66 FLRA No. 9

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
REGIONAL OFFICE
WINSTON-SALEM, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1738
(Union)

0-AR-4501

_____

DECISION

August 25, 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 Stanley D. Henderson 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 grievance was timely and arbitrable, and found that the Agency abused its discretion in promoting the grievant to General Schedule (GS)-9, Step 5, rather than GS-9, Step 10. For the reasons set forth below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

A. Background

The grievant is employed by the Agency as a Veterans Service Representative (VSR). Award at 4. Previously, the grievant occupied a GS-11, Step 10 position with the Army Corps of Engineers, where she gained over thirty years' experience. *Id.*

The grievant accepted a GS-7 position with the Agency. *Id.* The Agency set the grievant's pay upon her initial hire at GS-7, Step 10 by applying the Highest Previous Rate (HPR) rule, which allows an agency to set pay within a grade at any rate not exceeding the employee's highest previous rate.[1] Award at 2 (citing Veterans Affairs (VA) Handbook 5007 (VA Handbook), Part II, Chapter 4, Section 2(a)). According to the grievant, a human resources (HR) representative promised that, upon her promotion, she would progress to GS-9, Step 10 and GS-10, Step 10. *Id.* at 4. The grievant testified that the information was a "deciding factor" in her decision to accept the offer. *Id.* According to the HR representative, she could not recall specifically discussing any promotion questions with the grievant, but "would never promise anyone a particular pay step upon promotion." *Id.*

One year after the grievant began working for the Agency, the Two Step Promotion (Two-Step) rule was applied and the grievant was promoted to GS-9, Step 5. *Id.* When the grievant received a Standard Form (SF)-50, she contacted the HR department to ask why she was not promoted to GS-9, Step 10. *Id.* at 5. The Agency's current HR specialist denied the grievant's request for a Step 10 because her previous experience outside the Agency did not enhance her total qualifications for her current position. *Id.*

The grievant consulted the Union and sent a formal request for reconsideration to the HR department. The Agency denied her request for reconsideration, saying that, because her previous experience was unrelated to her current position, the requirements for applying the HPR rule were not met and that equity to the grievant and the VA was best served by placing the grievant at GS-9, Step 5. *Id.* The grievant then appealed the decision to the Merit Systems Protection Board (MSPB). *Id.* In an initial decision, an MSPB administrative judge dismissed her appeal for lack of jurisdiction because it involved a classification matter. *Id.* at 5-6. The grievant then went to the Union, which, after consulting legal counsel, advised her to submit a grievance. *Id.* at 6.

The Union presented a grievance alleging that the Agency violated the VA Handbook and the parties' agreement by failing "to take account of [the grievant's] enhanced overall qualifications" and failing to place her at a GS-9, Step 10. *Id.* The matter was not resolved and

[1] The employee's HPR is the maximum payable rate an employee may receive upon being hired or promoted. *See* 5 C.F.R. § 531.221. Alternatively, the Two Step Promotion rule is the minimum an employee must receive upon promotion, which is calculated in accordance with 5 U.S.C. § 5334(b).

was submitted to arbitration. *Id.* The Arbitrator framed the issues as follows:

> (1) Is the grievance arbitrable, procedurally and substantively?
>
> (2) Did the Agency violate the [parties' a]greement and VA regulations in setting [the g]rievant's pay step upon promotion?

Id. at 1.

B. Arbitrator's Award

The Arbitrator first found that the grievance was timely. The Arbitrator concluded that the grievance constituted a "continuing violation," in accordance with Article 42, Section 7 of the parties' agreement.[2] *Id.* at 10. The Arbitrator determined that, because the grievance alleged an underpayment of the grievant's pay, each underpayment constituted a grievable act or occurrence. *Id.*

Additionally, the Arbitrator decided that, even if the violation was not of a continuing nature, the grievance was timely because the delays were initially caused by the Agency's actions. *Id.* at 12. In this regard, the Arbitrator determined that the Agency misinformed the grievant by telling her she must deal with the HR department in Jackson. *Id.* at 11. The Arbitrator also found that the grievant cannot "be faulted" for her decision to go to the MSPB, nor should she be charged with any omissions by the Union. *Id.* at 11-12. Therefore, because the grievant filed her grievance within thirty days of her case being dismissed by the MSPB, the Arbitrator concluded that the grievance was timely. *Id.* at 12.

