

71 FLRA No. 13

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

NATIONAL TREASURY EMPLOYEES UNION
(Union)

0-AR-5364

DECISION

February 26, 2019

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

Decision by Member Abbott for the Authority

I. Statement of the Case

In this decision, we conclude that the Agency's misinterpretation of the award—that sustaining a grievance challenging a particular performance appraisal implicates the legality of the entire performance-appraisal system—does not provide a basis for finding the award contrary to law.

The grievant is an attorney-advisor who handles disability benefits appeals. For the 2015 fiscal year, the grievant disagreed with her successful rating and believed that her performance warranted an outstanding rating. The Union filed a grievance alleging that the Agency failed to provide a fair appraisal in accordance with the Agency's policy.

Arbitrator John Paul Simpkins determined that the Agency failed to give proper consideration to the contributions described in the grievant's self-assessment. Furthermore, the Arbitrator concluded that the grievant had sufficiently rebutted the Agency's reasons for denying her an outstanding rating and sustained the grievance. The Agency filed exceptions to the award.

The question before us is whether the award is contrary to law. Because the Agency relies on a misinterpretation of the award, we deny the Agency's exception.

II. Background and the Arbitrator's Award

The Agency developed a three-tier employee performance appraisal system, known as the Performance Assessment and Communication System (PACS). The elements concerning PACS are articulated in the Agency's Personnel Policy Manual (PPM) § 430.1. Employees are rated at a level 1, 3, or 5 in four critical elements. A level 5 rating represents outstanding performance; a level 3 rating represents successful performance; and a level 1 rating represents unsuccessful performance. Under Article 21 of the parties' agreement, the Agency must notify employees of their expectations for each level of performance (discussion requirements).

As relevant here, the grievant received a successful rating for three elements for the 2015 fiscal year. The Union filed a grievance challenging the grievant's performance rating, and the grievance went to arbitration.

In his March 8, 2018, award, the Arbitrator found that PACS was a fair and appropriate policy for assessing employee performance and that the Agency complied with its discussion requirements. However, he concluded that the grievant's rating failed to include the contributions described in her self-assessment. The Arbitrator also found that the Agency erred when it: (1) accepted the negative feedback of an unnamed administrative law judge (ALJ) rather than the "first-hand documented evidence strongly favoring an opposite observation";¹ (2) concluded that the grievant wasted time contacting the ALJs; and (3) failed to consider the ALJ attestations attached in the grievant's self-assessment. Considering the Agency's errors and weighing the evidence, the Arbitrator concluded that the grievant had sufficiently rebutted the Agency's reasons for denying her an outstanding rating. The Arbitrator sustained the grievance.

On April 9, 2018, the Agency filed exceptions to the award, and the Union filed an opposition on May 8, 2018.²

III. Analysis and Conclusion: The award is not contrary to law.

The Agency argues that the Arbitrator's finding in favor of the grievant conflicts with his express findings

¹ Award at 19.

² As a preliminary matter, the Union argues that the Agency now presents arguments that it did not present at arbitration. Opp'n Br. at 9-14. After a careful review of the record, we find that the Agency sufficiently raised its arguments to the Arbitrator. Exceptions, Attach. A, Agency's Closing Br. at 7. Consequently, we will consider the Agency's arguments. 5 C.F.R. §§ 2425.4(c), 2429.5.

that the Agency “develop[ed] a fair and appropriate procedure for assessing employee’s performance” and complied with its discussion requirements.³ Specifically, the Agency alleges that the award is “clearly against [government-wide] regulations” concerning the appraisal of employee performance because “the [A]rbitrator found that PACS itself was ‘wrong.’”⁴

The Agency misinterprets the award.⁵ The Arbitrator explicitly found that PACS was “a fair and appropriate procedure for assessing employees’ performance.”⁶ However, the Arbitrator criticized the Agency’s *application* of PACS and the Agency’s failure to properly weigh the grievant’s contributions.⁷ Thus, contrary to the Agency’s arguments, the award is not a “simpl[e] disagree[ment]” with PACS,⁸ and the award does not implicate PACS’s compliance with the regulations cited by the Agency. Because the Agency’s contrary-to-law exception relies on a misinterpretation of the award, we deny it.⁹

For the foregoing reasons, we find that the Agency has not established that the award is contrary to law.¹⁰ And, because we deny the contrary to law exception, we also reject the Agency’s contrary to Agency policy exception¹¹ based on the same arguments.¹²

IV. Decision

We deny the Agency’s exceptions.

³ Exceptions at 6-9.

⁴ *Id.* at 6.

⁵ When an exception involves an award’s consistency with law, the Authority reviews any question of law de novo. *NAIL, Local 5*, 70 FLRA 550, 552 (2018) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 344 (2017)). In reviewing de novo, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the relevant legal standards. *Id.*

⁶ Award at 21.

⁷ *Id.* (“The [A]rbitrator finds no violation of the law applicable to the Agency’s requirement to develop a fair and appropriate procedure for assessing employees’ performance. The same cannot be said of the . . . application of the PPM.”).

⁸ Exceptions at 9-11.

⁹ *AFGE, Local 1101*, 70 FLRA 644, 648 (2018) (citing *AFGE, Nat’l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010) (party’s misunderstanding of award provides no basis for finding award contrary to law)).

¹⁰ *Id.*

¹¹ The Agency argues that the Arbitrator’s finding in favor of the grievant is contrary to Agency policy in light of his express finding that the Agency complied with its discussion requirements. Exceptions at 8-11.

¹² See *SSA, Office of Disability Adjudication & Review, Springfield, Mass.*, 68 FLRA 803, 806 (2015) (citing *U.S. DOD, Def. Contract Mgmt. Agency*, 66 FLRA 53, 58 (2011)) (where the Authority denies an essence exception, and an exceeded-authority exception repeats the same argument, the Authority also denies the exceeded-authority exception).

Member DuBester, concurring:

I concur in the decision to deny the Agency's exceptions.