

**FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.**

**THE LIBRARY OF CONGRESS
WASHINGTON, D.C.
(Agency)**

and

**AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES
LOCAL 2910
(Union)**

0-AR-4226

DECISION

February 24, 2009

**Before the Authority: Carol Waller Pope, Acting Chairman and
Thomas M. Beck, Member**

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Barbara B. Franklin filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Union filed a grievance seeking the correction of two safety hazards. The Arbitrator sustained the Union's grievance and ordered the Agency to post a notice informing employees of her award.

II. Background and Arbitrator's Award

The Agency (the Library of Congress) occupies the James Madison Memorial Building (Building). Congress established the Architect of the Capitol (AOC) to operate

and preserve legislative branch facilities, such as the Building. In addition, under the Congressional Accountability Act of 1995 (CAA), 2 U.S.C. § 1301, *et seq.*, the Office of Compliance (OOC) was established to enforce Occupational Safety and Health Act (OSHA) standards in legislative branch facilities. In order to meet its statutory obligations, the OOC conducts inspections of the Agency's facilities during each session of Congress. Although the Union participates in the OOC's inspections, it does not have immediate access to the OOC's inspection reports, which are not published for approximately two years. *See Award at 4.*

The Building's seventh floor contains four mechanical rooms for elevator maintenance, one for each of the Building's four quadrants. *See id.* at 5. The seventh floor is a restricted area that is maintained solely by the AOC. *See Exceptions, Attach. V, J. Ex. 3 at 6.* During an OOC inspection of the seventh floor, at which Union officials were present, the inspectors discovered that one of the mechanical rooms lacked a smoke alarm. *See Award at 5.* A Union official inquired whether the freight elevator had a "recall and capture" feature that would lock the elevator out of service in the event of a fire. *Id.* An AOC official with the inspection group stated that he would check and get back to the Union. The Union was not informed that the AOC had initiated plans to renovate the freight elevator to include the "recall and capture" feature until the hearing. *See id.* at 7, 18.

The Union filed a grievance alleging that the Agency was in violation of Article 33, §§ 1, 2, and 8 of the parties' agreement because one of the elevator rooms lacked a smoke alarm and the freight elevator was not programmed to lock itself out of service in the event of a fire.¹ *See id.* at 5-6. The Union requested that the Agency "take[] whatever action[s] are necessary" to correct the problems. *Id.* at 5-6; *Exceptions, Attach. V, J. Ex. 2 at 2.*

In its Report and Decision on the Grievance (Decision), the Agency stated that, under the CAA and Article 33, § 3 of the parties' agreement, the OOC -- and not the Agency's Office of Workforce Management (OWM) through the grievance procedure -- had the exclusive authority to address the Union's alleged safety violations. *See Award at 6; Exceptions, Attach. V, J. Ex. 3 at 6.* The Agency replied that the OOC would prepare a report outlining any safety violations and the steps necessary to correct them; that it was in compliance with Article 33, § 2 of the parties' agreement because the OOC had not identified and communicated any "serious unsafe condition" to the Agency; that it was in compliance with Article 33, § 8 because the OOC had not identified and communicated the presence of any "fire safety problem[s]" to the Agency; and that the statutory duty to correct unsafe conditions and fire safety problems rested with the AOC. *Exceptions, Attach. V, J. Ex. 3 at 6-7.* The Agency also argued that the Union ignored Article 33, § 3 of the parties' agreement by filing a grievance with the OWM because only the OOC was authorized to compel inspection or corrective action under the CAA. *See id.* at 7.

¹ Pertinent provisions of the parties' agreement are set forth in the attached appendix.

The grievance was not resolved, and was submitted to arbitration. At the beginning of the hearing, in addition to its suggested framing of the two safety hazard issues, the Union submitted a third issue: whether the Union could file a grievance to enforce Article 33 of the parties' agreement or to seek correction of a safety hazard. *See* Award at 1-2; Exceptions, Attach. VII at 1. At the conclusion of the hearing, the Union withdrew its proposed issues and the parties stipulated to the following issue: "[w]as the Union's grievance to enforce Article 33, §§ 1, 2 and 8, appropriate in the circumstances of th[e] case?" Award at 2, 8; Exceptions, Attach. II at 226-27.