The Arbitrator next rejected the argument that he was bound by the MSPB's initial decision because the elements of collateral estoppel were not met. *Id.* at 14. According to the Arbitrator, the grievant did not have an opportunity to litigate the classification question because she was not represented by the Union and because the MSPB did not hold a hearing, take testimony, or make findings. *Id.* Additionally, the Arbitrator noted that the MSPB administrative judge, in addressing the classification issue, was not interpreting 5 U.S.C. § 7121(c)(5) or Authority precedent. *Id.*

The Arbitrator then determined that the grievance did not concern a classification matter under Article 42, Section 2(B) of the parties' agreement or § 7121(c)(5). *Id.* at 12. The Arbitrator concluded that the grievance did not concern classification because it was limited to the issue of whether the grievant had been promoted to the proper pay step. *Id.* at 13. In this regard, the Arbitrator found that the grievant did not claim that her position was classified improperly or argue about her grade level or duties. *Id.* The Arbitrator also rejected the argument that the grievant should have used the classification appeals process in Article 9, Section 3 of the parties' agreement because, as he already concluded, the grievance did not concern classification. *Id.*

Having determined that the grievance was timely and arbitrable, the Arbitrator considered whether the Agency abused its discretion in setting the grievant's pay upon promotion. *Id.* at 14-15. The Arbitrator found that Article 2, Section 1 of the parties' agreement "expressly incorporates the regulatory provisions disputed in this case." Award at 9; *see also* Award at 14. The Arbitrator noted that the VA Handbook, which incorporates "applicable statutes and regulations," grants the Agency discretion to set pay upon promotion, subject to explicit guidelines and procedures. *Id.* at 15. According to the Arbitrator, the Agency's decision to place the grievant at a Step 10 upon her initial hire "constituted a judgment" that her total qualifications had been enhanced by her non-VA experience. *Id.* The Arbitrator found that the VA Handbook did not "expressly state that the [HPR rule] is a one-time benefit that is extinguished upon first application." *Id.* The Arbitrator found it to be counterintuitive that the factors leading the Agency to find that the grievant had enhanced qualifications would disappear after one year. *Id.* at 16.

According to the Arbitrator, "[t]he Agency's reliance on [equitable] grounds as a basis for rejecting the [HPR] rule . . . is misplaced" because the VA Handbook allows for the Agency to consider equity "only in situations where an initial determination has been made that the [HPR] rule cannot be applied." *Id.* at 17. The Arbitrator determined that comparing the grievant's current and former job series did not constitute an assessment of the quality of the grievant's previous experience, as required by the VA Handbook. *Id.* at 18. The Arbitrator also found that the HR specialist did not document the reason for rejecting the HPR rule, as required by the VA Handbook. *Id.*

The Arbitrator also credited the grievant's testimony that she had been promised a Step 10 upon her promotion to GS-9. *Id.* According to the Arbitrator, even though the Agency's witness could not recall promising the grievant anything, she "did not directly challenge" the grievant's version of the events. *Id.* The

[2] The relevant provisions of the parties' agreement and the VA Handbook are set forth in the appendix to this decision.

Arbitrator concluded that the grievant "had been given a firm assurance" of her step upon promotion. *Id.* at 18-19. However, the Arbitrator found it unnecessary to determine whether the promise was an enforceable contract because it was simply a factor contributing to whether the Agency abused its discretion. *Id.* at 19.

