66 FLRA No. 166

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4359

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DECISION

August 22, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Roger P. Kaplan filed by the United States Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP) 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 CBP's exceptions.[1]

The Arbitrator found that CBP violated the parties' collective-bargaining agreement (the agreement) because personnel from DHS's Office of Inspector General (DHS-OIG) did not follow procedural protections set forth in Article 41 of the agreement when they interviewed CBP employees.

For the following reasons, we deny CBP's exceptions.

II. Background and Arbitrator's Award

When Congress created DHS, the United States Customs Service (Customs) was transferred from the United States Department of Treasury to DHS and became CBP. Before the transfer, Customs and the Union entered into the agreement. The agreement contains Article 41,[2] which establishes procedures that representatives of CBP must use when interviewing bargaining-unit employees as part of an investigation. Award at 3-5. As relevant here, Article 41 requires CBP to: inform employees of their right to Union representation during investigatory interviews; use certain forms to inform interviewed employees of their rights; and give the Union reasonable advance notice when CBP schedules investigatory interviews of employees. *Id.* at 8. Although the agreement has expired, and CBP revoked several of the agreement's provisions, CBP did not revoke Article 41.

DHS issued a management directive that requires DHS components to fully cooperate with DHS-OIG investigations. *Id.* at 10. The directive further states that CBP employees are subject to discipline if they refuse to provide documents, information, answers to questions, or sworn statements. *Id.* Similarly, CBP issued "Standards of Conduct" that require its employees to participate in investigations conducted by "competent authority." *Id.*

In addition, DHS maintains the Joint Intake Center (the center), which is composed equally of employees from CBP and another component of DHS, the United States Immigration and Customs Enforcement (ICE) division. The center processes allegations that CBP employees have engaged in misconduct, and forwards the allegations to DHS-OIG.

It is undisputed that DHS-OIG does not follow any of the requirements of Article 41 discussed above when it conducts investigatory interviews of CBP employees. *Id.* at 8-9. Accordingly, the Union filed a grievance alleging that CBP violated Article 41 when DHS-OIG personnel interviewed CBP employees without complying with Article 41. *Id* at 5. The matter was unresolved and proceeded to arbitration. As relevant here, the parties stipulated to the following issues:

> 1. Whether personnel from [DHS-OIG] are "representative[s] of [CBP]" for all purposes of Article 41 . . . when they conduct investigatory interviews of CBP bargaining[-]unit employees?
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> . . . .

[1] In addition, as discussed further below, CBP requested leave to file – and did file – a supplemental submission.

[2] The relevant portions of Article 41 are set forth in the appendix to this decision.

> [2]. If personnel from [DHS-OIG] are "representative[s] of [CBP]" for all purposes of Article 41 . . . , whether CBP violated Article 41 when [DHS-OIG] personnel failed to adhere to the rights and procedures specified therein when conducting investigatory interviews of CBP bargaining[-]unit employees? If so, what shall be the remedy?[3]

Id. at 2-3.

The Arbitrator found that, during investigatory interviews, DHS-OIG complied with § 7114(a)(2)(B) of the Statute,[4] but did not follow Article 41. *Id.* at 16, 26. As a result, the Arbitrator stated that the only issue left for him to resolve was whether DHS-OIG was a representative of CBP for purposes of Article 41. *See id.* at 16.

In order to resolve that issue, the Arbitrator examined the Supreme Court's decision in *NASA v. FLRA*, 527 U.S. 229 (1999) (*NASA*), in which the Court held that the National Aeronautics and Space Administration's (NASA's) Inspector General (IG) was a representative of NASA within the meaning of § 7114(a)(2)(B) of the Statute when it interviewed an employee of an activity of NASA. *See* Award at 22-23. The Arbitrator noted that the Court in *NASA* determined that rights under § 7114(a)(2)(B) "are not limited to situations where agency investigators are representing an entity that collectively bargains with the employee's union." *Id.* at 22.

