68 FLRA No. 40

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4933

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DECISION

January 28, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Susan R. Meredith issued an award (second remedial award) on March 18, 2013, adopting the formulae that the Union proposed to implement the remedy awarded by Arbitrator Margery F. Gootnick: "[c]ustoms [o]fficers whose work schedules were changed [by the Agency] in violation of applicable law and regulation are entitled to retroactive adjustments in their pay."[1] We must resolve four substantive questions.

First, we must determine whether the award is contrary to the Back Pay Act (BPA).[2] Because the question of whether the grievants suffered a loss in pay, allowances, or differentials was not before Arbitrator Meredith, we find that the award is not contrary to the BPA.

Second, we must determine whether the award is contrary to the legal doctrine that the federal government is immune from money damages unless a federal statute waives that immunity (the doctrine of sovereign immunity). Because the award is consistent with the BPA, and the BPA waives sovereign immunity, we find that the award is not contrary to the doctrine of sovereign immunity.

Third, we must determine whether the award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. Because the alleged ambiguities can be clarified by Arbitrator Meredith, who "retain[ed] jurisdiction to resolve any potential implementation disputes and/or to clarify the terms of her award" for "a period of one year from the date th[e] award becomes final and binding or for a period of 120 days after all payments ordered . . . have been satisfactorily resolved," we find that the award is not incomplete, ambiguous, or contradictory so as to make implementation of the award impossible.[3]

Finally, we must determine whether the award is based on a nonfact. Because the Agency's nonfact arguments challenge Arbitrator Meredith's factual findings on matters that the parties disputed below, we find that the award is not based on a nonfact.

II. Background and Arbitrator's Award

This dispute involves the Agency's Revised National Inspectional Assignment Policy (RNIAP).[4] The RNIAP replaced an earlier National Inspectional Assignment Policy that had been negotiated by the Agency and the Union and that provided for local negotiation of matters set forth in § 7106(b)(1) of the Federal Service Labor-Management Relations Statute (the Statute), including staffing levels and tours of duty at the local level.[5] The Union, after receiving complaints from customs officers that their work assignments were being changed without adequate notice because of flexibilities created by the RNIAP, requested bargaining over the RNIAP and a new "bid-and-rotation" system.[6] The Agency declined the request based, in part, on the existence of a question concerning representation, explaining that negotiating over the RNIAP would give the Union an unfair competitive advantage over competing labor organizations in the upcoming election.[7] After the Agency refused the request, the Union filed a grievance on March 3, 2006, alleging that the Agency violated 5 U.S.C. § 6101(a)(3); 5 C.F.R. § 610.121; § 7116(a)(1), (5), and (8) of the Statute; and the parties' collective-bargaining agreement.[8] The grievance was unresolved, and the parties submitted the matter to arbitration.[9]

[1] Second Remedial Award at 5.
[2] 5 U.S.C. § 5596.
[3] Second Remedial Award at 15.
[4] *U.S. DHS, U.S. CBP*, 65 FLRA 978, 978 (2011) (*DHS*).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

A. The Interim Award

When the Agency and the Union were unable to stipulate to the issues, Arbitrator Gootnick framed them as follows:

> 1. Whether the Agency violated 5 U.S.C. § 6101(a)(3), 5 C.F.R. § 610.121, and Article 21, Sections 3A and B of the parties' agreement when scheduling the work of [c]ustoms [o]fficers? If so, what is the appropriate remedy?
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> 2. Whether the Agency violated Article 37 of the parties' agreement and/or § 7116(a)(1) and (5) of the Statute when it failed to bargain over the RNIAP and/or a new bid and rotation policy as proposed by the Union? If so, what is the appropriate remedy?
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> 3. Whether the Agency violated Articles 37 and 39 [of the parties' agreement] and/or § 7116(a)(1), (5), and (8) of the Statute when it declined to provide information in response to the information request attached to the Union's grievance? If so, what is the appropriate remedy?[10]

Arbitrator Gootnick found, in pertinent part, that the Agency violated 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a) and (b) when scheduling the grievants' work.[11] Specifically, she found that the Agency changed the grievants' established work schedules "to meet 'operational needs' or to provide service 'at the least cost' to the government and the public," in accordance with the RNIAP, and in violation of the statute and regulation.[12] Arbitrator Gootnick also found that the Agency violated § 7116(a)(1), (5), and (8) of the Statute when it failed to respond to the Union's information request pertaining to the affected grievants' work schedules.