The Arbitrator concluded that the Agency abused its discretion because it: (1) was "arbitrary and unreasonable" in refusing to consider the HPR rule because it already had applied it once; (2) misapplied the Handbook in determining whether the HPR applied; (3) failed to conduct the required analysis for determining whether the grievant had enhanced total qualifications; (4) failed to document the basis for failing to apply the HPR; and (5) failed to consider the promise to the grievant. *Id.* In so doing, the Arbitrator again stated that the parties' agreement "incorporates VA pay-setting regulations and procedures." *Id.* at 14. Therefore, the Arbitrator found that the Agency violated Article 2, Section 1 of the parties' agreement by misapplying the Handbook and ordered the Agency "to place [the g]rievant at a [S]tep 10 salary rate for the period of her GS-9 VSR employment." *Id.* at 19-20. The Arbitrator awarded backpay for the period between when the grievant was promoted to GS-9, Step 5 and the date of the grievant's next career-ladder promotion. *Id.* at 20.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the Arbitrator made two errors of law in finding that the grievance was timely. Exceptions at 26. First, the Agency claims that the grievance does not constitute a continuing violation; otherwise, according to the Agency, all pay-setting determinations would be continuing violations. *Id.* Second, the Agency asserts that the Arbitrator erroneously found that the grievant could not be charged with the Union's failure to submit a timely grievance, which, according to the Agency, "turns collective bargaining on its head." *Id.* at 27 n.10. Further, the Agency argues that the Arbitrator's timeliness determination fails to draw its essence from Article 42, Section 7 of the parties' agreement, which provides that the Union must file grievances within thirty days of the act or occurrence. *Id.* at 27.

The Agency also argues that the Arbitrator "failed to address the Agency's . . . argument regarding the MSPB decision" because he only addressed its argument regarding collateral estoppel. *Id.* at 18. The Agency asserts that the Arbitrator is bound by the MSPB's determination that the grievance concerns a classification matter because, in *Cornelius v. Nutt*, 472 U.S. 648 (1985) (*Cornelius*), the United States Supreme Court found that arbitrators are bound by MSPB decisions. Exceptions at 18. The Agency claims that the Arbitrator erred in concluding "that the MSPB did not find that this pay dispute involved a classification decision" because, according to the Arbitrator, it did "not describe [Authority] precedent on § 7121(c)(5) classification decisions." *Id.* at 19. Thus, the Agency argues that the Arbitrator erred as a matter of law and exceeded his authority. *Id.*

The Agency further asserts that the grievance does concern a classification matter under § 7121(c)(5) and Authority precedent, relying on *United States Equal Employment Opportunity Commission, Memphis District Office, Memphis, Tennessee*, 18 FLRA 88 (1985) (*EEOC*) and *The Veterans Administration Medical Center, Togus, Maine*, 17 FLRA 963 (1985). *Id.* at 19-22. According to the Agency, because the "grievance is over the grade level the grievant should receive through a noncompetitive career ladder promotion," the Arbitrator exceeded his authority and erred as a matter of law when he found that the grievance did not concern classification. *Id.* at 22. The Agency also argues that the award fails to draw its essence from the parties' agreement, which excludes classification matters from the grievance procedure. *Id.* at 22-23.

The Agency contends that the Arbitrator's award fails to draw its essence from the parties' agreement because the grievant failed to follow the classification appeals procedures in Article 9, Section 3 of the parties' agreement. *Id.* at 25-26. According to the Agency, the parties' agreement provides that an employee must submit classification appeals to the Agency or to the Office of Personnel Management (OPM). *Id.* at 25. The Agency claims that, in filing a grievance, the grievant failed to follow the classification appeals procedures in accordance with the parties' agreement. *Id.*

The Agency also argues that the Arbitrator's finding of an oral promise is unenforceable because the HR representative who made the promise "was without authority to bind the Agency." *Id.* at 23. According to the Agency, she did not have "actual or implied" authority under the regulations, statutes, or VA Handbook provisions to determine what salary the grievant would be paid, nor did she have the authority to "negotiate a contract on behalf of the United States." *Id.* at 24.

Further, the Agency asserts that the Arbitrator erred in finding that the Agency misapplied the VA Handbook. *Id.* at 28. According to the Agency, its HR specialist testified that she did consider equity after determining that the HPR rule did not apply. *Id.* at 28-29.

