69 FLRA No. 17

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3320
(Union)

and

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
(Agency)

0-AR-5122

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DECISION

December 18, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

In fiscal year (FY) 2012, the Agency conducted a lottery to determine the order in which bargaining-unit employees at the Agency's Fort Worth Center, who earned an overall outstanding rating, could elect to receive either a quality-step-increase (QSI) or a cash award. Although eighteen bargaining-unit employees were eligible, only one QSI was available to these employees due to budgetary constraints. The Union filed a grievance on behalf of one eligible employee (the grievant) who did not receive a QSI. Arbitrator Frederick Ahrens found that the Agency did not violate the parties' collective-bargaining agreement when it used a lottery method to determine the order in which eligible employees could express a preference for, and thus receive, the available QSI. There are three principal, substantive, questions before us.

The first question is whether the award fails to draw its essence from the parties' agreement. The Union makes two primary claims. First, the Union claims that, contrary to the award, Article 11, Section 2 of the parties' agreement requires the Agency to determine and consider all eligible employees' award preferences before determining who should receive the QSI. But the Union fails to demonstrate that the parties' agreement specifies any particular method for considering employee award preferences. Second, the Union claims that, contrary to the award, the Agency's use of a lottery was not "fair and equitable," and therefore violated Article 11, Section 5 of the parties' agreement. But the Union does not demonstrate that use of a lottery is not "fair and equitable" under the parties' agreement. Therefore, because the Union fails to show that the award's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

The second question is whether the award is contrary to law. The Union makes several contrary-to-law claims. Primarily, the Union claims that the Arbitrator imposed "an improper burden" of proof on the Union.[1] Because the Union's claim is based on a misinterpretation of Authority precedent, and the Union fails to support its remaining contrary-to-law claims, the answer is no.

The third question is whether the award is based on two nonfacts. First, the Union claims that the award is based on the "false factual statement" that the Agency "considered employee [award] preference."[2] As this factual matter was disputed at arbitration, the finding cannot be challenged on nonfact grounds before the Authority. The Union also claims that "[t]he [a]ward is . . . based on [the] nonfact [of the lottery method used by the Agency] being fair and equitable."[3] However, whether the lottery method is fair and equitable is a matter of contract interpretation – analyzed in Section IV.A. below as a Union essence claim – and not a fact that can be challenged on nonfact grounds. Therefore, the answer is no.

II. Background and Arbitrator's Award

The Agency employs the grievant in the intake branch of the Office of Fair Housing and Equal Opportunity in the Agency's Fort Worth Center. Consistent with the Agency's incentive-awards program, employees who earn an overall outstanding rating are eligible to receive either a QSI or a cash award, subject to budgetary availability. For FY 2012, only one QSI was available for bargaining-unit employees at the Fort Worth Center due to budgetary constraints. All remaining eligible employees would receive a cash award. The grievant was one of eighteen bargaining-unit employees who earned an overall outstanding rating.

The Agency decided to use a lottery method to determine the order in which eligible employees in the Fort Worth Center could elect either the one available QSI or a cash award.

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[1] Exceptions at 13.
[2] *Id.* at 9.
[3] *Id.*

For the lottery, the Agency wrote the names of the eligible employees on pieces of paper which were apparently placed in a "coffee can,"[4] and a Union representative then randomly drew one name at a time. The first employee whose name was drawn elected to receive a cash award, but the second employee opted for the QSI. Because the QSI had been selected, there was no reason to continue drawing names, and the lottery was over. As the grievant's name was not drawn in the lottery, she was not asked about her award preference or offered a QSI. She received a cash award.

