

2015. The second quarter in 2015 (the ratings quarter) was the first quarter in the 2015 annual rating cycle.

The grievance in this case alleges that the element ratings in the ratings quarter by Lt. Shiflett that result in an overall rating violated the Master Agreement (Agreement), Local Supplement Agreement (Supplement), Agency Policy (Policy) or 5 USC 7102. The parties did not agree to a stipulated issue at the hearing. The issue in this case is whether the Agency violated the Agreement, Supplement, Policy and/or Statute by the element ratings assigned to the Grievant by Lt. Shiflett for the ratings quarter?

Factual Background

The Grievant had a rating of Outstanding on three elements and Exceeds on two elements for the ratings quarter immediately preceding the ratings quarter at issue in this case. The result was that the Grievant achieved an overall rating of Outstanding for that prior ratings period. Performance awards and promotion points are based on final yearly ratings (performance evaluations). Nevertheless, a quarterly rating can have an effect on a staff member's ability to get promoted. Moreover, a quarterly rating can have an effect on performance awards.

The Grievant was an active Union Steward for Local #0171 prior to and during the ratings quarter. He was also a member of the negotiations team engaged in negotiations with the Agency during the ratings quarter. The rating period for the second quarter was a 90-day period. During that 90-day period, the Grievant was on duty for a period of 22 days. Therefore, the Grievant was on official time engaged in bargaining with the

Agency for a substantial majority of the time during the ratings quarter.

Article 14.g of the Supplement provides: "The Employer reaffirms that performance log entries or performance counseling sessions will be based on the actual behavior of the employee, not personality traits or judgmental conclusions drawn by the supervisor." Article 14.h of the Supplement reads: "Union official's performance evaluation will be based solely on job-related performance. If job-related performance cannot be rated due to the use of official time, the official's current rating will be valid."

Article 14, Employee Performance and Ratings, of the Agreement states as follows:

Section a. The Employer's performance evaluation program as applied to bargaining unit employees is intended to increase the efficiency of operations, foster good employee morale, strengthen employee-Management relationships, and evaluate work performance based upon established elements and performance standards. These standards and elements will be developed and communicated to each employee, and as they are applied to an employee, will be fair and based upon objective criteria and job-relatedness. In the event that employees do not understand portions of their performance requirements, it is the employee's responsibility to bring those specific areas to the attention of their supervisors.

Section b. Bargaining unit employees shall the right to appeal their performance ratings through the negotiated grievance procedure with or without the Union. It is understood that only the Union or the Agency can pursue the matter to arbitration.

Section c. The parties to this Agreement endorse the concept that evaluations should be completed by supervisors who have knowledge of an employee's performance. Where employees serve subject to multiple supervisors, it is recommended that, where practicable, such employee's ratings be completed by the supervisor for whom they worked during the rating period. This endorsement is not intended to waive any rights employees may otherwise have to grieve their performance ratings.

1. the Employer and its representatives are committed to following Agency policy regarding the performance appraisal program. This policy will be available for the employee's review upon request. This policy states that the following time frames will be adhered to in relation to performance log entries:

a. rating officials must record specific incidents in the performance log within fifteen (15) working days of becoming aware of the incident;

b. after an entry has been made in the performance log, the employee will be given an opportunity to see the entry as soon as practicable and before the entry is used officially, but no later than fifteen (15) working days after the entry is made; and

c. these time requirements may be adjusted, if necessary, because of the rating official's or employee's absence.

Section d. The Employer agrees to provide information requested by the Union regarding the performance evaluation program and distribution of ratings if a valid request is made under the provisions of 5 USC, Chapter 7114(b(4)).

Lt. Shiflett rated the Grievant as Exceeds in the five rating elements for the rating quarter. These ratings resulted in an overall rating of Excellent. Pursuant to Article 14.c.1.b of the Agreement, Lt. Shiflett issued the ratings to the Grievant. The Grievant did not agree with

the ratings, and notified Lt. Shiflett that he had on been on official time for the majority of the ratings quarter. According to Lt. Shiflett, he reviewed his ratings for the Grievant in light of the Grievant's objection but concluded that the ratings should stand. Lt. Shiflett notified the Grievant of his determination.

On August 21, 2015, the Grievant and his Union representative, Brain Coker, submitted a Formal Grievance Form that appealed the quarterly ratings through the negotiated grievance procedure. The appeal certifies that "efforts at informal resolution have been unsuccessful." On September 3, 2015, the Agency denied the grievance. Specifically, the denial states that there was no evidence that Lt. Shiflett based his performance-log rating on anything other than (the Grievant's) work during the rating period.

On September 10, 2015, Union Steward Coker submitted a Notice of Intent to Invoke Arbitration. The appeal contended that the ratings of the Grievant violated the Agreement (the ratings issue). The appeal further alleged that the ratings constituted retaliation against the Grievant because of his Union activity (the retaliation issue). The arbitration hearing in this case was held on May 26, 2016. The parties did not raise any threshold (arbitrability) issues at the hearing.

Although the parties did not agree to on an issue(s) to be resolved at the hearing, they did agree at the outset of the hearing that the issue in this case involved the period of time the Grievant was on duty during the rating

period. Accordingly, the only issues for resolution in this case are the ratings issue and the retaliation issue raised in the appeal to arbitration.

