69 FLRA No. 49

UNITED STATES
DEPARTMENT OF DEFENSE
ILLINOIS NATIONAL GUARD
SCOTT AIR FORCE BASE, ILLINOIS
(Agency)

and

ASSOCIATION OF
CIVILIAN TECHNICIANS
CHAPTER 111
(Union)

0-AR-5152

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DECISION

May 3, 2016

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

I. Statement of the Case

Arbitrator Richard L. Horn sustained a grievance alleging that the Agency improperly filled a powered-support-systems mechanic supervisor position (supervisor position). There are three substantive questions before the Authority.

The first question is whether the award is based on a nonfact. Because the alleged nonfact challenges a matter that the parties disputed at arbitration and as the alleged nonfact was not a central fact underlying the award, the answer is no.

The second question is whether the award is contrary to law because the award impermissibly affected the Agency's right to select employees under § 7106(a)(2)(C) of the Federal Service Labor-Management Relations Statute (the Statute),[1] and impinged on the "right[s] of the military" when the Arbitrator determined the selectee was not qualified for the position and ordered the selection to be rerun.[2] Other than with respect to one portion of the remedy, which the Union concedes is deficient, the Agency does not demonstrate that the Arbitrator's findings are inconsistent with applicable legal standards. Therefore, the answer is no.

The final question is whether the award contravenes public policy. Because the Agency fails to support this exception, the answer is no.

II. Background and Arbitrator's Award

The Agency announced a vacancy for the supervisor position on USAJOBS. Six applicants, including the two grievants, were determined to have met the basic eligibility requirements of the civilian position, and they were referred to the selecting official. The selecting official, who was also the supervisor of the grievants, chose an applicant who was not one of the grievants. The Union filed a grievance on behalf of the grievants, and the matter went to arbitration.

The Arbitrator framed the issue as whether the Agency "willfully commit[ted] procedural and regulatory violations during the placement action to fill the [supervisor position]."[3]

Initially, the Arbitrator found procedural violations of the Agency's Technician Personnel Plan (TPP) 335 that occurred in the merit promotion process. He found that the grievants' supervisor "failed in his responsibility"[4] to ensure that his subordinates, who were on deployment, would be considered for the advertised positions, and that eligible applicants were restricted to those already assigned to the unit, as opposed to the position being open to applicants state wide. He found that individually these procedural violations may have been "simple mistakes,"[5] but cumulatively these violations supported the Union's "narrative."[6] The Arbitrator also found that "[t]he evidence would . . . indicate it was common knowledge" that the work relationship between the Agency's selecting official and one of the grievants was "at best[,] contentious[,] and at worst[,] openly hostile."[7] And so, according to the Arbitrator, due to the grievants' union affiliation and activities, the relationship between the selecting official and the grievants almost guaranteed they would not be selected. The Arbitrator then observed that "regardless" of this motivation, the procedures of TPP 335 were violated.[8]

The Arbitrator sustained the grievance. He found that of the six applicants, only the two grievants met basic eligibility for the position, namely possessing

[1] 5 U.S.C. § 7106(a)(2)(C).
[2] Exceptions at 18.
[3] Award at 2.
[4] *Id*. at 8.
[5] *Id*. at 9.
[6] *Id*.
[7] *Id*. at 10.
[8] *Id*. at 11.

thirty-six months of the specialized experience delineated in the job announcement.[9] With that finding, the Arbitrator determined that the other four applicants, including the selectee, were not qualified for the supervisor position – and that, therefore, the Agency violated TPP 335.

As a remedy, the Arbitrator ordered that corrective action be taken in compliance with another Agency regulation, Technician Personnel Regulation 300. Specifically, the Agency had to: (1) vacate the selectee from the supervisor position and return that technician to his former position or to another position for which he is qualified; (2) appoint a competent selecting official who was outside of the supervisory chain of the two grievants and who was not involved in the original selection process (new selecting official) or in the grievance procedures; (3) certify the two grievants to the new selecting official for consideration in a new selection process that would be conducted in accordance with TPP 335; and, (4) if neither grievant were selected, the new selecting official would provide a full justification as to why neither grievant was selected.[10]

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

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar consideration of the applicants' resumes.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[11] the Authority will not consider any evidence or arguments that could have been, but were not, presented to the Arbitrator.[12]

The Agency has submitted the resumes of all six applicants as attachments to its exceptions and has referred to these resumes as the "[m]issing" documents.[13] In its exceptions, the Agency concedes that the resume materials were not brought before the Arbitrator, hence they were "[m]issing" from the hearing, and that only the questionnaires, as completed by the six applicants, were offered as joint exhibits at hearing.[14] The Agency does not claim that the applicants' resumes could not have been brought before the Arbitrator. Consequently, consistent with the principles set forth above, we do not consider the six applicants' resumes, under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the award is based on a nonfact.[15] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[16] Further, the Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at hearing.[17]

