64 FLRA No. 129

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

0-AR-4341

DECISION

April 28, 2010

Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to both a merits award and a remedy award of Arbitrator Sheila Mayberry 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.

In the merits award, the Arbitrator sustained a grievance alleging that the Agency suspended the Local Union's president (the grievant) without just cause and in retaliation for her protected activity. In the remedy award, the Arbitrator awarded compensatory damages based upon the Agency's retaliation against the grievant for her Equal Employment Opportunity (EEO) representational activities. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Awards

This dispute arose after the grievant, who is on 100 percent official time, spent a day outside the office (hereinafter "off station") to meet with non-Union counsel from a law firm to ascertain whether the firm would represent bargaining-unit employees in pending EEO cases that the Union's attorney was unable to handle. Merits Award at 15. Although the grievant gave her supervisor advance notice, via email, of her upcoming absence, the email did not specifically state the reason for her absence. *Id.* at 7. However, upon returning to work the day after her absence the grievant explained to her supervisor the reason for her absence. *Id.* The Agency charged the grievant with eight hours of absence without leave (AWOL), and she filed a corresponding grievance (the AWOL grievance). *Id.* at 1. Later, the Agency suspended the grievant for ten days based on her AWOL and other prior disciplinary actions. *Id.* The grievant filed a second grievance challenging the suspension (the suspension grievance), which was unresolved and submitted to arbitration.

A. The Merits Award

As agreed upon by the parties, the issues at arbitration were "1) whether the [g]rievant was disciplined for just cause, and 2) if not, was it the result of reprisal for the [g]rievant's protected activities?" *Id.*

As an initial matter, the Arbitrator held that she could resolve the suspension grievance despite the fact that the AWOL grievance was not before her. *Id.* at 16. The Arbitrator stated that it was necessary to make a substantive determination on the AWOL charge in order to resolve whether the Agency had just cause to impose the suspension. *Id.* In addition, the Arbitrator noted that a future decision on the merits of the AWOL charge might be controlled by her decision concerning the suspension. *Id.*

With respect to the merits, the Arbitrator explained that, in order for her to affirm the suspension, the Agency had the burden to show by a preponderance of the evidence that "1) [the grievant] was properly guilty of AWOL; 2) a nexus or logical relationship existed between that offense and the efficiency of the Agency's operations; and 3) the penalty of suspension was appropriate and needed to vindicate or restore that efficiency." *Id.* (citing *Parsons v. U.S. Dep't of the Air Force*, 707 F.2d 1406, 1409 (D.C. Cir. 1983) (*Parsons*)).

Applying the first prong of the *Parsons* analysis, the Arbitrator found that the Agency based its suspension decision on its determinations that the grievant: (1) was not entitled to official time for her absence to meet with outside counsel on behalf of unit employees; and (2) failed to comply with proper procedures for reporting off-station representational activities. Merits Award at 16-17. In support of this finding, the Arbitra-

tor quoted a letter by the Agency's Interim Assistant to the Chief of Staff (the Interim Assistant's Letter). [1]

To determine whether it was appropriate for the grievant to use official time to obtain non-Union legal representation for unit members with EEO claims, the Arbitrator reviewed Article 16, Section 3, and Article 45, Sections 1 and 6 of the parties' agreement. *Id.* at 17. Article 16, Section 3 summarizes employees' rights to union representation and states, in pertinent part, that management recognizes "an employee's right to *assistance* and representation by the Union." *Id.* (emphasis added by Arbitrator). Article 45, Section 1 sets forth the purpose of official time and provides, in pertinent part, that "official time shall be granted in amounts specified by the Agreement or otherwise negotiated for the purpose of . . . [h]andling grievances and other complaints, [and] . . . [h]andling other representational functions[.]" *Id.* at 3. By contrast, Article 45, Section 6 provides that Union representatives will be on duty time "[f]or cases in which a Union representative is designated as the employee's representative, preparing or presenting appeals to the Merit System[s] Protection Board [(MSPB)] and handling discrimination claims under [Equal Employment Opportunity Commission (EEOC)] procedures." *Id.* at 4.

