

66 FLRA No. 57

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4308

DECISION

November 1, 2011

Before the Authority: Carol Waller Pope, Chairman, and
Thomas M. Beck and Ernest DuBester, Members¹

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Roger I. Abrams 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 concluded that the Agency violated the Statute and the parties’ national agreement by its actions on expiration of the national agreement. For the reasons that follow, we deny the Agency’s exceptions.

II. Background and Arbitrator’s Award

On the day of the expiration of the national agreement, the Agency notified the Union that, on expiration of the agreement, the Agency was withdrawing from “certain permissive subjects of bargaining.” Exceptions, Joint Ex. (J.E.) 3 at 1. The Agency also notified the Union that the Agency would “no longer honor certain contract provisions that violate law or regulation.” *Id.* In regard to the “permissive subjects,” the Agency elaborated that it would “no longer enforce the provisions of any local, divisional, functional or

national Partnering Agreements and other Partnering[-]type provisions in the National Agreement.”² *Id.* The Agency identified the following provisions of the national agreement to be permissive as “Partnering[-]type provisions”: Article 8, Subsection 8.B (Subsection 8.B) and Article 12, Subsections 20.D.1, D.3, and H (Subsections 20.D.1, D.3, and H). *Id.*, Attach. 1 at 1-2. In regard to contract provisions that violate law, as relevant here, the Agency identified a portion of Article 8, Subsection 1.F (disputed Subsection 1.F) of the national agreement as “unenforceable.” *Id.*, Attach. 2 at 1. In addition, the Agency declared the permissive, partnering-type provisions of Subsections 20.D.1, D.3, and H also to be unenforceable as contrary to law. *Id.*, Attach. 1 at 1-2.

The Union filed a grievance that was submitted to arbitration on the following stipulated issues:

Whether the [Agency] violated law, the National Agreement and/or any other [a]greement when it gave notice to [the Union] . . . that it was unilaterally withdrawing from “certain permissive and unenforceable subjects of bargaining.” If so, what shall be the remedy?

Whether the [Agency] violated law and/or the National Agreement when it unilaterally gave notice to the [Union] . . . that it would no longer enforce the provisions of [Subsection 1.F] If so, what shall be the remedy?

Award at 2-4.

The Arbitrator first addressed whether the Agency violated the Statute or the national agreement when it notified the Union that the Agency would no

¹ Member Beck’s concurring opinion is set forth at the end of this decision.

² In this regard, the Arbitrator noted that the parties had agreed to a modernization partnering agreement (MPA) and that, under the MPA and the national agreement, the Union had the right to appoint employees to joint work councils and committees to assure employee input into the modernization. Award at 8.

longer enforce a portion of Subsection 1.F.³ The Agency claimed that it had properly refused to continue to enforce disputed Subsection 1.F because the disputed subsection is contrary to management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute. *Id.* at 14. Although the Arbitrator agreed that enforcement of the disputed subsection affects management's rights, he concluded that disputed Subsection 1.F is enforceable under § 7106(b)(3) because it constitutes an arrangement and its enforcement does not excessively interfere with the exercise of management's rights. *Id.* at 34-37.

In this regard, the Arbitrator found that disputed Subsection 1.F constitutes an arrangement and is narrowly tailored because the provision for the Union to meet with employees is intended to ameliorate adverse effects attributable to management's meeting to address Agency-wide issues affecting the employees. The Arbitrator emphasized that the meeting occurs "after the conclusion of only certain types of formal meetings, those 'addressing Service-wide issues impacting all or a significant part of one (1) or more Divisions in the SCR's [Service Center Representative's] area.'" *Id.* at 35-36 (quoting disputed Subsection 1.F; citing *FAA, Wash., D.C.*, 55 FLRA 1233 (2000) (*FAA*)).

