66 FLRA No. 58

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 231
(Union)

0-AR-4734

_____

DECISION

November 3, 2011

_____

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 an award of Arbitrator Amedeo Greco 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.

The Arbitrator found that the Agency violated the parties' expired collective bargaining agreement (CBA) when it permanently reassigned the two grievants. He directed the Agency to return the grievants to their former positions, compensate them for lost pay and benefits, and pay the Union's attorney fees. For the reasons that follow, we dismiss the Agency's exceptions in part, deny them in part, and remand the award in part to the parties for resubmission to the Arbitrator, absent settlement.

II. Background and Arbitrator's Award

The Agency operates small "user-fee airports" (UFAs) for select flights. Award at 2 & n.2. The two grievants are Customs and Border Protection Officers (CBP Officers) who worked at UFAs. *Id.* When the Agency permanently reassigned them to positions at Denver International Airport (DIA) – which is not a UFA – the Union filed a grievance alleging that the reassignments violated the CBA. *See id.* at 2, 10. The grievance was unresolved and submitted to arbitration, where, as relevant here, the Arbitrator framed the issues as follows: "[D]id the Agency violate Article 20, Section 4.F.[] of the [CBA] [(Section 4.F.)] when it permanently moved [the] grievants . . . from their prior positions . . . to [DIA,] and, if so, what is the appropriate remedy?"[1] *Id.* at 2.

The Arbitrator found that Article 20, Section 1 of the CBA (Section 1) required the Agency to exercise its right to assign employees "in accordance with" the CBA.[2] *Id.* at 10-11 (quoting CBA Art. 20, § 1.B.(1)) (internal quotation mark omitted). Notwithstanding Section 1, the Agency argued to the Arbitrator that Section 4.F. did not apply to the grievants' reassignments because the Agency's revised National Inspectional Assignment Policy (RNIAP) superseded

[1] Section 4 states, in relevant part:

> *F. Directed reassignments*: The [Agency] retains the right to identify and direct the reassignment of an [e]mployee based on the needs of the [s]ervice, including but not limited to the following:
>
> (1) for deficiencies in an employee's work performance which may be corrected or minimized in a different work location; or
>
> (2) for remediation reasons.

Award at 10-11 (quoting CBA Art. 20, § 4.F.).

[2] Section 1 provides, in pertinent part:

> *A.* The [Agency] retains the right to assign, reassign and detail employees [and] to assign work . . . .
>
> *B.* The [Agency] shall exercise the authorities set forth in Section 1.A[.] above:
>
> (1) in accordance with applicable law, appropriate regulations, and this [CBA];
>
> (2) in a fair and impartial manner (i.e., consistent with law and regulation). . . .

Award at 10 (quoting CBA Art. 20, § 1.A.-B.(2)).

Section 4.F.[3] *Id.* at 14. The Arbitrator found that the RNIAP superseded "any conflicting provisions" in the expired CBA, *id.*, but he found further that Section 4.F. did not conflict with the RNIAP, *see id.* at 14-15. Specifically, the Arbitrator determined that Section 4.F. concerned "permanent reassignments," whereas the RNIAP addressed "short-term matters" like "'unexpected staff shortages.'" *Id.* at 14. Thus, the Arbitrator found that Section 4.F. applied to the grievants' reassignments and placed an "affirmative burden" on the Agency to establish that those reassignments were based on the "'needs of the [s]ervice.'" *Id.* at 15; *see also id.* at 11.

The Agency presented the Arbitrator with two justifications for reassigning the grievants. First, the Agency argued that the reassignments provided training and experience that made the grievants "more proficient at performing their jobs." *Id.* at 12. The Arbitrator credited that argument and found that the "'needs of the [s]ervice' . . . justified" reassigning the grievants to DIA for a "reasonable training period," *id.*, which "should not have exceeded [thirty] days[,]" *id.* at 15. *See also id.* n.14. Second, the Agency argued that it directed the reassignments in order to prevent "'integrity issues[,]' . . . [such as the] grievants [becoming] too familiar[,] and thus not as vigilant as they should have been[,] when dealing with repeat customers and passengers at the . . . small[]" UFAs. *Id.* at 11. Evaluating that argument, the Arbitrator found that none of the "evidence . . . show[ed] that there were any legitimate integrity or complacency issues" with respect to the grievants when they worked at the UFAs. *Id.* at 12. Thus, the Arbitrator found that "the Agency [violated Section 4.F. because it] . . . failed to prove that the 'needs of the [s]ervice' justified [permanently] moving" the grievants to DIA. *Id.*; *see also id.* at 14, 16.