Arbitrator Gootnick's interim award, issued in 2007, ordered the Agency to cease and desist from continuing these violations; to post a notice; and to provide the Union with information concerning the affected grievants' work assignment changes under § 7114(b)(4) of the Statute.[13] She further ordered the parties to meet and confer regarding remedies and retained jurisdiction for sixty days for the limited purpose of considering remedial issues and issuing an appropriate remedy.[14]

B. The First Remedial Award

When the parties could not agree to a remedy, they brought the matter back to Arbitrator Gootnick. She found that the BPA would allow recovery during the entire period of the RNIAP, because the Union filed its grievance less than six years after the RNIAP became effective.[15] Individual grievants would have varying recovery periods depending on when the Agency first applied the RNIAP to them.[16] Arbitrator Gootnick also determined that, contrary to the Agency's argument, the grievants were not excluded from the coverage of 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121.[17] And she found that, with certain exceptions, "the Agency's unjustified or unwarranted personnel action in changing [the grievant]s' established work schedules in violation of applicable law and regulation resulted in the reduction of their pay, allowances, or differentials."[18] Finally, Arbitrator Gootnick "found that the Union was the prevailing party, that the award of attorney fees was in the interest of justice, and that the fees sought by the Union were reasonable."[19] Accordingly, Arbitrator Gootnick "ordered the relief set out in her [i]nterim [a]ward, along with compensation under the [BPA,] and attorney fees."[20]

The Agency filed exceptions to the first remedial award with the Authority, and the Union filed an opposition to the Union's exceptions. The Authority dismissed the Agency's exceptions, in part, and denied them, in part.[21]

C. The Second Remedial Award

When the parties were again unable to resolve the remaining remedial issues, they submitted the matter to Arbitrator Meredith, as Arbitrator Gootnick died in April of 2012.[22] The parties did not stipulate to an issue. Arbitrator Meredith noted that the previous arbitrator found that the grievants "whose work schedules were changed in violation of applicable law and regulation are entitled to retroactive adjustments in their pay;" "determined the period for which retroactive pay could be made;" and "ruled on exceptions the Agency asserted to

[10] *Id.* at 978-79.
[11] *Id*. at 979.
[12] Second Remedial Award at 2.
[13] *DHS*, 65 FLRA at 979.
[14] *Id.*
[15] *Id.*
[16] Exceptions, Attach., Ex. 5 at 9-10 (First Remedial Award).
[17] *DHS*, 65 FLRA at 980.
[18] First Remedial Award at 9.
[19] *DHS*, 65 FLRA at 980.
[20] *Id.*
[21] *Id*. at 978.
[22] Second Remedial Award at 4.

those payments."[23] She concluded, therefore, that the only issue before her was "how these retroactive adjustments are to be accomplished."[24]

The Agency proposed a claims procedure by which the Agency would notify eligible grievants of their ability to make a claim and give them an opportunity to review their prior work schedules.[25] After receiving the claims, "the Agency would determine whether there was a loss in pay, allowances[,] or differentials[,] and whether that loss was a result of the Agency's scheduling policies."[26] The Agency would pay claims when it determined there was a loss and notify the Union when it determined that claims should not be paid.[27] Arbitrator Meredith noted that "[t]he Agency's proposal [did] not specify how the payments [would] be calculated once a loss has been determined[,] nor how the Agency would decide whether there has been a loss."[28]

