

68 FLRA No. 11

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
PERRY POINT, MARYLAND
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 331
(Union)

0-AR-4940

DECISION

October 30, 2014

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

Arbitrator Jay D. Goldstein found that the parties' agreement entitled the grievant to a temporary promotion for performing higher-graded duties and awarded the grievant 120-days' pay at the higher-graded rate. This case presents the Authority with three substantive questions.

First, we must determine whether the award is contrary to § 7121(c)(5) of the Federal Service Labor-Management Relations Statute¹ (the Statute) because the Arbitrator erred in finding that the grievance involved a temporary promotion, rather than the classification of the grievant's position. Because the Agency has not established that the grievance concerns the classification of the grievant's position, the answer is no.

Second, we must determine whether the award fails to draw its essence from the parties' agreement because the Arbitrator did not determine whether the grievant performed General Schedule (GS)-12 duties for at least 25% of her time, in accordance with the parties' agreement. Because the Arbitrator made sufficient

findings that the grievant performed GS-12 duties for at least 25% of her time to support the award's remedy, the answer is no.

Third, we must determine whether the award is based on nonfacts because the Arbitrator failed to properly weigh evidence or make factual findings. Because the Arbitrator made proper factual findings and disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be given such evidence, provides no basis for finding an award deficient, the answer is no.

II. Background and Arbitrator's Award

The grievant, a GS-11 information-technology specialist (specialist), began performing GS-12 work after assuming the duties of several GS-12 specialists who had been promoted. After the grievant provided a detailed accounting of the GS-12-level work that she was performing to her first-level supervisor, the first-level supervisor informed the grievant's second-level supervisor that the Agency should "obvious[ly]" promote the grievant.² The second-level supervisor denied the promotion and responded that, if the first-level supervisor had been assigning GS-11 specialists GS-12 level work, the practice "must stop now."³

The Union filed a grievance alleging that the Agency had violated Article 12 of the parties' agreement by failing to properly compensate the grievant for her performance of higher-graded duties. Article 12 of the parties' agreement provides, in pertinent part, that "a [GS] employee who performs the grade-controlling duties of a higher-graded position for at least 25% of his time . . . shall be temporarily promoted."⁴ The parties did not resolve the grievance and submitted it to arbitration.

Before turning to the merits of the case, the Arbitrator first considered the Agency's contention that the grievance was not arbitrable because the Union sought a reclassification of the grievant's position from GS-11 to GS-12 and that "[s]uch reclassification is barred by" § 7121 of the Statute.⁵ The Arbitrator rejected the Agency's contention, finding that the Union had "made clear . . . through establishment of its burden of proof and the requested remedy . . . that it was not seeking a re[classification, only compensation, for duties performed at a higher level."⁶

After determining that he had jurisdiction over the dispute, the Arbitrator framed the only remaining

² Award at 2.

³ *Id.*

⁴ *Id.* at 9 (internal quotation marks omitted).

⁵ *Id.* at 8.

⁶ *Id.* at 5.

¹ 5 U.S.C. § 7121(c)(5).

issue before him as whether the grievant, a GS-11 specialist, had been “assigned to perform . . . properly classified (under GS-12) higher[-]graded duties . . . without being appropriately compensated at the higher rate.”⁷

The Arbitrator concluded that the grievant’s supervisors knowingly assigned the grievant GS-12 level work.⁸ The Arbitrator also found that they acknowledged that the grievant satisfied the requirements for a temporary promotion under the parties’ agreement.⁹ When fashioning the remedy, the Arbitrator explained that the Agency’s failure to “finish the task of quantif[ying]” the grievant’s duties limited his award, and he awarded the grievant 120-days’ pay at the GS-12 rate in effect at the time that she filed her grievance.¹⁰

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency’s exceptions.