The Agency also claims that the Arbitrator ignored the HR specialist's testimony and that her decision was consistent with the VA Handbook. *Id.* at 30-31. Finally, the Agency argues that it did not abuse its discretion under the VA Handbook. *Id.* at 31. According to the Agency, it acted in conformity with the Two-Step rule, and within the Agency's discretion under the regulations, when it determined that the grievant's qualifications were not enhanced by her prior experience. The Agency also contends that it was equitable to place her at GS-9, Step 5. *Id.* at 31-32.

B. Union's Opposition

The Union argues that the Arbitrator's award draws its essence from the parties' agreement. Opp'n at 5. According to the Union, the Agency's exceptions attempt to "miscast the [a]ward" and constitute a mere disagreement with the Arbitrator's findings. *Id.*

The Union argues that the Arbitrator's determination that the grievance was timely is not contrary to law. *Id.* at 8. According to the Union, the Agency did not identify any law with which the finding conflicts. *Id.* The Union contends that the Agency "affirmatively misled" the grievant, who relied on the Agency's advice to consult the Jackson HR department. *Id.* at 9. Additionally, the Union asserts that the grievance constitutes a continuing violation because the grievant continued to be paid at an improper rate. *Id.* at 9-10.

The Union contends that the Arbitrator was correct to refuse to follow the MSPB decision because the MSPB lacked subject matter jurisdiction over the grievance. *Id.* at 5. Additionally, the Union claims that, in any event, the Authority is not bound by MSPB decisions. *Id.* at 7. The Union argues that the Arbitrator was correct in finding that the grievance did not concern classification because "[c]lassification goes to the proper grade or title of the work that is being performed and what grade the employee should be." *Id.* at 5. According to the Union, because the grievance concerns the grievant's proper pay step, it is not excluded by § 7121(c)(5). *Id.* at 6. Further, the Union asserts that the subject at issue in the grievance was "not subject to a classification appeal . . . ." *Id.* at 7.

The Union also argues that the Agency's argument regarding an oral promise is misplaced because the award does not enforce an oral contract. *Id.* at 8. The Union asserts that the Arbitrator did not base his award on this ground because the Arbitrator explicitly refused to consider whether the promise made to the grievant constituted an oral contract. *Id.*

The Union also contends that the Arbitrator properly found that the Agency failed to follow its regulations and acted in an arbitrary manner. *Id.* at 10. According to the Union, the Agency's HR specialist simply followed the Two-Step rule without considering the HPR rule. *Id.* at 11. The Union argues that the Agency was required to determine whether the HPR rule or the Two-Step rule would better promote equity to both the Agency and the grievant. *Id.* The Union asserts that the Agency failed to conduct the required analysis and, thus, acted arbitrarily. *Id.* at 11-12.

IV. Analysis and Conclusions

A. The Arbitrator's procedural arbitrability determination is not contrary to law.

The Agency argues that, in finding the grievance to be timely, the Arbitrator made two errors of law. In this regard, the Agency asserts that the Arbitrator erroneously found the grievance to be a continuing violation and erroneously found that the grievant should not be charged with the Union's omissions. Exceptions at 26. The Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural arbitrability ruling itself. *See, e.g., AFGE Local 3882*, 59 FLRA 469, 470 (2003). However, the Authority has stated that a procedural arbitrability determination may be found deficient on the ground that it is contrary to law. *See id.* (citing *AFGE Local 933*, 58 FLRA 480, 481 (2003)). In addition, the Authority has stated that a procedural arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or that the arbitrator exceeded his or her authority. *See id. See also U.S. Equal Emp't Opportunity Comm'n*, 60 FLRA 83, 86 (2004) (citing *AFGE Local 2921*, 50 FLRA 184, 185-86 (1995)).