The Arbitrator found that the agreement confers "broad[]" representational authority to Union officials, and recognizes an employee's right to "assistance" as well as representation by the Union. *Id.* at 17. The Arbitrator also found that the grievant previously had used official time to assist in EEO matters without protest from the Agency. *Id.* at 18. Consequently, the Arbitrator held that "[a]ssisting and preparing for EEOC hearings" falls within the Union's representational obligations as understood by the parties, and that the grievant's absence to obtain legal representation for unit members was an appropriate use of official time. *Id.* at 17-18. The Arbitrator also held, based on the testimony of the grievant and other Union officials, that "a past practice existed whereby [100 percent official time union officials] would *notify* their immediate supervisors if they needed to conduct union business off station[,]" but that such officials did not need Agency authorization to conduct such business off station. *Id.* at 19 (emphasis added).

The Arbitrator rejected the Agency's argument that a series of emails between the grievant and an Agency Human Resources Management Specialist (HRMS) constituted negotiations that modified this past practice so that Union officials' notifications to management were required to provide additional detail including the date, time frame, location, and purpose of off-station representational activities. *Id.* at 19-20. In this regard, the Arbitrator held that the emails did not constitute a negotiated agreement that modified notification procedures because they did not comply with the ground rules for initiating negotiations set forth in the parties' agreement, which require "face-to-face [negotiations and] . . . prior notification of proposals and review of any agreements between the local Union and the local Agency's facility by their respective national counterparts." *Id.* at 19. The Arbitrator also found that, during the parties' alleged "negotiations," the Union expressly refused to change the procedure, and that the parties' subsequent actions indicated that "no new practice had been set into place." *Id.* Consequently, the Arbitrator found that the grievant "clearly followed the established practice of prior notification before leaving the duty station to conduct [U]nion business by reporting her plans in an email sent to her direct supervisor" the day before her absence. *Id.* at 20.

Having found that the grievant appropriately used official time and that she followed established notification procedures, the Arbitrator determined that the Agency failed to establish that the grievant was AWOL and, thus, failed to meet the first requirement of the analysis set forth in *Parsons*. *Id.* The Arbitrator then noted that even if the Agency had met the first *Parsons* requirement, it failed to meet the second *Parsons* requirement of a nexus between the offense and the efficiency of the Agency's operations. *Id.* at 20 n.2. Thus, the Arbitrator concluded that the suspension was not for just cause.

Next, the Arbitrator examined whether the Agency suspended the grievant in reprisal for her protected activities. The Arbitrator set forth the framework established by the Authority for resolving complaints of discrimination in violation of § 7116(a)(2) of the Statute and stated that, in order to make a prima facie showing that the suspension was discriminatory, the Union had to

1. The relevant portion of the Arbitrator's decision is as follows:

> The basis of the Agency's decision to suspend the [g]rievant is found in the Agency's final decision . . . . [The] Interim Assistant to the Chief of Staff . . . stated, "I have determined that the . . . trip to Washington/Baltimore has not been justified as an appropriate use of official time and also fails to comply with the agreed upon procedures for reporting off station representational activities."

Merits Award at 16-17. As discussed further below, the Agency argues in its exceptions that the Interim Assistant's Letter is the Agency's final decision on the AWOL grievance rather than its final decision to impose the suspension.

demonstrate that: (1) the grievant was engaged in a protected activity; and (2) such activity was a motivating factor in the agency's treatment of the grievant. *Id.* at 20 (citing *U.S. Dep't of Veterans Affairs, Ralph Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 44, 47 (2002) (citing *Letterkenny Army Depot*, 35 FLRA 113 (1990))). In addition, the Arbitrator stated that federal regulations prohibit retaliation against employees for "processing or representing fellow employees in EEO proceedings." Merits Award at 21 (citing 29 C.F.R. § 1613.261). [2]