The Arbitrator found that "[t]he evidence would . . . indicate it was common knowledge" that the work relationship between the Agency's selecting official and one of the grievants was "at best[,] contentious[,] and at worst[,] openly hostile."[18] The Agency argues that it is "poor reasoning" to "base a finding of hostil[ity] on 'common knowledge.'"[19] The Agency alleges that the award is based on a nonfact because this finding was used to conclude that the selecting official "took out that animosity" on the grievant by denying him the position.[20]

However, the parties disputed the working relationships of the selecting official with one of the grievants at some length at arbitration.[21] Further, even assuming that this finding is clearly erroneous, it is not a central fact underlying the award.[22] The Arbitrator expressly stated that "regardless of the motivation[,] the TPP 335 procedures were violated and corrective action must be taken."[23] Therefore, the award is not based on a nonfact.

Thus, we deny the Agency's nonfact exception.

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[9] *Id.* at 10.
[10] *Id.* at 11.
[11] 5 C.F.R. §§ 2425.4(c), 2429.5.
[12] *E.g.*, *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012); *SSA, Office of Disability Adjudication & Review, Nat'l Hr'g Ctr.*, 66 FLRA 193, 195 (2011) (*SSA Nat'l*).
[13] Exceptions at 11.
[14] *Id.*; Opp'n at 1-2.
[15] Exceptions at 15.
[16] *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).
[17] *E.g.*, *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 770 (2006) (citing *U.S. Dep't of VA, VA Pittsburgh Healthcare Sys.*, 60 FLRA 516, 518-19 (2004)).
[18] Award at 10.
[19] Exceptions at 15.
[20] *Id.*
[21] Opp'n, Attach. 2, Tr. at 130-31; *see U.S. Dep't of VA, Bd. of VA*, 68 FLRA 170, 172-73 (2015) (Member Pizzella dissenting).
[22] *U.S. Dep't of Treasury, IRS*, 69 FLRA 122, 124 (2015).
[23] Award at 11.

B. The award is contrary to law, in part.

The Agency argues that the award is contrary to law because it impermissibly affects its right to select employees under § 7106(a)(2)(C) of the Statute,[24] and impinges on the "right[s] of the military."[25]

In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo.[26] In applying a de novo standard of review, the Authority assesses whether the Arbitrator's legal conclusions are consistent with the applicable standard of law.[27] Under this standard, the Authority defers to the Arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[28]

1. We set aside the portion of the remedy that directs the Agency to use a different selecting official, but we find that the award does not otherwise impermissibly affect management's right to select.

The Agency contends that the Arbitrator's determination that only the two grievants were qualified for the position violated the Agency's management right to "select from among those that management believes are best."[29] In contrast, the Union argues that: management's right to select applies only to "selections for appointments from . . . among *properly* ranked and certified candidates"; and because the Arbitrator found that the candidates had *not* been properly ranked and certified, the award does not violate management's right to select.[30]

In resolving exceptions that contend that an award is contrary to a management right, the Authority first assesses whether the award affects the exercise of a right set forth in § 7106(a).[31] As relevant here, under § 7106(a)(2)(C) of the Statute, management has the right, "with respect to filling positions, to make selections for appointments from . . . among *properly ranked and certified* candidates for promotion[,] or . . . any other *appropriate* source."[32]

Here, it is unnecessary to resolve the parties' dispute over whether the award affects this management right. For the following reasons, even if it does, the award does not *impermissibly* affect the right.[33]

As the Authority previously has held, most recently in *U.S. OPM*,[34] if an award affects a management right under § 7106(a)(2), then the Authority examines whether the arbitrator was enforcing – as relevant here – an "applicable law," within the meaning of § 7106(a)(2).[35] The Authority has held that an "applicable law" within the meaning of § 7106(a)(2) includes not only statutes, but as relevant here, regulations having the force and effect of law.[36]

Further, regulations have the force and effect of law when they: (1) affect individual rights and obligations; (2) were promulgated pursuant to an explicit or implicit delegation of legislative authority by Congress; and (3) were promulgated in conformance with any procedural requirements imposed by Congress.[37]

The Authority has considered whether agency regulations constitute an applicable law under these requirements. In *Department of the Air Force, U.S. Air Force Academy, Colorado Springs, Colorado*[38] and *U.S. Department of the Navy, Naval Undersea Warfare Center, Newport, Rhode Island*,[39] the Authority held that the agency regulations at issue in those decisions had the force and effect of law and constituted applicable laws.