The grievant filed a grievance expressing her dissatisfaction with the process the Agency followed. The Union and the Agency did not resolve the grievance, and it was submitted to arbitration. At arbitration, the parties did not agree on the issues, so the Arbitrator framed them as: "[D]id the Agency violate the [parties' agreement], Article[] 11[, Section] . . . 2, Article 4, and Article 11[, Section] 5 when it used a lottery to determine the order of the eligible employees and then their preference[s] to receive a [QSI] or a cash award[?]"[5]

Before the Arbitrator, the Union argued that the lottery was "unfair and inequitable,"[6] and not "an appropriate selection process"[7] under the parties' agreement. The Agency disagreed.[8]

Concerning the contract provisions at issue, Article 11, Section 2 states, in pertinent part, that "[the Agency] shall consider employee preference in the determination of which of the two . . . types of awards shall be granted."[9] Article 11, Section 5 states, in pertinent part, that "[t]he methodology used by [the Agency] to establish and give awards . . . shall be developed and applied in a fair and equitable manner."[10] Article 4, Section 1 states, in pertinent part, that "[e]mployees shall be treated fairly and equitably."[11]

The Arbitrator "consider[ed] . . . the evidence submitted [by the parties,] and the hearing testimony," and denied the Union's grievance.[12] Concluding that the Agency did not violate the identified provisions of the parties' agreement "when it used a lottery to determine the order of the eligible employees and then their preference to receive a [QSI] or a cash award,"[13] the Arbitrator found that "[the Agency] is not required to take the employee's choice[;] it is *required only to consider* the employee[']s preference."[14]

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

III. Preliminary Matter: §§ 2425.4(c) and 2429.5 bar the Union's public-policy exception.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented before the Arbitrator.[15]

In its exceptions, the Union claims that the award is contrary to public policy.[16] Specifically, the Union argues that the award erroneously upholds the Agency's action even though "[t]he Agency[] did not follow the [parties' agreement,] which was . . . negotiated in good faith and for the public interest."[17]

The record indicates that, in the proceeding before the Arbitrator, the Union was aware of the issue on which it now bases its public-policy exception – that the Agency allegedly violated the parties' negotiated agreement.[18] But the Union did not make a public-policy argument to the Arbitrator. As the Union could have, but did not, present this argument to the Arbitrator, we find that §§ 2425.4(c) and 2429.5 bar the Union's public-policy exception, and we dismiss that exception.[19]

IV. Analysis and Conclusions

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

The Union claims that the award fails to draw its essence from the parties' agreement for two primary reasons. First, the Union claims that, contrary to the award, Article 11, Section 2 of the parties' agreement requires the Agency to determine and consider all eligible employees' award preferences before determining who should receive the QSI.[20] Second, the Union claims that, contrary to the award, the Agency's use of a lottery was

[4] *Id.* at 7.
[5] Award at 3-4.
[6] Union's Post Hr'g Br. at 11.
[7] *Id.* at 13.
[8] Agency's Post Hr'g Br. at 9-15.
[9] Exceptions, Attach., Collective Bargaining Agreement (CBA) at 42.
[10] *Id.* at 43.
[11] *Id.* at 9.
[12] Award at 5.
[13] *Id.* at 4.
[14] *Id.* at 5 (emphasis added).
[15] 5 C.F.R. §§ 2425.4(c), 2429.5; *e.g.*, *NTEU, Chapter 83*, 68 FLRA 945, 947 (2015) (citing *AFGE, Local 3571*, 67 FLRA 218, 219 (2014)).
[16] Exceptions at 11-12.
[17] *Id.* at 12.
[18] Union's Post Hr'g Br. at 2, 13.
[19] *AFGE, Local 1938*, 66 FLRA 741, 742-43 (2012).
[20] Exceptions at 4-5.

not "fair and equitable," and therefore violated Article 11, Section 5 of the parties' agreement.[21] For the reasons below, we deny the Union's essence exceptions.

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.[22] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the parties' agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the parties' agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the parties' agreement; or (4) evidences a manifest disregard of the parties' agreement.[23] 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.[24] The Authority has found that an award fails to draw its essence from a collective-bargaining agreement when the award is expressly contrary to the wording of the agreement.[25]

Regarding the Union's first essence exception, the Union does not demonstrate that the award fails to draw its essence from Article 11, Section 2 of the parties' agreement. As discussed above, Article 11, Section 2 states that "[the Agency] shall consider employee preference in the determination of which of the two . . . types of awards shall be granted."[26]

The Union does not claim that the Agency did not consider employee preferences at all in awarding the available QSI. The Union only claims that the parties' agreement requires the Agency to consider all eligible employees' award preferences before determining who should receive the QSI. But the agreement does not specify any particular method for considering employee award preferences. Because it is undisputed that employee award preferences determined which employee received the QSI, we find that the Union fails to demonstrate that the Arbitrator's interpretation of Article 11, Section 2 is irrational, unfounded, implausible, or in manifest disregard of the agreement.