After finding that the Agency's violations of Section 4.F. constituted "unjustified personnel actions," the Arbitrator directed the Agency to return the grievants to their former UFA positions and "pay them all of the overtime and other benefits, if any, that they would have earned had they not been . . . reassigned" to DIA beyond a thirty-day training period. *Id.* at 15. He further directed the Agency to "pay all of the Union's reasonable attorney[] fees" because the Agency's "unjustified personnel actions" resulted in a "reduction in pay that [the grievants] otherwise would have received but for the Agency's actions." *Id.* The Arbitrator found that awarding attorney fees was "in the interest of justice" because: (1) "not doing so . . . would require the Union to spend its own funds to rectify the Agency's unjustified personnel action"; (2) the Agency neglected to take any "other reasonable steps to help address [its] . . . concerns" before permanently reassigning the grievants; and (3) "no evidence" supported the Agency's asserted concerns over "integrity issues" with the grievants. *Id.* at 16.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is contrary to 5 C.F.R. § 335.102(a),[4] which the Agency contends "specifically authorizes agencies to reassign career and career conditional employees." Exceptions at 23. The Agency also asserts that the award abrogates management's rights to: (1) determine its internal security practices, *id.* at 16 (citing 5 U.S.C. § 7106(a)(1)); (2) direct its employees, *id.* at 17 (citing 5 U.S.C. § 7106(a)(2)(A)); (3) assign employees to particular worksites as it determines necessary, *id.* (citing 5 U.S.C. § 7106(a)(2)(A)); (4) assign work at non-UFA worksites to the grievants, *id.* at 17-18 (citing 5 U.S.C. § 7106(a)(2)(B)), 22-23; and (5) assign work at the UFAs to other employees, *id.* *See generally id.* at 14-15, 19 (citing *U.S. Envtl. Prot. Agency*, 65 FLRA 113, 115-18 (2010) (Member Beck concurring) (*EPA*)), 22-23. In this regard, the Agency asserts that the Union did not argue to the Arbitrator, and the Arbitrator did not find, that Section 4.F. was enforceable as a procedure under § 7106(b)(2) of the Statute or an appropriate arrangement under § 7106(b)(3) of the Statute. *Id.* at 18-20.

The Agency contends that the award is based on a nonfact because the Arbitrator mistakenly found that the Agency reassigned the grievants due to concerns with their "personal[]" integrity. *Id.* at 13. In this regard, the Agency contends that it has found that all CBP Officers stationed at UFAs, not merely the grievants personally, are "*vulnerable* to corruption and other *potential* security or integrity risks." *Id.*

The Agency also argues that the award fails to draw its essence from the CBA in three respects. First, the Agency alleges that the Union bore the burden of proof under Article 32, Section 7.I. of the CBA

[3] The RNIAP provides, in pertinent part:

> *b. Staffing Flexibility*
>
> Agency managers may assign employees from one facility to another in order to meet workload or operational requirements.
>
> *Management Guidance: Managers shall assess their levels of workload and resources on a daily basis. This section provides the managers with the latitude to move employees from one work location to another to meet emerging operational needs[and] address immediate threats or unexpected staffing shortages.*

Exceptions, Attach., Joint Ex. 2 at 4 (RNIAP Part 5, § A.1.b.); *see also* Award at 14 (quoting RNIAP Part 5, § A.1.b.).

[4] 5 C.F.R. § 335.102(a) states, in relevant part, that "an agency may . . . reassign a career or career-conditional employee."

(Section 7.I.)[5] but that the Arbitrator improperly assigned the Agency an "affirmative burden" under Section 4.F. *Id.* at 24-25 (citing Award at 12, 15). Second, the Agency argues that the Arbitrator implausibly interpreted the phrase "needs of the [s]ervice" in Section 4.F. as precluding the Agency from reducing airport security risks and increasing the capabilities of CBP Officers. *Id.* at 26. Third, the Agency asserts that the Arbitrator unreasonably interpreted the CBA to find that the reassignments should have ended after thirty days, because "nothing in the [CBA] . . . purports to limit the . . . duration of an assignment" for training or any other purposes. *Id.* at 27.

