

IN THE MATTER OF THE ARBITRATION PROCEEDINGS

BEFORE ARBITRATOR JAMES S. MARGOLIN

BETWEEN

AFGE-NCFLL)
Grievant)
v.) **FMCS CASE NUMBER: 100322-02326-A**
Bureau of Labor Statistics)
Agency)

Appearances:

Daryl Laurie

For the National Council of Field Labor Locals (NCFLL), AFGE, AFL-CIO
Representative of Grievant

Lynn Pratico

Office of the Department for Labor Relations and Negotiations (ODLRN)/Office of the Assistant Secretary for Administration and Management (OASAM).

Attorney for Respondent Bureau of Labor Statistics

OPINION AND AWARD

BACKGROUND

This case involves an institutional grievance filed by the National Council of Field Labor Locals (hereinafter “the Union or NCFLL”) against the Department of Labor’s (DOL) Bureau of Labor Statistics (hereinafter “the Agency”). The Grievance arose from the application of the rating of record to the 2009 performance elements and standards related to element two for the

Field Economist (Industrial Price) position, element four for the Field Economist (Compensation) position, and element five for the Economic Assistant and Field Economist (Consumer Price) positions. It is the Agency's position that the performance elements at issue are in compliance with the requirements of 5 USC 4302 of the statute, Chapter 43 of the Code of Federal Regulations, Department Personnel Regulations and the parties' agreement, and that there has been no violation of the statute, applicable regulations, or the parties' agreement. The Union alleges that these performance elements and standards are not valid because the outcome is determined by a third party and therefore outside the employee's control. The Union is alleging that the elements and standards related to the maximization of survey responses contained in the prototype standards for Field Economists and Economic Assistants at the Bureau of Labor Statistics constitute a violation of statute and regulations, namely, 5 USC 4302(b), the Code of Federal Regulations, Chapter 43-Performance Management, and Departmental Personnel Regulations, Chapter 430.

Hearing was conducted at the Two Pershing Square Building, 2300 Main Street, Kansas City, Missouri on May 25 and 26, 2011. During the course of the hearing both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses. The parties elected to file post-hearing briefs which were timely filed within enlargements of time. The parties stipulated that the grievance was properly before the Arbitrator. The Arbitrator issues this Award based upon the probative value of evidence at the hearing, witness testimony including their perceived bias and truthfulness, and the arguments of the parties pertaining to law and just cause standards of discipline. The parties stipulated to the following issues to be presented to the arbitrator:

Whether element 4 of the Field Economist (Compensation) performance standards for the 2009 and 2010 performance periods ending September 30, 2009 and September 30, 2010, respectively, violates the parties' agreement, regulation or statute.

Whether element 5 of the Economic Assistant performance standards for the 2009 and 2010 performance periods ending September 30, 2009 and September 30, 2010, respectively, violates the parties agreement, regulation or statute.

Whether element 2 of the Field Economist (Industrial Price) performance standards for the 2009 performance periods ending September 30, 2009, violates the parties agreement, regulation or statute.

Whether element 5 of the Field Economist (Consumer Price) performance standards for the 2009 and 2010 performance periods ending September 30, 2009 and September 30, 2010, respectively, violates the parties' agreement, regulation or statute.

RELEVANT CONTRACT, STATUTORY AND REGULATORY PROVISIONS

Article 5 - Rights of Employees

Section 3- Employee Concerns:

Each employee shall have the right to bring matters of personal concern to the attention of appropriate officials of the Department and/or the NCFLL.

Article 15 - Grievance Procedures

Section 7 - General Procedures

D.1 - Union-Filed Institutional Grievance states in pertinent part:

A grievance by the NCFLL is a request for institutional relief over the interpretation or application of this Agreement or the interpretation or application of Departmental regulations, and the applications of Government-wide regulation, covering personnel policies and practices.

D.2 - Union-Filed Employee Grievance states in pertinent part:

A Union filed employee grievance seeks personal relief for an individual employee or group of employees. The grievance(s) should be filed in accordance with the procedures and time frames delineated in Section 7, just as if the affected employee(s) had initiated the grievance(s).