III. Analysis and Conclusions

A. The award is not contrary to § 7121(c)(5) of the Statute.

The Agency argues that the award is contrary to § 7121(c)(5) because the grievance concerns the classification of the grievant’s position.¹¹ 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.¹² 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.¹³ In making that assessment, the Authority defers to the arbitrator’s underlying factual findings.¹⁴

Under § 7121(c)(5), arbitrators lack jurisdiction to determine “the classification of any position which does not result in the reduction in grade or pay of an employee.”¹⁵ Where the essential nature of a grievance concerns the grade level of the duties assigned to and performed by the grievant in his or her permanent position, the grievance concerns the classification of a

position within the meaning of § 7121(c)(5).¹⁶ However, “where the substance of the grievance concerns whether the grievant is entitled to a temporary promotion under a collective[-]bargaining agreement by reason of having performed the established duties of a higher-graded position, the Authority has long held that the grievance does not concern the classification of a position within the meaning of § 7121(c)(5).”¹⁷

The Agency has not established that the grievance concerns the classification of a position rather than a temporary promotion. The Arbitrator found that “the Union made clear . . . through establishment of its burden of proof and the requested remedy . . . that it was not seeking a re-classification,” but only a retroactive temporary promotion of the grievant.¹⁸ Consistent with this, in its opposition, the Union argues that the Arbitrator correctly awarded the grievant a temporary promotion.¹⁹

Further, it is undisputed that the duties allegedly performed by the grievant were the duties of a position other than her own. Specifically, the Arbitrator found that the grievant performed duties previously assigned to GS-12 specialists in her office.²⁰

By contrast, the Arbitrator did not “consider whether the grievant[] should have been permanently promoted.”²¹ Nor did the Arbitrator “evaluate the grade level of the duties permanently assigned to and performed by the grievant[] to determine the appropriate classification of [her] position” – some of the hallmarks of a classification action.²²

The Agency’s reliance on *USDA, Food & Consumer Service, Dallas, Texas (USDA)*²³ is misplaced. In that case, the GS-11 grievant did not take on the duties of specific higher-graded employees, as here. Instead, she was assigned higher-graded work by her GS-12 team leader who proposed and executed “a division of duties in which he would assign ‘GS-12[-] level work’ to the

⁷ *Id.* at 10-11 (internal quotation marks omitted).

⁸ *Id.* at 4.

⁹ *Id.* at 11.

¹⁰ *Id.* at 12-13.

¹¹ Exceptions at 6-9.

¹² *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)).

¹³ *U.S. DOD, Dep’t of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 7121(c)(5).

¹⁶ *SSA*, 60 FLRA 62, 64 (2004).

¹⁷ *U.S. Dep’t of the Treasury, IRS*, 63 FLRA 567, 571 (2009) (*IRS*); see also *U.S. DOL, Bureau of Labor Statistics*, 65 FLRA 651, 654 (2011); *U.S. Dep’t of the Air Force, 81st Training Wing, Keesler Air Force Base, Miss.*, 60 FLRA 425, 428 (2004) (holding that a grievance does not concern classification where arbitrator compares grievant’s duties to another position).

¹⁸ Award at 5.

¹⁹ Opp’n at 3-6.

²⁰ Award at 2, 4.

²¹ *SSA, Port St. Lucie Dist., Port St. Lucie, Fla.*, 64 FLRA 552, 554 (2010).

²² *IRS*, 63 FLRA at 571.

²³ 60 FLRA 978 (2005) (Chairman Pope dissenting in part). Chairman Pope notes that she dissented in *USDA* and continues to believe that decision was wrongly decided. Nevertheless, she agrees that *USDA* is distinguishable from this case for the reasons stated herein.

grievant.”²⁴ Moreover, after the grievant in *USDA* requested a promotion, the agency ordered a desk audit to determine the level of work that she was performing. The Authority held in *USDA* that “[s]uch actions are consistent with attempts to determine the proper grade level to assign to the duties being performed . . . which constitutes a classification matter within the meaning of § 7121(c)(5).”²⁵ Here, by contrast, the Agency did not undertake a desk audit of the grievant’s position, nor did the grievant request that it do so.²⁶ Accordingly, the Agency has not established that the grievance concerns the classification of a position, rather than a temporary promotion, and we deny the Agency’s contrary-to-law exception.

- B. The award does not fail to draw its essence from the parties’ agreement.