The Arbitrator determined that, although *NASA* did not address whether parties could negotiate over the procedures that apply in IG investigations (IG-investigation procedures), *id.* at 18, its holding that an agency could not use an IG to "circumvent" lawful restrictions on IG-investigation procedures was still applicable, *id.* at 23. The Arbitrator noted that the Statute contains both § 7114(a)(2)(B) and § 7117, and that § 7117 establishes a legal obligation to bargain in good faith. *Id.* He found that, through Article 41, the Union and CBP's predecessor, Customs, agreed to "expand[] the rights granted in § 7114(a)(2)(B)." *Id.* He also found that permitting "those expanded, negotiated rights to be ignored" on the basis that DHS-OIG is the entity conducting the investigations "would permit the same harm that the Supreme Court was unwilling to permit in *NASA*." *Id.* The Arbitrator stated that, just as NASA's IG could not ignore § 7114(a)(2)(B) merely because it did not have a bargaining relationship with the union that represented NASA's employees, DHS-OIG should not be permitted to ignore Article 41 just because it does not have a bargaining relationship with the Union. *Id.* Moreover, according to the Arbitrator, allowing DHS-OIG to ignore Article 41 would erode the statutory duty to bargain in good faith and would "frustrate Congress' policy of encouraging collective bargaining in the federal sector." *Id.* at 24. The Arbitrator further noted that, although the agreement has expired, CBP had not suggested any modifications to Article 41. *Id.*

The Arbitrator rejected CBP's claim that the proper controlling authority was the decision of the United States Court of Appeals for the Fourth Circuit in *U.S. Nuclear Regulatory Commission, Washington, D.C. v. FLRA*, 25 F.3d 229 (4th Cir. 1994) (*NRC*). The Arbitrator stated that, in *NRC*, the Fourth Circuit concluded that negotiations concerning IG-investigation procedures were impermissible. *See* Award at 23 n.2. However, the Arbitrator found that *NRC* was not persuasive because it was decided prior to, and inconsistent with the reasoning in, *NASA*. *Id.*

The Arbitrator also declined to apply a decision in which the Authority found that an activity was not liable for its IG's denial of an employee's request for union representation during an investigatory interview. *See id.* at 19 (discussing *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Forrest City, Ark.*, 57 FLRA 787 (2002) (*DOJ*)). The Arbitrator found that *DOJ* was inapposite because the "level of cooperation between [DHS-]OIG and CBP places their relationship on a more cooperative level" than the relationship between the IG and the activity in *DOJ*. *Id.* at 21-22.

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[3] Additionally, the parties stipulated that the Arbitrator would decide whether: (1) ICE personnel were representatives of CBP for purposes of Article 41; and (2) if so, whether CBP violated Article 41 when ICE conducted investigatory interviews of bargaining-unit employees. Award at 2-3. Neither party challenges the Arbitrator's resolution of those issues. Accordingly, we do not address those issues further.

We note that the Union also submitted a fifth issue to the Arbitrator – specifically, whether CBP violated § 7116 of the Statute by repudiating Article 41. *Id.* at 3. The Arbitrator concluded that this issue was not properly before him, *see id.* at 13, and there are no exceptions to this conclusion. Accordingly, the issue of whether CBP committed an unfair labor practice is not before us.

[4] Section 7114(a)(2)(B) of the Statute provides, in relevant part:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at . . . any examination of an employee in the unit by a representative of the agency in connection with an investigation if . . . the employee reasonably believes that the examination may result in disciplinary action against the employee; and . . . the employee requests representation.

5 U.S.C. § 7114(a)(2).

Specifically, the Arbitrator stated that CBP had "chosen to augment the operation of its OIG by creating the [center] and staffing it in part with CBP employees." *Id.* at 21. According to the Arbitrator, CBP's creation and staffing of the center – which "works with the [DHS-]OIG to ensure that the [DHS-]OIG has first call on investigating any allegations of misconduct involving CBP employees," *id.* – demonstrated an interdependent, "symbiotic relationship" between DHS-OIG and CBP, *id.* at 25. The Arbitrator stated that this finding was "buttressed by the situations where CBP managers were called upon to order CBP employees to cooperate with [DHS-]OIG, under threat of disciplinary action," and further supported because "CBP employees are required to cooperate with [DHS-]OIG investigations under both DHS and CBP policies and directives." *Id.* at 22. As a result, the Arbitrator concluded that "[DHS-]OIG was a representative of CBP when it conducted investigatory interviews of CBP bargaining[-]unit employees," and that "CBP's collaboration with [DHS-]OIG was sufficient to make it liable for [DHS-]OIG's failure to follow Article 41." *Id.* at 25.