As for the first requirement, the Arbitrator found that the grievant was engaged in protected activity when she used official time to seek legal representation for unit employees with EEO claims. Merits Award at 21. The Arbitrator also found that the grievant assisted in an EEOC class-action lawsuit brought by unit employees, and that the Agency was "aware of the [g]rievant's role in this matter." *Id.* As for the second requirement, the Arbitrator found that there was "no direct evidence" that the Agency had a discriminatory motive. *Id.* Nevertheless, the Arbitrator found that the grievant was suspended "for" her protected activity of obtaining legal representation for unit employees. *Id.* The Arbitrator noted that the suspension recommendation came less than a month after the conditional certification of a class of unit employees in the EEOC class action in which the grievant had provided assistance. *Id.* In light of the grievant's six years of representational activities without discipline for off-station use of official time, the Arbitrator found the Agency's decision to impose such a "harsh measure" less than a month after the Agency was notified about the class certification in the EEOC matter warranted an inference that the grievant's protected activities were "at least a motivating factor in the Agency's decision to discipline her." *Id.*

Finally, the Arbitrator rejected the Agency's argument that the grievant's absence was unauthorized, and consequently held that the Agency did not rebut the showing of discriminatory retaliation. *Id.* Therefore, the Arbitrator found that the Agency retaliated against the grievant because of her protected activity, and she sustained the grievance. *Id.* at 22. In addition, she awarded back pay with interest and attorney fees, and she retained jurisdiction to receive "evidence to form an objective determination of compensatory damages allowed in this matter based upon the [g]rievant's EEO representational activities." [3] *Id.*

B. The Remedy Award

In the remedy award, the Arbitrator stated that "an employee who participates in processing . . . EEO . . . complaints is protected from reprisal." Remedy Award at 2 (citing 29 C.F.R. § 1613.261). The Arbitrator found that the "[g]rievant was discriminated against when the Agency suspended her in retaliation for her EEO representational activities," and that the grievant was entitled to "the same protection from retaliation, including . . . compensatory damages, as if [her complaint] were processed through the EEOC." *Id.* at 3-4 (citing 42 U.S.C. § 1981). The Arbitrator held that compensatory damages are an available remedy for such discriminatory reprisal as long as they are based on objective evidence. Remedy Award at 2 (citing *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292 (2000); *U.S. Dep't of Commerce, Patent & Trademark Office*, 52 FLRA 358 (1996)). According to the Arbitrator, the grievant "submitted sufficient objective evidence to warrant compensatory" damages, and the Arbitrator therefore awarded $15,000. [4] Remedy Award at 4-5.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that several findings in the merits award do not draw their essence from the parties' agreement. Exceptions at 2-4. First, the Agency contends that the Arbitrator "unilaterally combined" the AWOL grievance and the suspension grievance without

2. Prior to 1992, 29 C.F.R. § 1613.261 provided, in pertinent part, that "It is unlawful to restrain, interfere, coerce or discriminate against complainants . . . during any stage in the presentation and processing of a complaint . . . or because an individual filed a charge of discrimination . . . ." *Washington v. Garrett*, 10 F.3d 1421, 1435 (9th Cir. 1993) (quoting 29 C.F.R. § 1613.261). In 1992 the EEOC revised its regulations to consolidate separate regulatory subparts addressing different types of complaints, e.g. Title VII complaints, Age Discrimination in Employment Act (ADEA) complaints, etc. Although 29 C.F.R. § 1613.261 no longer exists, a similar prohibition against retaliation can now be found at 29 C.F.R. § 1614.101(b), which provides, in relevant part, that "[n]o person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act, the [ADEA], the Equal Pay Act, [or] the Rehabilitation Act, . . . or for participating in any stage of administrative or judicial proceedings under those statutes." 29 C.F.R. § 1614.101(b) (internal citations omitted).

3. We note that the Agency filed exceptions to the merits award. In response, the Authority issued an Order to Show Cause requiring the Agency to show cause why its exceptions should not be dismissed as interlocutory. The Agency did not file a response to the Order to Show Cause, and its initial exceptions were dismissed without prejudice.