The Agency further argues that the award fails to draw its essence from Article 12, Section 2(A) of the parties’ agreement.²⁷ 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.²⁸ Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties’ 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.²⁹ 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.”³⁰

The Agency argues that the award fails to draw its essence from Article 12 of the parties’ agreement because the Arbitrator found that the grievant was *promoted* without first determining that she was *detailed*, as required by the parties’ agreement. Article 12, Section 2(A) of the parties’ agreement provides that “[e]mployees detailed to a higher[-]grade position for a period of more than ten (10) consecutive work days must

be temporarily promoted.”³¹ Therefore, the Agency argues, “an employee cannot be found to be temporarily promoted without first finding [that] the employee was detailed.”³²

Contrary to the Agency’s position, Article 12 of the parties’ agreement does not condition temporary promotions on first receiving details. In *U.S. Department of VA, Medical Center, Washington, District of Columbia (VA)*,³³ we analyzed the same argument stemming from the same nationwide-master-agreement language at issue here. In *VA*, we held that Article 12, Section 2(A) “does not condition temporary promotions upon formal details.”³⁴ Thus, consistent with *VA*, nothing in Article 12 prohibited the Arbitrator from finding that the grievant was entitled to a temporary promotion, despite the Agency’s failure to formally detail her.³⁵ In light of Authority precedent, we find the Agency’s argument unpersuasive.

We also reject – for similar reasons – the Agency’s related argument that any award of a temporary promotion must be limited to sixty days, because details over sixty days can be made only by competitive procedures. The Arbitrator’s remedy is not predicated on a finding that the grievant was detailed. Accordingly, we find that this argument by the Agency also fails to establish that the award is deficient.

The Agency argues, in addition, that the award fails to draw its essence from the parties’ agreement, and that the temporary promotion remedy was erroneous, because the time the grievant spent performing higher-graded work lacked quantification, as required by Article 12.³⁶ Article 12, Section 2(A) of the parties’ agreement provides only that “[GS] employee[s] who perform[] the grade-controlling duties of a higher-graded position for at least 25% of [their] time . . . shall be temporarily promoted.”³⁷

Here, the Arbitrator found that the requirements for a temporary promotion under Article 12, Section 2(A) of the parties’ agreement were satisfied. Analyzing the case based on “the Union’s theory” – that the grievant met Article 12, Section 2(A)’s 25% requirement – the Arbitrator focused on the actions of the grievant’s supervisors.³⁸ Specifically, the Arbitrator found that the grievant’s supervisors “lent credence” to the Union’s claims that the grievant met the requirements of

²⁴ *Id.*

²⁵ *Id.* at 982.

²⁶ Exceptions at 8 (noting that the Agency did not conduct a desk audit of the grievant’s position).

²⁷ *Id.* at 9-10.

²⁸ 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

²⁹ *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

³⁰ *Id.* at 576.

³¹ Exceptions at 10.

³² *Id.*

³³ 67 FLRA 194, 196 (2014).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Exceptions at 10.

³⁷ Award at 9.

³⁸ *Id.* at 11

Article 12, Section 2(A) “by considering [promotion] as the remedy for what [the Agency] acknowledged had been occurring.”³⁹ Read in context, we interpret the Arbitrator’s award as finding that what “had been occurring” – which the Agency considered remedying with a promotion – was the grievant’s performance of higher-graded duties for at least 25% of her time. The award therefore includes factual findings sufficient to support the award’s remedy.

The dissent erroneously finds that the sentence from the award cited above “appears in the portion of the award discussing the *qualification* of the grievant’s duties – not the *quantification* of them.”⁴⁰ The dissent ignores the Arbitrator’s immediately preceding sentence, which, as discussed above, analyzes the case based on the Union’s theory – that “*employee[s] who perform[] the grade-controlling duties of a higher-graded position for at least 25% of [their] time . . . shall be . . . promoted.*”⁴¹ Therefore, it is clear that quantification of the grievant’s duties was central to the Arbitrator’s analysis.

Moreover, in the balance of the award, the Arbitrator rejected the Agency’s claims that the grievant never performed higher-graded duties, or a sufficiently high percentage of those duties, to be entitled to a temporary promotion. The Arbitrator determined, in this connection, that the Agency bore the burden of “quantifying” the grievant’s duties, including the 25% requirement set forth in Article 12, Section 2(A) of the parties’ agreement. “The burden . . . was on at least two supervisors to have kept track of their subordinate; not the other way around. Unfortunately, those supervisors did not finish the task of quantification.”⁴² Because the Agency failed to carry its burden, the Arbitrator rejected the Agency’s claims.

