

**67 FLRA No. 74**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 788  
(Union)

and

UNITED STATES  
DEPARTMENT OF ENERGY  
RICHLAND OPERATIONS OFFICE  
OFFICE OF RIVER PROTECTION  
(Agency)

0-AR-4943

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DECISION

February 27, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

Arbitrator David Gaba found that the Agency did not violate the parties' collective-bargaining agreement when it reduced the amounts of annual performance awards due to unavailable funds. There are three questions before us.

The first is whether the Arbitrator denied the Union a fair hearing by engaging in ex parte communications with the Agency. Because the Union has not established that the ex parte communications with the Agency so prejudiced the Union as to affect the fairness of the proceeding as a whole, the answer is no.

The second is whether the award is deficient because the Arbitrator was biased. Because the Union has not demonstrated that the award was procured by improper means, that the Arbitrator was partial or corrupt, or that his ex parte communications with the Agency prejudiced the Union, the answer is no.

The third is whether the award fails to draw its essence from the parties' agreement. Because the Union has not demonstrated that the Arbitrator's interpretation of the agreement is irrational, unfounded, implausible, or in manifest disregard of its terms, the answer is no.

**II. Background and Arbitrator's Award**

The parties' agreement provides for annual performance awards. Specifically, Article 14, Section 14.09 states that, for each fiscal year, the Agency "shall designate the funding level it will allocate" for performance awards "[b]ased on available funding."<sup>1</sup> The agreement also requires that employees eligible for performance awards be granted a specified percentage of their base pay "subject to the availability of funds allocated" for each fiscal year.<sup>2</sup> In 2011, the Office of Personnel Management (OPM) and the Office of Management and Budget issued a memorandum that limited agency performance awards. In response to the memorandum, the Agency reduced the amount it had previously designated for fiscal year 2012 performance awards.

The Union filed a grievance challenging the Agency's reduction of the amounts of performance awards. The grievance went to arbitration.

The Arbitrator framed the issue as: "Whether the [Agency] violated Article [14, Section] 14.09 of the [parties' agreement] when it paid annual performance awards for [f]iscal [y]ear 2012 in compliance with the [d]irective [i]ssued by [OPM]."<sup>3</sup>

Before the Arbitrator issued the award, the Agency sent him several emails concerning administrative matters about when and how the award would issue. The Union was not copied on these emails.

The Arbitrator then issued the award, finding that the parties' agreement "limit[s] the [Agency]'s duty to pay" performance awards when funding is unavailable.<sup>4</sup> And he determined that, under OPM's directive to reduce spending on awards, funding was unavailable for performance awards for fiscal year 2012. The Arbitrator therefore found that the Agency did not violate the parties' agreement when it reduced the amount of the performance awards, and he denied the grievance.

The Union filed exceptions to the Arbitrator's award, and the Agency filed an opposition to the Union's exceptions.

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<sup>1</sup> Award at 9, 23.

<sup>2</sup> *Id.* at 10.

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

<sup>4</sup> *Id.* at 27-28.

### III. Analysis and Conclusions

#### A. The Arbitrator did not deny the Union a fair hearing.

The Union claims that the Arbitrator denied it a fair hearing.<sup>5</sup> The Authority will find that an arbitrator denied a fair hearing when the excepting party demonstrates that the arbitrator refused to hear or consider pertinent or material evidence or conducted the proceedings in a manner that so prejudiced a party as to affect the fairness of the proceedings as a whole.<sup>6</sup> Under this standard, in order to demonstrate that an arbitrator's ex parte contact rendered an award deficient, a party must show that the contact so prejudiced that party as to affect the fairness of the proceedings as a whole.<sup>7</sup>

The Union contends that the ex parte communications between the Arbitrator and the Agency affected the fairness of the proceedings.<sup>8</sup> According to the Union, the communications prejudiced the Union because the Union could not evaluate what the Arbitrator and the Agency discussed.<sup>9</sup> The Union also contends that the communications violated the agreement between the parties and the Arbitrator concerning ex parte emails, and that an "argument can be made that the [A]rbitrator gave preferential treatment" to the Agency because "the decision was unfavorable to the Union."<sup>10</sup> Finally, the Union alleges, the Arbitrator "unfairly considered documentation" that the Agency sent to the Arbitrator but not to the Union.<sup>11</sup>