4. Based on testimony and documentation offered by the Union, the Arbitrator awarded damages for the grievant's "emotional and psychological distress, as well as the negative professional impact caused by the . . . suspension[.]" Remedy Award at 5; *see also id.* at 1-2, 4.

the mutual consent of the parties, in violation of Article 42, Section 10 of the parties' agreement.[5] *Id.* at 3. Second, the Agency claims that the Arbitrator's finding that the grievant could use official time for EEO representational matters is contrary to Article 45, Section 6 of the parties' agreement, which the Agency asserts provides that Union representatives will be on *duty* time in such circumstances.[6] *Id.* at 4. Third, the Agency argues that the Arbitrator misinterpreted Article 44, Section 2 of the parties' agreement when she found that, through the disputed emails, the parties did not negotiate and agree to modify their past practice regarding off-station absence procedures for union officials.[7] *Id.* Additionally, the Agency argues that even if the Arbitrator were correct that the parties did not change their practice, the Arbitrator "failed to apply her own interpretation of the past practice" because the grievant's email about her off-station absence did not sufficiently indicate that the absence was related to Union business. *Id.* at 4 n.2.

In addition, the Agency maintains that the merits award is deficient because it is based on several nonfacts. *Id.* at 6-8. First, the Agency asserts that the Arbitrator's finding of no just cause is based on an incorrect finding that the Interim Assistant's Letter provided a basis for the decision to suspend the grievant, when in fact it was the Agency's final decision on the AWOL grievance. Exceptions at 6-7 (citing Merits Award at 16-17). Second, the Agency argues that the Arbitrator "erroneously determine[d] that a union official seeking EEO representation for a bargaining unit member is the factual equivalent to actual representation of that bargaining unit member." Exceptions at 7. Third, the Agency contends that the Arbitrator erred in finding that AWOL was not a legitimate non-discriminatory reason for the Agency to discipline the grievant, and that even if it was not, a settlement agreement between the grievant and the Agency in a prior EEO matter "tacitly extends the right to take disciplinary action as a result of AWOL."[8] *Id.* Additionally, the Agency claims that the Arbitrator erred by ignoring federal leave policy and finding that past practice and the parties' agreement exclusively govern the off-station absences of union officials using 100 percent official time. *Id.*

Further, the Agency contends that the awards are contrary to law, rule, or regulation. *Id.* at 4-6. In this regard, the Agency argues that union officials may use official time in EEO matters when representing the interests of the entire bargaining unit, but may not use official time to serve as "personal EEO representatives" because this does not constitute "protected activity under [the Statute]." *Id.* at 5 (citing 5 U.S.C. § 7131(d);[9] *Dep't of Veterans Affairs Med. Ctr., Muskogee, Okla.*, 53 FLRA 1228, 1240 (1998) (*Muskogee*); *Nat'l Archives & Records Admin.*, 24 FLRA 245 (1986) (*Nat'l Archives*); *Library of Congress*, 19 FLRA 267 (1985)). Consequently, the Agency contends that the Arbitrator either: (1) converted two unit members' EEO claims into a claim affecting the entire unit; or (2) "unilaterally granted to the grievant a new statutory right to official time[.]" Exceptions at 5. The Agency also contends that the Arbitrator erred in finding that the Agency did not satisfy the second requirement of the *Parsons* analysis. *Id.* at 5-6. With regard to the Arbitrator's finding that the Agency retaliated against the grievant, the Agency argues that the Arbitrator's analysis combines two "mutually exclusive" retaliation standards — one under the Statute and another under EEO authority — and that, given her finding of no "direct evidence" of a retaliatory motive, the Arbitrator failed to explain her conclusion that the grievant's protected activity was a "motivating factor" in the Agency's suspension decision. *Id.* at 6 & n.4. Finally, the Agency contends that because the Statute does not provide for compensatory damages as a remedy for violations of 5 U.S.C. § 7116(a)(2), there is no legal basis for the award of compensatory damages. *Id.* at 6.

5. Article 42, Section 10 of the parties' agreement provides, in pertinent part, that multiple grievances over the same issue "may be combined and decided as a single grievance at the later steps of the grievance procedure by mutual consent." Exceptions at 3.

6. The pertinent wording of Article 45, Section 6 is set forth *supra*, Section II.A.

7. Article 44, Section 2, of the parties' agreement, which addresses mid-term bargaining at the national level, provides, in pertinent part, that "[i]f the parties are unable to reach agreement, negotiations will normally proceed to face-to-face bargaining." Exceptions, Attach. (Master Agreement) at 171.