As a remedy, the Arbitrator directed CBP to inform the Union immediately when DHS-OIG contacts CBP with a request to arrange an employee interview. *Id.* at 27. Moreover, he held that, "[i]f [DHS-]OIG continues to fail to follow Article 41," then CBP would be prohibited from relying on any information obtained by DHS-OIG in investigatory interviews. *Id.* The Arbitrator further directed the Union to determine whether there were any cases where it reasonably could argue that the outcome of a disciplinary or adverse action would be different if CBP re-interviewed the employee in compliance with Article 41. *Id.* The Arbitrator held that the Union would be required to inform CBP of such cases within forty-five days of his award and that CBP would have thirty days to consider the cases in "good faith" and inform the Union as to whether it would reconsider the case. *Id.* The Arbitrator retained jurisdiction for ninety days "should the parties disagree over any aspects of the remedy." *Id.* at 28.

III. Positions of the Parties

A. CBP's Exceptions

CBP asserts that the Arbitrator's award is inconsistent with the holding in *NRC* that "contractual limitations on the conduct of investigatory interviews by the OIG would be inconsistent with the statutory independence of the OIG" under the Inspector General Act of 1978 (IG Act). Exceptions at 12 (citing *NRC*, 25 F.3d at 231, 234). In addition, CBP argues that the award is contrary to law because the Arbitrator's reliance on the Supreme Court's decision in *NASA* is flawed for the following three reasons: (1) the Arbitrator erred by expanding the holding in *NASA* – which was limited to an IG's representative status under § 7114(a)(2)(B) – to find that § 7117 requires DHS-OIG to follow Article 41, *id.* at 7-8; (2) the Arbitrator erroneously relied on the public-policy concern underlying *NASA* – preventing the "erosion of Congressional[ly] conferred, statutory, procedural safeguards for employees who are under investigation by their agency" – to improperly "bind DHS[-]OIG to supplementary [contractual] obligations" despite DHS-OIG's compliance with § 7114(a)(2)(B), *id.* at 8-9; and (3) in *NASA*, the Court emphasized the importance of protecting *statutory* rights, and, thus, the Arbitrator's reliance on this decision to enforce a *contract* provision is "inappropriate," *id.* at 10 (citing *NASA*, 527 U.S. at 237).

CBP also argues that the award is contrary to law, and that the Arbitrator exceeded his authority, because the Arbitrator "fashion[ed] a remedy which improperly imposed contractual obligations on" DHS-OIG, "which is neither a party to the grievance, nor a party to the expired [a]greement." *Id.* at 13. Specifically, CBP asserts that, because DHS-OIG "has no bargaining relationship with [the Union], is not a party to the expired [a]greement, and had no input in the creation of the [a]greement, [it] cannot be subject to the grievance and arbitration procedures of the expired [a]greement." *Id.* at 13-14 (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (*Ortiz*); *Martin v. Wilks*, 490 U.S. 755, 768 (1989) (*Martin*)).

Finally, CBP contends that the award is based on a nonfact because the Arbitrator erroneously found that CBP had "chosen to augment the operation of its OIG by creating the [center] and staffing it in part with CBP employees." *Id.* at 14 (quoting Award at 21). CBP argues that: it did not create the center; the center functions as a "tracking system" without the "larger duties that the Arbitrator attribute[d] to it;" and, thus, the existence and operation of the center do not support a finding that the level of cooperation between CBP and OIG is sufficient to distinguish *DOJ*. *Id.* at 15.

B. Union's Opposition

The Union argues that the Arbitrator correctly refused to apply *NRC* because the proper controlling decision is the Authority's decision in *NTEU*, 47 FLRA 370 (1993) (*NTEU I*), *rev'd sub nom. NRC*, 25 F.3d 229, in which the Authority concluded that proposals concerning IG-investigation procedures were not contrary to the IG Act. Opp'n at 43. Although the Union acknowledges that *NRC* reversed *NTEU I*, it contends that the Authority considers *NRC* "anomalous" and has never "acquiesced [to] it." *Id.* (citing *HQ, NASA, Wash., D.C.*, 50 FLRA 601, 614 n.11 (1995), *aff'd sub nom NASA*, 527 U.S. 229). The Union also argues that the Arbitrator correctly relied upon *NASA* because "virtually

the same policy considerations at issue in *NASA* are relevant here." *Id.* at 37.

