

73 FLRA No. 143

FEDERAL EDUCATION ASSOCIATION  
STATESIDE REGION  
(Union)

and

UNITED STATES  
DEPARTMENT OF DEFENSE  
EDUCATION ACTIVITY  
DOMESTIC DEPENDENT  
ELEMENTARY  
AND SECONDARY SCHOOLS  
(Agency)

0-AR-5656  
(73 FLRA 32 (2022))

DECISION

November 29, 2023

Before the Authority: Susan Tsui Grundmann, Chairman,  
and Colleen Duffy Kiko, Member

**I. Statement of the Case**

The Union grieved the Agency's decision to change certain excepted-service positions to competitive-service positions when the Agency filled vacancies or new positions. In an initial award, Arbitrator Kurt Saunders determined that the grievance was not substantively arbitrable. In *Federal Education Association, Stateside Region (FEA)*,<sup>1</sup> the Authority granted the Union's contrary-to-law exception challenging that determination, and remanded the matter to the parties for resubmission to the Arbitrator to render a decision on the grievance's merits.

In a remand award, the Arbitrator denied the grievance, finding that the Agency's action did not violate law or the parties' collective-bargaining agreement. The Union filed exceptions to the remand award on nonfact, bias, essence, and contrary-to-law grounds. Because the

Union does not demonstrate that the remand award is deficient, we deny the exceptions.

**II. Background**

a. Initial Award and Authority's Decision in *FEA*

As *FEA* sets forth the facts of this case in detail, we summarize them only briefly here. On July 31, 2017, the Agency notified the Union (July notice) that it would change certain professional positions previously designated as "[e]xcepted [s]ervice" to "[c]ompetitive [s]ervice"<sup>2</sup> (the change). The July notice stated that for those positions, the Agency would fill vacancies using "the hiring authorities/options under Title 5 (Competitive Service) as the appropriate source," but employees who currently encumbered any affected position would remain in the excepted service.<sup>3</sup> In response, the Union filed an institutional grievance alleging (1) the Agency did not have the authority to implement the change, and (2) filling bargaining-unit vacancies is "covered by" the parties' agreement.<sup>4</sup> The Agency denied the grievance, and the Union advanced it to arbitration.

The Arbitrator framed four issues. The first two issues concerned whether the grievance was procedurally or substantively arbitrable. In pertinent part, the third issue was whether "the Agency provide[d] the Union with appropriate notice[,] as required by Article 7 [Section] 2.a[,] of the anticipated adverse effects of [the] change on Article 22 [Section] 3.d of the contract [(Article 22)]"; and the fourth issue was whether "the Agency violate[d] Article 22 and/or 10 [U.S.C. §] 2164 when it changed specified positions in the bargaining unit from [e]xcepted [s]ervice to [c]ompetitive [s]ervice."<sup>5</sup>

The Arbitrator found that the grievance was procedurally, but not substantively, arbitrable. The Arbitrator did not address the merits of the Union's claims that the Agency violated Article 22 or 10 U.S.C. § 2164.

Despite finding the grievance not substantively arbitrable, the Arbitrator addressed the third issue and noted that Article 22 states: "In selecting a source of recruitment from which to fill a position, the selecting Agency official will first consider permanent . . . employees for the position."<sup>6</sup> The Arbitrator found the change adversely affected bargaining-unit employees because employees whose positions remained in the excepted service might not be deemed eligible to apply – and would not be given first consideration – for positions that were changed to the competitive service. The

<sup>1</sup> 73 FLRA 32 (2022).

<sup>2</sup> Initial Award at 6.

<sup>3</sup> *Id.* at 7.

<sup>4</sup> *Id.* at 7-8.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.* at 4.

Arbitrator concluded the Agency had a contractual obligation to advise the Union of this adverse effect, but did not do so. As a remedy for that contract violation, the Arbitrator directed the Agency to give the Union an opportunity to submit impact-and-implementation proposals regarding affected employees.