The Arbitrator also assessed the competing practical needs of the parties and determined that the negative impact on management's rights was not disproportionate. *Id.* at 37. He reiterated that the meeting with employees would occur after the conclusion of only certain types of management meetings and found that it is held at the most meaningful and appropriate moment to reflect on the issues affecting unit employees. *Id.* at 35-36. He further found that the meeting with employees would be brief and would constitute an efficient means of communicating with employees that is less disruptive than alternative meetings with employees would be. *Id.* at 35, 37. He also found that the timing of

the meeting with employees diminished its interference with management's assignment of work. In this regard, he emphasized that, as the meeting immediately followed the meeting scheduled by management, it would not interrupt assignments of work. *Id.* at 37. For these reasons, he concluded that enforcement of disputed Subsection 1.F does not excessively interfere with management's right to assign work. *Id.*

On this basis, the Arbitrator concluded that the Agency violated the Statute and the national agreement when it gave notice to the Union that it would no longer enforce disputed Subsection 1.F. *Id.* at 51-52.

In considering whether the Agency violated law or any agreements when it gave notice that it was withdrawing from certain permissive subjects of bargaining, the Arbitrator specifically addressed the "partnering agreements" and the partnering provisions under the "expired National Agreement." *Id.* at 43. He concluded that "[t]he Agency was well-founded in its determination that the partnership arrangements [are] permissive subjects." *Id.* at 45. However, noting that the Agency did not offer to bargain over the impact and implementation of the termination of the partnership arrangements, the Arbitrator stated that there was the additional question of whether the Agency had such a bargaining obligation. *Id.* He concluded that the Agency had a duty to bargain over the impact and implementation of this change under the Statute. Consequently, he determined that the Agency violated the Statute and committed an unfair labor practice (ULP). *Id.* at 47. In concluding that the Agency violated the Statute, the Arbitrator rejected the Agency's reliance on *United States Department of Justice, Federal Bureau of Prisons, FCI Danbury, Danbury, Connecticut*, 55 FLRA 201, 206 (1999) (Member Wasserman concurring in part and dissenting in part) (*FCI Danbury*).⁴ *Id.* at 45-46.

In regard to the issue of the Agency's notice that it would no longer enforce partnership agreements or partnership provisions of the national agreement, the Arbitrator also concluded that "the failure to bargain about [the] impact and implementation of the decision violated the National Agreement." *Id.* at 46, 51.

³ The Agency identified the following portion of Subsection 1.F as unenforceable:

At the conclusion of formal meetings addressing Service-wide issues impacting all or a significant part of one (1) or more Divisions in the SCR's [Service Center Representative's] area, the Employer will provide the Union with up to thirty (30) minutes to meet with employees without managers present. The Union has determined that if more than one (1) chapter is represented at the meeting, the representatives will either split the time or, if reasonable, they will meet separately with those employees in their chapter's jurisdiction.

Exceptions, J.E. 1 (National Agreement) at 11.

⁴ In *FCI Danbury*, the Authority concluded that the agency's right to terminate a permissive subject of bargaining was not contingent on first satisfying a bargaining obligation as to the impact or implementation of the change. In so concluding, the Authority emphasized that the union would have the opportunity to bargain on these matters as part of the renegotiation of the expired agreement. *FCI Danbury*, 55 FLRA at 206. In rejecting the Agency's reliance on *FCI Danbury*, the Arbitrator found that the Agency's actions gave the Union no opportunity to bargain before termination. Award at 45.

The Arbitrator further considered the Agency's specific withdrawal from Subsection 8.B.⁵ He noted the Agency's explanation that, because it had withdrawn from all partnership agreements, there were no longer any partnership councils to provide the copies of workload studies. *Id.* at 47. However, the Arbitrator found that, although the Agency abolished the councils, the workload studies remained "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of bargaining" within the meaning of § 7114(b)(4) of the Statute. *Id.* at 48 (quoting § 7114(b)(4)). Consequently, the Arbitrator concluded that the Agency's withdrawal violated the Statute and the national agreement. *Id.*

The Arbitrator separately addressed the Agency's assertion that, in addition to being permissive subjects of bargaining, Subsections 20.D1, D.3,⁶ and H⁷ are unenforceable as contrary to management's right to assign work under § 7106(a)(2)(B). *Id.* at 39-43. He concluded that, although enforcement of Subsections 20.D1 and D.3 affects the right to assign work, the provisions are enforceable under § 7106(b)(3).