In addition, the Agency asserts that the Arbitrator's finding that the RNIAP did not apply is "inconsistent with" the RNIAP, *id.* at 29. *See id.* at 27-30. According to the Agency, the Arbitrator should have evaluated the reassignments based on the RNIAP because: (1) the "parties were operating under an expired [CBA] when the reassignments occurred," *id.* at 28; and (2) the RNIAP explicitly recognizes managerial authority to determine the "length of [an employee's] tour of duty," *id.* at 29 (quoting Exceptions, Attach., Joint Ex. 2 at 1 (RNIAP Part 3, para. 3)). Finally, the Agency contends that the Arbitrator's awards of compensation and attorney fees are contrary to the Back Pay Act (BPA), 5 U.S.C. § 5596. *Id.* at 30. With regard to compensation, the Agency argues that its other exceptions demonstrate that it did not commit an unjustified or unwarranted personnel action, which the BPA requires. *Id.* at 31. With regard to attorney fees, the Agency asserts that the Arbitrator "essen[tially] . . . awarded the Union attorney[] fees simply because it won[,]" rather than making the required finding that such an award is warranted "in the interest of justice" under one or more of the "*Allen* factors." *Id.* at 31-33 (citing 5 U.S.C. § 7701(g) (§ 7701(g)); *Allen v. U.S. Postal Serv.*, 2 M.S.P.R. 420 (1980) (*Allen*)).[6]

B. Union's Opposition

As to 5 C.F.R. § 335.103, the Union asserts that the Agency did not raise its argument concerning that regulation before the Arbitrator. Opp'n at 20. With respect to the Agency's management-rights exceptions, the Union concedes that the award affects those rights, *id.* at 14, but argues that Section 4.F. is an appropriate arrangement under § 7106(b)(3) of the Statute because it "protects employees from being unnecessarily transferred without cause[,]" *id.* at 15.

Concerning the Agency's nonfact exception, the Union asserts that the parties disputed at arbitration the legitimacy of the "integrity issues" that the Agency presented to justify reassigning the grievants. *See id.* at 11 (citing Tr. at 146-47). As for the Agency's essence exceptions, the Union asserts that the Arbitrator properly found that the Agency violated the "needs of the [s]ervice" requirement in Section 4.F. *Id.* at 21-24.

With respect to the RNIAP, the Union argues that the Arbitrator correctly found that it applied only to short-term assignments. *Id.* at 23-24. Further, the Union disputes the Agency's contentions that the awards of compensation and attorney fees are contrary to the BPA. *Id.* at 25. With regard to attorney fees, the Union asserts that the Arbitrator "clearly articulate[d] why the [award of fees] is in the interest of justice" when he found that: (1) the Agency committed an unjustified or unwarranted personnel action by reassigning the grievants in violation of the CBA; (2) the Agency did not take any reasonable steps to address its concerns before reassigning the grievants; and (3) the concerns asserted by the Agency to justify the reassignments "were wholly unsupported by evidence." *Id.* at 25-26. Based on those findings, the Union argues that the Arbitrator found that the Agency "should have known it would not prevail on the merits of the case." *Id.* at 26.

IV. Preliminary Matters: Sections 2425.4 and 2429.5 of the Authority's Regulations bar some of the exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations (Regulations),[7] the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[8]

[5] Section 7.I. states, as relevant here, that the "filer [of the grievance] shall bear the burden of proving his case by a preponderance of the evidence." Exceptions at 24 (quoting CBA Art. 32, § 7.I.); *see also id.*, Attach., Ex. 12 (full text of CBA Art. 32).

[6] In *Allen*, the Merit Systems Protection Board established a non-exclusive set of criteria for determining whether an award of attorney fees is "warranted in the interest of justice" under § 7701(g). *See Allen*, 2 M.S.P.R. at 434-36 (discussing the criteria now referred to as the "*Allen* factors"). The "*Allen* factors" are set forth *infra* Part V.C.2.

[7] The Regulations concerning the review of arbitration awards, as well as certain related procedural regulations – including §§ 2425.4 and 2429.5 – were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). Because the Agency's exceptions were filed after that date, we apply the revised Regulations here. *See* 5 C.F.R. § 2425.1 (2011) (revised Regulations apply to all exceptions filed on or after October 1, 2010).