The Agency asserts that the Arbitrator's findings regarding timeliness are contrary to law. Exceptions at 26. However, the Agency has failed to identify any laws, rules, or regulations with which the Arbitrator's award conflicts. A general assertion, absent more, is not sufficient to support a contention that an award is contrary to law. *U.S. Dep't of Veterans Affairs, Montgomery Reg'l Office, Montgomery, Ala.*, 65 FLRA 487, 489 (2011); *NFFE, Local 1442*, 61 FLRA 857, 859 (2006). Accordingly, we reject the Agency's arguments as bare assertions and deny this exception. *See AFGE, Local 1547*, 65 FLRA 928, 930 n.2 (2011) (rejecting a contrary-to-law argument as a bare assertion where the

excepting party did not identify any law with which the award conflicted).

The Agency also argues that the Arbitrator's timeliness determination exceeds his authority and fails to draw its essence from the parties' agreement. Exceptions at 27. However, these arguments directly challenge the Arbitrator's procedural arbitrability determination and do not provide a basis for finding the award deficient. *See AFGE, Local 933*, 65 FLRA 9, 11 (2010) (finding that the exception challenging the arbitrator's timeliness conclusion directly challenged his procedural arbitrability determination).

B. The Arbitrator was not bound by the MSPB decision.

The Agency argues that the Arbitrator "erred as a matter of law" when he "ignored the MSPB's decision." Exceptions at 18-19. 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 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) (*Dep't of Def.*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Agency contends that "arbitrators are bound by the decisions of the [MSPB]." Exceptions at 18 (citing *Cornelius*, 472 U.S. 648). However, the Supreme Court in *Cornelius* held that "the arbitrator is to apply the same substantive standards that the [MSPB] would apply" if a grievance is filed over an "agency disciplinary action taken pursuant to § 4303 or § 7512." *Cornelius*, 472 U.S. at 652. The Supreme Court's holding is consistent with Authority precedent. *See Soc. Sec. Admin.*, 65 FLRA 286, 288 (2010) (citing *IFPTE, Local 11*, 46 FLRA 893, 902 (1992)) (finding that "arbitrators are bound by the same substantive standards as the [MSPB] only when resolving grievances concerning actions covered by 5 U.S.C. §§ 4303 and 7512"). Actions covered by §§ 4303 and 7512 include actions based on unacceptable performance and other adverse actions. 5 U.S.C. §§ 4303 and 7512. Because this grievance concerns a promotion, rather than an adverse action, it is not covered under §§ 4303 or 7512. *See NFFE, Local 1658*, 55 FLRA 668, 671 (1999) (finding that a grievance concerning non-selection was not covered under §§ 4303 or 7512). Therefore, the Agency has not established that the Arbitrator was bound by the MSPB's decision.

Moreover, the Authority is not bound by the MSPB's jurisdictional determinations. *See U.S. Dep't of Veterans Affairs, Med. Ctr., Charleston, S.C.*, 58 FLRA 706, 709 (2003) (finding that the Authority has jurisdiction over Privacy Act matters even though the MSPB found that it lacked jurisdiction over those matters). Accordingly, we find that the award is not contrary to law and deny this exception.

The Agency also argues that the Arbitrator "failed to address the Agency's first argument regarding the MSPB decision," which we construe as an argument that the Arbitrator exceeded his authority. Exceptions at 18. 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 not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. *See U.S. Dep't of the Army, Corps of Engineers, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).

The Arbitrator addressed the issues framed for resolution, including whether "the grievance [is] arbitrable, procedurally and substantively[.]" Award at 1. In this regard, the Arbitrator concluded that, because the MSPB had no subject matter jurisdiction and was not addressing the Statute, "the MSPB decision ha[d] no bearing on the issues involved in this arbitration." *Id.* at 14. Accordingly, we deny this exception. *See AFGE, Local 3627*, 64 FLRA 547, 550 (2010) (finding that the arbitrator did not exceed his authority when he resolved all of the issues actually submitted to arbitration).

C. The award is not contrary to § 7121(c)(5).

The Agency argues that the award is contrary to § 7121(c)(5) because the grievance concerns a classification matter. Exceptions at 19-23. As previously stated, in analyzing whether an award is contrary to law, we review questions of law de novo and defer to the Arbitrator's factual findings. *See Dep't of Def.*, 55 FLRA at 40.