On July 20, 2020, both the Union and the Agency filed exceptions to the award. On August 19, 2020, each party filed an opposition to the other's exceptions.

In *FEA*, the Authority found that the Arbitrator's substantive-arbitrability determination was contrary to law.<sup>7</sup> The Authority also found the Arbitrator's discussion on the third issue was "non-binding dicta" because he found the matter not grievable.<sup>8</sup> Consequently, the Authority declined to consider the parties' challenges to the Arbitrator's discussion of that issue, and instead remanded the matter to the parties for resubmission to the Arbitrator for a decision on the merits.<sup>9</sup>

#### b. Remand Award

In the remand award, the Arbitrator noted that both parties had filed exceptions to the initial award; the Authority had overturned his substantive-arbitrability finding; and the Union had filed an exception to the initial award's findings on the third issue. Citing the Authority's "decision that [the] original ruling [on the third issue] was dicta," and "the almost certainty of a renewed Union objection if the original finding [on that issue] is resubmitted," the Arbitrator "withd[r]ew" his "original response" on the third issue.<sup>10</sup> He further stated that "[a] new ruling will be provided on this issue that the undersigned will endeavor to be consistent with law, free of any dicta, and will bring this grievance to a close."<sup>11</sup> The Arbitrator then addressed the merits of the third and fourth issues.

Addressing the fourth issue<sup>12</sup> – as relevant here, whether the Agency violated Article 22 when it made the change<sup>13</sup> – the Arbitrator explained that, even before the change, an excepted-service employee "could not legally be granted priority consideration if applying for any

[c]ompetitive[-s]ervice vacancy [and, f]or that employee, priority consideration would only apply if the employee applied for an [e]xcepted[-s]ervice vacancy."<sup>14</sup> Thus, the Arbitrator determined that Article 22's priority consideration could "reasonably [be] interpreted" as applying only to hiring for excepted-service positions.<sup>15</sup> On this basis, the Arbitrator concluded that after the change, "the application of [Article 22] did not change."<sup>16</sup> Rather, "[w]hat changed was a decrease in the number of [e]xcepted[-s]ervice positions."<sup>17</sup> Therefore, the Arbitrator found the change did not affect any priority-consideration benefit under Article 22 for incumbent excepted-service employees. The Arbitrator concluded that the Agency did not violate Article 22.

As to the third issue – whether the Agency provided the Union with appropriate notice of the change's anticipated adverse effects on Article 22, as required by Article 7, Section 2.a – the Arbitrator noted that Article 7, Section 2.a states: "The Agency recognizes that the [Union] must be notified of changes to personnel policies, practices, and/or terms and conditions of employment that impact bargaining[-]unit members, prior to implementation, in accordance with [the Federal Service Labor-Management Relations Statute (the Statute)]."<sup>18</sup> The Arbitrator found it "undisputed" that, in the July notice, the Agency gave the Union "appropriate notice" of the change,<sup>19</sup> and that the Agency did not separately notify the Union of the alleged adverse effect of the change – namely, that bargaining-unit employees in excepted-service positions would not receive priority consideration for the positions that the Agency would fill as competitive-service positions.<sup>20</sup>

Nevertheless, the Arbitrator found the Agency's failure to provide separate notice of the alleged adverse effect was not "unreasonable," because "[t]he loss of priority consideration" to the excepted-service employees "is a legal outcome, not contractual," and Article 22's application to such employees "did not change."<sup>21</sup> Citing Article 7, Section 2.b.1.c – which permits the Union to request a discussion concerning Agency changes – the Arbitrator noted that, had the Union availed itself of that option by proceeding with a "pre-change discussion"

<sup>7</sup> *FEA*, 73 FLRA at 34.

<sup>8</sup> *Id.* at 34-35.

<sup>9</sup> *Id.* at 35.

<sup>10</sup> Remand Award at 3. The Arbitrator also incorporated his findings from the initial award regarding procedural arbitrability, which are unchallenged.