[8] Section 2425.4(c) provides, in pertinent part, that exceptions may not rely on "any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented to the arbitrator." Section 2429.5 provides, in pertinent part, that the "Authority will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented . . . before the . . . arbitrator."

5 C.F.R. §§ 2425.4(c), 2429.5 (2011). *See AFGE, Local 1546*, 65 FLRA 833, 833 (2011). In addition, the Regulations require a party to "set forth in full" the arguments "in support of" its exceptions, including "specific references to the record . . . and any other relevant documentation," § 2425.4(a)(2), as well as "[l]egible copies of any documents referenced" that "are not readily available to the Authority," § 2425.4(a)(3). 5 C.F.R. § 2425.4(a)(2)-(3) (2011).

The Union alleges that, before the Arbitrator, the Agency did not claim that 5 C.F.R. § 335.103 authorized the reassignments. Opp'n at 20. The issue before the Arbitrator concerned whether the Agency exercised its authority to reassign the grievants consistent with the needs of the service. *See* Award at 11, 15. Thus, the Agency had notice at arbitration that it could, and should, present any arguments relevant to such authority, including a claim that 5 C.F.R. § 335.103 authorized the reassignments. However, the record contains no indication that the Agency presented this claim to the Arbitrator. As such, we find that the Regulations bar the exception concerning 5 C.F.R. § 335.103 and dismiss that exception.

In addition, there is no evidence that the Agency argued before the Arbitrator that returning the grievants to their former UFA positions would abrogate management's rights to determine its internal security practices or to direct its employees. *See* Award at 7 (Agency raised rights to "assign . . . employees" and "assign work"). There is also no indication that the Agency argued at arbitration that Section 4.F. was unenforceable under § 7106(b) of the Statute. *See* 5 C.F.R. § 2425.4(a)(2)-(3) (2011) (party must support exceptions with specific references to the record). In this regard, the Authority has held that, where an agency should have known to argue to an arbitrator that a contract provision was not negotiated under § 7106(b), and the agency did not do so, the Authority will not consider that argument for the first time on exceptions to the arbitrator's award. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Oakdale, La.*, 63 FLRA 178, 179-80 (2009) (*DOJ*).[9]

At arbitration, the Union argued that "there was no needs-of-service basis for . . . reassigning [the grievants,] and as a result, the [A]gency" violated Section 4.F. Tr. at 21; *see also id.* at 19 (facts did not show reassignments were based on "needs of service" as Section 4.F. required). As a remedy for violating Section 4.F., the Union requested that the Arbitrator return "both [grievants] . . . to their original assignments." *Id.* at 21. Thus, the Agency could have, and should have, presented to the Arbitrator all of its management-rights challenges to the Union's proposed interpretation of Section 4.F., including challenges to its enforceability under § 7106(b) of the Statute. *See* 5 C.F.R. § 2429.5 (2011); *DOJ*, 63 FLRA at 179-80. As there is no indication that the Agency presented those arguments to the Arbitrator, we find that the Regulations bar consideration of those arguments in support of the exceptions.[10]

V. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the award is based on a nonfact because the Arbitrator found that the Agency reassigned the grievants in order to address "personal[]" integrity concerns. Exceptions at 13-14. The Union contends that the parties disputed this matter at arbitration. Opp'n at 11. 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.*

Even assuming that the Arbitrator's finding with respect to the Agency's integrity concerns is a factual determination, the parties disputed this matter before the Arbitrator. *E.g.*, Tr. at 19 (Union stated that Agency's

[9] Although *DOJ* involved an application of § 2429.5 prior to the regulatory revisions discussed *supra* note 7, the revised version of § 2429.5 "'merely incorporates into regulation'" the Authority's practice under the prior version of § 2429.5. *See NTEU, Chapter 164*, 65 FLRA 901, 903 n.3 (2011) (quoting 75 Fed. Reg. at 42,289). Thus, *DOJ*'s application of former § 2429.5 remains authoritative under revised § 2429.5.