8. Ten years prior to the events at issue here, the grievant and the Agency entered into an EEOC settlement agreement in which the grievant expressly agreed to be disciplined according to the terms of the settlement, which states that any charge of AWOL may result in disciplinary or adverse actions against the grievant. Merits Award at 14.

9. 5 U.S.C. § 7131(d) provides, in pertinent part, that:

> Except [for those activities specifically addressed] in the preceding subsections of [§ 7131]:
>
> (1) any employee representing an exclusive representative, or
>
> (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,
>
> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

B. Union's Opposition

The Union argues that the merits award draws its essence from the parties' agreement. Opp'n at 4-6. The Union also argues that the Agency has not established that the merits award is based on nonfacts. *Id.* at 8-10. In addition, the Union contends that the awards are not contrary to law, rule, or regulation. *Id.* at 6-8. In this connection, the Union asserts that the grievant was performing representational duties during the absence at issue, and therefore was entitled to official time. *Id.* The Union also argues that the Arbitrator's finding of reprisal is not contrary to law. *Id.* at 8.

IV. Analysis and Conclusions

A. The merits 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 U.S. Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990).

The Agency's first essence argument is that the Arbitrator "unilaterally combined" the AWOL grievance and the suspension grievance without the parties' mutual consent, in violation of Article 42, Section 10. Exceptions at 3. In resolving the suspension grievance, which was properly before her, the Arbitrator made necessary "findings of fact regarding the circumstances that led to the issuance of the suspension[,]" including the grievant's alleged AWOL, and she noted that "a future collateral decision on the actual merits of the AWOL charge may be controlled by the decision in this matter." Merits Award at 16. These findings do not establish that the Arbitrator combined the grievances in violation of the parties' agreement. Thus, the Agency's exception is misplaced.

The Agency's second essence argument is that, in finding that the grievant properly used official time, the Arbitrator ignored Article 45, Section 6 of the parties' agreement, which pertinently provides that union representatives will be on duty time for cases in which they are "designated as the employee's representative," including "handling discrimination claims under EEOC procedures." Merits Award at 4. As an initial matter, the grievant, who was assisting unit employees by attempting to secure non-Union representation for them, was not "designated" as the representative of those unit employees; thus, by its plain wording, Article 45, Section 6 does not apply. *Id.* In addition, the Arbitrator interpreted other sections of the agreement to recognize Union officials' responsibilities in *assisting* employees in EEO matters, which would therefore constitute an appropriate use of official time. *Id.* at 18. The Arbitrator also found that the parties had a past practice of allowing the grievant to use official time for EEO matters. *Id.* The Agency provides no basis for concluding that the Arbitrator erred in making these findings and, as a result, the Agency's arguments provide no basis for determining that the Arbitrator's interpretation of the agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement.

The Agency's third essence argument is that the agreement provides no basis for the Arbitrator's finding that negotiations modifying a past practice must be "face to face[.]" Exceptions at 4. Even assuming that the Agency is correct, the Arbitrator found that, during the parties' alleged "negotiations," the Union expressly refused to change the procedure, and that the parties' subsequent actions indicated that "no new practice had been set into place." Merits Award at 20. The Agency's arguments provide no basis for concluding that it was irrational, unfounded, implausible, or in manifest disregard of the parties' agreement for the Arbitrator to find that the Union did not agree to any modification of notification procedures.

The Agency also contends that the Arbitrator "failed to apply her own interpretation of the past practice[,]" which according to the Agency, required Union officials to "indicate to their supervisors that the off station activity was to conduct union business." Exceptions at 4 n.2. It is not clear that the Arbitrator made such a finding. *See* Merits Award at 19 ("a past practice existed whereby [100 percent union officials] would notify their immediate supervisors if they needed to conduct union business off station."). Even if she did, however, the Agency's arguments provide no basis for concluding that the Arbitrator's finding is irrational, unfounded, implausible, or in manifest disregard of the agreement.