⁵ Subsection 8.B provides: "The [Agency] will provide copies of workload studies to the appropriate divisional or functional Partnering Council, and upon request, to the local [Union] chapters(s)." National Agreement at 13.

⁶ Subsections 20.D.1 and D.3 provide:

The National TEPS [Total Evaluation Performance System] Committee shall be responsible for the monitoring and oversight of the TEPS program in all centers to promote consistent implementation and administration of TEPS nationwide. In order to carry out this charge, the Committee shall be responsible, at a minimum, for the following:

1. [N]ominating members to participate in the creation and revisions of all TEPS IRMs [Internal Revenue Manuals] and training materials to determine their accuracy, consistency, and whether such materials are consistent with the terms of this Agreement[.]
-
2. [O]verseeing the creation of the training package using the "train the trainer" concept; the Committee will provide assistance, research, and consistent solutions to problems identified during the initial development process, as well as during presentation to the field[.]

National Agreement at 42-43.

⁷ Subsection 20.H provides: "The local TEPS Committee will validate and review for statistical significance the data supporting any proposed changes to Center Director Ranges and concur with such changes." National Agreement at 43.

Id. at 39-40. He found that enforcement of the provisions affected management's right because the joint involvement of the national Total Evaluation Performance System (TEPS) committee precluded management from assigning all of the duties to employees of its own choosing. However, he concluded that the provisions constitute arrangements and that their enforcement does not excessively interfere with management's right. *Id.* at 40. In this regard, he found that the joint involvement of the national TEPS committee under Subsections 20.D.1 and D.3 does not excessively intrude on management's right to assign work and constitutes an appropriate arrangement. *Id.* He also stated that "[b]ecause the Agency determines the precise qualifications of the persons who would serve on those councils, it is able to maintain its overall status and control over the nature of the councils' work through the exercise of management rights." *Id.* at 40-41. For these reasons, he concluded that the Agency violated the Statute and the national agreement by declaring Subsections 20.D.1 and D.3 unenforceable.

As to Subsection 20.H, the Arbitrator agreed with the Agency that enforcement of Subsection 20.H is contrary to management's right to assign work. In addition, the Arbitrator concluded that, because the Union declined the Agency's offer to negotiate over the impact and implementation of the Agency's declaration, the Union waived its right to bargain. *Id.* at 43.

As a remedy, the Arbitrator directed the Agency to cease and desist from such violations of the Statute and national agreement and to post a notice to that effect signed by the Commissioner of the Agency. *Id.* at 48. He also directed a return to the status quo ante, except as to Subsection 20.H. *Id.* at 52.

III. Positions of the Parties

A. Agency's Exceptions

1. Disputed Subsection 1.F.

The Agency contends that the Arbitrator's conclusion that disputed Subsection 1.F is enforceable is contrary to management's rights under § 7106(a)(2)(A) and (B) to direct employees and assign work. Exceptions at 15-20. In this regard, the Agency first argues that disputed Subsection 1.F does not constitute an arrangement within the meaning of § 7106(b)(3). The Agency claims that the Arbitrator failed to identify any adverse effects that flow from management's right to hold meetings and failed to explain how the provision is narrowly tailored to redress or compensate employees who are adversely affected by the meetings. *Id.* at 23.

The Agency additionally argues that, if the Authority finds that the provision constitutes an arrangement, then the enforcement of the provision excessively interferes with the exercise of management's right to assign work. *Id.* at 25-26, 28-29. In this regard, the Agency maintains that enforcement of the provision completely eliminates any right management has to deny the employees time to meet with the Union and precludes management from assigning work to employees during the time they are meeting with the Union. *Id.* at 26, 28-29. Although the Agency recognizes the Union's right to meet with employees to discuss the effects of the change, the Agency asserts that the portion of Subsection 1.F⁸ that it does not dispute is preferable to the meeting set forth in disputed Subsection 1.F. *Id.* at 29 n.14.