Discussion

A. The Ratings Issue

Article 14.h of the Local Supplement states, "Union officials performance evaluation will be based solely on job-related performance. *If job-related performance cannot be rated due to the use of official time, the official current rating will be valid.*" (emphasis added). In its brief, the Agency argues that this provision of the Supplement "only applies to union officials who spend 100 percent of the quarter on official time and work no time on a post." If the parties had so intended, that language could have and likely would have been used to designate the time requirement set forth in Article 14.h.

The language in Article 14.h suggests that this provision applies to a situation wherein a union official is on official time for a period of time and on-duty for a specific time within the ratings quarter. The parties agree that a time period is not set forth in the Agreement. However, the first sentence of this provision clearly indicates that the on-duty time period must be such as to permit a performance evaluation. It thus appears that the parties intentionally did not specify a time certain in Article 14.h in order to have the relevant time period determined under the facts in each case.

The Grievant was on duty 22 days and on official time the remainder of the 90-day rating period. Lt. Shiflett worked in the office during the rating period. The Grievant worked on mobile assignments outside the office during the rating period. The Grievant testified that he only saw Lt. Shiflett twice while on duty during the rating period. Lt. Shiflett testified that he did not remember how many time he saw the Grievant on duty during that rating period but believed that he saw the Grievant on duty at last one time.

Lt. Shiflett did not know the Grievant was on official duty at the time he initially issued the ratings to the Grievant. He only became aware of that fact when the Grievant raised this issue in his objections to the ratings. Additionally, Article 14.c.1.a of the Agreement requires that a rating official "must record specific incidents in the performance log within fifteen (15) days of becoming aware of it." Lt. Shiflett only states in the rating document that, "Officer Wright exceeds the standards for this rating period."

Contrast that "exceeds" statement by Lt. Shiflett to the statement given for the Outstanding rating in the prior rating period: "Officer Wright performed an outstanding job working in the visiting room this quarter. He supervises inmates in a firm, fair and consistent manner. He can be counted on to be professional and thorough in dealing with inmates. He insures that all tasks are completed in a timely manner. He controls contraband by conducting frequent and irregular searches in his area of responsibility. He conducts unscheduled rounds of the visiting room throughout his tour of duty. Officer Wright communicates effectively with inmates and his peers." How the

"exceeds" statement of Lt. Shiflett complied with the requirement of Article 14.c.1.a is not apparent.

The totality of circumstances convince that Lt. Shiflett did not have sufficient knowledge of the Grievant's on-duty work performance to rate it. Under the circumstances, the Grievant's job-related performance was not and could not be adequately rated due to the Grievant's use of official time. Therefore, the finding must be that the Agency violated Article 14.h of the Supplement by the ratings assigned to the Grievant during the ratings quarter. In such a case, Article 14.h provides that the Grievant's "current rating" would be valid. The current rating for the Grievant was an "Outstanding" overall rating for the prior ratings quarter.

B. The Retaliation Issue

Article 6.b.3 of the Agreement prohibits discrimination based on "protected activity, Union membership, or Union activity." 5 USC 7102 provides that each employee shall have the right "to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and to other officials of the executive branch of the Government, the Congress, or other appropriate authorities." That right obviously included the right to represent a labor organization in labor negotiations with the Agency. 5 USC 7116 makes it an unfair labor practice "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter."

The Union argues that the Grievant had numerous meetings with management officials, including Lt. Shiflett, wherein exchanges became heated. It also contends that Lt. Shiflett had made derogatory comments about the Union. The Union has the burden of proof on the discrimination issue. That burden is to show by a preponderance of the evidence that the ratings of the Grievant were motivated by his Union activity. In this case, that burden is to show that discriminatory intent probably or more likely than not was reflected in the ratings. The evidence regarding heated exchanges with management officials and derogatory comments about the Union certainly rise to the level of a reasonable suspicion.

The evidence convinces that the ratings by Lt. Shiflett were attributable to his unfamiliarity with the Grievant's work performance to the extent that Lt. Shiflett did not even know that the Grievant had spent the great majority of the rating period on official duty. To hold otherwise would seem to require a finding of discriminatory intent for every negative management decision when heated exchanges and negative comments had occurred. It is this view that discriminatory intent must be determined by all the facts involved in each management decision. The evidence in the record does not support the retaliation claim by the Union.

C. The Remedy

The Union requests a remedy that the evaluation of the Grievant be changed to reflect the previous valid rating. That previous rating was an "Outstanding" overall rating. Based on the foregoing, it appears that evaluation remedy requested by the Union should be granted. The Union also requests other

remedies in this case. In this opinion, the change of the rating is sufficient to address the violation of the Supplement. Accordingly, the other requested remedies are not granted.

AWARD

The grievance is sustained, in part, and denied, in part. The Agency shall change the Grievant's overall rating for the ratings quarter to an Outstanding level.

DATED, this the 11th day of September, 2015.

A handwritten signature in cursive script that reads "Norman Bennett". The signature is written in black ink and is positioned above a horizontal line.

Norman Bennett
ARBITRATOR