[10] We note that, in contrast with the management-rights arguments above that are barred by §§ 2425.4 and 2429.5, the Agency argued at arbitration that it exercised its rights to assign employees and assign work when reassigning the grievants to DIA. *See* Award at 7. Thus, the Authority's Regulations do not bar the Agency's claims that the award is contrary to those management rights. In responding to those claims, the Union contends that the award enforces Section 4.F. as a provision negotiated under § 7106(b), Opp'n at 15, and, because the Agency's argument to the contrary is barred, the Union's contention is uncontested. As such, the Agency's claims cannot establish that the award is contrary to § 7106(a), and we deny the exceptions based upon those claims. *See EPA*, 65 FLRA at 115; *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 107 & n.6 (2010) (Chairman Pope concurring) (absent claim that award enforces contract provision that was not negotiated under § 7106(b) of the Statute or that arbitrator applied a § 7106(b) provision "in a way [not] reasonably related to the provision and the harm being remedied," Authority will not find award contrary to management rights).

alleged "concern over . . . integrity" was baseless); *id.* at 21-22 (Agency stated that managers would testify as to their "responsibility" to reassign employees to reduce "possible integrity violations or integrity issues"). Thus, the Agency's argument does not provide a basis for finding that the award is based on a nonfact. *See NFFE, Local 1984*, 56 FLRA at 42. Accordingly, we deny the nonfact exception.

B. The award draws its essence from the CBA.

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) (*OSHA*). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576. Exceptions based on a misunderstanding of an arbitrator's award do not provide a basis for finding that an award fails to draw its essence from the parties' agreement. *See NAGE, Local R4-45*, 55 FLRA 789, 793-94 (1999) (*Local R4-45*). Moreover, where an arbitrator interprets an agreement as imposing a particular requirement, the fact that the agreement is silent with respect to that requirement does not, by itself, demonstrate that the award fails to draw its essence from the parties' agreement. *See, e.g., U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003) (*Johnson Med. Ctr.*); *U.S. Dep't of Def., Educ. Activity, Arlington, Va.*, 56 FLRA 901, 905-06 (2000) (*Def. Educ. Activity*).

The Agency alleges that the Union bore the burden of proof under Section 7.I., but that the Arbitrator improperly assigned the Agency an "affirmative burden" under Section 4.F. Exceptions at 24-25 (citing Award at 12, 15). As mentioned previously and as relevant here, Section 7.I. states that the "filer [of the grievance] shall bear the burden of proving his case by a preponderance of the evidence," Exceptions at 24 (quoting CBA Art. 32, § 7.I.), and Section 4.F. states that the Agency "retains the right to identify and direct the reassignment of an [e]mployee based on the needs of the [s]ervice," Award at 10-11. Interpreting Section 4.F., the Arbitrator found that the Agency had an "affirmative burden" to show that the reassignments were "based upon the needs of the [s]ervice." *Id.* at 15, 11. However, this finding concerned only one aspect of the broader issues being arbitrated, which included: (1) whether the Agency had permanently assigned the grievants to their respective UFAs, *id.* at 13; (2) whether a "move" to DIA constituted a "reassignment," *id.* at 13-14; and (3) what was an "appropriate remedy" for a contractual violation, *id.* at 2. Consequently, the Arbitrator's assigning the Agency an "affirmative burden" in connection with one aspect of the dispute does not establish that Arbitrator assigned the Agency the overall "burden of proving *[the] case*," Exceptions at 24 (emphasis added). Therefore, we deny this exception because the Arbitrator's finding of an affirmative Agency burden under Section 4.F. is not irrational, unfounded, implausible, or in manifest disregard of Section 7.I. *See OSHA*, 34 FLRA at 575.

In addition, the Agency alleges that the Arbitrator interpreted Section 4.F. so that the "need[s] of the [s]ervice" do not include reducing security risks or increasing CBP Officers' capabilities. *See* Exceptions at 26. However, the Arbitrator did not do so. With regard to potential security risks, he stated that he did "not . . . suggest . . . the Agency's concerns over integrity issues [at] other [UFAs] . . . are unwarranted[,]" Award at 12 n.8, but that the evidence did not support any such concerns regarding these particular grievants, *id.* at 12 & n.8. Thus, the Agency's first allegation misinterprets the award. *See Local R4-45*, 55 FLRA at 794. As for the Agency's assertion that the Arbitrator did not consider employee development to be one of the "needs of the [s]ervice," that argument similarly misinterprets the award because the Arbitrator found that, under Section 4.F., increases in job proficiency justified the grievants' temporary reassignments to DIA for thirty days. Award at 12-13; *see Local R4-45*, 55 FLRA at 794. As this exception is based on misinterpretations of the award, we find that it does not provide a basis for finding the award deficient.