Under § 7121(c)(5) of the Statute, a grievance concerning "the classification of any position which does not result in the reduction in grade or pay of an employee" is removed from the scope of the negotiated grievance procedures. Classification of a position is defined as "the analysis and identification of a position

and placing it in a class under the position-classification plan established by [OPM] under chapter 51 of title 5, United States Code." 5 C.F.R. § 511.101(c). Under the system established by OPM, classification entails the identification of the appropriate title, series, grade, and pay system of a position. *See* 5 C.F.R. § 511.701(a); *see also U.S. Dep't of Labor*, 12 FLRA 639, 640 (1983) (finding that an award does not involve classification where the employees were not challenging the class, grade, or pay system of their positions) (*DOL*).

The Authority has held that a grievance does not involve classification "merely because the grievance or award involves the amount of an employee's pay." *U.S. Sec. & Exch. Comm'n, Wash., D.C.*, 61 FLRA 251, 254 (2005) (*SEC*). Even though the Agency argues that "this grievance is over the grade level the grievant should receive through a noncompetitive career ladder promotion," Exceptions at 22, the parties do not dispute that the grievant was entitled to a GS-9 position following her promotion.[3] The dispute concerns what pay step the grievant should have received upon her promotion; it does not concern the grievant's title, series, grade or pay system. Because the amount of an employee's pay does not concern classification, we find that the award is not contrary to § 7121(c)(5) and deny this exception.[4] *See SEC*, 61 FLRA at 254 (finding that a grievance concerning pay was not a classification matter); *DOL*, 12 FLRA at 640 (finding that an award was not contrary to § 7121(c)(5) where the grievance concerned employees' entitlement to hazardous duty pay).

D. The award draws its essence from the parties' agreement.

The Agency argues that the award fails 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 United States Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). 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.

1. Article 42, Section 2B

The Agency argues that the award does not draw its essence from Article 42, Section 2B of the parties' agreement, which mirrors § 7121(c)(5) and excludes classification matters from the scope of the negotiated grievance procedure. Exceptions at 22-23. The Authority has previously applied statutory standards in assessing the application of contract provisions that "mirror . . . the Statute." *AFGE*, 59 FLRA 767, 769 (2004). As we have rejected the Agency's claim that the award is contrary to § 7121(c)(5), we deny the Agency's essence exception for the same reasons. *See U.S. Dep't of the Treasury, IRS., Small Bus./Self Employed Bus. Div., Fraud/BSA, Detroit, Mich.*, 63 FLRA 567, 572 (2009).

2. Article 9, Section 3

The Agency also argues that the award does not draw its essence from Article 9, Section 3 of the parties' agreement because the grievant failed to follow classification appeal procedures. Exceptions at 24-26. As previously discussed, the grievance here does not concern a classification matter. Because the grievance does not concern classification, the Agency has provided no basis for finding that the Arbitrator's interpretation of the parties' agreement is implausible or irrational. *See U.S. Dep't of the Air Force, 81st Training Wing, Keesler Air Force Base, Miss.*, 60 FLRA 425, 428 (2004)

[3] Further, even if the grievance had involved whether the grievant was entitled to a noncompetitive career ladder promotion, that still would not involve classification within the meaning of § 7121(c)(5). *See U.S. Dep't of Health & Human Servs., Nat'l Institute for Occupational Safety & Health, Cincinnati Operations, Cincinnati, Ohio*, 52 FLRA 217, 221 (1996) (finding that grievances over the denial of a career ladder promotion do not involve classification). Rather, a grievance concerns classification when, among other things, it concerns the promotion *potential* of a grievant. *See U.S. Dep't of Hous. & Urban Dev.*, 65 FLRA 433, 435 (2011) (finding that a grievance concerns classification if it alleges that the grievant's "promotion potential" should be changed); *EEOC*, 18 FLRA at 89-90 (finding a grievance to concern classification where it concerned "the grade level to which the grievant could be promoted").