The Union proposed a process by which the grievants would not need to file claims.[29] Instead, the parties would "apply two formulae to the schedule data to determine the remedy owed to each [grievant]."[30] One formula "addresses employees scheduled such that the working hours in each day in the basic workweek [were] not the same by providing that the employees be paid overtime for all hours worked outside of the basi[c] workweek."[31] In the Union's view, the "basic workweek" is "the schedule worked most often during the week."[32] Under this formula, scheduling changes "may also require a payment of nighttime differential when premium time was lost to non-premium time."[33] A second formula would apply to "those employees whose schedules were changed such that they did not receive two consecutive non-work days off."[34]

The Agency argued that the Union's formulae: (1) were rejected by Arbitrator Gootnick; and (2) would "provide payment to [grievants] in excess of their losses."[35] Arbitrator Meredith rejected these arguments. She reasoned that, while Arbitrator Gootnick did not adopt formulae, Arbitrator Gootnick's prediction that "the parties would be able to review and jointly resolve what each employee's financial entitlements should be" after the Agency provided the Union with the relevant work schedules was incorrect.[36] Therefore, according to Arbitrator Meredith, the fact that Arbitrator Gootnick did not impose formulae "is not a reason to refrain from doing so" now.[37] Moreover, Arbitrator Meredith held that the Union's formulae would not compensate the grievants in excess of their losses.[38] She reasoned that, while certain grievants may be paid overtime for hours that they did not work, a grievant "who is deprived of the opportunity to work overtime by the Agency's unwarranted schedule changes has a measureable loss of pay, allowances[,] and possibly differentials."[39] Overall, Arbitrator Meredith concluded that "the formulae proposed by the [Union] are most likely to place the [grievants] . . . into the place [that] they would have been absent the unjust action."[40]

Accordingly, Arbitrator Meredith ordered the Agency to cease and desist from violating 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a) and (b) in scheduling its customs officers, and to retain all work scheduling records for all customs officers.[41] She ordered the Agency to post those records electronically within thirty days of the award becoming final and binding and for the records to remain posted until all of the grievants' claims are settled.[42] Arbitrator Meredith also ordered the Agency to "issue to all current employees entitled to a remedy the exact calendar dates and number of hours for which the [A]gency believes the employee is entitled to compensation," as well as an accounting of the Agency's calculation of the compensation due to the employee.[43] In addition, Arbitrator Meredith outlined the formulae for determining the compensation due to each employee.[44]

Specifically, Arbitrator Meredith ordered the Agency to use the following formulae to calculate the award, which we will refer to as the "hours award" and the "day-off award," respectively:

> a. Where [the Agency] scheduled [the grievants] such that the hours of work for each workday were not the same during the basic work[week], [the Agency] shall provide back[pay] in the form of [Customs Officers Pay Reform Act (COPRA)[45]] overtime for those hours worked outside of the basic

[23] *Id.* at 5.
[24] *Id.*
[25] *Id.* at 6.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 7.
[32] *Id.*
[33] *Id.* at 8.
[34] *Id.*
[35] *Id.* at 7.
[36] *Id.* at 6-7 (internal quotation marks omitted).
[37] *Id.* at 7.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 8.
[41] *Id.* at 11.
[42] *Id.*
[43] *Id.* at 12.
[44] *Id.*
[45] 19 U.S.C. § 267.