Regarding the Union's second essence exception, the Union does not demonstrate that the award's finding that the lottery method was "fair and equitable" fails to draw its essence from the parties' agreement.[27] As discussed above, Article 11, Section 5 states that "[t]he methodology used by [the Agency] to establish and give awards . . . shall be developed and applied in a fair and equitable manner."[28] And Article 4 requires that "[e]mployees shall be treated fairly and equitably."[29]

The Union does not claim that the lottery method the Agency used altered in any way the pool of employees eligible to receive a QSI. Employees eligible to receive a QSI (or a cash award) shared one common trait – each had earned an overall outstanding rating. Further, the Union does not claim that the lottery's random character discriminated among eligible employees in any way, based on their individual qualities or characteristics. Because the lottery's random character treated all of the eligible employees equally for purposes of determining which employee would receive the one available QSI, the Union fails to demonstrate that the Arbitrator's interpretation of "fair and equitable" language in Article 11, Section 5 and Article 4 is irrational, unfounded, implausible, or in manifest disregard of the agreement.

The Union relies on *SSA, Louisville, Kentucky* (*SSA, Louisville*)[30] for support,[31] but that case is inapposite. In *SSA, Louisville*, the Authority upheld an arbitrator's finding that the collective-bargaining agreement in that case required a particular agency official to approve award nominations, and that "redelegating" the function "compromised the appearance of fair and equitable treatment."[32] The instant case does not have any comparable agreement provisions or arbitral findings. Therefore, *SSA, Louisville* does not provide a basis for finding that the award fails to draw its essence from the parties' agreement.

Finally, the Union claims that the award fails to draw its essence from Article 5 of the parties' agreement.[33] Article 5 provides, in pertinent part, that the Agency "shall give in writing to the [Union] . . . proposed changes relating to personnel policies, practices, and conditions of employment."[34] In support, the Union argues that the Agency did not give the Union notice and

[21] *Id.* at 3-7.
[22] *AFGE, Council 220*, 54 FLRA 156, 159 (1998) (citing 5 U.S.C. § 7122(a)(2)).
[23] *SSA, Office of Disability Adjudication & Review*, 64 FLRA 1000, 1001 (2010) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).
[24] *Id.*
[25] *U.S. Small Bus. Admin.*, 55 FLRA 179, 182 (1999).
[26] CBA at 42.
[27] Exceptions at 3-7.
[28] CBA at 43.
[29] *Id.* at 9.
[30] 65 FLRA 787, 789-90 (2011).
[31] Exceptions at 6.
[32] *SSA, Louisville*, 65 FLRA at 790 (citations omitted) (internal quotation marks omitted).
[33] Exceptions 6-8.
[34] CBA at 20.

an opportunity to bargain over the Agency's use of the lottery method.[35]

Although the Union proposed this issue to the Arbitrator,[36] the Arbitrator did not adopt the Union's proposal or address the issue. And the Union does not challenge the Arbitrator's framing of the issues or assert that the Arbitrator exceeded his authority by not resolving an issue submitted to arbitration. Thus, as there is no showing that the award was required to include findings on the Article 5 issue, we do not address this matter further.[37]

Accordingly, we deny the Union's essence exceptions.