Article 43 – Performance Management Systems

Section 2 – Procedures for Developing Elements and Performance Standards

- A. Consistent with Management's right to assign work, the performance elements should be consistent with the duties and responsibilities contained in an employee's positions description.
- B. In establishing standards, due considerations will be given to employee input.

- C. Employees are entitled to an explanation of the rationales for their elements and standards.
- D. Due consideration will be given the employee as to the resources available and the authority delegated necessary to meet the identified standards and elements.

Section 3- Performance Standards

A performance standard will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the job in question for each employee or position under the System.

After receiving proposed elements and standards from the supervisor, the employee will have the opportunity to meet and discuss these standards with the supervisor, and to provide his or her written comments.

When a performance standard has more than one criterion, employees will be advised as to the relative importance of the criteria contained within the standard.

A performance standard may be in the form of meeting less than all the criteria under a performance standard or of meeting all the criteria under a performance standard.

Upon request, supervisors will inform employees orally of what is expected in order to exceed a standard. Employees will be provided ongoing feedback from their supervisors on their work performance.

Section 4 – Annual Rating of Record states in pertinent part:

- A. Within 30 days after the end of the rating period, each employee shall receive an annual rating.
- B. Each Agency will ensure regular performance feedback is provided to each employee during the appraisal period. As part of this feedback, a progress review must be held at least once during the appraisal period... At a minimum, during this progress review, employees will be informed orally of their performance relative to the elements and standards in their performance plans...

Section 7 – Special Circumstances

Performance appraisals must take into account: authorized absences, including Union representation, during the course of working hours, and factors outside the employee's control.

Section 10 – Information Sharing

Management agrees to share Agency prototype elements and standards developed at the regional or national level for similar or common positions within the bargaining unit with the NCFLL in a timely manner. The NCFLL will have a minimum of 30 calendar days to submit comments on standards before their implementation.

“Prototype elements and/or standards” are performance elements and standards that apply to several positions with similar duties, responsibilities, and job requirements. Usually they are developed centrally for all positions in a particular mission critical occupation and grade.

Section 11- Grievability and Arbitrability of Job Elements and Performance Standards

Performance Standards may only be grieved when they are applied to a rating of record.

5 U.S.C Chapter 43 – Performance Appraisal

5 U.S.C. § 4302 (b) states in pertinent part:

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for –

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) relate to the job in questions for each employee or position under the system;

(2) ... communicating to each employee the performance standards and the critical elements of the employee’s position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and (6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

5 CFR Part 430 – Performance Management.

5 C.F.R. §430.203 states in pertinent part:

Critical element means a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable. Such elements shall be used to measure performance only at the individual level.

5 C.F.R. § 430.209 states in pertinent part:

An agency shall --

(a) Submit to OPM for approval a description of its appraisal system(s) as specified in § 430.204(b) of this subpart, and any subsequent changes that modify any element of the agency's system(s) that is subject to a regulatory requirement in this part.

Departmental Personnel Regulations - Chapter 430

DPR Chapter 430 Subchapter 1 states in pertinent part:

Section 3. Definitions

Section 3.g

“Prototype elements and/or standards” are performance elements and standards that apply to several positions with similar duties, responsibilities, and job requirements. Usually they are developed centrally for all positions in a particular mission-critical occupation and grade.

Section 6. Performance Plans

Section 6.a states in pertinent part:

Results-Based Elements. The performance plan will consist of critical elements focused on organizational results. Each element must have written performance standards which hold the employee accountable for measurable and/or observable results. These results-based standards will be written at the *Meet* level for all critical elements. Standards must include measures of performance, such as quality, quantity, timeliness, and cost effectiveness. Performance elements must reference the Department, Agency, and/or other organizational strategic goal(s) with which each is aligned. To the extent possible, supervisors’ performance plans should be aligned with executive performance plans within the chain of authority. Managers’ and supervisors’ performance plans will have at least one element which addresses responsiveness to client/customer needs. Supervisors’ performance plans will contain at least one critical element which addresses employee perspectives, such as development, recognition, and fair treatment.

Section 6.b

Competencies. Performance elements should be directly linked to the job description. The linkage to the job description must be properly documented through a job analysis, which results in the identification of critical competencies required for successful performance of the job. Those competencies will be identified in the critical elements.