> workweek. The basic work[week] is defined as those daily schedules or shifts where the employee worked the majority of his/her hours during the basic work[week].
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> b. Where [the Agency] scheduled [the grievants] such that they did not receive two consecutive non-work days off in a basic workweek, [the Agency] shall provide back[pay] in the form of COPRA overtime for one of the two non-consecutive days off. [46]

The Agency filed exceptions to the second remedial award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar certain Agency exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[47] At the hearing and in its brief to Arbitrator Meredith, the Union requested the remedy that Arbitrator Meredith awarded in the second remedial award.[48] As relevant here, the Agency argues in its exceptions that: (1) this remedy is contrary to COPRA;[49] Arbitrator Meredith (2) exceeded her authority and (3) violated the doctrine of functus officio in awarding the remedy;[50] and (4) the remedy is contrary to public policy, because it constitutes punitive damages.[51] These arguments, however, were not raised at arbitration. Because these arguments could have been presented below, but were not, we find that §§ 2425.4(c) and 2429.5 bar these exceptions.[52]

IV. Analysis and Conclusions

A. The second remedial award is not contrary to the BPA.

The Agency argues that the second remedial award is contrary to the BPA. When an exception involves an award's consistency with law, the Authority reviews any questions of law raised by the exception and the award de novo.[53] In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[54]

An award of backpay is authorized under the BPA when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified and unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of an employee's pay, allowances, or differentials.[55] The Agency argues that the second remedial award is deficient under the second prong of this inquiry.

According to the Agency, the second remedial award is contrary to the BPA because it awards backpay but "does not even attempt to make the requisite inquiry into whether there has been an actual loss in pay, allowances, or differentials."[56] In support of this argument, the Agency cites *Spezzaferro v. FAA* for the proposition that "the make-whole remedy provided by the Back Pay Act requires a determination in each case of how much overtime the [grievant] would have worked, based on that [grievant]'s prior overtime assignments or upon the experience of similar [employees]."[57]

In addition, the Agency argues that the award is contrary to the BPA because it "relies on speculative loss rather than the employee's actual loss, as it assumes, without any evidence, that an employee scheduled consistent with 5 U.S.C. § 6101 would have been assigned to work overtime."[58] According to the Agency, Arbitrator Meredith "must have found that [a grievant] would have worked [eight] hours of overtime every time that he or she had a non-consecutive day off" in order to award that grievant compensation under the BPA.[59] However, the Agency argues, Arbitrator Meredith "assume[d], without any support," that each time a grievant's schedule violated § 6101: (1) "there was

[46] Second Remedial Award at 12-13.
[47] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also AFGE, Local 3571*, 67 FLRA 218, 219 (2014) (*Local 3571*).
[48] Opp'n, Attach., Ex. 7 at 8 & n.12, 18 & n.45, 20 & n.48, 21, 22 & n.49, 30.
[49] Exceptions at 24-26.
[50] *Id.* at 34-36
[51] *Id.* at 44-46.
[52] *E.g., NTEU, Chapter 190*, 67 FLRA 412, 413 (2014) (contrary to law); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 357 (2014) (exceeds authority); *Int'l Bhd. of Elec. Workers, Local 26*, 67 FLRA 455, 456 (2014) (contrary to public policy).
[53] *E.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 770 (2006).
[54] *Id.*
[55] *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012) (*IRS*).
[56] Exceptions at 17.
[57] 807 F.2d 169, 171 (Fed. Cir. 1986).
[58] Exceptions at 17.
[59] *Id.* at 22.

overtime available" for the grievant; (2) the grievant "was ready, willing, and able to work the overtime"; (3) "the Agency would have assigned that [grievant] to perform the overtime"; and (4) the grievant "would have worked that overtime."[60]

We reject the Agency's arguments that the second remedial award is contrary to the BPA. Even if employees do not actually work overtime, they may receive backpay under the BPA if an unjustified or unwarranted personnel action resulted in their failure to work overtime.[61] Here, Arbitrator Gootnick found in the first remedial award that, apart from exceptions for schedule changes made at a grievant's request or to allow a grievant to attend a court hearing in his or her official capacity, "the Agency's unjustified or unwarranted personnel action in changing [the grievant]s' established work schedules in violation of applicable law and regulation resulted in the reduction of their pay, allowances, or differentials."[62] As Arbitrator Meredith noted, Arbitrator Gootnick determined that the Agency changed these employees' schedules so that they were deprived of that overtime, which they would have earned if the Agency had not violated the statute and regulations.[63] That is, Arbitrator Gootnick determined that the grievants – apart from the exceptions noted above – would have worked schedules of eight-hour days with consecutive days off and would have been assigned additional hours of work on an overtime basis but for the Agency's § 6101 violations.[64]