Contrary to the dissent’s view, the award is reasonably read as requiring the Agency to monitor the types of duties that the grievant was performing, and to support its claim that the grievant was performing GS-11 duties all of the time. Further, the Agency does not claim that a different allocation of the burden of proof as to Article 12, Section 2(A) is set forth in law, rule, regulation, or the parties’ agreement. And judicial and Authority precedent have consistently held that, where an arbitrator resolves a contractual claim, the arbitrator may establish and apply whatever allocation of proof he or she

considers appropriate unless a specific allocation is required.⁴³ Therefore, the Agency and the dissent do not provide a basis for finding that the Arbitrator’s chosen allocation is deficient.⁴⁴

Given the Arbitrator’s factual findings, and as the Agency did not meet its burden, there is no basis for finding that the Arbitrator erred in finding that the grievant was entitled to a temporary promotion under the parties’ agreement.⁴⁵

Accordingly, we deny the Agency’s essence exceptions.

C. The award is not based on nonfacts.

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.⁴⁶ Disagreement with an arbitrator’s evaluation of evidence, including the determination of the weight to be given

³⁹ *Id.*

⁴⁰ Dissent at 9-10.

⁴¹ Award at 11.

⁴² *Id.* at 12

⁴³ See, e.g., *Sullivan, Long & Hagerty, Inc. v. Local 559 Laborers’ Int’l Union*, 980 F.2d 1424, 1429 (11th Cir. 1993); *SSA, Chi. Region, Cleveland Ohio Dist. Office, Univ. Circle Branch*, 56 FLRA 1084, 1086 (2001) (“[I]n the absence of any established burden of proof, the arbitrator [is] free to determine which party [is] required to bear the burden of proof.” (quoting *NFFE, Local 1437*, 55 FLRA 1166, 1171 (1999)); *AFGE, Local 2250*, 52 FLRA 320, 324 (1996) (“[I]n the absence of a specified standard of proof, arbitrators have the authority to establish whatever standard they consider appropriate . . . , [m]oreover, unless otherwise provided, establishing the standard encompasses specifying which party has the burden of proof.” (citing *U.S. Dep’t of the Navy, Navy Pub. Works Cent., San Diego, Cal.*, 49 FLRA 553, 558 (1994)).

⁴⁴ See, e.g., *U.S. Dep’t of Commerce, Patent & Trademark Office, Arlington, Va.*, 60 FLRA 869, 866 (2005).

⁴⁵ Member DuBester notes, moreover, that the Arbitrator’s award of 120-days’ pay at the GS-12 rate is consistent with the principle that arbitrators have broad discretion to fashion a remedy. *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 67 FLRA 552, 554 (2014). In a case like this, that broad remedial discretion may properly take account of other principles, like the principle of unjust enrichment – by addressing the Agency’s unjust enrichment when it failed to pay the grievant for higher-graded work performed at the Agency’s direction. See Elkouri & Elkouri, *How Arbitration Works* 556 (Alan Miles Ruben ed., 6th ed. 2003) (“[T]he general principal of unjust enrichment is that one person should not be permitted to enrich himself unjustly at the expense of another, but the party so enriched should be required to make restitution for property or benefits received, where it is just and equitable, and where such action involves no violation or frustration of the law.”) (citation omitted).

⁴⁶ *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 628 (2012) (*DHS*).

such evidence, provides no basis for finding the award deficient.⁴⁷

The Agency argues that the award is based on nonfacts in two respects.⁴⁸ The Agency's first nonfact exception is that the Arbitrator: (1) erred in attributing more weight to a supervisor's e-mails than her oral testimony; (2) discredited three Agency witnesses without making a credibility determination; and (3) improperly bolstered the grievant's testimony.⁴⁹ In short, the Agency disagrees with the Arbitrator's evaluation of the evidence, including his determination of the weight to be given such evidence.⁵⁰ Such disagreements with an arbitrator's evaluation of evidence do not provide a basis for finding that an award is based on nonfacts.⁵¹ Therefore, we deny the Agency's first nonfact exception.

The Agency's second nonfact exception is that the Arbitrator did not determine whether "[the grievant] performed . . . GS-12 duties for more than 25% of the time."⁵² This argument relies on the same essence arguments discussed above. As we have rejected the Agency's essence exceptions, we also reject the Agency's related nonfact exception.

Accordingly, we deny the Agency's nonfact exceptions.

IV. Decision

We deny the Agency's exceptions.