Section 7. Appraisal of Performance

Section 7.c

Annual Rating of Record. Within 30 days after the end of the rating period. Each employee should receive an annual rating of record.

Section 7.d states in pertinent part:

Progress Reviews. Each Agency will ensure regular performance feedback is provided to each employee during the appraisal period. As part of this feedback, a progress review must be held at least once during the appraisal period.

Section 7.e (1) states in pertinent part:

General Requirements. The rating official must appraise employees' performance relative to the elements and standards performed. The performance rating of record must take into consideration factors outside the employee's control impacting the results achieved...

Section 8. Performance Improvement Actions

Section 8.b states in pertinent part:

Initiation of a PIP. The rating official will initiate a minimum 90-day PIP period in accordance with 5 CFR 432.104 whenever an employee's performance fails to meet the standard on one or more critical elements. The rating official will develop the PIP in writing...

STATEMENT OF FACTS AND DISCUSSION

The Bureau of Labor Statistics was established in 1884. Since that time, the mission of the Agency has been to collect, analyze, and disseminate essential economic information to support public and private decision-making. Each year Congress authorizes funding for the surveys conducted by the Agency. Included in these surveys are the Consumer Price Survey, the Producer Price Survey, and the National Compensation Survey. The data collected by the Field Economists and Economic Assistants are used to calculate the Consumer Price Index (CPI), the Producer Price Index (PPI), the International Price Program (IPP), and Employer Cost Index (ECI). The CPI, PPI, IPP, and ECI have all been designated Principal Federal Economic Indicators by the Office of Management and Budget and are used by the President, the Congress, and Federal Reserve Board to determine fiscal and monetary policy for the United States.. For example, the CPI is used to determine the cost of living adjustment for Social Security recipients, while the ECI is used as an input for Medicare hospital reimbursements. Additional examples include the use of the CPI and PPI by the Federal Reserve Board to determine interest rates. The

PPI and the IPP are inputs into the Gross Domestic Product (GDP) estimates calculated by the Department of Commerce.

The Agency surveys are developed and designed in accordance with the requirements contained in the *Office of Management and Budget Standards and Guidelines for Statistical Surveys* which all federal statistical agencies must follow. Agencies whose surveys which do not meet an 80 percent unit response rate or a 70 percent item response rate are required to conduct a non-response bias analysis. High response rates are necessary to produce reliable and accurate statistics, thus ensuring high quality information is available to assist policy makers when crafting fiscal and monetary policy. The Agency has no power under law or regulation to compel business compliance and response to Agency surveys. The performance of Agency employees are measured on the quantity of voluntary responses to Agency surveys they are able to obtain from businesses.

The Agency developed performance elements and standards for those employees who are employed as Field Economist and Economic Assistants. One of the critical elements the Agency identified for these positions, consistent with the duties and responsibilities contained in the position descriptions, is maximizing survey and/or establishment responses.

For several years, Field Economists and Economic Assistants with the U.S. Department of Labor, Bureau of Labor Statistics have a critical element in their performance standards related to the maximization of survey responses. These employees are evaluated on this critical element based on obtaining voluntary information from a third party, for which they have no control. After 25 years of discussing but not resolving the issue with the Agency, the Union filed an institutional grievance pursuant to Article 15 Section 7 D.1.

The Union contends that the response rate performance elements are not valid because the outcome is determined by third parties (businesses) outside the employees' control. The United States Code at 5 U.S. C. §4302.b.1 provides for the establishment of "performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria." Additionally, 5 U.S.C. §4302.b.2 provides for "communicating to each employee the performance standards and critical elements of the employee's position."

The Merit Systems Protection Board (MSPB) has held that the requirements of 5 U.S.C. § 4302 are satisfied by communicating to employees the standards they must meet in order to be evaluated at a level sufficient to meet job retention. *Melnick v Dep't of Housing and Urban Development*, 43 M.S.P.R. 93, 98 (1989), aff'd 899 F.2d 1228 (Fed. Cir. 1990). Such communication may occur through written instructions, information concerning deficiencies and methods of improving performance responses to the employee's questions concerning performance, or in any manner calculated to apprise the employee of the requirements against which he is to be measured. *Chaggaris v. General Services Admin.*, 49 M.S.P.R. 249, 254 (1991).