Applying the foregoing here, there is no dispute that Agency regulation TPP 335 is mandatory and establishes the obligations of the Agency and the rights of employees with respect to promotions and assignments within the Agency. Accordingly, the first requirement is

[24] 5 U.S.C. § 7106(a)(2)(C).
[25] Exceptions at 7, 17-18.
[26] *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)).
[27] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[28] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (*citing U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).
[29] Exceptions at 7.
[30] Opp'n at 4.
[31] 5 U.S.C. § 7106(a).
[32] *Id.* § 7106(a)(2)(C) (emphasis added).
[33] *See, e.g., U.S. Dep't of VA, Bos. Healthcare Sys., Bos., Mass.*, 68 FLRA 116, 118 (2014) (assuming, without deciding, that the arbitrator's award affected a management right).
[34] 68 FLRA 1039, 1040-41 (2015).
[35] *Id.* at 1041 (citing *U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs.*, 67 FLRA 665, 666 (2014)); *see generally U.S. Dep't of the Army, U.S. Army Aviation & Missile Research Div., Redstone Arsenal, Ala.*, 68 FLRA 123, 125 (2014) (*Redstone*) (Member Pizzella dissenting) (negotiated contract provision and management right to select).
[36] *Fed. Prof'l Nurses Ass'n, Local 2707*, 43 FLRA 385, 390 (1991); *NTEU*, 42 FLRA 377, 390-93 (1991) (*NTEU*) (rules or regulations accorded the force and effect of law are binding law governing the agency's decisions which must be followed).
[37] *NTEU*, 42 FLRA at 392-93(citations omitted).
[38] 59 FLRA 894, 899 (2004) (*Air Force*).
[39] 55 FLRA 687, 690-91 (1999) (*Navy*).

satisfied. As to the second requirement, Congress has expressly authorized the President of the United States to prescribe rules governing the competitive service, and the President has, in turn, so authorized the U. S. Office of Personnel Management (OPM).[40] Consistent with this authority, OPM has promulgated rules governing agency promotion and placement programs from which TPP 335 is derived.[41] As to the final requirement, the Administrative Procedure Act (APA)[42] specifically exempts matters relating to agency management and personnel from the notice and comment requirements otherwise required for regulations by the APA.[43] Accordingly, the third requirement is satisfied. We conclude that the TPP 335 is a regulation having the force and effect of law, and thus constitutes an applicable law within the meaning of § 7106(a)(2).

The Arbitrator found that the Agency violated Agency regulation TPP 335 when it selected for the supervisor position an applicant who was unqualified. According to the Arbitrator, the only qualified applicants were the two grievants. It is well established that the Authority defers to an arbitrator's factual findings, unless a finding has been successfully challenged as a nonfact, which is not the case here.[44] In his award, the Arbitrator credited the testimony of the retired, former supervisor who testified about the requirements for the position as given in the job announcement, namely the thirty-six months of technical experience with the equipment at issue, and who testified that only the two grievants had that required experience and that the selectee did not. While the Agency challenges the credibility and persuasiveness of the former supervisor's testimony, we have already determined that the "missing" resumes are barred under §§ 2425.4(c) and 2429.5, and the Agency does not provide any other support for its challenge. Therefore, as the Agency's arguments lack support in the record, we find the Agency's arguments to be bare assertions.[45] Finally, we note TPP 335 requires that candidates meet the basic qualifications established for the position.[46]

Therefore, as the award is based on the Arbitrator's enforcement of an "applicable law," the Agency fails to establish that the award impermissibly affects its management right to select employees. The Agency does not successfully challenge the Arbitrator's factual findings or otherwise demonstrate that the award misapplies the Agency regulation.

Finally, the Authority notes that the Agency did argue very briefly that the award also infringed on its right to assign work, and cited as support for this argument two negotiability decisions.[47] Nonetheless, even assuming the argument was sufficiently raised and even assuming the Agency's right to assign work was affected by the award, the Arbitrator was enforcing an applicable law, as discussed above. Therefore, the Agency has not demonstrated that the award impermissibly affects its right to assign work.[48]

The Agency also argues that the award does not reflect what management would have done had management not violated the applicable law, citing the "reconstruction" requirement in *U.S. Department of the Treasury, BEP, Washington, D.C.*[49] In assessing challenges to arbitral remedies on § 7106 grounds, the Authority no longer requires remedies to "reconstruct"[50] what agencies would have done had they complied with the pertinent law or contract.[51] As relevant here, under the revised analysis, the Authority assesses whether the award affects the exercise of the asserted management right.[52] If so, then the Authority examines whether the award provides a remedy for a violation of an applicable law within the meaning of § 7106(a)(2) of the Statute.[53]