Accordingly, the question of whether the grievants suffered a loss in pay, allowances, or differentials was not before Arbitrator Meredith.[65] If the Agency wished to argue that grievants other than those it previously identified did not suffer a loss as a result of the Agency's actions, it should have done so before Arbitrator Gootnick.

Moreover, to the extent the Agency is contesting the formulae that Arbitrator Meredith adopted as the remedy, the formulae award relief only in the instances for which Arbitrator Gootnick found that the Agency's unwarranted and unjustified personnel actions resulted in a loss to the grievants. Consistent with Authority precedent, these findings sufficiently identified the specific circumstances under which the grievants were entitled to backpay.[66] In this regard, the Authority has held that, as long as an award sufficiently identifies the specific circumstances under which employees are entitled to backpay, an arbitrator need not require evidence of "itemize[d] individual loss[es]" to support an award of backpay under the BPA.[67]

Therefore, we find that the Agency has failed to demonstrate that the second remedial award is contrary to the BPA.

B. The second remedial award is not contrary to the doctrine of sovereign immunity.

As set forth above, generally, under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[68] However, the Authority has declined to apply §§ 2425.4(c) and 2429.5 to bar claims regarding sovereign immunity because such claims may be raised at any time.[69] Therefore, even though the record does not indicate that the Agency presented its sovereign-immunity argument to Arbitrator Meredith, §§ 2425.4(c) and 2429.5 do not preclude the Agency from raising this claim before the Authority.[70]

The Agency argues that the award is contrary to law because the remedy does not fall within the BPA's waiver of sovereign immunity.[71] The Agency's first sovereign-immunity argument is that the "[t]he provisions of 5 U.S.C. § 6101 regarding consecutive days off or set start times do not provide employees with an entitlement to monetary compensation" for purposes of the BPA.[72] In support of this claim, the Agency cites *Sanford v. Weinberger*[73] for the proposition that "overtime pay, or any monetary remedy, is not appropriate in the case of [§] 6101(a)(3) violations."[74] In *Sanford*, the court noted that a "fundamental precept of law holds that no monetary damages can be awarded against the United States unless some provision of law commands the payment of same."[75] And, the Agency

[60] *Id.* at 22-23.
[61] *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 66 FLRA 737, 739 (2012).
[62] First Remedial Award at 9.
[63] Second Remedial Award at 7.
[64] *See id.*
[65] *Cf. U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 67 FLRA 417, 419 (2014) ("[I]ssues arising from the original award were not before the [a]rbitrator on remand.").
[66] *IAMAW, Lodge 2261 & AFGE, Local 2185*, 47 FLRA 427, 434-35 (1993).
[67] *Id.*
[68] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also Local 3571*, 67 FLRA at 219.
[69] *U.S. Dep't of the Interior, U.S. Park Police*, 67 FLRA 345, 347 (2014); *SSA, Office of Disability Adjudication & Review, Region I*, 65 FLRA 334, 337 (2010).
[70] *Id.*
[71] Exceptions at 12-15.
[72] *Id.* at 14.
[73] 752 F.2d 636 (Fed. Cir. 1985).
[74] Exceptions at 14.
[75] *Sanford*, 752 F.2d at 639.

argues, "[n]either [§] 6101, nor its associated regulations, oblige the Agency to provide backpay or any other monetary remedy for its scheduling deviations from consecutive days off or the same start times."[76]

But the Agency's argument is unavailing. When a party's sovereign-immunity claim depends on an argument that an arbitration award is contrary to the BPA, and the Authority finds that the award is consistent with the BPA, the Authority denies the sovereign-immunity claim.[77] Consistent with our finding above that the award is consistent with the BPA, the Agency's first sovereign-immunity claim does not show that the award is contrary to law.