<sup>11</sup> *Id.*

<sup>12</sup> We summarize the Arbitrator's findings regarding the fourth issue before summarizing his findings regarding the third issue, as the former findings provide helpful context to the latter findings.

<sup>13</sup> The Arbitrator also found that the Agency did not violate 10 U.S.C. § 2164. Because the exceptions do not challenge that finding, we do not discuss it further.

<sup>14</sup> Remand Award at 9.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (further explaining that "[t]he existence of employees in the two [s]ervice [p]latforms did not change, only the number in each").

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 11.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (further concluding the Agency had "no obligation . . . to notify the Union that [Article 22] was somehow affected by the change" because Article 22's "application was unaltered").

instead of filing the grievance, it could have discussed the alleged adverse effect with the Agency.<sup>22</sup>

Consequently, the Arbitrator denied the grievance.

On March 13, 2023, the Union filed exceptions to the remand award. On April 12, 2023, the Agency filed an opposition to the Union's exceptions.

### III. Analysis and Conclusions

#### a. The award is not based on nonfacts.

The Union argues the award is based on several nonfacts.<sup>23</sup> To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>24</sup> However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.<sup>25</sup> Additionally, parties may not successfully challenge as nonfacts an arbitrator's interpretation of a collective-bargaining agreement.<sup>26</sup>

First, the Union challenges the Arbitrator's finding that it failed to pursue "pre-change discussions" with the Agency under Article 7, Section 2.b.1.c. The Union argues that, in concluding the Agency was not obligated to provide separate notice of any adverse effect arising from the change, the Arbitrator disregarded a finding from his initial award. Specifically, the Union cites the Arbitrator's prior finding that the Agency failed to respond to a Union email asking the Agency to notify it of any planned changes to current hiring procedures, so that the Union could submit bargaining proposals.<sup>27</sup> However, in concluding that the Agency was not obligated to provide separate notice, the Arbitrator relied on his finding that the failure to provide such notice was not "unreasonable" because the application of Article 22 did not change;<sup>28</sup> he did not rely on the Union's alleged failure

to pursue pre-change discussions with the Agency. Therefore, the challenged finding is not central to the award, and provides no basis for finding the award is based on a nonfact.<sup>29</sup>

Next, the Union argues the Arbitrator "based his decision" that Article 22's application was unchanged "on the nonfact that the grievance centered on the change in classification of current employees, whereas the grievance concerns the hiring practice and authority under which the Agency will hire for future positions."<sup>30</sup> To support its argument, the Union cites the Arbitrator's statements that (1) "the existence of employees in the two [s]ervice [p]latforms did not change, only the number in each" and (2) "the adverse effect in question is 'the loss of the priority[-]consideration benefit under [Article 22] for certain employees whose classification was changed from [e]xcepted to [c]ompetitive [s]ervice."<sup>31</sup> Although the Union interprets these statements as evidence that the Arbitrator mistakenly thought the Agency changed the classification of *employees* as opposed to *positions*,<sup>32</sup> it is clear from the remand award that the Arbitrator construed the grievance as concerning the filling of positions.<sup>33</sup> Further, as discussed in section III.C., the Arbitrator's conclusion that Article 22's application was unchanged was based upon his legal conclusion that employees in excepted-service positions could not be granted priority consideration for competitive-service positions, not on any finding that existing employees had their position classification changed. The Union's nonfact argument challenges the Arbitrator's interpretation of Article 22 and, as such, it does not provide a basis for finding the award is based on a nonfact.<sup>34</sup>

We deny the nonfact exceptions.

#### b. The Union does not demonstrate that the Arbitrator was biased.

The Union argues the Arbitrator was biased.<sup>35</sup> To establish bias, the excepting party must demonstrate that (1) the award was procured by improper means, (2) there

<sup>22</sup> *Id.*

<sup>23</sup> Exceptions at 5-7; Exceptions Br. at 12-18.