The Agency claimed that it objected to the substitution of this issue and that the issue was moot. As a preliminary matter, the Arbitrator determined that the grievance was not moot, that she had jurisdiction to consider the stipulated issue, and that, based on her memory and hearing notes, the Agency agreed to the stipulated issue. *Id.* at 10.

In rejecting the Agency's argument that the grievance was moot because the Union did not amend the grievance to include a violation of Article 36 (the Negotiated Grievance Procedure) of the parties' agreement after it withdrew the safety hazard issues, the Arbitrator determined that the Agency did not raise this objection at the hearing. The Arbitrator found that the Union did not withdraw its underlying grievance but maintained throughout the grievance process it had a right to file a grievance to enforce Article 33 of the parties' agreement. *See id.* at 11. In support of this finding, the Arbitrator cited the Agency's position in its Decision that the OWM was not the proper body to address the safety violations. The Arbitrator also cited the Union's information request to determine the Agency's position on whether the Union could file a grievance to correct safety hazards.² The Arbitrator concluded that the Union's failure to expressly amend its grievance did not deprive her of jurisdiction, since the Article 36 issue was raised throughout the grievance process, and the parties agreed to the stipulated issue *See id.* at 12-13.

Addressing the merits of the grievance, the Arbitrator found that Article 33 established that the AOC maintained and operated the Agency's facilities, and that the OOC inspected the Agency's facilities for hazards. The Agency agreed that it had contractual obligations to monitor its facilities and to take necessary steps to maintain fire safety. *See id.* at 14. The Arbitrator rejected the Agency's argument that the Union's requested remedy would require the Agency to take actions that conflicted with the CAA. *See id.* at 14-15. In this regard, the Arbitrator stated that the requested remedy that the Agency "take whatever actions are necessary," had to be read in the context of the references in the grievance to Article 33, §§ 1, 2, and 8. *Id.* at 15. Specifically, the Arbitrator cited Article 33, § 2, which states that "[t]he [Agency] shall take whatever actions are necessary[,]" including making requests to the AOC and to Congress, to

² The Arbitrator noted that the Union filed a separate grievance over the Agency's denial of the information request, in which the Union asked for clarification on the Agency's position on whether the Union properly could file a grievance on unsafe working conditions. Award at 11-12. After the Agency denied the request, the Union filed a grievance and subsequently invoked arbitration. As the Union withdrew the grievance on the day of the hearing in this case, the Arbitrator found that nothing prevented her from deciding whether the Union had a right to file the grievance. *See id.* at 12.

remedy serious unsafe or unhealthy conditions. *Id.* (quoting Article 33, § 2). The Arbitrator stated that § 8 clarified that the Agency's duty to "take all necessary actions" only pertained to actions "within its control[.]" *Id.* (quoting Article 33, § 8). As the Union's grievance mirrored the language of Article 33, the Arbitrator found that the grievance did not require the Agency to take actions that were outside of its control and authority.

The Arbitrator also rejected the Agency's argument that the Agency could not provide a remedy because the hazards were in an area maintained solely by the AOC. The Arbitrator found that the hazards "could affect[] employees throughout the [B]uilding." *Id.* at 17. Further, the Arbitrator found that the Union's decision to file a grievance instead of contacting the OOC was reasonable. In this regard, the Arbitrator stated that the OOC had just completed its biennial inspection of the Building, and, as such, the Union would not know whether its concerns had been addressed until the inspection reports were made public two years later. *See id.* at 17. Thus, the Arbitrator determined that the grievance appropriately attempted to enforce the Agency's obligations under Article 33. *See id.* at 18.

The Arbitrator also found that the Union's grievance appropriately alleged violations of Article 33, and, as such, the allegations concerned a condition of employment as required under the Article 36 definition of a grievance. *See id.* Further, the Arbitrator stated that the Agency conceded that the grievance did not raise matters excluded by Article 36. Consequently, the Arbitrator concluded that the Agency had violated Article 36 by asserting that the substance of the Union's grievance could not be addressed through the negotiated grievance procedure. *See id.* at 18-19. The Arbitrator granted the Union's grievance and ordered the Agency to post a notice, informing employees of her award. *See id.* at 19, 21.