The Agency also argues that awarding the grievants backpay would violate the U.S. Supreme Court's decision concerning sovereign immunity in *United States v. Testan*.[78] In *Testan*, federal employees claimed that they should receive backpay as compensation for the alleged misclassification of their positions,[79] but the Court found that the employees had no "substantive right . . . to backpay" under the BPA "for the period of their claimed wrongful classifications."[80] The Authority has previously held that *Testan* is inapposite to backpay claims that are not based on alleged classification errors.[81] Consequently, as the employees here are not seeking backpay due to classification errors, the Agency's argument regarding *Testan* does not demonstrate that the award is contrary to law.[82]

For these reasons, we find that the Agency has failed to demonstrate that the second remedial award is contrary to the doctrine of sovereign immunity.

C. The second remedial award is not incomplete, ambiguous, or contradictory so as to make implementation of the award impossible.

The Agency claims that the second remedial award is "circular, incomplete, and ambiguous and make[s] implementation of [the a]ward impossible."[83] Specifically, the Agency contends that the second remedial award suffers from four ambiguities: (1) what constitutes an employee's "basic work[week]";[84] (2) whether only the shifts an employee actually worked should be considered when calculating the hours award;[85] (3) whether an employee who was scheduled to be off on a given day, but who was called in to work and paid COPRA overtime for those hours, is entitled to receive compensation under the day-off award or the hours award; and (4) "whether the [d]ay[-o]ff [a]ward and [h]ours [a]ward[] are to be calculated separately or together, specifically where the hours overlap."[86]

The Authority will set aside an award that is "incomplete, ambiguous, or contradictory as to make implementation of the award impossible."[87] To prevail on this ground, "the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain."[88] However, the Authority has specifically rejected alleged ambiguities as a basis for finding an award deficient on this ground when the arbitrator has retained jurisdiction to clarify the award.[89] The Authority has held that such ambiguities are for clarification by the arbitrator and provide no basis for finding the award deficient.[90]

Here, Arbitrator Meredith "retain[ed] jurisdiction to resolve any potential implementation disputes and/or to clarify the terms of her award" for "a period of one year from the date th[e] award becomes final and binding or for a period of 120 days after all payments ordered . . . have been satisfactorily resolved."[91] Accordingly, the alleged ambiguities can be clarified by Arbitrator Meredith and provide no basis for finding the award deficient.[92] We therefore deny the Agency's exception that the award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible.

[76] Exceptions at 14.
[77] *E.g.*, *U.S. DHS, U.S. CBP*, 67 FLRA 461, 464 (2014) (*CBP*); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 189-90 (2009).
[78] Exceptions at 14 (citing *United States v. Testan*, 424 U.S. 392, 405-07 (1976)).
[79] *Testan*, 424 U.S. at 393-95.
[80] *Id.* at 407.
[81] *E.g.*, *CBP*, 67 FLRA at 464-65; *U.S. Dep't of the Air Force, 82nd Training Wing, Sheppard Air Force Base, Tex.*, 65 FLRA 137, 140 (2010).
[82] *See id.*
[83] Exceptions at 36.
[84] *Id.* at 37.
[85] *Id.* at 38.
[86] *Id.* at 39.
[87] 5 C.F.R. § 2425.6(b)(2)(iii); *see also U.S. Dep't of the Air Force, Grissom Air Reserve Base, Ind.*, 67 FLRA 302, 304 (2014).
[88] *U.S. DOD, Def. Logistics Agency*, 66 FLRA 49, 51 (2011) (citing *NATCA*, 55 FLRA 1025, 1027 (1999)).
[89] *U.S. VA, Cent. Tex. Veterans Health Care Sys., Temple, Tex.*, 66 FLRA 71, 73 (2011) (*VA*).
[90] *Id.*
[91] Second Remedial Award at 15.
[92] *U.S. VA Cent. Tex.*, 66 FLRA at 73.