Member Pizzella, dissenting in part:

Although I agree with my colleagues that the Arbitrator's award is not contrary to law, I disagree with the majority's conclusion that the award draws its essence from the parties' collective-bargaining agreement (agreement). It is true that the Authority and the courts generally defer to an arbitrator's interpretation of the parties' agreement. But that deference is not limitless.¹ And it is just as true that an arbitrator may not ignore the plain language of the parties' agreement and base an award on his own subjective notions of fairness² – which is precisely what Arbitrator Jay Goldstein did here.

Under the express language of the parties' agreement, to receive a temporary promotion, a grievant must "perform[] the grade-controlling duties of a higher-graded position for *at least [25%] of his time.*"³ But the Arbitrator ignored this express contractual limitation and awarded the grievant a temporary promotion, despite conceding that there was a lack of evidence as to how much work the grievant had performed at the General Schedule (GS)-12 level.⁴ The Arbitrator opined that, under "a fair and equitable method" of evaluating the evidence, "some measure of relief [wa]s appropriate."⁵ And, on that basis alone, he awarded the grievant compensation as if she had proven that she performed GS-12 duties at least 25% of the time.

In a tortured analysis, the majority interprets the award as finding that the grievant had been performing higher-graded duties at least 25% of her time.⁶ In reaching this conclusion, the majority asserts that "the Arbitrator found that the grievant's supervisors 'lent credence' to the Union's claims that the grievant met the requirements of Article 12, Section 2(a) 'by considering [promotion] as the remedy for what [the Agency] acknowledged had been occurring.'"⁷ But the Arbitrator made no such statement. Rather, the Arbitrator stated that the supervisors "lent credence to the notion that she was performing [GS-12] duties by considering [promotion] as the remedy for what they acknowledged

⁴⁷ *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 103 (2012) (*IRS St. Louis*).

⁴⁸ Exceptions at 11-12.

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 12.

⁵¹ *IRS St. Louis*, 67 FLRA at 103.

⁵² Exceptions at 12.

¹ See *Beacon Journal Pub'g Co. v. Akron Newspaper Guild, Local No. 7*, 114 F.3d 596, 599

(6th Cir. 1997) (noting that, despite great amount of deference accorded an arbitrator's decision, the court's "review is not toothless").

² See *E. Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000) (arbitrator may not ignore the plain language of the parties' contract).

³ Award at 9 (emphasis added).

⁴ *Id.* at 13 (finding a "paucity of evidence" as to how much GS-12 work the grievant performed).

⁵ *Id.*

⁶ Majority at 6.

⁷ *Id.* (quoting Award at 11) (emphasis added).

had been occurring.”⁸ Two supervisors “considering” a promotion is simply not the same as finding the grievant actually spent 25% of her time performing GS-12 duties. Likewise, finding that something “len[ds] credence to [a] notion” is not the same as finding a fact to be true.⁹

Additionally, the majority ignores the fact that this sentence appears in the portion of the award discussing the *qualification* of the grievant’s duties – not the *quantification* of them.¹⁰ Indeed, three paragraphs after making this observation, the Arbitrator concluded that the only remaining issue before him was “the quantification of performed GS-12 duties, and not qualification of them.”¹¹ He then proceeded to discuss the amount of GS-12 duties the grievant performed – a discussion that would have been wholly unnecessary if, as the majority claims, he had already found on the previous page that the grievant had been performing those duties at least 25% of the time.¹² And the Arbitrator concluded his quantification discussion by finding that there was a “paucity of evidence” as to how much GS-12 work the grievant performed, again undermining the majority’s theory that the Arbitrator had quantified the grievant’s performance of higher-graded duties earlier in the award.¹³ Thus, when this sentence is “[r]ead in context,”¹⁴ the majority’s interpretation of it is illogical. And, even accepting the majority’s position, the most the quoted sentence could support is that the Arbitrator found that the grievant performed *some* GS-12 duties – not that she performed those duties more than 25% of the time.