B. The award is not contrary to law.

The Union claims that the award is contrary to law because the Arbitrator imposed an "improper" "burden of proof" on the Union.[38] In support of this claim, the Union cites *SSA, Baltimore, Maryland* (*SSA, Baltimore*).[39]

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[40] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[41] In making that assessment, the Authority defers to the arbitrator's underlying factual findings,[42] unless a party demonstrates that the findings are deficient as nonfacts.[43]

The Union misinterprets *SSA, Baltimore*. In that case, an arbitrator determined that an agency, in filling a vacancy, did not give an applicant the priority consideration to which a settlement agreement and the parties' contract entitled the applicant.[44] The arbitrator based his determination on the finding that the applicant was improperly compared to other applicants.[45] Contending that this case is like *SSA, Baltimore*, the Union argues that "the burden of proof . . . for a lottery method would be [to establish that] the [grievant] was compared against others."[46]

SSA, Baltimore does not support the Union's exception. Initially, this case and *SSA, Baltimore* deal with different issues. Unlike *SSA, Baltimore*, there is no issue in this case concerning priority consideration or an agency's alleged violation of an agreement providing a grievant with such a benefit. And regarding the issue of the appropriate burden of proof, *SSA, Baltimore* supports denying, rather than granting, the Union's exception. The Authority held in *SSA, Baltimore* that unless a specific burden of proof is required, an arbitrator may establish and apply whatever burden the arbitrator considers appropriate in resolving claims under the parties' agreement.[47] There is no claim that the parties' agreement sets forth any specific burden of proof regarding the issues in this case. Thus, there is no basis for concluding that the Arbitrator was required to apply any particular burden of proof in resolving the Union's claims. For these reasons, we deny this contrary-to-law exception.

The Union's remaining contrary-to-law exceptions also lack merit. The Union claims that "the language of the [parties' agreement was] not followed[,] and any burden [on] the Union to prove it was still not a fair and equitable process would be too great."[48] The Union also claims that "[t]he Union cannot have a burden to prove the [Federal Service Labor-Management Relations Statute[49]] wrong in order to bargain."[50] Section 2425.6(e)(1) of the Authority's Regulations provides, in relevant part, that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c) of the Regulations, "or otherwise fails to demonstrate a legally recognized basis for setting aside the award."[51] Here, the Union does not cite any relevant law, rule, or regulation, and does not provide any arguments in support of its remaining contrary-to-law exceptions. Therefore, we deny these exceptions under § 2425.6(e)(1) of the Authority's Regulations.[52]

Accordingly, we deny the Union's contrary-to-law exceptions.

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[35] Exceptions at 7.
[36] Award at 3.
[37] *See SSA, Office of Disability Adjudication and Review*, 64 FLRA 469, 470-71 (2010).
[38] Exceptions at 13.
[39] 57 FLRA 181, 184 (2001).
[40] *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)).
[41] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[42] *Id.*
[43] *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).
[44] *SSA, Baltimore*, 57 FLRA at 184.
[45] *Id.*
[46] Exceptions at 13.
[47] *SSA, Baltimore*, 57 FLRA at 184.
[48] Exceptions at 13.
[49] 5 U.S.C. §§ 7101-7135.
[50] Exceptions at 13.
[51] 5 C.F.R. § 2425.6(e)(1).
[52] *U.S. DHS, U.S. CBP*, 68 FLRA 1015, 1022 (2015).

C. The award is not based on a nonfact.

The Union claims that the award is based on two nonfacts. First, the Union claims that the award is based on the "false fact[]" that the Agency "considered employee [award] preference."[53] Second, the Union claims that "[t]he [a]ward is also based on [the] nonfact [of the lottery method used by the Agency] being fair and equitable."[54] For the following reasons, we deny the Union's nonfact exceptions.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[55] However, the Authority will not find that an award is based on a nonfact when the factual matter at issue was disputed at arbitration.[56] In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective-bargaining agreement does not constitute a fact that can be challenged as a nonfact.[57]

Regarding the Union's first nonfact exception, the record shows, and the Union acknowledges,[58] that the Agency presented evidence at arbitration concerning whether the Agency "considered" the selected employee's award preference.[59] The Union disputed this factual matter at hearing and in its post-hearing brief.[60] As the Authority will not find that an award is based on a nonfact when the pertinent factual matters were disputed at arbitration, this exception does not provide a basis for finding that the award is based on a nonfact.