2. Subsections 20.D.1, D.3, and H

The Agency contends that the Arbitrator exceeded his authority when he failed to resolve whether Subsections 20.D.1, D.3, and H constitute permissive subjects of bargaining. *Id.* at 48. The Agency claims that "[t]he parties stipulated as an issue to be determined by the Arbitrator whether the Agency violated law or the National Agreement by declaring these provisions to be permissive and withdrawing from them on that basis." *Id.* The Agency maintains that, although the Arbitrator resolved whether the provisions are enforceable, he failed to resolve whether they constitute permissive subjects of bargaining. *Id.* at 48-49.

As to the Arbitrator's conclusion that Subsections 20.D.1 and D.3 are enforceable, the Agency contends that the conclusion is contrary to management's right under § 7106(a)(2)(B) to assign work. *Id.* at 30. The Agency also contends that the conclusion is based on a nonfact. *Id.* at 33. As to nonfact, the Agency maintains that the Arbitrator's conclusion that these provisions are enforceable was based on the clearly erroneous finding that the Agency determines the qualifications of the employees appointed by the Union to the national TEPS committee and that this matter was not disputed before the Arbitrator. *Id.* at 33-35.

The Agency additionally argues that, even if the Arbitrator's conclusion is not based on a nonfact, the conclusion is deficient because enforcement of the provisions excessively interferes with the exercise of management's right to assign work. *Id.* at 35-36. The Agency states that it is not disputing the formation of the

⁸ This portion of Subsection 1.F provides: "At any formal meeting, the Union representative may inform employees that if any of them wish to discuss meeting topics with him or her further or in private, the employee may come to the Union office or other area to meet with the steward once they have checked out of the unit." National Agreement at 11-12.

national TEPS committee to express its views. *Id.* at 37. Instead, the Agency claims the subsections excessively interfere with management's right to assign work because the subsections prohibit management from assigning to employees of its own choosing the duties of creating and revising revenue manuals and training materials and overseeing the creation of training packages. *Id.*

3. Obligation to Bargain

The Agency contends that the Arbitrator's conclusion that it violated its statutory duty to bargain, and committed a ULP, by failing to offer the Union an opportunity to bargain over the impact and implementation of the Agency's decision to withdraw from permissive subjects of bargaining on expiration of the agreement is contrary to the Statute. *Id.* at 39. Specifically, the Agency asserts that the Arbitrator's conclusion is contrary to Authority precedent. *Id.* The Agency notes that the Authority stated in *FCI Danbury* that a "party's right to terminate unilaterally a permissive subject of bargaining is not contingent on first satisfying a bargaining obligation as to the substance, impact or implementation of the change." *Id.* at 41 (quoting *FCI Danbury*, 55 FLRA at 206). The Agency argues that the Arbitrator failed to follow *FCI Danbury* and that, consequently, his conclusion that the Agency had a duty to bargain over the impact and implementation of this change under the Statute and that it violated the Statute and committed a ULP, is contrary to law. *Id.* at 45. In its summary conclusion to its exceptions, the Agency states that, as it was not obligated under the Statute to negotiate over its decision to terminate permissive subjects of bargaining, the Arbitrator's conclusion that the Agency violated "the National Agreement . . . is also contrary to law and should be set aside." *Id.* at 52-53.

4. Subsection 8.B.

The Agency contends that the Arbitrator's conclusion that the Agency violated the Statute and the national agreement when it withdrew from the requirement to provide workload studies either exceeds the Arbitrator's authority or fails to draw its essence from the national agreement. *Id.* at 46. As to exceeded authority, the Agency claims that the Arbitrator resolved an issue not submitted to arbitration when he concluded that the Agency violated § 7114(b)(4) by not providing the studies. *Id.* The Agency argues that the "sole question was whether providing workload studies to partnering coun[cils] was a permissive subject of bargaining" and not the issue of whether the Agency has a separate obligation under the Statute to provide the studies. *Id.* at 46-47.