For the foregoing reasons, we deny the Agency's essence exceptions.

B. The merits award is not based on nonfacts.

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). 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. *See id.* An exception that challenges an arbitrator's legal conclusions does not demonstrate that an award is based on a nonfact. *See, e.g.*, *AFGE Local 3690*, 63 FLRA 118, 120 (2009); *AFGE Council 215*, 60 FLRA 461, 466 (2004). In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA 88, 92 (1995).

First, the Agency asserts that the Arbitrator erred by finding that the Interim Assistant's Letter set forth the basis for the Agency's final suspension decision, when in fact it provided the Agency's final decision on the AWOL grievance. Exceptions at 6-7 (citing Merits Award at 16-17). However, the Agency does not dispute that it suspended the grievant for the same reasons that are set forth in the Interim Assistant's Letter. *See* Exceptions, Attach. (Suspension Letter Sept. 26, 2005) at 1 (citing Exceptions, Attach. (Proposed Suspension Letter Aug. 8, 2005) at 1 (stating that the Agency was suspending the grievant because she was AWOL and did not follow proper procedures to be away from her station.)). Therefore, the Agency fails to establish a clearly erroneous central fact underlying the award, but for which the Arbitrator would have reached a different result.

Second, the Agency argues that the Arbitrator "erroneously determine[d] that a union official seeking EEO representation for a bargaining unit member is the factual equivalent to actual representation of that bargaining unit member." Exceptions at 7. The Arbitrator did not make such a finding. To the extent the Agency is challenging the Arbitrator's interpretation of the parties' agreement, as noted above, the Authority has held that an arbitrator's conclusion that is based on an interpretation of a collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA at 92. For these reasons, the Agency provides no basis for finding that the award is based on a nonfact in this regard.

Third, the Agency disputes the Arbitrator's finding that AWOL was not a legitimate non-discriminatory reason for suspending the grievant, and argues that "[i]t is axiomatic that AWOL can be a basis for disciplinary action." Exceptions at 7. The premise of the Agency's argument is incorrect because the Arbitrator did not find that absence without leave *cannot* serve as a legitimate non-discriminatory reason for disciplinary action, but rather that the grievant was not properly charged with AWOL. Merits Award at 20-21. Similarly, the EEO settlement agreement cited by the Agency merely provides that the grievant agreed that any charge of AWOL might result in disciplinary or adverse actions against her. *Id.* at 14. The settlement agreement does not legitimize the Agency's suspension of the grievant because it does not change the Arbitrator's finding that the grievant was not AWOL according to the terms of the parties' agreement.

Fourth, the Agency argues that the Arbitrator erred when she held that federal leave policy was irrelevant to the issue of whether the grievant was AWOL. Exceptions at 7-8. As the Agency does not identify a factual finding or demonstrate that any alleged factual finding is clearly erroneous, the Agency provides no basis for finding that the award is based on a nonfact in this regard. [10]

For the foregoing reasons, we deny the Agency's nonfact exceptions.

C. The award is not contrary to law, rule, and/or regulation.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award *de novo*. *See NTEU, Chapter 24,* 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA,* 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437,* 53 FLRA 1703, 1710 (1998). An arbitrator's failure to apply a particular legal analysis "does not render [an] award deficient because, . . . in applying the standard of *de novo* review, the Authority assesses whether the arbitrator's legal *conclusions* are consistent with law, based on the underlying factual findings." *AFGE, Nat'l Border Patrol Council*, 54 FLRA 905, 910 n.6 (1998). *See also AFGE, Nat'l Border Patrol Council, Locals 2544 & 2595*, 62 FLRA 428, 430 (2008).

10. Alternatively, we construe this exception as arguing that the Arbitrator's finding is contrary to law, rule and/or regulation, as discussed below.

1. The finding that federal leave policy was irrelevant to whether the grievant was AWOL.

The Agency argues that the Arbitrator "created an artificial exemption to federal leave policy" when she held that federal leave policy was irrelevant to the issue of whether the grievant was AWOL. Exceptions at 7-8. The leave policy cited by the Agency provides in pertinent part that AWOL is "absence from duty which is not authorized[,]" and that AWOL "may be cause for disciplinary action." *Id.*, Attach. (Leave Policy for General Schedule and Federal Wage System Employees) at 5. As the Arbitrator found, nothing in that policy discusses when and how Union officials may use official time. Merits Award at 18-19. Thus, the Agency's reliance on that policy is misplaced, and we deny this exception.