The Union rejects the Agency's claim that the award is contrary to law because it imposes contractual obligations on DHS-OIG. *See id.* at 40-42. The Union also disagrees with the Agency's assertions that the Arbitrator exceeded his authority, *see id.* at 44-45, and that the award is based on a nonfact, *see id.* at 45-48.

IV. Preliminary Issue

The Union argues that CBP's exceptions should be dismissed without prejudice as interlocutory, under § 2429.11 of the Authority's Regulations. *See* Opp'n at 24 (citations omitted). Specifically, the Union contends that the award is not final because the Arbitrator directed the parties to discuss whether CBP would reconsider disciplinary actions against individual employees in light of the award, and the parties will "likely" disagree over that reconsideration – thus requiring the Arbitrator to intervene. *Id.* at 25.

As noted previously, CBP requested leave to file – and did file – a supplemental submission (supp. submission) with the Authority pursuant to § 2429.26 of the Authority's Regulations. Under § 2429.26, the Authority may, in its discretion, grant leave to file other documents as it deems appropriate. 5 C.F.R. § 2429.26. The Authority has granted leave to file a supplemental submission where, for example, the excepting party did not have a prior opportunity to respond to an argument – raised for the first time in an opposition – that its exceptions were interlocutory. *See, e.g., Cong. Research Employees Ass'n, IFPTE, Local 75,* 64 FLRA 486, 486 n.1 (2010). Because CBP did not have a prior opportunity to address the Union's argument – raised for the first time in its opposition – that the exceptions were interlocutory, we grant CBP's request and consider its supplemental submission. In that submission, CBP argues that the Arbitrator completely resolved all of the issues before him and "issued a full and complete remedy" with "detailed procedures for its implementation." Supp. Submission at 4.

Section 2429.11 of the Authority's Regulations pertinently provides that "the Authority . . . ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11. This means that the Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all of the issues submitted to arbitration. *U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007) (Chairman Cabaniss and then-Member Pope dissenting in part on other grounds) (*Kirtland*). Thus, an arbitration award that postpones the determination of a remedy does not constitute a final award subject to review. *Id.* However, where an arbitrator retains jurisdiction to assist in the implementation of awarded remedies, but there is no indication that the Arbitrator or parties contemplated the introduction of some new measure of damages, the award is final. *Id. See also AFGE, Nat'l Council of EEOC Locals No. 216*, 65 FLRA 252, 253-54 (2010) (*AFGE*).

Here, the Arbitrator found that CBP violated the agreement and directed CBP to comply with the agreement. *See* Award at 26-27. Additionally, he directed the Union to determine whether there were any cases where it reasonably could argue that DHS-OIG compliance with Article 41 would have resulted in a different outcome. *Id.* at 27. He further held that the Union was required to inform CBP of such cases within forty-five days of his award, and that CBP would have thirty days to consider the cases in "good faith" and inform the Union as to whether it would reconsider the case. *Id.* The Arbitrator also stated that he would retain jurisdiction for ninety days "should the parties disagree over any aspects of the remedy." *Id.* at 28. The Arbitrator retained jurisdiction solely to assist with the implementation of his awarded remedies; there is no indication that he or the parties contemplated the introduction of some new measure of damages in further proceedings. Thus, the Arbitrator resolved all of the issues before him, and we find that the exceptions are not interlocutory. *See AFGE*, 65 FLRA at 253-54; *Kirtland*, 62 FLRA at 123. Accordingly, we address the exceptions on the merits.

V. Analysis and Conclusions

A. The award is not contrary to law.

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. *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 conducting de novo review, the Authority assesses the arbitrator's legal conclusion, not his or her underlying reasoning. *See, e.g., U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 432-33 (2010) (*IRS*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). Further, a party contending before the Authority that an award is deficient bears the burden of ensuring that the record contains sufficient information for the Authority to render a decision on that issue. *See U.S. Dep't of the Army, Fort Campbell Dist., Third Reg., Fort Campbell, Ky.*, 37 FLRA 186, 195 n.2 (1990) (*Fort Campbell*) (claim that award was contrary to agency regulation). In this regard, an excepting party's