As to essence, the Agency claims that "[t]o the extent the Arbitrator interpreted [Subsection 8.B] to

require the Agency to provide the workload studies to the National Union, the Arbitrator's interpretation fails to draw its essence from the agreement." *Id.* at 47.

5. Remedial Notice

In the event that the Authority does not set aside the Arbitrator's conclusions that the Agency violated the Statute, the Agency contends that the Arbitrator's order to post a notice signed by the Commissioner is contrary to Authority precedent. *Id.* at 51-52 (citing *U.S. Dep't of Labor, Wash., D.C.*, 61 FLRA 825 (2006) (then-Member Pope agreeing solely to avoid an impasse)). The Agency asserts that the Arbitrator's order is inappropriate because the Commissioner was not responsible for the violations. *Id.* at 52.

B. Union's Opposition

The Union contends that the Arbitrator correctly ruled that disputed Subsection 1.F is enforceable under § 7106(b)(3). Opp'n at 10-16. The Union argues that the Arbitrator's conclusion that disputed Subsection 1.F is an appropriate arrangement that is narrowly tailored to ameliorate the adverse effects of the exercise of a management right is supported by the wording of the subsection and its intent and application. *Id.* at 10. The Union notes that the wording of the subsection only affords the Union a right to meet with employees about changes to their conditions of employment that have a significant effect. *Id.* The Union claims that the subsection does not address only speculative and hypothetical concerns because the subsection applies only when the Agency has determined that an actual change in conditions of employment will occur that affects all or a significant part of the bargaining unit. *Id.* at 12-13.

The Union further asserts that the Arbitrator correctly concluded that the arrangement is appropriate because it does not excessively interfere with management's right to assign work. *Id.* at 15. The Union maintains that the Arbitrator properly determined that the arrangement does not excessively interfere with management's right because it provides for a short meeting that is a more efficient and less disruptive means for the Union to meet with affected employees than the one-on-one meetings provided for in the portion of Subsection 1.F that is not in dispute. *Id.* at 16.

As to Subsections 20.D.1 and D.3, the Union agrees with the Agency that the Arbitrator's finding that the Agency determines the qualifications of employees appointed by the Union to the committees is erroneous. *Id.* at 19. However, the Union contends that the award is not based on a nonfact as a result of this erroneous finding. *Id.* at 20. The Union maintains that, as Subsections 20.D.1 and D.3 do not pertain to the Union's

right to select members of the committees, the Arbitrator's finding is irrelevant and does not invalidate the Arbitrator's conclusion that the provisions are enforceable. *Id.* at 19-20.

With respect to Subsection 20.D.1, the Union asserts that the language of the subsection does not support the Agency's claim that the provision interferes with management's right to assign duties creating and revising manuals to employees of its own choosing. The Union notes that, under the subsection, the joint TEPS committee merely nominates employees to perform such duties and does not appoint or select such employees. *Id.* at 23. The Union argues that, consequently, the language does not support the Agency's claim that such duties are performed solely and exclusively by employees nominated by the joint TEPS committee. *Id.* The Union maintains that, instead, consistent with its management rights, the Agency has the right to assign employees to create and revise manual materials. *Id.*

With respect to Subsection 20.D.3, the Union notes that the national TEPS committee oversees the creation of training packages and provides assistance during development and presentation. The Union asserts that the language does not support the Agency's claim that the committee is solely and exclusively charged with the creation of training packages. *Id.* at 23-24.

In addition, the Union contends that the Arbitrator did not fail to resolve the issue of whether Subsections 20.D.1, D.3 and H constitute permissive subjects of bargaining, *id.* at 37, and correctly determined that, before the Agency could withdraw from the permissive subjects of bargaining, it was required to negotiate over the impact and implementation of the changes, *id.* at 26-33.