Regarding the second nonfact exception, the Union argues that the award is based on the nonfact that the lottery method was "fair and equitable."[61] But the Arbitrator's conclusion that the lottery method was "fair and equitable" was based on the Arbitrator's interpretation of the parties' agreement. Therefore, it does not constitute a fact that can be challenged as a nonfact.[62] Thus, this exception also does not provide a basis for finding that the award is based on a nonfact.

Accordingly, we deny the Union's nonfact exceptions.

V. Decision

We dismiss, in part, and deny, in part, the Union's exceptions.

[53] Exceptions at 9.
[54] *Id.*
[55] *AFGE, Local 2382*, 66 FLRA 664, 667 (2012) (*Local 2382*).
[56] *AFGE, Local 3723*, 67 FLRA 149, 150 (2013); *Local 2382*, 66 FLRA at 668.
[57] *NLRB*, 50 FLRA 88, 92 (1995).
[58] Exceptions at 8-9.
[59] Agency's Post Hr'g Br. at 6-7.
[60] Union's Post Hr'g Br. at 8.
[61] Exceptions at 9.
[62] *SSA, Balt., Md.*, 54 FLRA 600, 605 (1998).

Member Pizzella, concurring:

In a memorable scene from the 1942 movie classic, *Casablanca*, Captain Renault (played by Claude Rains)[1] disingenuously declares, "I'm shocked, shocked to find that gambling is going on in here" as the backroom croupier, not so subtly, slips the captain his own "winnings."[2]

In this case, which not only reminds me of this scene from *Casablanca* but also the keynote melody from the 1950 Broadway hit, *Guys and Dolls*, "Luck be a Lady,"[3] I join with my colleagues and agree that the exceptions filed by AFGE, Local 3320 are without merit.

I write separately, however, to note several aspects of this odd case which present a teachable moment for the federal labor-management relations community. I invite this community to carefully consider whether a dispute of the nature described below is of sufficient significance to warrant the expenditure of Agency resources (i.e. the time and salary of Agency officials) and Union official time when both of these are paid for by the American taxpayer.[4]

In January 2011, the President imposed a two-year pay freeze on executive branch agencies and authorized the Office of Personnel Management (OPM) and the Office of Management and Budget (OMB) to provide guidance on "reduc[ing] total spending on individual performance awards."[5]

As a consequence in fiscal year 2012, the Office of Fair Housing and Equal Opportunity (office) at the Fort Worth Center of the U.S. Department of Housing and Urban Development (HUD Fort Worth) did not have sufficient funding to give all employees, who received an outstanding rating, their choice between a Quality Step Increase (QSI) or a cash award, as provided for in HUD Fort Worth's incentive-awards policy.[6] During that rating period, eighteen employees in the office received outstanding ratings. But there was only sufficient funding for one QSI; all other employees, who received an outstanding rating, would receive a cash award.

But HUD Fort Worth decided it would use a "lottery" (I am not making this up) to determine which of the eighteen employees would get to choose the QSI. The names of all eligible employees – all of the eighteen employees who received an outstanding rating − were placed in a "coffee can" and then a representative from AFGE, Local 3320 drew the winning name.[7] The employee whose name was picked first did not want the QSI. He preferred and opted for a cash award. Therefore, the AFGE representative picked a second name. This employee opted for the QSI.

Michelle Ferrell was not one of the employees who had the good fortune to have her name picked from the can.[8] Even though she received a cash award, she filed a grievance arguing that the process was not "fair" and "equitable" as required by the parties' agreement and that it also "deviate[d]" from HUD Fort Worth's incentive-awards policy.[9]

As I have stated many times before, the rights and responsibilities set out in the Federal Service Labor-Management Relations Statute (the Statute)[10] presume that parties will "utilize the Statute to create positive working relationships and resolve good-faith disputes" and to promote "the effective conduct of government business."[11] It seems obvious to me that the circumstances of this case are not of the type which promote a positive working relationship and most certainly do not advance the effective conduct of government business.

This matter certainly should not have made its way to arbitration.