III. Positions of the Parties

A. Agency's Exceptions

As construed below, the Agency argues that the award is based on several nonfacts: the Arbitrator "erroneously found that the Union had not withdrawn the underlying grievance[.]" Exceptions at 7; the award is "illogical" because the Arbitrator concluded that the Agency violated Article 36, even though the Union did not originally grieve this issue and the issue was the subject of a different grievance before another arbitrator, *id.* at 9; the award is "inaccurate" as a "factual matter" because the Arbitrator concluded that the Agency did not allow the Union to use the grievance procedure to address the safety hazards, *id.* at 10; the record "indisputably demonstrates" that it processed the grievance and participated in the grievance process, *id.*; the Arbitrator based her award on a nonfact in finding that the Agency, rather than the AOC, has exclusive control and authority over the elevators and mechanical rooms in the Building *id.* at 14-15; and both federal law and undisputed testimony establishes that the AOC has exclusive control over these areas. *Id.* (citation omitted).

Based on its nonfact argument that the Union withdrew its grievance, the Agency asserts that the Arbitrator's award constitutes an impermissible advisory opinion because the Union withdrew all substantive issues. *See id.* at 7-8, 11 (citing *United States Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352 (2005); *NFFE, Local 1998*, 48 FLRA 1074 (1993)); *AFGE, Local 1864*, 45 FLRA 691 (1992)); *NAGE, Local R1-144*, 10 FLRA 209 (1982)). The Agency contends that advisory opinions are "explicitly prohibited" by Article 37, § 5 of the parties' agreement. *Id.* at 8. According to the Agency, not only did the Arbitrator exceed her authority under § 5, but she also issued an award that fails to draw its essence from that section. *See id.* at 8, 11. The Agency contends that, if the Arbitrator is allowed to add a provision to the parties' agreement that the parties did not bargain for, i.e., one allowing advisory opinions, then Congress' intent to establish the grievance procedure as the "exclusive administrative procedure[] for resolving grievances" under the Statute would be defeated. *Id.* at 12 (citation omitted).

Finally, the Agency argues that the award fails to draw its essence from Article 33, § 3 of the parties' agreement. The Agency alleges that, under § 3, the Union was required to call attention to unsafe working conditions and request an inspection from the Agency's Safety Services or the OOC if it had any safety concerns. *See id.* at 12-13. The Agency contends that the Arbitrator's failure to reconcile the Union's failure to follow Article 33, § 3 of the parties' agreement with her conclusion that the Agency violated Article 36 is in "manifest disregard of the agreement[.]" *Id.* at 13.

B. Union's Opposition

The Union argues that the Arbitrator did not find that the Agency was responsible for the elevators in the Madison Building. *See* Opposition at 6. Specifically, the Union alleges that the Arbitrator only determined that the Agency was required to "provide a safe and healthful work environment for its employees" and to "take whatever actions are necessary" and within its control and authority. *Id.* (citation omitted).

The Union argues that the Arbitrator did not exceed her authority because the parties agreed to the Arbitrator's formulation of the issue, and the Arbitrator rendered a decision on that issue. *See id.* at 3. The Union also asserts that the case law cited by the Agency does not establish that the Arbitrator lacked jurisdiction to resolve the Union's grievance.

The Union contends that the award does not fail to draw its essence from the parties' agreement because the Union could not have known that the Agency would assert that it could not file a grievance concerning the Agency's failure to comply with Article 33. *See id.* at 4. The Union asserts that its grievance does not contain an allegation that the Agency violated Article 36 of the parties' agreement. The Union states that the Agency never responded to its information request seeking to clarify the Agency's position on the Union's right to file a grievance in this case. The Union also cites the Arbitrator's findings that the Union did not actually withdraw its underlying grievance and that the Agency's obligations could be enforced through the Article 36 grievance procedure.

Finally, the Union contends that the award does not fail to draw its essence from Article 33, § 3. In this regard, the Union cites the Arbitrator's finding that the Union did not request an inspection because the OOC had just completed its inspection of the Building. *See id.* at 5. The Union claims that it would have been illogical for the Union to request an inspection from Safety Services because Safety Services did not have access to the Building's seventh floor, which is under the AOC's exclusive control. *See id.* The Union also states that the Arbitrator found that, under the parties' agreement, the Agency was required to take "whatever steps are in its power, including contacting the AOC, to remedy safety hazards." *Id.* The Union contends that it was not precluded from utilizing the negotiated grievance procedure, even if it had requested an inspection. *See id.* at 5-6.