The language of the statute requires that an employee be evaluated on job performance based on objective criteria to the maximum extent feasible, and that the performance standards and critical elements be communicated to employees. The communication of the elements and standards is not a matter of dispute in this grievance. At issue, rather, is whether the response rate element is objective or measurable. The Union asserts that the outcome of a part of the standard is determined by the voluntary mood of a third party business, and not within an employee's control. The Agency asserts that this argument has no merit that since "this is not a requirement under the statute".

The Union alleges that the elements and standards in question are not valid because they are dependent on a third party over which the employee has no control. Further, they are not written at the “meets” level because a third party controls the outcome of the rating. The performance periods in question are from October 1, 2008 through September 30, 2009 and October 1, 2009 through September 30, 2010, respectively. As a remedy, the Union is requesting that the element regarding maximizing survey response be removed from the standard of evaluating employees.

Union Witness testimony was provided by Field Economists Wallie Breig and Martin Levin, and Economic Assistant Richard Smith. The consistent theme of their testimony centered on employees being evaluated on the refusal rate critical element and their ability to meet or exceed being totally dependent on the cooperativeness of an outside third party for which they have no control. The problem, as they testified during the hearing, is the fact that the third party respondent is not under any legal obligation to participate in the survey process. These witnesses provided several reasons that a respondent chooses not to cooperate in the survey process, they include but are not limited to: The respondents dislike of the Federal Government in general; the respondents dislike with the current Presidential Administration and/or Congress; the respondents lack of time and/or available resources to allow participation.

The Union entered into evidence a copy of a redacted letter sent by the Agency to potential respondents for their participation in the survey process. In the fourth paragraph of the letter, it states:

“... through your voluntary participation, BLS programs provide a wide variety of information on such topics as wages and benefits, job growth, consumer and producer prices, unemployment, and other economic statistics for your industry and area.”
[emphasis added].

Thus, BLS employees are evaluated by the voluntary participation of, and at the mercy and whim of third parties in the survey process. It was clear from all testimony that little if no

uniform guidance is given to employees on how to deal with “refusals”, *i.e.* the refusal of businesses to participate voluntarily with the BLS survey. The employee is not judged on his or her efforts, but rather on extraneous circumstances beyond the employee’s control. The employee’s success is defined not by uniform and objective standards but rather the luck of the draw as to the assignment by the supervisor, the mood of the respondent business or the deceptive guile of the employee as promoted by the system as a whole. The system promotes deception and dishonesty by the employee to sometimes cajole the respondent to participate in the survey so that the employee will not be negatively evaluated. Negative evaluation can result in the lack of advancement in pay or position, and termination.

Article 43 of the Collective Bargaining Agreement between the U.S. Department of Labor and the National Council of Field Labor Locals covers the Performance Management System. The Refusal Standard is one of the "critical elements" of the Performance Standards in BLS. Performance Standards are issued to every employee on an annual basis and critical elements are those elements deemed essential for the successful performance of your job. An employee can be fired if he or she fails in a single critical element. One must meet all of critical elements to get promoted in the Career Ladder, to get Within Grade Increases; to receive annual performance awards, and to compete for promotions. Under the Departmental Personnel Regulations (DPR) Chapter 430 Subchapter 1 6(a), a performance plan will consist of critical elements focused on organization results. Each element must have written performance standards which holds the employee accountable for measurable and/or observable results. These results-based standards will be written at the *Meets* level for all critical elements. However, Christa Friars-Brown, an Agency witness, conceded that in the evaluation of an employee under a critical element, such as the refusal standard: "If it's out of their control, then they should not be held accountable for it." Similarly, Mr. Jay Mousa, Associate Commissioner, Field Operations-BLS, when asked if the Field Economist/Economic Assistant should be held accountable for refusals beyond their control, he responded that they should not.