D. The second remedial award is not based on a nonfact.

The Agency also argues that the second remedial award is based on nonfacts.[93] 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.[94] 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.[95] Moreover, disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be given such evidence, provides no basis for finding the award deficient.[96]

Specifically, the Agency claims that Arbitrator Meredith made four "erroneous assumptions" that were central to her award.[97] The Agency's first nonfact argument is that Arbitrator Meredith incorrectly assumed that the previous arbitrator had "determined that every employee with a scheduling deviation had been deprived of overtime[,] which they otherwise would have earned."[98] Even assuming that Arbitrator Meredith's interpretation of Arbitrator Gootnick's award constitutes a factual determination subject to challenge as a nonfact,[99] the parties disputed this matter at arbitration.[100] Accordingly, we find that the Agency's first nonfact argument does not provide a basis for finding that the award is based on a nonfact.[101]

The Agency's second nonfact argument is that Arbitrator Meredith relied on the erroneous assumption that "the Union's formula[e] will not provide employees with payments in excess of their losses."[102] Again, the parties disputed this issue below.[103] And Arbitrator Meredith rejected the Agency's claim, stating: "The Agency argues that the Union's formulae provide payment to employees in excess of their losses, but I do not find this to be true."[104] We find that the Agency's second nonfact argument, therefore, does not provide a basis for finding the award deficient.[105]

The Agency's third nonfact argument is that Arbitrator Meredith incorrectly assumed that, in presenting its proposed claims process, "the Agency did not specify how a loss would be calculated," what the remedy would be for those losses, "or what the process would be for resolving differences."[106] Once again, these issues were disputed at length below.[107] Accordingly, we find that the argument provides no basis for finding the award based on a nonfact.[108]

The Agency's final nonfact argument is that Arbitrator Meredith relied on the erroneous assumption that "the five[-]year period of time between [the previous arbitrator]'s 2008 decision and possible implementation of the award was unreasonable."[109] But nowhere in the second remedial award does Arbitrator Meredith call that time period "unreasonable," nor does the Agency cite any other place in the record where she does. Thus, the Agency has failed to identify a clearly erroneous central fact underlying the award, but for which Arbitrator Meredith would have reached a different result.[110] We therefore find that this argument, too, does not provide a basis for finding the award deficient, and we deny the Agency's nonfact exception.

V. Decision

We dismiss the Agency's exceptions, in part, and deny them, in part.

[93] Exceptions at 40-44.
[94] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[95] *Id.*
[96] *IRS*, 67 FLRA at 103.
[97] Exceptions at 40.
[98] *Id.*
[99] *Cf. U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 501 (2000) (arbitrator's interpretation of Federal Service Impasses Panel decision cannot be disputed as a nonfact).
[100] *See* Opp'n, Attach., Ex. 7 at 5-7, 17-23; *id*. Ex. 8 at 5, 8, 10-11.
[101] *NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009) (*NAGE*).
[102] Exceptions at 40.
[103] *See* Second Remedial Award at 7.
[104] *Id*.
[105] *NAGE*, 64 FLRA at 246.
[106] Exceptions at 40.
[107] *See* Agency's Post-Hr'g Br. at 11-17 (explaining Agency's proposed claims process); Union Post-Hr'g Br. at 10 ("The [A]gency's proposed process leaves so many questions unanswered, and almost certainly will require . . . additional hearings, etc."); *id.* at 24 ("The [A]gency would receive the claims and rule on them under whatever compensation formula it thought appropriate under the [BPA]. Any remaining disputes would then proceed to some unspecified dispute resolution process.").
[108] *IRS*, 67 FLRA at 103.
[109] Exceptions at 40.
[110] *Cf. AFGE, Local 3495*, 60 FLRA 509, 512 (2004).