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

We construe the Agency's arguments that the Arbitrator improperly found that the Union had not withdrawn its underlying grievance and that the award is "illogical" and "inaccurate" as claims that the award is based on nonfacts. *See AFGE, Local 3615*, 55 FLRA 1160, 1161 (1999) (construing union's argument that arbitrator made "inaccurate" findings as a nonfact claim); *AFGE, AFL-CIO, Local 2608*, 49 FLRA 1589, 1595 (1994) (construing union's argument that arbitrator used illogical reasoning as a nonfact claim). The Agency also asserts that the award is based on a nonfact because the Arbitrator improperly concluded that the Agency had control of the Building's elevators.

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. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). 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. *AFGE, Local 376*, 62 FLRA 138, 141 (2007) (*AFGE, Local 376*).

In its post-hearing brief, the Agency argued that the Union withdrew its substantive grievance. *See Award at 11; Exceptions, Attach. III at 9-10.* The Arbitrator rejected this claim and found that "[c]ontrary to the [Agency's] contention, the Union *did not withdraw the underlying grievance*, thereby leaving nothing before the Arbitrator to decide. Rather, it maintained its position throughout that one of the issues to be decided was whether it had the right to file a grievance to enforce Article 33." *Award at 11* (emphasis added). Further, the hearing transcript reveals that, at the conclusion of the hearing, the Union only withdrew the first two of its proposed issues, and not the grievance itself. *See Exceptions, Attach. II at 226.* Thus, the Agency has failed to demonstrate that the Arbitrator's finding in this regard is clearly erroneous. Moreover, the Agency disputed this matter in its post-hearing brief to the Arbitrator and cannot now challenge this issue as a nonfact. *See AFGE, Local 3957, Council of Prison Locals*, 61 FLRA 841, 845 (2006) (nonfact exception was denied where union had disputed issue in its post-hearing brief).

With respect to the Agency's claim that it did not argue that the Union could not address health and safety matters through the grievance procedure, the Arbitrator found that the Agency violated Article 36 of the parties' agreement by arguing that such matters could not be grieved through the grievance procedure. *See* Award at 19. As to the Agency's claim that the Arbitrator based her award on an issue that the Union did not grieve, the Arbitrator found that the Union raised the stipulated issue -- whether the Union could file a grievance to correct the alleged safety hazard -- in the grievance. *See id.* at 11. Although the Arbitrator found that the Building's mechanical rooms were "outside the control and authority" of the Agency, she found that the Agency was contractually obligated to take actions within its power to correct associated safety hazards. Award at 17. The Agency disputed all of these matters before the Arbitrator. Therefore, the Agency's exceptions do not provide a basis for overturning the award. *See AFGE, Local 376, 62 FLRA at 141.*

B. The Arbitrator did not exceed her authority.

The Agency argues that the Arbitrator exceeded her authority because she "maintain[ed] jurisdiction after the Union withdrew its substantive grievance" and thereafter issued an advisory opinion. Exceptions at 6. As stated above, the Arbitrator made a factual finding that the Union did not withdraw its grievance and the Agency has not provided a basis for overturning this finding. Accordingly, the Agency's exception is denied.

The Agency's arguments that the Arbitrator exceeded her authority under Article 37, § 5 of the parties' agreement, and that her award fails to draw its essence from that section, argue the same claim -- that the Arbitrator issued an impermissible advisory opinion. As such, we do not address the Agency's arguments concerning Article 37, § 5 separately. *See SSA, Baltimore, Md., 57 FLRA 690, 693 n.6 (2002)* (as agency's claim that arbitrator exceeded his authority did nothing more than restate its essence claim, the claims were not addressed separately). Consequently, we deny the Agency's exceptions.

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

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. *See 5 U.S.C. § 7122(a)(2); AFGE, Council 220, 54 FLRA 156, 159 (1998)*. 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. *See United States Dep't of Labor (OSHA), 34 FLRA 573, 575 (1990)*. 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.” *Id.* at 576.