As to Subsection 8.B, the Union contends that the Arbitrator did not exceed his authority. The Union asserts that the Arbitrator's conclusion that the Agency violated § 7114(b)(4)(B) when it unilaterally withdrew from Subsection 8.B was within the stipulated issue of whether the Agency violated law. *Id.* at 36. Regarding the remedy, the Union contends that the Arbitrator correctly ordered that the notice be signed by the Commissioner. *Id.* at 41-42.

IV. Analysis and Conclusions

- A. The Arbitrator's conclusion that disputed Subsection 1.F is enforceable is not contrary to law.

The Authority reviews de novo questions of law raised by exceptions to an arbitrator's award. *E.g., U.S. EPA, Region 2*, 61 FLRA 671, 674 (2006). In

applying a standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* In making that determination, the Authority defers to the arbitrator's underlying findings of fact. *Id.*

The Agency contends that the Arbitrator's conclusion that Subsection 1.F is enforceable is contrary to management's rights under § 7106(a)(2)(A) and (B) to direct employees and assign work.⁹

Under the Statute, upon expiration of a collective bargaining agreement, mandatory subjects of bargaining continue in effect to the maximum extent possible, absent agreement to the contrary or unless modified in a manner consistent with the Statute. *E.g., U.S. Dep't of the Air Force, Headquarters, Air Force Materiel Command*, 49 FLRA 1111, 1121 (1994). In resolving whether an agency can terminate an expired contract provision on the basis that its terms violate a management right, the Authority determines, as relevant here, whether the provision is within the duty to bargain under § 7106(b)(3) of the Statute by applying the analysis set forth in *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*). *Dep't of Health & Human Servs., SSA*, 44 FLRA 870, 880 (1992) (*SSA*).

The Agency argues that disputed Subsection 1.F is not an appropriate arrangement within the meaning of § 7106(b)(3). Under the analysis set forth in *KANG*, the Authority first determines whether the contract provision is intended to be an arrangement for employees adversely affected by the exercise of a management right. In doing so, the Authority identifies any effects or reasonably foreseeable effects on employees that flow from the exercise of management's rights and how those effects are adverse. *See, e.g., AFGE, Local 1164*, 66 FLRA 112, 116 (2011). The Authority also determines whether the contract provision is sufficiently tailored to compensate employee suffering adverse effects attributable to the exercise of management's rights. *See id.* If the Authority concludes that the contract provision constitutes an arrangement, then the Authority determines whether it is appropriate and constitutes a mandatory subject of bargaining or whether it is inappropriate and not a mandatory subject of bargaining because it excessively interferes with the asserted management right. *See SSA*, 44 FLRA at 880. In doing so, the Authority weighs the

benefits afforded to employees against the intrusion on the exercise of the asserted management right. *See id.*

In concluding that disputed Subsection 1.F constitutes an arrangement, the Arbitrator relied on the Authority's decision in *FAA*, which concerned a practice of allowing union participation on selection panels. In that decision, the Authority concluded that the disputed practice constituted an arrangement because the practice provided for union participation as a prophylactic measure designed to prevent employees from being harmed by unfair or inaccurate ratings flowing from management's exercise of its rights to select and assign work. *FAA*, 55 FLRA at 1236-37. Here, similar to the provision in *FAA*, disputed Subsection 1.F provides for a meeting with the Union as a prophylactic measure to prevent employees from being harmed by Agency-wide issues affecting the employees.

Accordingly, we find that the Arbitrator correctly concluded that disputed Subsection 1.F constitutes an arrangement under § 7106(b)(3). For the following reasons, we also find that the Arbitrator correctly concluded that the arrangement is appropriate under § 7106(b)(3).

As interpreted by the Arbitrator, disputed Subsection 1.F provides a significant benefit to employees by providing them with the opportunity to discuss with the Union the effects of the Agency-wide issues affecting them and enhances their ability to address the effects on their working conditions. The Agency does not dispute this benefit, but argues, instead, that it is outweighed by the intrusion on management's right to assign work. Exceptions at 25. In agreement with the Arbitrator, we conclude that this benefit is not outweighed by the intrusion on management's right to assign work.