The record shows that the ex parte communications are emails that the Arbitrator and the Agency exchanged regarding administrative matters about how and when the award would issue.<sup>12</sup> And, other than these emails, the record does not reveal any other "documentation" on which the Union was not copied.<sup>13</sup> The Union fails to demonstrate how these ex parte communications so prejudiced the Union as to affect the fairness of the proceedings as a whole.<sup>14</sup> Accordingly, the Union has not demonstrated that the Arbitrator denied it a fair hearing, and we deny this exception.<sup>15</sup>

#### B. The Arbitrator was not biased.

The Union also claims that the Arbitrator was biased because he engaged in the ex parte communications with the Agency.<sup>16</sup> To establish bias, the excepting party must demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party.<sup>17</sup>

As discussed above, the ex parte communications between the Arbitrator and the Agency concerned administrative matters about how and when the award would issue.<sup>18</sup> The Union provides no basis for finding that the Arbitrator's actions prejudiced the Union, that he was partial or corrupt, or that the award was procured by improper means.<sup>19</sup> Accordingly, we deny this exception.

#### C. The award draws its essence from the parties' agreement.

The Union claims that the award fails to draw its essence from the parties' agreement.<sup>20</sup> When 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.<sup>21</sup> 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.<sup>22</sup> The courts defer to the arbitrator's interpretation of the collective-bargaining agreement "because it is the arbitrator's construction of the agreement for which the parties have bargained."<sup>23</sup>

<sup>5</sup> Exceptions at 5.

<sup>6</sup> *U.S. Dep't of Transp., FAA*, 65 FLRA 320, 323 (2010) (*FAA*).

<sup>7</sup> *AFGE, Local 1709*, 57 FLRA 711, 713-14 (2002) (*Local 1709*).

<sup>8</sup> Exceptions at 5.

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

<sup>10</sup> *Id.*; see also Exceptions, Attach. 3.

<sup>11</sup> Exceptions at 5.

<sup>12</sup> Exceptions, Attach. 4.

<sup>13</sup> Exceptions at 5.

<sup>14</sup> *Local 1709*, 57 FLRA at 713 (finding that union failed to establish that ex parte visit by the arbitrator to worksite prejudiced proceedings as a whole).

<sup>15</sup> *FAA*, 65 FLRA at 323.

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

<sup>17</sup> *AFGE, Local 1938*, 66 FLRA 741, 743 (2012) (*Local 1938*).

<sup>18</sup> Exceptions, Attach. 4.

<sup>19</sup> *Local 1938*, 66 FLRA at 743; see also, e.g., *U.S. Dep't of the Air Force, Air Force Logistics Command, Hill Air Force Base, Utah*, 34 FLRA 986, 990 (1990) (finding award not deficient where ex parte communication between agency and arbitrator had occurred, and union failed to show arbitrator bias).

<sup>20</sup> Exceptions at 6-7.

<sup>21</sup> 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

<sup>22</sup> See, e.g., *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*).

<sup>23</sup> *Id.* at 576.

The Arbitrator found that Article 14, Section 14.09 of the parties' agreement requires the Agency to fund performance awards when funding is available, and that the parties' agreement relieves the Agency from this obligation when funding is not available.<sup>24</sup> The Arbitrator also found that, under OPM's directive to agencies to reduce spending on awards, funding was not available.<sup>25</sup> The Union argues that the Arbitrator "incorrectly determined that funds were not available,"<sup>26</sup> because funds had already been designated for performance awards before the OPM directive.<sup>27</sup> But the Union does not argue that the award is based on a nonfact, and expressly states that it does not raise a nonfact exception.<sup>28</sup> Further, the Union does not demonstrate that the Arbitrator's interpretation of Article 14, Section 14.09 is irrational, implausible, unfounded, or in manifest disregard of the agreement.<sup>29</sup>

In its essence exception, the Union also asserts that the Arbitrator failed to address certain issues concerning the Agency's decision to allocate 75% of the award fund to performance awards and 25% to special awards, and the Agency's alleged violation of a previous arbitrator's ruling concerning the meaning of "available funding."<sup>30</sup> But the Union expressly states that it does not raise an exceeded-authority exception to the award,<sup>31</sup> and the Union provides no basis for finding the award irrational, implausible, unfounded, or in manifest disregard of the agreement.

Accordingly, we deny the Union's essence exception.

#### **IV. Decision**

We deny the Union's exceptions.

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<sup>24</sup> Award at 26-27.

<sup>25</sup> *Id.* at 28, 30.

<sup>26</sup> Exceptions at 7.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 6.

<sup>29</sup> See *OSHA*, 34 FLRA at 576.

<sup>30</sup> Exceptions at 7; see also Award at 17-18 (internal quotation marks omitted).

<sup>31</sup> Exceptions at 6, 8.