2. The finding that that the grievant was entitled to official time.

The Agency argues that the award is contrary to 5 U.S.C. § 7131(d) because it created a "new statutory right" for the grievant to use official time to serve as the "personal EEO representative[]" of two unit employees contrary to the Authority's holding in *Muskogee* that union officials may use official time in EEO matters only when representing the interests of the entire bargaining unit. Exceptions at 5.

Section 7131(d) provides that the use of official time for representational activities other than negotiations or participation in Authority proceedings is subject to negotiation. 5 U.S.C. § 7131(d). Under § 7131(d), union representatives in the bargaining unit "shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest." *Id.*

The Authority has held that the parties may negotiate all matters concerning use of official time under § 7131(d), including, as relevant here, use of official time to assist unit employees in EEOC proceedings. *See AFGE, Nat'l INS Council*, 45 FLRA 391, 400 (1992), *enforced in relevant part*, 4 F.3d 268 (4th Cir. 1993) (*AFGE INS*); *U.S. DOJ, INS*, 37 FLRA 362, 372 (1990). Consequently, any entitlement to official time to engage in activities covered by § 7131(d) is a contractual, not statutory, entitlement. *See AFGE INS*, 45 FLRA at 400. *Cf. NFFE, Local 405*, 42 FLRA 1112, 1146-47 (1991) (proposal allowing union to represent employees with EEO complaints and to file such complaints found negotiable). The Arbitrator did not misinterpret *Muskogee* to create a "new statutory right" to official time for assistance in EEO matters, Exceptions at 5; rather, she found that the grievant appropriately used official time to perform § 7131(d) activities based on the "contract language and past practice" of the parties. Merits Award at 18.

Further, the decisions cited by the Agency do not support its argument that "[u]nion officials serving as personal EEO representatives are not engaged in protected activity under [the Statute]." Exceptions at 5. *Nat'l Archives* does not concern EEO representation, but rather stands for the proposition that official time may not be used for the nonrepresentational activity of "assisting an employee in a private matter with the police." 24 FLRA at 248. In *Library of Congress*, the Authority clarified that an exclusive representative's entitlement to information under 5 U.S.C. § 7114(b)(4) does not extend to representation of employees in agency regulatory proceedings, such as EEO complaints, 19 FLRA at 268-70; nothing in this holding indicates that it would be contrary to § 7131(d) to interpret a collective bargaining agreement to authorize official time for EEO representational activities.

Accordingly, we deny this exception.

3. The finding that the Agency failed to meet the second requirement of the *Parsons* analysis.

The Agency excepts to the Arbitrator's finding that it failed to meet the second requirement of the *Parsons* analysis. Even if *Parsons* applied, [11] in order to affirm the suspension, the Agency had the burden to demonstrate that the suspension satisfied each of the three *Parsons* requirements. *Parsons*, 707 F.2d at 1409. The Arbitrator found that the Agency had not satisfied the first *Parsons* requirement because the Agency had not shown that the grievant was AWOL. Merits Award at 20. We have found that the Agency has not demonstrated that the Arbitrator erred in finding that the grievant was not AWOL. Therefore, even if *Parsons* applied, the Agency's argument regarding the second *Parsons* requirement would not provide a basis for finding the award contrary to law. Accordingly, we deny this exception.

11. *Parsons* involved MSPB standards governing agency removal actions. We note that this case concerns a ten-day suspension, and that in cases involving a suspension of fourteen or fewer days, the arbitrator is not bound to follow the substantive standards of the MSPB. *See, e.g.*, *NTEU, Chapter 128*, 62 FLRA 382, 383 n.* (2008).