[4] The Agency also argues that, in making his classification determination, the Arbitrator exceeded his authority, but does not support this claim. Exceptions at 22. As such, we reject this claim as a bare assertion. *See Soc. Sec. Admin., Balt., Md.*, 57 FLRA 690, 694 n.9 (2002).

(finding that, because a grievance did not concern classification, parties were not required to follow classification appeals procedures). Therefore, we find that the award draws its essence from the parties' agreement and deny this exception.

3. Article 2, Section 1

The Agency contends that the award is contrary to the VA Handbook because the Arbitrator misapplied the VA Handbook and because the Agency complied with its requirements. Exceptions at 28-30, 31-32. When a collective bargaining agreement incorporates the agency regulation with which an award allegedly conflicts, the matter becomes one of contract interpretation because the agreement, not the agency regulation, governs the matter in dispute.[5] *AFGE, Local 2703*, 59 FLRA 81, 83 (2003) (citing *NAGE, Local R4-6*, 52 FLRA 1522, 1526 (1997)) (*AFGE, Local 2703*).

The Arbitrator found, and the Agency does not dispute, that the parties' agreement expressly incorporates the VA Handbook. Award at 9. Accordingly, we apply an essence standard in considering whether the Arbitrator misapplied the VA Handbook.

The VA Handbook provides that the HPR rule "will be controlling only where the record indicates, in the authorizing official's judgment, . . . that the individual's total qualifications were likely to have been enhanced" by the employee's previous experience. Award at 2 (citing VA Handbook, Part II, Chapter 4, Section 2(c)). In determining whether an employee's total qualifications have been enhanced, the Agency must consider, among other things: "[t]he employee's tenure in the position on which the [HPR] is based" and "equity to the employee and VA" if "an affirmative determination cannot be made for application of the [HPR] rule." *Id.* at 2-3 (citing VA Handbook, Part II, Chapter 4, Section 2(c)(2)-(3)). The VA Handbook also provides that "[t]he basis for selection of a rate lower than the [HPR] . . . should be documented in the individual's personnel folder." *Id.* at 3 (citing VA Handbook, Part II, Chapter 4, Section 2(c)).

The Agency argues that the Arbitrator erred in finding that it abused its discretion because it complied with the requirements of the VA Handbook in setting the grievant's pay. Exceptions at 31-32. However, the Arbitrator found that the discretion granted to the Agency was "limited by explicit guidelines and procedures." Award at 15. In interpreting the VA Handbook, the Arbitrator found that the Agency "misappl[ied] the regulatory criteria for determining whether the [HPR] rule [was] applicable or controlling" and "fail[ed] to make the required analysis for a determination of 'enhanced total qualifications.'" *Id.* at 19. The Arbitrator further found that the Agency "fail[ed] to take into account the equitable factor of inducing assurances made at the time of hire." *Id.* Finally, the Arbitrator determined that the Agency "fail[ed] to properly document the basis for selecting a rate lower than the HPR." *Id.*

The Agency has not established that the Arbitrator's interpretation of the VA Handbook is irrational, unfounded, implausible, or in manifest disregard of the agreement. *See Soc. Sec. Admin.*, 65 FLRA 523, 526-27 (2011) (denying an agency's argument that a handbook was contrary to law under an essence standard). Accordingly, we find that the award draws its essence from the VA Handbook and the parties' agreement and deny this exception.[6] *See U.S. Dep't of the Navy, Naval Air Station, Pensacola, Fla.*, 65 FLRA 1004, 1008 (2011); *AFGE, Local 2703*, 59 FLRA at 83.

E. The award is not based on a nonfact.

The Agency argues that the Arbitrator ignored the HR Specialist's testimony. Exceptions at 30. We construe this argument as asserting that the award is based on a nonfact. *See U.S. Dep't of Veterans Affairs, N.Y Reg'l Office, N.Y.C., N.Y.*, 60 FLRA 17, 18 (2004). 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). The Authority has long held that disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded

[5] Member Beck notes that the Arbitrator incorrectly found that the parties' "[a]greement incorporates VA pay-setting regulations and procedures." Award at 14. In this regard, Article 2, Section 1 of the parties' agreement provides that the Agency shall be governed by "Federal statutes" and "Government-wide regulations," *id.* at 1, but does not, as plainly worded, reference Agency regulations or the VA Handbook. However, because the Agency has failed to offer any exception to this finding, that issue is not before the Authority.

