy?" *Id.* at 3.

As an initial matter, the Arbitrator identified Article XVIII, Sections 1 and 3 and Article XXIX, Section 2(c) as the relevant provisions of the parties' agreement.¹ *Id.* He found that "[a]n evaluation must be in good faith and supported by convincing, demonstrable facts that reflect Article XVIII[s] values and safeguards[.]" and that, "[i]n [the] instan[t] [case], the Agency satisfied these criteria[.]" *Id.* at 28. The Arbitrator further found that "[a]ny Article XXIX deficiencies either involve ministerial requirements with no direct impact on the evaluation itself or other collateral matters that [do] not diminish its legitimacy." *Id.* at 29. In addition, he determined that the Agency did not violate applicable law in evaluating the grievant. *Id.* at 23, 29. Accordingly, he denied the grievance. *Id.* at 29.

III. Positions of the Parties**A. Union's Exceptions**

The Union argues that the Arbitrator "created harmful errors by asking management how he should rule[.]" "fighting with the Union rep[.]" and "not identifying or holding management accountable for [its] failure to comply with": (1) "due process in the evaluation and arbitration processes"; (2) "5 U.S.C. [C]hapter 43 and [§] 5307(d) and 5 C.F.R. [part] 430"; (3) "the Negotiated Agreement"; (4) its obligation to provide "truthful testimony," as well as data that is "legally required" under "5 U.S.C. § 7101"; and (5) the Union's "request for witnesses." Exceptions at 1-2. The Union also argues that the Agency failed to comply with "AR 690-400 Chapter 4302 Total Army Performance Evaluation System[.]" as well as "the Occupational Safety and Health Act [(OSHA)] of 1970, 29 [U.S.C.] [§] 660 & [§] 2112 of title 28, United States Code Pub. L. 98-620 &

1. Article XVIII, Section 1 provides, in pertinent part: "The performance appraisal system shall provide fair, accurate and objective evaluation of job performance. Each employee's evaluation shall be directly related to their official duties. Management shall provide assistance to employees in meeting performance standards." Award at 3.

Article XVIII, Section 3 provides, in pertinent part: "Standards used for the evaluation or performance shall be fair, valid, objective, attainable and communicated in writing to each employee at the beginning of the rating period." *Id.*

Article XXIX, Section 2(c), provides, in pertinent part: "A grievance is defined to be a dispute or complaint between the Employer and the Union or employee(s) covered by this agreement, pertaining to the following: . . . [m]atters involving . . . the interpretation and application of agency policies, regulation, and practices whether specifically covered by this agreement or not." *Id.* at 4.

SEC. 11, Executive Order 12196, OSHA 29 [C.F.R.] [part] 1960, DODI 6055.1, DODI 6055.5, AR 385-10 and AR 40-5[.]” *Id.* at 1. The Union’s remaining exceptions quote testimony and summarize evidence presented at the hearing. *See id.* at 2-138.

B. Agency’s Opposition

The Agency contends that “the creation of ‘harmful errors’ is not a specific ground for review of an arbitrator’s award as provided for in 5 [C.F.R.] § 2425.6[.]” and, therefore, the exceptions “must be dismissed in [their] entirety.” *Opp’n* at 4, 6. In this connection, the Agency asserts that the Union “does not provide any justification in support of its ‘harmful errors’ claim[] other than [its] reference to the arguments contained in its post-hearing brief.” *Id.* at 6.

IV. Analysis and Conclusions

The Authority’s Regulations specifically enumerate the grounds that the Authority currently recognizes for reviewing awards. *See* 5 C.F.R. § 2425.6(a)-(b). In addition, the Regulations provide that if exceptions argue that an arbitration award is deficient based on private-sector grounds not currently recognized by the Authority, then the excepting party “must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions.” 5 C.F.R. § 2425.6(c).

Further, § 2425.6(e)(1) of the Regulations provides that an exception “may be subject to dismissal or denial if: . . . [t]he excepting party fails to raise and support” the grounds listed in § 2425.6(a)-(c), “or otherwise fails to demonstrate a legally recognized basis for setting aside the award[.]” 5 C.F.R. § 2425.6(e)(1). Thus, an exception that does not raise a recognized ground is subject to dismissal under the Regulations. *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting in part) (*Local 3955*).

The Union’s contentions that the Arbitrator created “harmful errors” and that the Agency failed to comply with various laws do not constitute grounds currently recognized by the Authority for reviewing awards. *See* 5 C.F.R. § 2425.6(a)-(b). As the Union does not raise a recognized ground or cite legal authority to support a ground not currently

recognized by the Authority, we dismiss the exceptions. *See Local 3955*, 65 FLRA at 889.²

V. Decision

The Union’s exceptions are dismissed.

2. Member Beck notes that he would contrast this case from *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 891 (2011) for the reasons articulated in his dissent in that case. He would instead compare this case with *Fraternal Order of Police, Pentagon Police Labor Committee*, 65 FLRA 781 (2011) where the Union failed to explain adequately how the award was deficient. In this case, the Union relies upon sheer volume (128 pages of testimony and evidence that was presented to the Arbitrator), rather than a clear and articulable ground, to support its exception.