As interpreted by the Arbitrator, Subsection 1.F restricts management's right to assign work after the conclusion of only certain types of meetings. Award at 35-36. He found that the Union meeting with employees is brief, *id.* at 37, and that, as the meeting immediately follows management's meeting, it is held at "the meaningful and appropriate moment" to address the issues affecting unit employees, *id.* at 36. He also found that the timing of the employee meeting diminishes its interference with management's assignment of work because it would not interrupt assignments of work. *Id.* at 37. Consequently, he determined that it constitutes an efficient means of communicating with employees that is less disruptive than alternatives. *Id.* at 35. Although contending that the meeting excessively interferes with the assignment of work, the Agency acknowledges that a meeting between the Union and unit employees is likely regardless of disputed Subsection 1.F and concedes that

⁹ When a party fails to provide any arguments or authority to support its exception, the Authority denies the exception as a bare assertion. *E.g., U.S. Dep't of Veterans Affairs Med. Ctr., Kan. City, Mo.*, 65 FLRA 809, 812 n.6 (2011). Here, the Agency fails to provide any arguments or authority pertaining to management's right to direct employees under § 7106(a)(2)(A). Accordingly, we deny this exception as it pertains to § 7106(a)(2)(A) as a bare assertion.

Union meetings with employees in these circumstances do not necessarily interfere excessively with the right to assign work. *See* Exceptions at 29 n.14. We defer to the Arbitrator's finding that the brief meeting provided by disputed Subsection 1.F with all affected unit employees immediately following management's meeting is the more efficient means of conducting that meeting¹⁰ and conclude that, on balance, the benefits to employees outweighs the intrusion on management's right.

Accordingly, we find that the Arbitrator correctly concluded that disputed Subsection 1.F is enforceable as a contract provision negotiated under § 7106(b)(3), and we deny this exception.

B. The award is not deficient as it pertains to Subsections 20.D.1, D.3, and H.

The Agency contends that the Arbitrator exceeded his authority when he failed to resolve whether Subsections 20.D.1, D.3, and H constitute permissive subjects of bargaining. As relevant here, the Authority finds that arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration. *E.g., AFGE, Local 648, Nat'l Council of Field Labor Locals*, 65 FLRA 704, 710 (2011).

The parties stipulated as an issue for resolution whether the Agency violated law or the national agreement when it gave notice that it was withdrawing from certain permissive subjects of bargaining. Award at 2. In resolving this issue, the Arbitrator specifically addressed the "partnering agreements" and the partnering provisions under the "expired National Agreement." *Id.* at 43. He concluded that "[t]he Agency was well-founded in its determination that the partnership arrangements [are] permissive subjects." *Id.* at 45. The Agency does not address why the Arbitrator's conclusion on "partnership arrangements" does not encompass the partnership arrangements of Subsections 20.D.1, D.3, and H. Consequently, the Agency fails to establish that the Arbitrator failed to resolve an issue submitted and exceeded his authority. Accordingly, we deny this exception.

As to the Arbitrator's conclusion that Subsections 20.D.1 and D.3 are enforceable, the Agency contends that the conclusion is contrary to management's right under § 7106(a)(2)(B) to assign work and is based on a nonfact. Exceptions at 30, 33. In particular, the Agency claims that the subsections excessively interfere

with management's right to assign work because the subsections prohibit management from assigning to employees of its own choosing the duties of creating and revising revenue manuals and training materials and overseeing the creation of training packages. *Id.* at 36-37.

The parties do not dispute that enforcement of these provisions affects management's right to assign work. In addition, the Agency does not dispute that these provisions constitute arrangements, but argues, instead, that their enforcement excessively interferes with its right to assign work. Accordingly, we address only whether enforcement of Subsections 20.D.1 and D.3 interferes excessively with management's right.