[6] The Agency also argues that the Arbitrator's finding of an oral promise is unenforceable. Exceptions at 23. However, the Arbitrator did not find that the promise constituted an oral agreement; rather, he only found the promise to be relevant as an equitable consideration. Award at 19. Further, we previously found that the award, including the Arbitrator's finding regarding equity, draws its essence from the agreement. Accordingly, we deny the Agency's exception. *See U.S. Dep't of Homeland Sec.,U.S. Customs & Border Prot.*, 64 FLRA 916, 921 (2010) (denying an exception when the premise of the exception was misplaced).

such evidence, provides no basis for finding the award deficient. *See AFGE, Local 3295*, 51 FLRA 27, 32 (1995).

The Agency's argument that the Arbitrator ignored testimony challenges the Arbitrator's evaluation of the credibility of witnesses and the evaluation of the weight to be accorded the testimony. This argument does not provide a basis for finding the award deficient. *See AFGE, Local 1395*, 64 FLRA 622, 626 (2010) (finding that the party's argument that the arbitrator ignored witness testimony does not establish that the award is based on nonfacts); *NTEU, Chapter 138*, 61 FLRA 642, 644 (2006) (denying a nonfact exception where the union argued that the arbitrator ignored witness testimony). Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.

APPENDIX

Article 2, Section 1 of the parties' agreement provides:

> In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable Federal statutes. They will also be governed by Government-wide regulations in existence at the time this Agreement was approved.

Award at 1.

Article 42, Section 2(B) of the parties' agreement provides, in relevant part:

> This Article shall not govern a grievance concerning:
>
> . . . .
>
> 5. The classification of any position which does not result in the reduction in grade or pay of an employee.

Id. at 2.

Article 42, Section 7 of the parties' agreement provides, in relevant part:

> In the event of a formal filing of a grievance, the following steps will be followed:
>
> > Step 1. An employee and/or the Union shall present the grievance . . . in writing within thirty (30) calendar days of the date that the employee or Union became aware or should have become aware of the act or occurrence or anytime if the act or occurrence is of a continuing nature . . .

Id.

VA Handbook 5007, Part II, Chapter 4 provides, in relevant part:

> . . . .
>
> 2. Highest Previous Rate for Title 5 Positions
>
> a. Title 5, U.S. Codes, sec. 5334(b) sets forth certain minimum pay adjustment rules applicable to promotions of employees between General Schedule positions. Subject to these mandatory requirements, 5 CFR 531.203(c) generally provides agencies with discretion to set the pay of the employee who is . . . promoted . . . at any rate for the employee's grade which does not exceed his highest previous rate . . . .
>
> b. In applying the provisions of this chapter, salary rates received in non-VA positions . . . may be taken into account in fixing salary rates, if appropriate in the judgment of the authorizing official, but no right is vested in the employee to receive a rate based on such service.
>
> c. The earned rate rule will be controlling only where the record indicates, in the authorizing official's judgment, that the experience gained in the position on which the rate is proposed to be based was of such quality and duration that the individual's total qualifications were likely to have been enhanced. The following considerations will be taken into account in making this determination:
>
> . . . .
>
> 2) The employee's tenure in the position on which the earned rate is based must have been sufficient to have demonstrated his ability to perform satisfactorily at such higher rate. . . .
>
> 3) Where an affirmative determination cannot be made for application of the earned rate rule, in light of the above criteria, a salary rate shall be selected at any lower level within the grade that is not below the minimum allowed by law or regulation. . . . The rate selected in such cases shall be that which in the authorizing official's judgment best represents equity to the employee and VA, and affords reasonable internal alignment with the rates received by other groups of employees within the installation. The basis for selection of a rate lower than the normal rate under the earned rate rule should be documented in the individual's personnel folder.

Id. at 2-3.