Nonetheless, I empathize with the grievant and her annoyance at the process selected by HUD Fort Worth – a lottery (more on this below) – to determine which employee would have the chance to receive a QSI. But the record is devoid of any evidence which would indicate that the grievant was treated unfairly or differently than either of the two employees whose names were selected. The grievant, and the fifteen, non-selected employees, nonetheless, still

[1] https://en.wikipedia.org/wiki/Claude_Rains.
[2] http://www.imdb.com/title/tt0034583/quotes.
[3] *Guys and Dolls*, https://en.wikipedia.org/wiki/Luck_Be_a_Lady (*Luck*).
[4] *See U.S. Dep't of the Interior, U.S. Park Police*, 67 FLRA 345, 351 (2014) (Concurring Opinion of Member Pizzella) (citing *U.S. DHS, CBP*, 67 FLRA 107, 112 (2013) (Concurring Opinion of Member Pizzella)).
[5] Guidance on Awards for Fiscal Years 2011 and 2012, https://www.chcoc.gov/content/guidance-awards-fiscal-years-2011-and-2012) (June 11, 2011) (Guidance on Awards.
[6] Majority at 2.
[7] Exceptions at 7.
[8] Award at 4.
[9] *Id.* at 3.
[10] 5 U.S.C. §§ 7101-7135.
[11] *U.S. DHS, CBP*, 67 FLRA 107, 113 (2013) (Concurring Opinion of Member Pizzella); *see also SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 607 (2014) (Dissenting Opinion of Member Pizzella) (citing *U.S. Dep't of the Air Force, Space & Missile Sys. Ctr., L.A. Air Force Base, El Segundo, Cal.*, 67 FLRA 566, 573 (2014) (Dissenting Opinion of Member Pizzella); *AFGE, Local 2198*, 67 FLRA 498, 500 (2014) (Concurring Opinion of Member Pizzella)).

received a cash award (dare I say, consolation prize). Therefore, it cannot be argued that the process was not fair and it is not clear what remedy could have been awarded to satisfy the grievant and not disadvantage each of the other employees who also received outstanding ratings and also did not receive a QSI.

Much like Captain Renault in the cited scene from *Casablanca*, who protests his "shock" that "gambling is going on in here," it is inexplicably puzzling, why in the second act of this case, AFGE, Local 3320 would force HUD Fort Worth to arbitration (a choice entirely within its discretion), arguing that the use of the lottery (to choose which employee would receive the one-available QSI) *after* AFGE, Local 3320's own "representative" participated in the lottery and actually drew the two winning names in the first act of this strange case.

Finally, after having served at a senior level in six federal agencies for over 20 years, I find the notion of using a lottery, to determine which employees will receive a performance award, an abdication of a basic and essential management responsibility.

The Harvard Business School, in its weekly publication *Working Knowledge* (from April 8, 2013), noted that awards programs, and even cash awards themselves, may lead to reduced motivation and productivity when the process is not carefully planned and administered.[12] Without a doubt, fiscal year 2012 was a difficult budget year for federal agencies and, as noted above, the restrictions on awards imposed by the President through OPM and OMB severely restricted what portion of federal-agency budgets could be allocated for awards. But that guidance and those restrictions did not relieve federal agencies from using common sense and ensuring that awards were "meaningful . . . and clearly distinguish[ed] levels of performance."[13] No matter how little, or how much, funding is available for performance awards, our "merit system calls for differences in performance to be the basis for making reward distinctions, rather than other non-merit factors."[14]

In other words, federal managers must be willing to assume responsibility, within the confines of their budgets, to make meaningful distinctions – distinctions which may be difficult when eighteen employees are all eligible to receive a QSI. That difficulty, however, does not relieve managers of making those tough decisions and leaving the decision to chance.

But (in recognition of his 100th birthday) as Frank Sinatra famously crooned "[*l*]*uck be a lady tonight* . . . ."[15]

Thank you.

[12] *How to Demotivate Your Best Employees*, http://hbswk.hbs.edu/item/how-to-demotivate-your-best-employees.

[13] Guidance on Awards.

[14] *Merit System Principles and Performance Management*, https://www.opm.gov/policy-data-oversight/performance-management/reference-material.

[15] *Luck.*