"mere citation" to legal authority, "without explanation or analysis, is nothing more than a bare assertion and does not demonstrate that an arbitrator's award is contrary to law." *AFGE, Local 3354*, 64 FLRA 330, 334 (2009) (*Local 3354*).[5]

CBP argues that the award is contrary to law because the Arbitrator should have applied the holding in *NRC* and concluded that Article 41 is contrary to the IG Act, and that he erred by relying on *NASA* to reach a contrary conclusion. In *NTEU*, 66 FLRA 892 (2012) (*NTEU II*), the Authority declined to follow *NRC* "to the extent that *NRC* held that parties may not bargain over *any* IG-investigation procedures, regardless of their particular terms." 66 FLRA at 894. Instead, the Authority stated that it will assess whether particular provisions of such agreements are contrary to specific terms of the IG Act. *Id.* at 897. And agreements that are not contrary to law, rule, or regulation are enforceable in arbitration. *See NTEU*, 65 FLRA 509, 513 (2011) (Member Beck dissenting in part), *pet. for review denied sub nom. U.S. Dep't of the Treasury, Bureau of the Public Debt, Wash., D.C. v. FLRA*, 670 F.3d 1315 (D.C. Cir. 2012).

Here, CBP does not explain how any of the particular terms of Article 41 are inconsistent with any specific provisions of the IG Act, or any other law, rule, or regulation. In fact, the "Law and Arguments" section of CBP's exceptions does not include a single citation to the wording of Article 41. *See* Exceptions at 5-15. Rather, CBP makes a "mere citation" to the IG Act as a whole, without the supporting "explanation or analysis" that is required to demonstrate that the award is contrary to any specific provisions of that Act. *Local 3354*, 64 FLRA at 334. Thus, CBP's argument regarding the IG Act does not satisfy CBP's "burden of ensuring that the record contains sufficient information for the Authority to render a decision on" whether the Arbitrator's enforcement of Article 41 is contrary to law. *Fort Campbell*, 37 FLRA at 195 n.2.

In addition, CBP argues that the award is contrary to law because DHS-OIG is not a party to the agreement, and that the Arbitrator erred by "fashioning a remedy which improperly imposed contractual obligations on" DHS-OIG. Exceptions at 13. *See also id.* at 14 (citing *Ortiz*, 527 U.S. at 846; *Martin*, 490 U.S. at 768). As an initial matter, the Arbitrator found that *CBP* violated Article 41, *see* Award at 28, and directed CBP to take certain actions, *see id.* at 27; he did not find that DHS-OIG violated the agreement or direct DHS-OIG to take any actions. Additionally, the Authority has held that DHS-OIG investigators are representatives of CBP. *See NTEU II*, 66 FLRA at 897. In this regard, as DHS-OIG is charged with investigating the conduct of *all* DHS employees – including CBP employees – it serves as CBP's own OIG. Moreover, the Authority has stated that "there is no basis for finding that the result of . . . bargaining" between the Union and CBP "is unenforceable merely because DHS-OIG allegedly controls the conditions of employment that were the subject of that bargaining." *Id.* This principle applies to Article 41, which is the result of bargaining between the Union and CBP's predecessor, Customs. Further, the court decisions cited by CBP are inapposite because they involve whether a settlement agreement entered into by one group of private plaintiffs is binding upon a different group of private plaintiffs; they do not address the circumstances under which one component of a federal agency may enter into enforceable agreements that impose obligations on another component of the same agency. *See Ortiz*, 527 U.S. at 846; *Martin*, 490 U.S. at 768. Accordingly, that the award may affect how DHS-OIG conducts investigations does not alone demonstrate that the award is contrary to law.

For the foregoing reasons, we deny CBP's contrary-to-law exceptions.

B. The Arbitrator did not exceed his authority.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those who are not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

CBP argues that the Arbitrator exceeded his authority by "fashioning a remedy which improperly imposed contractual obligations on" DHS-OIG, "which is neither a party to the grievance, nor a party to the expired [a]greement." Exceptions at 13. To the extent that CBP is arguing that the Arbitrator disregarded a specific limitation under law, as discussed above, we have rejected CBP's contrary-to-law arguments. In addition, CBP does not argue that the Arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, or awarded relief to those who are not encompassed within the grievance. Accordingly, CBP does not demonstrate that the Arbitrator exceeded his authority, and we deny the exception.