<sup>24</sup> *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 501 (2023) (*VA Pershing*) (citing *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022)).

<sup>25</sup> *AFGE, Loc. 3601*, 73 FLRA 515, 517 (2023) (*Local 3601*).

<sup>26</sup> *Id.*; *AFGE, Loc. 1802*, 50 FLRA 396, 398 (1995) (*Local 1802*) (denying nonfact exception challenging contractual interpretation).

<sup>27</sup> Exceptions Br. at 13-16.

<sup>28</sup> Remand Award at 11.

<sup>29</sup> *Local 3601*, 73 FLRA at 517 (award not deficient on nonfact grounds where challenged finding was not central to award); see also *AFGE, Loc. 3917*, 72 FLRA 651, 653 (2022) (Chairman DuBester concurring) (same).

<sup>30</sup> Exceptions Br. at 17.

<sup>31</sup> *Id.* (quoting Remand Award at 9) (internal quotation marks omitted).

<sup>32</sup> *Id.* ("the [A]rbitrator's determination that the employees' classification was changed . . . is based on a nonfact").

<sup>33</sup> Remand Award at 3 (characterizing the grievance as "a direct challenge to the Agency's choice of hiring authorities"), 6 (finding that 10 U.S.C. § 2164 did not prohibit the Agency from classifying positions in the competitive service).

<sup>34</sup> *Fed. Educ. Ass'n, Stateside Region*, 72 FLRA 724, 725 (2022) (*FEA Stateside*) (rejecting nonfact challenge to arbitrator's interpretation of Article 22's vacancy-notice requirements (citing *SSA*, 71 FLRA 580, 582 n.22 (2020) (Member DuBester concurring); *NTEU*, 69 FLRA 614, 619 (2016))); *Local 1802*, 50 FLRA at 398.

<sup>35</sup> Exceptions Br. at 22-24.

was partiality or corruption on the arbitrator's part, or (3) the arbitrator engaged in misconduct that prejudiced the party's rights.<sup>36</sup> A party's assertion that an arbitrator's findings were adverse to that party, without more, does not demonstrate that an arbitrator was biased.<sup>37</sup> Moreover, an arbitrator's comments criticizing a party do not demonstrate prohibited bias where the arbitrator does not rely on the comments to resolve the grievance.<sup>38</sup>

First, the Union argues that the Arbitrator demonstrated bias by: (1) "consistently" referring to the fact that the Union filed exceptions to the initial award;<sup>39</sup> and (2) reversing, in the remand award, his initial-award rulings for the Union on the third and fourth issues, noting the "almost certain[tly] of a renewed Union objection" if his original finding on the third issue "is resubmitted."<sup>40</sup> In the remand award, the Arbitrator explained that (1) the Authority had described his findings on the merits of the third issue as "dicta," and (2) he was attempting, on remand, to make a ruling "consistent with law."<sup>41</sup> While the Union asserts the Arbitrator's "opposite ruling" on this issue demonstrates bias because the facts did not change between the initial award and the remand award,<sup>42</sup> the Authority concluded in *FEA* that the Arbitrator's findings based on those facts were dicta. As such, the Arbitrator was not bound to reach the same ruling upon review after the remand. Under these circumstances, the Arbitrator's references to the Union's previous exceptions, and his ruling against the Union in the remand award, do not demonstrate that his ruling was motivated by the Union's filing of exceptions to the initial award rather than a desire to render a legally sufficient award.<sup>43</sup>

Second, the Union argues the Arbitrator demonstrated bias by stating that the Union failed to pursue pre-change discussions with the Agency under

Article 7, Section 2.b.1.c of the parties' agreement, rather than filing the grievance.<sup>44</sup> As explained in section III.A. above, the Arbitrator's finding that the Agency provided sufficient notice of the change was not based on the Union's alleged failure to pursue pre-change discussions.<sup>45</sup> Thus, even assuming the Arbitrator's statements were critical of the Union, he did not rely on them to resolve the grievance. Therefore, they do not demonstrate bias.<sup>46</sup>

We deny the bias exception.