The Agency also asserts that "nothing in the [CBA] . . . purports to limit the . . . duration of an assignment," and, thus, the Arbitrator unreasonably interpreted Section 4.F. to find that the needs of the service did not justify the reassignments beyond a thirty-day training period. Exceptions at 27. However, the Agency does not identify a provision in the CBA requiring that reassignments that facilitate employee development last longer than thirty days. Moreover, the fact that the thirty-day limit applied by the Arbitrator does not specifically appear in the text of Section 4.F. does not establish that the award fails to draw its essence from the CBA. *See Johnson Med. Ctr.*, 58 FLRA at 414;

Def. Educ. Activity, 56 FLRA at 905-06. Thus, we find that the Agency does not establish that it was irrational for the Arbitrator to find that the "needs of the [s]ervice" justify only temporary reassignments in certain circumstances. *See OSHA*, 34 FLRA at 575. Accordingly, we deny this exception. *See id.*

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

The Agency alleges that the award is contrary to the RNIAP and the BPA. When an exception involves an award's consistency with law, rule, or regulation, 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 applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *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) (*Ala. Nat'l Guard*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. The award is not contrary to the RNIAP.

The Agency asserts that the award is "inconsistent with" the RNIAP, Exceptions at 29. *See id.* at 27-30. The Authority has recognized that the RNIAP establishes "policies and procedures . . . with respect to inspectional assignment matters."[11] *NTEU, Chapter 137*, 61 FLRA 60, 63 (2005) (*Chapter 137*) (citing RNIAP Part 3). In this regard, the Authority treats agency policies as agency rules or regulations for purposes of determining whether an award is consistent with governing rules and regulations. *E.g., AFGE, Local 2408*, 58 FLRA 608, 610 (2003). Thus, we assess whether the award is contrary to an Agency rule or regulation – specifically, the RNIAP.

The Agency contends that the RNIAP directly conflicts with Section 4.F.'s restrictions on management's authority to assign and reassign employees and, thus, that the Arbitrator should have applied the RNIAP. *See* Exceptions at 29-30. However, parties' agreements, rather than agency rules or regulations, govern the disposition of matters to which they both apply. *See U.S. Dep't of the Navy, Naval Training Ctr., Orlando, Fla.*, 53 FLRA 103, 108-09 (1997) (*Naval Training Ctr.*); *U.S. Dep't of the Treasury, U.S. Customs Serv., N.Y.C., N.Y.*, 51 FLRA 743, 746 (1996); *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 194 (1990). With respect to the Agency's claim that the RNIAP applies because the CBA – including Section 4.F. – was expired at the time of the reassignments, the Authority has held that an agency may not unilaterally modify provisions of an expired agreement relating to mandatory subjects of bargaining. *See U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 59 FLRA 703, 710 n.20 (2004) (then-Member Pope concurring). The Agency does not contend that the requirements of Section 4.F. fall outside the scope of mandatory bargaining, and, thus, it provides no basis for finding that it could unilaterally decline to adhere to those requirements. *See id.* Consequently, the expiration of Section 4.F. is immaterial here, and, even assuming that Section 4.F. and the RNIAP provide conflicting standards for evaluating the propriety of the grievants' reassignments, the Agency does not demonstrate that the Arbitrator erred in finding that Section 4.F., rather than the RNIAP, governed the reassignments. *See Naval Training Ctr.*, 53 FLRA at 108-09; *see also Ala. Nat'l Guard*, 55 FLRA at 40. Accordingly, we deny the Agency's exception asserting that the award is inconsistent with the RNIAP.

2. The award is not contrary to the BPA.

The Agency contends that the awards of compensation and attorney fees are contrary to the BPA. With regard to the award of compensation, under the BPA, awarding backpay is authorized only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action has resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *See, e.g., U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1218-19 (1998). As the Agency's exception to the award of compensation focuses only on the first of these requirements, we address only that requirement. *E.g., U.S. Dep't of the Treasury, IRS, Phila. Serv. Ctr., Phila., Pa.*, 53 FLRA 1697, 1700 (1998) (*IRS*) (addressing only the requirements disputed by the parties). In particular, the Agency claims that, as a result of its other exceptions, it has demonstrated that it did not commit an unjustified or unwarranted personnel action. As we have denied the Agency's other exceptions, we deny this exception as well.