Moreover, the majority misreads the award in finding that the Arbitrator transferred the burden of proof to the Agency. The Arbitrator wrote that “[t]he burden . . . was on at least two supervisors to have kept track of their subordinate,”¹⁵ not that it was the Agency’s burden to *prove* that the grievant was performing GS-12 duties less than 25% of the time. Indeed, the Arbitrator stated that “[i]ts” – i.e., *the Union’s* – “burden of proof required evidence to demonstrate that [the g]rievant worked in the equivalent position of a GS-12 . . . or in the very least, performed the same duties as the higher position,”¹⁶ but did not place *any* evidentiary or persuasive burden on the Agency.¹⁷ Moreover,

immediately after this statement, the Arbitrator reiterated his earlier conclusion that “[the g]rievant’s proof lacked precise quantification” and that the most the evidence supported was that the grievant’s supervisors “had agreed that [the] [g]rievant . . . perform[ed] various GS-12 duties during the performance of her GS-11 work”¹⁸ – not that she had performed those duties 25% of her time.

Finally, I fail to understand the majority’s reliance on the fact that the Arbitrator “[a]nalyz[ed] the case based on” the Union’s “theory” of the case – which itself is merely a restatement of the requirements of Article 12 – as support for its theory that the Arbitrator somehow found that the grievant performed GS-12 duties at least 25% of her time.¹⁹ It is an arbitrator’s *job* to analyze and decide the issue before him. Moreover, as our case law demonstrates, simply because a question is put before an arbitrator does not guarantee that he will actually provide an answer.²⁰

As in *U.S. DOD, Defense Logistics Agency, Defense Distribution Depot, Red River, Texarkana, Texas*, my colleagues infer facts that are simply not there.²¹ As I stated in my dissent in that case, I believe they err, and act contrary to Authority precedent, when they imply such facts to correct a deficient arbitral award.²²

Accordingly, I can only conclude that the Arbitrator based his award on his subjective notion of fairness – that because the grievant was performing *some* higher-graded work, she deserved *some* extra pay – rather than on the clear provisions of the parties’ agreement. The task of an arbitrator, however, is to interpret and enforce a contract – not to impose his sense of right and wrong on the parties.²³ Here, the Arbitrator abandoned

filing the grievance – the Union in most cases.”); *accord* Foreign Service Grievance Board Rule, 22 C.F.R. § 905.1(a) (“In all grievances other than those concerning disciplinary actions, the grievant has the burden of establishing, by a preponderance of the evidence, that the grievance is meritorious.”).

¹⁸ Award at 13.

¹⁹ Majority at 6.

²⁰ *Cf. U.S. Dep’t. of Def., Def. Contract Audit Agency, Cent. Reg., Irving, Tex.*, 60 FLRA 28, 30 (2004) (arbitrator exceeded his authority by not resolving issue before him).

²¹ 67 FLRA 609, 616 (2014) (dissenting opinion of Member Pizzella) (majority’s inference that arbitrator found no appearance of impropriety not supported by the undisputed facts).

²² *See id.* at 617 (precedent “does not permit the Authority to correct a deficient arbitral award to find a contractual violation ‘implicitly’ when no contract violation was found by the arbitrator”).

²³ *See United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

⁸ Award at 11.

⁹ *Id.*

¹⁰ *See id.* at 10-12.

¹¹ *Id.* at 12.

¹² *Id.*

¹³ *Id.* at 13.

¹⁴ Majority at 6.

¹⁵ Award at 12.

¹⁶ *Id.* at 13 (emphasis added).

¹⁷ *See Hussmann Refrigerator Co.*, 68 Lab. Arb. Rep. (BNA) 565, 569 (1977) (Mansfield, Arb.) (“Ordinarily the so-called burden of proof in arbitration proceedings rests with the party

that task, and the majority, in denying the Agency's essence exception, condones his behavior.

As I stated in my concurring opinion in *U.S. DHS, CBP*,²⁴ "Arbitrators need to avoid rendering 'circular[]' and 'incoherent' arbitral awards,"²⁵ and "[t]he Authority needs to . . . refrain[] from endorsing such awards by arbitrators."²⁶

Because the Arbitrator ignored the plain language of the parties' agreement in awarding the grievant backpay without finding that she performed higher-graded work at least 25% of the time, I would grant the Agency's essence exception.

Thank you.

²⁴ 67 FLRA 107 (2013) (Member Pizzella concurring).

²⁵ *Id.* at 113 (quoting *U.S. DOJ, Fed. BOP v. FLRA*, 654 F.3d 91, 96-97 (D.C. Cir. 2011) (*BOP*)).

²⁶ *Id.* (citing *BOP*, 654 F.3d at 97).