- c. The remand award draws its essence from the parties' agreement.

The Union argues the remand award fails to draw its essence from the parties' agreement.<sup>47</sup> The Authority will find that an arbitration award is deficient as failing to draw its essence from a 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 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.<sup>48</sup> Mere disagreement with the arbitrator's interpretation does not establish that the award fails to draw its essence from the agreement.<sup>49</sup> Moreover, where an essence exception is premised upon an assertion that the award is inconsistent with governing law, and the excepting party fails to demonstrate the award is contrary to law, the Authority will deny the essence exception.<sup>50</sup>

The Union argues the Arbitrator's determination that Article 22 applies only to hiring for excepted-service

<sup>36</sup> *VA Pershing*, 73 FLRA at 504 (citing *AFGE, Loc. 2052, Council of Prisons Locs. 33*, 73 FLRA 59, 61 (2022) (Chairman DuBester concurring); *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 70 FLRA 924, 929 (2018) (*IRS*) (Member DuBester concurring in part and dissenting in part on other grounds)).

<sup>37</sup> *VA Pershing*, 73 FLRA at 504; *IRS*, 70 FLRA at 929-30.

<sup>38</sup> *Int'l Bhd. of Boilermakers, Loc. 290, Bremerton Metal Trades Council*, 72 FLRA 694, 695 (2022) (*Bremerton*); *Indep. Union of Pension Emps. for Democracy & Just.*, 72 FLRA 328, 329 n.18 (2021).

<sup>39</sup> Exceptions Br. at 22.

<sup>40</sup> *Id.* (quoting Remand Award at 3).

<sup>41</sup> Remand Award at 3.

<sup>42</sup> Exceptions Br. at 23.

<sup>43</sup> *U.S. Dep't of VA, Med. Ctr., Detroit, Mich.*, 61 FLRA 371, 375 (2005) (arbitrator's ruling against excepting party on remand did not demonstrate bias where there was "no evidence that the [a]rbitrator was motivated by the [party's] decision to file exceptions to his previous awards, rather than being motivated by some other consideration, such as a decision to reconsider his previous determination").

<sup>44</sup> Exceptions Br. at 22-24.

<sup>45</sup> Remand Award at 11.

<sup>46</sup> *See, e.g., Bremerton*, 72 FLRA at 695 (arbitrator's critical comment regarding grievant's reason for requesting leave did not demonstrate bias where arbitrator did not rely on the grievant's reason to resolve the grievance).

<sup>47</sup> Exceptions Br. at 7-12.

<sup>48</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 73 FLRA 620, 622 (2023) (citing *NTEU, Chapter 149*, 73 FLRA 413, 416 (2023)).

<sup>49</sup> *U.S. Dep't of HHS, Food & Drug Admin., San Antonio, Tex.*, 72 FLRA 179, 180 (2021) (*HHS*) (Chairman DuBester concurring).

<sup>50</sup> *See, e.g., FEA Stateside*, 72 FLRA at 726-27 (denying an essence exception premised on a previously rejected contrary-to-law claim); *NFFE, Loc. 376*, 67 FLRA 134, 136 (2013) (same).

positions “has no basis in the contract” and “is a manifest disregard of the issue at hand.”<sup>51</sup> Specifically, the Union contends the remand award “nullif[ies]” Article 22 by finding that its application did not change despite the Agency’s change in hiring practices.<sup>52</sup> The Union further asserts the Arbitrator erred by finding that “loss of priority consideration is a result of a legal outcome, and not contractual.”<sup>53</sup> According to the Union, any Agency action which circumvents its *contractual* obligation to “first consider permanent . . . employees for a position when selecting a source of recruitment from which to fill a position” violates Article 22.<sup>54</sup>