In particular, the Agency challenges that portion of the remedy where the Arbitrator ordered a different selecting official to participate in the new selection process, one who was outside the supervisory chain of the grievants, and who did not participate in the original merit promotion process or in the grievance process.[54]

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[40] *See U.S. Dep't of Commerce, PTO*, 65 FLRA 13, 16 (2010) (citing 5 U.S.C. § 3302); *see also* Exec. Order No. 12,107, 44 Fed. Reg. 1055 (Dec. 28, 1978); Exec. Order No. 10,577, 19 Fed. Reg. 7521 (Nov. 22, 1954).
[41] Exceptions, Attach. D, TPP 335 at i (TPP 335); *e.g.*, *Navy*, 55 FLRA at 690-91.
[42] 5 U.S.C. § 553(a)(2).
[43] *Navy*, 55 FLRA at 691.
[44] *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 604 (2014) (*SSA New Orleans*) (citing *U.S. DOJ, U.S. Marshalls Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012)).
[45] *See SSA Nat'l*, 66 FLRA at 197 (citing *AFGE, Local 3354*, 64 FLRA 330, 333 (2009)).
[46] TPP 335 at 8.
[47] Exceptions at 8 (citing *AFGE, Local 1985*, 55 FLRA 1145, 1152-53 (1999) (finding proposal requiring employees to pass a test nonnegotiable as it affected management's right to assign work); *Laborers Int'l Union of N. Am., AFL-CIO, Local 1276*, 9 FLRA 703, 706 (1982) (finding proposal negotiable that left to management's discretion the determination of the relative abilities, qualifications, and capabilities of its employees)).
[48] *See* 5 U.S.C. §7106 (a)(2)(A).
[49] Exceptions at 16 (citing 53 FLRA 146, 151-54 (1997).
[50] *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (*FDIC*) (Chairman Pope concurring).
[51] *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring).
[52] *Id.*
[53] *See id.* at 115 & n.7; *see also U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 630-31 (2012).
[54] Exceptions at 16.

The Union, in its opposition, indicates that it is "not oppose[d]" to vacating that portion of the remedy.[55] Where an opposing party concedes that a remedy is deficient, the Authority modifies the award to set aside the deficient remedy.[56] Consistent with this precedent, we modify the award to set aside this portion of the remedy.

Finally, the Agency challenges that portion of the remedy in which the Arbitrator orders the names of the two grievants to be certified to the selecting official for consideration as "overly broad" because the Arbitrator's order "limits the pool" of applicants.[57] We find this argument, unsupported by any caselaw, unpersuasive.[58] Indeed, the final portion of the remedy provides the next step in the event the selecting official selects neither grievant. As such, we are not persuaded that the Agency has demonstrated this aspect of the remedy is deficient.[59]

Our concurring colleague's claim[60] that the Authority must apply the "reasonably-related" standard to resolve the Agency's challenge to the Arbitrator's remedy in this case is unfounded. As the Authority stated in its *FDIC, Division of Supervision & Consumer Protection, San Francisco Region* decision, that "an arbitrator's award must . . . be reasonably related to the [applicable law violated] and the harm being remedied . . . is not intended to establish a new two-pronged analytical framework that will be recited in every case involving an award alleged to violate management rights."[61] It suffices in a case such as this, where there is no claim that the Arbitrator's remedy is not reasonably related to the violation of an applicable law, that the award provides a remedy for the violation. The Authority's variation from this general policy in a single case[62] is not, in our view, sufficient to establish binding precedent to the contrary.

[55] Opp'n at 6.

[56] *U.S. Dep't of VA, Zablocki VA Med. Ctr., Milwaukee, Wis.*, 66 FLRA 806, 807 (2012); *AFGE, Council of Prison Locals, Council 33*, 66 FLRA 602, 605 (2012) (citations omitted); *see also U.S. Dep't of VA, Long Beach Healthcare Sys., Long Beach, Cal.*, 63 FLRA 332, 334 (2009) (holding that arbitration matters are moot when the parties no longer have a legally cognizable interest in a dispute); *AFGE, Local 171, Council of Prison Locals 33*, 61 FLRA 661, 663 (2006) (same); *U.S. DOJ, INS, Jacksonville, Fla.*, 36 FLRA 928, 932 (1990) (same).

[57] Exceptions at 16-17.

[58] *See generally Bureau of Indian Affairs*, 25 FLRA 902, 904 (1987) (agency arguing that remedy was "overly broad" because it provided remedy to non-bargaining-unit employees).