The preponderance of the evidence established that, by establishing this critical element for FE and EA;'s, the Agency has failed to comply with 5 USC 4302(b) (1) and Article 43 Section 3 of the collective bargaining agreement between the U.S. Department of Labor and the National Council of Field Labor Locals. The statute and collective bargaining agreement requires the Agency to establish performance standards which, to the maximum extent feasible, permit the accurate appraisal of performance based on objective criteria, and which are reasonable, realistic, attainable, and clearly stated in writing. During the hearing, there was no credible Agency testimony or evidence that FE's and EA's are rated on any objective criteria which are reasonable, realistic and attainable. These employees are rated on the results and not the effort they put into obtaining voluntary cooperation of a third party to participate in the survey process. In *Mattes v. Department of the Army* 84 FMSR 6010, 24 MSPR 477 November 20, 1984 the presiding official determined those three out of five reports were not the sole responsibility of the appellant and that their delay was due to circumstances outside of the appellant's control.

Also, by establishing the refusal rate a critical element for FE and EA;'s, the Agency has failed to comply with 5 USC 4302(b) (2) which requires the Agency to ensure that employees are aware in advance of the performance standards and critical elements of their positions. During the Agency witness testimony of Jay Mousa, he admitted that the allowable range of refusals to "meet" the Performance Standard is benchmarked at the beginning of the appraisal year based upon the experience in the region the previous year. The average regional refusal rate is then recalculated by supervisors at the mid year of the rating period and again at the year end. This fails the legal standard that standards be clearly communicated "in advance" i.e. at the beginning of an evaluation period. Mr. Mousa conceded that the initial benchmark is "approximate" and the regional average is a "moving target" throughout the performance year. Under 5 U.S.C. 4302(b)(1) "an agency must communicate to the employee performance standards that are sufficiently specific to provide the employee with a firm benchmark toward which to aim his performance, and not an elusive goal that the agency may find the employee met or failed to meet at its pleasure. *Sullivan v. Department of the Navy*, MSPB Docket No. SF04328610843 (April 17, 1990) and *Smith v. Department of Energy*, 91 FMSR 5384, 49 MSPR 110 (MSPB 1991)

Additionally, the refusal rate critical element for FE's and EA's fails to comply with the Departmental Personnel Regulations (DPR) Chapter 430 Subchapter 1 6(a), which provides that a performance plan will consist of critical elements focused on organization results. Each element must have written a performance standard which holds the employee accountable for measurable and/or observable results. These results-based standards will be written at the *Meets* level for all critical elements. The refusal rate critical element holds an employee accountable for factors outside the control of an employee. This critical element is based specifically on respondents voluntarily cooperating to participate in the survey process. A refusal to cooperate, regardless of the reason(s), results as a negative against the FE/EA on this element. Even in the testimony of Agency witnesses Jay Mousa and Christa Friars-Brown, both conceded that employees should not be held accountable for factors outside their control. From the Agency testimony of Charlene Pfeifer, BLS Regional Commissioner, it was clear that the Agency does not provide the employees with any a checklist of "techniques" to be used by economists to thoroughly attempt collection of data from non-responsive employers. If a checklist were used, management could more accurately measure an employee on accomplishments within their control.

There was no probative evidence that any guidance is provided to supervisors when they evaluate employees on this critical element. This leaves a significant amount of discretion to a supervisor, and lack of uniformity, in deciding if an employee meets or fails the standard. The danger faced for an FE or EA who fails the refusal rate critical element is potential removal from federal service.

DECISION AND AWARD

It is the opinion and Award of the Arbitrator that, by a preponderance of the evidence, the performance elements at issue do not comply with the statute, applicable regulations and the parties' collective bargaining agreement.

THE GRIEVANCE IS SUSTAINED, and under the circumstances of the instant arbitration proceeding, it is just and proper that as a remedy, the Agency remove the performance rating element regarding maximizing survey response for all Field Economists and Economic Assistants from their performance standards, and the Agency not penalize any Field Economist and Economic Assistant failing to meet these named elements of their standards. Additionally, the Agency will review and reissue, where appropriate, a rating of record for Field Economists and Economic Assistants on the remaining elements for performance rating years of FY 2009 and FY 2010

This Award is in full settlement of all claims submitted to this Arbitration.

IT IS SO ORDERED THIS 20TH DAY OF JANUARY, 2012, by



JAMES S. MARGOLIN, ARBITRATOR