The Agency argues that the Arbitrator’s award is in “manifest disregard” of Article 33, § 3 of the parties’ agreement because § 3 “plainly states that the proper procedure” for remedying safety hazards is to “call attention to alleged unsafe or unhealthful conditions and request an inspection of such conditions by Safety Services or the OOC.” Exceptions at 12 (quoting Exceptions, Attach. V, J. Ex. 1 at 91). However, the full language of § 3, states that the Union “*may* call attention to alleged unsafe or unhealthful conditions and request an inspection of such conditions by Safety Services or the OOC.” *Id.*, Attach. V, J. Ex. 1 at 91 (emphasis added). The use of the word “may” does not establish that the Union was *required* to request an inspection, or that the Union’s *only* course of action was to request an inspection. *Compare AFGE, Locals 3807 & 3824*, 55 FLRA 1, 2 (1998) (finding that the word “may” did not impose a mandatory duty) *with IFPTE, Local 29, Goddard Eng’rs, Scientists & Technicians Ass’n*, 61 FLRA 382, 384 (2005) (finding that the use of the word “shall” indicates that an action is mandatory). Consequently, the Agency has not demonstrated that the Arbitrator’s interpretation of the parties’ agreement is irrational, implausible, unfounded, or in manifest disregard of the parties’ agreement. *See United States Dep’t of Transp., FAA*, 63 FLRA 15, 18 (2008). Accordingly, we deny the exception.³

V. Decision

The Agency’s exceptions are denied.

³ Member Beck notes that the stipulated issue here was whether “the Union’s grievance to enforce Article 33, Sections 1, 2 and 8, [was] appropriate in the circumstances of *this case*?” Award at 2 (emphasis added). However, the Arbitrator’s award directs the Agency to post a “Notice to Employees” stating that it will not assert that the grievance procedure is an inappropriate way to address safety violations “if the [Union] files such a grievance” in the future. *Id.* at 22. Member Beck notes that this remedy is prospective in nature and exceeds the stipulated issue presented to the Arbitrator. Since the Agency does not assert that the remedy exceeds the Arbitrator’s authority, in this regard, Member Beck notes that issue is not properly before the Authority.

APPENDIX

Article 33. WORKING CONDITIONS

Section 1. The Parties acknowledge that the Congressional Accountability Act of 1995 (CAA) authorizes the Office of Compliance (OOC) to enforce Occupational Safety and Health Administration (OSHA) health and safety standards at the Library. The Parties further acknowledge that the CAA provides that the Library and its employees are covered by and shall be afforded the rights and protections therein.

Section 2. The Library agrees to provide a safe and healthful work environment for its employees. This shall be accomplished through the provision of a work environment that is free from recognized hazards that are likely to cause death or physical harm. The Library shall take whatever actions are necessary, including requests to the Architect of the Capitol (AOC) and Congress, to remedy any serious unsafe or unhealthful condition. Such remedy shall be in accordance with the CAA. Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to the CAA that are applicable to his/her own actions and conduct.

Section 3. The Library shall promptly investigate employee reports of unsafe or unhealthful working conditions that pose a threat or danger to the health and safety of employees. Any employee or representative of employees may call attention to alleged unsafe or unhealthful conditions and request an inspection of such conditions by Safety Services or the OOC Timely response and reporting of investigations shall be in accordance with the CAA.

. . . .

Section 8. The Library agrees to take all necessary actions within its control to provide a reasonable degree of fire safety in Library buildings and structures. These actions may include requests to the Congress and AOC for funding and authorization to correct structural and other problems associated with life, safety, and fire protection in the Library buildings and structures.

Exceptions, Attach. V, J. Ex. 1 at 91-93.

Article 36. NEGOTIATED GRIEVANCE PROCEDURE

Section 1. The purpose of this article is to provide for a mutually acceptable procedure for the prompt and equitable settlement of grievances. This shall be the exclusive procedure available to all members

of the bargaining unit, either individually or jointly, and to the Guild in its own name and on behalf of the bargaining unit and to the Library for matters which fall within its coverage.

A grievance is any complaint:

- a. by an employee concerning any matter relating to a condition of employment of the employee;
- b. by the Guild concerning any matter relating to a condition of employment;
- c. by an employee or the Guild concerning:
 1. the effect or interpretation or a claim of breach of this Agreement, or
 2. any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

Id. at 107.

Article 37. ARBITRATION

Section 5. The arbitrator shall have no authority to change, modify, alter, subtract from, or add to, the provisions of this Agreement.

Id. at 113.