[59] For the reasons set forth in her concurring opinion in *FDIC*, 65 FLRA at 112, Chairman Pope agrees that the Agency provides no basis for finding the Arbitrator's remedy deficient. Specifically, she finds that the remedy is reasonably related to TPP 335 and the harm being remedied. However, she questions whether the majority's decision not to address the "reasonably related" standard is consistent with recent Authority precedent. In this regard, she acknowledges that, for a period of time, the Authority declined – over her objections – to apply that standard in cases where a party challenged an arbitrator's remedy on management-rights grounds. *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 1040, 1045 n.9 (2011) (not applying reasonably related requirement to an excepting party's management-rights challenge to an arbitral remedy); *U.S. Dep't of VA, Med. Ctr., Kan. City, Mo.*, 65 FLRA 809, 814 n.8 (2011) (same). However, more recently, the Authority has addressed the reasonably related standard in cases where such remedial challenges are made. *See, e.g., Redstone*, 68 FLRA at 125-26 (setting out reasonably related standard as part of management-rights framework but finding it premature to assess whether that requirement was met, because the Authority could make findings on remand that would clarify how the remedy related to the violations found); *SSA New Orleans*, 67 FLRA at 602 (Member Pizzella dissenting) (setting out the "reasonably related" standard as part of the legal framework); *id.* at 603 & n.103 (applying the standard and noting that, to the extent that certain prior precedent "implies that the . . . standard is not an appropriate standard to apply to resolve management-rights challenges to an arbitral remedy, it will no longer be followed."). She questions what guiding principle her colleagues are using to avoid applying that standard in this case, and why their avoidance of it does not reflect arbitrary and capricious decision-making.

[60] *Supra* n.59.

[61] *FDIC*, 65 FLRA at 107.

[62] *See SSA New Orleans*, 67 FLRA at 603.

2. The award does not impinge on "right[s] of the military."

The Agency contends that that the award is contrary to law because it "impinges" on the "military's right," also described as the "right[s] of the military," to promote those "who are best for the military position."[63] In this connection, the Agency contends that the award "requires" that one of the two grievants be selected for the supervisor position and that this, in turn, requires the military to select one of the grievants for a military supervisory position – despite the Agency's claim that the military finds neither of the grievants "acceptable to the military chain of command."[64]

The premise of the Agency's contentions – that the award requires the military to select one of the two grievants for a military supervisory position – is incorrect. The award leaves the Agency the option of not promoting either grievant, as long as the selecting official provides a "full justification as to why a selection was not made."[65] Therefore, the Agency's contentions are based upon a misinterpretation of the award, and we deny this portion of the Agency's contrary-to-law exception on that basis.[66]

C. The award is not contrary to public policy.

The Agency also contends that the award is "otherwise contrary to public policy."[67]

Under § 2425.6(e)(1) of the Authority's Regulations, an exception may be subject to denial if the excepting party fails to support a ground listed in § 2425.6(a)-(c) or otherwise fails to demonstrate a legally recognized basis for setting aside the award.[68]

Here, the Agency does not identify the explicit, well-defined, and dominant public policy it contends has been violated, nor does it reference the laws and legal precedents at issue. After a single citation to the Authority's Regulation § 2425.6,[69] the Agency makes no further argument regarding the unspecified public policy, and the Agency does not explain, under the standards set forth in the decisional law of the Authority, how this unspecified public policy has been contravened.[70] Because the Agency has failed to support this exception, we deny it.[71]

Thus, we deny the contrary-to-public-policy exception.

V. Decision

We modify the award by setting aside the part of the remedy that directs the Agency to provide a different selecting official, and we deny the Agency's remaining exceptions.

[63] Exceptions at 17-18.
[64] *Id*. at 18.
[65] Award at 11.
[66] *U.S. DHS, U.S. Citizenship & Immigration Servs*., 68 FLRA 772, 775 (2015).
[67] Exceptions at 6.
[68] *See* 5 C.F.R. § 2425.6(e)(1).
[69] *Id*. § 2425.6.
[70] See *U.S. Dep't of VA Med. Ctr., Kan. City, Mo.*, 67 FLRA 627, 628 (2014) (Concurring Opinion of Member Pizzella) (noting that agency did not name public policy implicated by arbitrator's mitigation of penalty); *Def. Sec. Assistance Dev. Ctr*, 60 FLRA 292, 293-94 (2004) (for an award to be found deficient, the invoked public policy must be explicit, well-defined, and dominant).
[71] *AFGE, Council of Prison Locals 33, Local 3690*, 69 FLRA 127, 131 (2015) (citations omitted).