[11] We note, in this regard, that the Authority has held that the RNIAP is not a collective bargaining agreement. *NTEU, Chapter 137*, 60 FLRA 483 (2004) (Chairman Cabaniss concurring), *recons. denied*, 61 FLRA 60 (2005), *pet. for review dismissed sub nom. NTEU v. FLRA*, No. 05-1338, 2006 WL 2521320 (D.C. Cir. 2006); *see also U.S. Dep't of Homeland Sec., Customs & Border Prot. v. FLRA*, 647 F.3d 359, 364 (D.C. Cir. 2011) ("We defer to the Authority's reasonable determination that the RNIAP is not a collective bargaining agreement.").

With regard to attorney fees, in addition to requiring a finding that an agency committed an unjustified or unwarranted personnel action that resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials, the BPA further requires that an award of fees be: (1) in conjunction with an award of backpay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with standards established under § 7701(g), which pertains to attorney fees awarded by the Merit Systems Protection Board. *See U.S. Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995). The prerequisites for an award under § 7701(g) are that: (1) the employee must be the prevailing party; (2) the award of attorney fees must be warranted in the interest of justice; (3) the amount of fees must be reasonable; and (4) the fees must have been incurred by the employee. *See id.*

The Authority has long held that, when resolving a request for attorney fees, arbitrators must set forth specific findings supporting their determinations on each pertinent statutory requirement. *Id.*; *accord IRS*, 53 FLRA at 1699-1700. When arbitrators do not sufficiently explain their determinations, the Authority will examine the record to determine whether it permits the Authority to resolve the matter. If so, then the Authority will modify the award or deny the exception as appropriate. If not, then the Authority will remand the award for further proceedings. *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1694 (1998) (*USDA*).

The Agency's exception to the award of fees addresses only whether that award is warranted in the interest of justice. As such, we address only this requirement. *E.g.*, *IRS*, 53 FLRA at 1700 (addressing only the requirements disputed by the parties). An award of attorney fees is warranted in the interest of justice if: (1) the agency engaged in a prohibited personnel practice; (2) the agency actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency; (3) the agency actions are taken in bad faith to harass or exert improper pressure on an employee; (4) the agency committed gross procedural error that prolonged the proceeding or severely prejudiced the employee; or (5) the agency knew or should have known that it would not prevail on the merits of its actions. *See Allen*, 2 M.S.P.R. at 434-36. The Authority also has stated that an award of attorney fees is warranted in the interest of justice when there is either a service rendered to the federal workforce or a benefit to the public derived from maintaining the action. *See, e.g.*, *AFGE, Local 1148*, 65 FLRA 402, 404 n.* (2010). An award of attorney fees is warranted if any of the foregoing criteria is satisfied. *Id.*

Although the Arbitrator stated that an award of fees was warranted "in the interest of justice," Award at 16, he did not address any of the *Allen* factors or address whether maintaining the action rendered a service to the federal workforce or benefitted the public. Nevertheless, the Union claims that the Arbitrator found fees warranted under the fifth *Allen* factor because the Agency "should have known it would not prevail on the merits of the case." Opp'n at 26.

A determination under the fifth *Allen* factor requires an evaluation of the nature and weight of the evidence available to the agency at the time of the disputed action. *Soc. Sec. Admin., Balt., Md.*, 63 FLRA 550, 552 (2009). Accordingly, arbitrators must determine the reasonableness of an agency's actions and positions in light of the information available at the time of the disputed action. *Id.* The assessment of whether an agency knew or should have known that it would not prevail is primarily factual because it is based on the arbitrator's evaluation of the evidence and the agency's handling of that evidence. *Id.*

Contrary to the Union's claim, there is no basis for finding that the Arbitrator determined what the Agency knew or should have known about the likelihood that it would succeed in justifying the reassignments based on the merits of its actions. Moreover, the Arbitrator did not make sufficient factual findings to support a conclusion that the award of attorney fees would be warranted under any of the other interest-of-justice criteria discussed above. *See IRS*, 53 FLRA at 1699-1700 (arbitrators must set forth specific factual findings to support their determinations on each pertinent statutory requirement for awarding attorney fees under BPA). Consequently, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to make the findings necessary to address the attorney fees request. *See USDA*, 53 FLRA at 1694.

VI. Decision

The Agency's exceptions are dismissed in part and denied in part, and the award is remanded in part to the parties for resubmission to the Arbitrator, absent settlement.