As noted above, Article 22 states that, “[i]n selecting a source of recruitment from which to fill a position, the selecting . . . official will first consider permanent . . . employees for the position.”<sup>55</sup> Article 22 is silent as to the type of positions to which it applies and, thus, does not conflict with the Arbitrator’s interpretation that it applies only to selections for excepted-service positions. Further, the Arbitrator based his interpretation upon his conclusion that an employee in an excepted-service position “could not legally be granted priority consideration if applying for any [c]ompetitive[-s]ervice vacancy.”<sup>56</sup> The Union does not argue that underlying *legal* conclusion is contrary to law. Therefore, the Union does not demonstrate that the remand award fails to draw its essence from the parties’ agreement.

The Union also identifies “Article 7” as part of its essence exception, but provides no supporting arguments.<sup>57</sup> Section 2425.6(e)(1) of the Authority’s Regulations states that an exception “may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground” listed in § 2425.6(a)-(c).<sup>58</sup> Consistent with § 2425.6(e)(1), because the Union does not provide any arguments regarding Article 7, we deny this argument as unsupported.<sup>59</sup>

We deny the Union’s essence exception.

d. The award is not contrary to law.

The Union argues that the award is contrary to law.<sup>60</sup> When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*.<sup>61</sup> In applying the standard of *de novo* review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law.<sup>62</sup> In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are nonfacts.<sup>63</sup>

The Union contends that the Arbitrator erred, as a matter of law, in concluding that the Agency did not violate its notice obligation under Article 7, Section 2.a – despite finding that the loss of priority consideration was an adverse effect on employees resulting from the change.<sup>64</sup> Citing § 7106(a)(2)(c) and § 7106(b)(3) of the Statute, and precedent addressing an agency’s statutory duty to bargain, the Union asserts the Agency was obligated to provide the Union notice of, and an opportunity to bargain over, the changes to the hiring practices.<sup>65</sup>

The Union’s argument is misplaced. The grievance did not raise, and the Arbitrator did not frame, an issue related to a duty to *bargain*. Rather, the pertinent issue the Arbitrator framed involved only whether the Agency provided the *notice* required by Article 7, Section 2.a. As such, the precedent the Union cites – which addresses the duty to bargain under the Statute – provides no basis for finding the award contrary to law.<sup>66</sup> Therefore, we deny the contrary-to-law exception.

#### IV. Decision

We deny the Union’s exceptions.

<sup>51</sup> Exceptions Br. at 9.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 10 (paraphrasing Remand Award at 11 (“The loss of priority consideration is a legal outcome, not contractual.”)).

<sup>54</sup> *Id.*

<sup>55</sup> Initial Award at 4.

<sup>56</sup> Remand Award at 9.

<sup>57</sup> See Exceptions Form at 7-8.

<sup>58</sup> 5 C.F.R. § 2425.6(e)(1).

<sup>59</sup> *U.S. Dep’t of VA, Gulf Coast Veterans Health Care Sys.*, 69 FLRA 608, 610 (2016) (citing *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014)) (denying exceptions for which the excepting party failed to provide support).

<sup>60</sup> Exceptions Br. at 18-21.

<sup>61</sup> *AFGE, Council 222*, 73 FLRA 54, 55 (2022) (citing *U.S. Dep’t of the Interior, Bureau of Land Mgmt., Eugene Dist., Portland, Ore.*, 68 FLRA 178, 180 (2015) (*Interior*)).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (citing *Interior*, 68 FLRA at 180-81).

<sup>64</sup> Exceptions Br. at 19-21.

<sup>65</sup> *Id.* at 20-21 (citing *U.S. Dep’t of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 174 (2009); *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999)).

<sup>66</sup> *U.S. DHS, U.S. ICE*, 65 FLRA 792, 795 (2011) (finding Authority precedent cited by excepting party involving statutory duty to bargain did not support contrary-to-law exception where matter involved only contractual violation).