[5] The Authority's Regulations concerning the review of arbitration awards were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the exceptions in this case were filed prior to October 1, 2010, we apply the prior version of the Regulations here. *See* 5 C.F.R. § 2425.1. However, we note that the revised Regulations expressly set forth the excepting party's burdens in a manner that is consistent with the Authority's prior decisions in *Fort Campbell* and *Local 3354*. *See* 5 C.F.R. §§ 2425.4(a) (setting forth required contents of exceptions) , 2425.6(e) (setting forth consequences of failure to satisfy content requirements).

C. The award is not based on a nonfact.

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). Accordingly, the Authority has denied nonfact exceptions where, even assuming that an arbitrator made a factual error, the excepting party did not demonstrate that, but for that error, the arbitrator would have reached a different result. *See AFGE, Local 3947*, 47 FLRA 1364, 1372 (1993) (*Local 3947*).

CBP argues that the award is based on a nonfact because the Arbitrator erroneously found that CBP had "chosen to augment the operation of its OIG by creating the [center] and staffing it in part with CBP employees." Exceptions at 14 (quoting Award at 21). CBP argues that this erroneous finding led the Arbitrator to wrongly conclude that the level of cooperation between CBP and OIG was sufficient to distinguish *DOJ*. *Id.* at 14-15.

The Arbitrator found that *DOJ* was inapposite because the relationship between the agency and IG at issue here was "more cooperative" than the relationship between the IG and the activity in *DOJ*. Award at 21-22. Although the Arbitrator based this conclusion *in part* upon the disputed finding that CBP "chose[] to augment the operation of its OIG by creating the [center] and staffing it in part with CBP employees," *id.* at 21, he also found that this conclusion was "buttressed by the situations where CBP managers were called upon to order CBP employees to cooperate with [DHS-]OIG, under threat of disciplinary action," *id.* at 22, and further supported because CBP employees "are required to cooperate with [DHS-]OIG investigations under both DHS and CBP policies and directives," *id.* The CBP does not challenge the accuracy of these additional findings, which provide further support for the Arbitrator's conclusion. Thus, CBP has not established that, but for the alleged factual error, the Arbitrator would have reached a different result. Accordingly, CBP has not established that the award is based on a nonfact, and we deny the exception. *See, e.g., Local 3947*, 47 FLRA at 1372.

VI. Decision

CBP's exceptions are denied.

APPENDIX

Award at 3-4.

Article 41 – Employer Investigative, Administrative, and Formal EEO Interviews

General – Normally, the Office of Internal Affairs (IA) is responsible for conducting investigative interviews of employees involving criminal matters while other representatives of the Employer (not necessarily the IA) are responsible for conducting interviews involving administrative misconduct (non-criminal). An employee being interviewed by a representative of the Employer in connection with either a criminal or non-criminal matters [sic] has certain entitlements/rights regardless of who is conducting the interview. This article sets forth those rights as well as the procedures that must be followed by the Employer representative conducting the interview.

Section 1. – General Notice
When an employee is interviewed by the Employer, and the employee is the subject of an investigation, the employee will be informed of the general nature of the matter (i.e., criminal or administrative misconduct) being investigated and be informed whether or not the interview is related to possible criminal misconduct by him. This notice shall be on a form (see Appendix G) which the employee will initial and date at the outset of the interview.

Section 2.A. – (Weingarten Rights) When the Employer conducts an interview of an employee and the employee is the potential recipient of any form of discipline or adverse action, the employer shall advise the employee of his right to union representation prior to the commencement of questioning. This notice shall be on a form (see Appendix H) that the employee signs at the beginning of the interview and is witnessed by the investigating agent.

B. – (Third Party Witness Interviews) Prior to beginning interviews with employees who are being interviewed as third party witnesses, the Employer will provide employees with a form (see Appendix I), which shall be signed and dated by the employee at the outset of the interview.

. . . .

Section 4. – (Miranda Rights) . . . [An employee] shall be given a statement of his constitutional rights in writing on a form (see Appendix J) . . .

Section 5. – (Beckwith Rights) . . . This notice shall be on a form (see Appendix K) . . .

Section 6. – (Kalkines Rights) . . . This notice shall be on a form (see Appendix L) . . .