4. The finding of retaliation and the award of compensatory damages.

The Agency argues that the Arbitrator erred in finding that the Agency's suspension decision was discriminatorily motivated, and emphasizes the Arbitrator's finding that "[t]here is no direct evidence that the Agency's 10-day suspension of the [g]rievant was based upon animus due to her union or EEO participation." Merits Award at 21; Exceptions at 6 & n.4. Although the Arbitrator sets forth the standards for finding unlawful reprisal under § 7116(a)(2) and (4) of the Statute, she also refers to retaliation for assisting in EEO proceedings in violation of Title VII and EEOC regulations. *See* Merits Award at 20-22; Remedy Award at 1-4. To the extent that the Agency argues that the Arbitrator's merits award is contrary to Title VII and the Statute because she found discriminatory retaliation without direct evidence of retaliatory animus, we address the legal standards for both Title VII and the Statute.

Under Title VII, an employee is not required to prove a retaliatory motive with direct evidence, but, instead, may present evidence from which retaliatory animus may be inferred. *See, e.g.*, *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1141 n.13 (5th Cir. 1981). In this regard, an employee may establish a causal connection between statutorily protected activity and an adverse personnel action indirectly by showing that the employer had knowledge of the employee's protected activity and that the adverse personnel action took place shortly after that activity. *AFGE, Local 704*, 57 FLRA 468, 474 (2001) (citing *Mitchell v. Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985)). *See also Singletary v. District of Columbia*, 351 F.3d 519, 525 (D.C. Cir. 2003) (noting that "a close temporal relationship may alone establish the required causal connection"). The Arbitrator found that the suspension was proximate in time to the grievant's "protected activity" and "the Union's assistance in an EEOC class action claim[,]" and the Agency does not provide any basis for finding that the Arbitrator erred in this regard. Merits Award at 21. The Agency also provides no basis for finding that the lack of direct evidence of a retaliatory motive invalidates the Arbitrator's inference of animus based on indirect evidence. Therefore, the Agency has not demonstrated that the Arbitrator erred by relying on the closeness in time between the grievant's protected EEO activities and her suspension in finding retaliation under Title VII.

With regard to the Statute, the Authority has similarly held that the discriminatory motivation necessary to establish a § 7116(a)(2) violation may be inferred from circumstantial evidence. *Dep't of the Treasury, U.S. Customs Serv., Region IV, Miami, Fla.*, 19 FLRA 956, 970 (1985). Therefore, the Arbitrator's reliance on circumstantial evidence is not contrary to the Statute. Further, the Agency does not dispute that it disciplined the grievant for her absence, which the Arbitrator found to be an appropriate use of official time. To the extent the Agency is arguing that the grievant's AWOL charge was a legitimate and non-discriminatory reason for her suspension, the Arbitrator found that the grievant was not AWOL and we deny the Agency's exceptions to that finding.

The Agency also asserts that the Statute "does not contemplate the award of compensatory damages for violations of [§] 7116(a)(2), and thus there is no basis for the [A]rbitrator's award of compensatory damages." Exceptions at 6. However, the Arbitrator makes clear in the remedy award that her award of compensatory damages is not pursuant to the Statute, but rather pursuant to EEO authority that prohibits the Agency's retaliation against the grievant for her EEO representational activities, which the Arbitrator also found constituted protected activity under the parties' agreement. [12] *See* Remedy Award at 2-4. The Civil Rights Act of 1991 provides for compensatory damage awards against defendants — including federal government agencies — for "intentional discrimination (not an employment practice that is unlawful because of its disparate impact)" in violation of Title VII. 42 U.S.C. § 1981a(1). *See, e.g.*, *U.S. DOD, Camp Lejeune Dependents Schools*, 57 FLRA 12, 17 (2001) (Chairman Cabaniss dissenting). The Agency does not address either the requirements for compensatory damages under the Civil Rights Act of 1991 or the Arbitrator's finding regarding the grievant's injuries. Thus, the Agency provides no basis for finding the award of compensatory damages contrary to law. Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.

12. In this regard, the Arbitrator noted that "[s]uch activity receives the same protection from retaliation, including awarding compensatory damages, as if it were processed through the EEOC." Remedy Award at 3-4 (citing 42 U.S.C. § 1981).