As interpreted by the Arbitrator, Subsections 20.D.1 and D.3 require joint involvement of management and the Union through the national TEPS committee and preclude management from assigning all of the TEPS duties to employees of its own choosing. However, Subsections 20.D.1 and D.3, as interpreted by the Arbitrator, do not require that TEPS duties be performed exclusively by the committee and do not preclude the Agency from assigning employees of its own choosing to create and revise manual materials and to create training packages. Consequently, the Agency's excessive-interference arguments are based on a misconstruction of the award, and the Agency fails to demonstrate that enforcement of Subsections 20.D.1 and D.3, as interpreted by the Arbitrator, excessively interferes with management's right to assign work under § 7106(a)(2)(B). Accordingly, we deny this exception.

As to nonfact, the Agency must establish that a central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different result. *E.g., U.S. Dep't of the Army, Corps of Eng'rs, Walla Walla Dist., Pasco, Wash.*, 63 FLRA 161, 163 (2009). The Agency contends that the Arbitrator's conclusion that Subsections 20.D.1 and D.3 are enforceable is based on a nonfact. As discussed above, we have decided that the Arbitrator's conclusion that Subsections 20.D.1 and D.3 are enforceable is not contrary to management's right to assign work under § 7106(a)(2)(B) because the subsections do not preclude the Agency from assigning employees of its own choosing to create and revise manual materials and to create training packages. Consequently, the Agency fails to establish how the Arbitrator's findings regarding the determination of the qualifications of the Union representatives who serve on the national TEP committee was material to the outcome of the award. *See id.* Accordingly, we also deny this exception.

¹⁰ We defer to the Arbitrator's factual findings underlying his legal conclusion because the Agency has not disputed these findings by contending they are based on a nonfact. *See U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 432 (2010).

- C. The Arbitrator's conclusions that the Agency violated the Statute and the national agreement by failing to bargain are not deficient.

The Agency contends that that the Arbitrator's conclusion that it violated its statutory duty to bargain is contrary to Authority precedent. Exceptions at 39. In a summary conclusion, the Agency also states that, as it was not obligated under the Statute to negotiate over its decision to terminate permissive subjects of bargaining, the Arbitrator's conclusion that the Agency violated the national agreement is also contrary to law. *Id.* at 52-53.

As to the Agency's statement that the Arbitrator's conclusion that the Agency violated the national agreement is contrary to law, as noted, *see supra* note 9, when an excepting party fails to provide any supporting arguments or authority to support an asserted exception, the Authority denies the exception as a bare assertion. *E.g., U.S. Dep't of Veterans Affairs Med. Ctr., Kan. City, Mo.*, 65 FLRA 809, 812 n.6 (2011). Here, the Agency does not provide any supporting arguments or authority to support its summary statement that the Arbitrator's conclusion that the Agency violated the national agreement is contrary to law. Accordingly, we deny the Agency's asserted exception as a bare assertion. *See id.*

As to the Agency's contention that the Arbitrator's conclusion that it violated its statutory duty to bargain is contrary to Authority precedent, the Authority has recognized that, when an arbitrator bases the award on separate and independent grounds, an excepting party must establish that all of the grounds are deficient to establish that the award is deficient. *E.g., SSA, Fredericksburg Dist. Office*, 65 FLRA 946, 949 (2011). In such circumstances, when the excepting party fails to establish that the award is deficient on one of the grounds relied on by the arbitrator, the Authority denies other exceptions to the award because they cannot provide a basis for finding the award deficient. *See U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 435 (2010) (*IRS*).

Here, the Arbitrator separately concluded that the Agency's failure to bargain over impact and implementation violated its statutory duty to bargain and violated the national agreement. In accordance with our decision that the Agency fails to establish that the Arbitrator's contractual ground for the award is deficient,

we deny this exception as any deficiency in the statutory finding does not provide a basis for finding the award deficient.¹¹

- D. The award as it pertains to Article 8, Subsection 8.B does not exceed the Arbitrator's authority and does not fail to draw its essence from the agreement.

As relevant here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration. *E.g., AFGE, Local 1815*, 56 FLRA 992, 993 (2000). The parties stipulated the relevant issue as whether the Agency violated law or the national agreement when it gave notice that it was unilaterally withdrawing from certain permissive subjects of bargaining. Award at 2. In resolving this issue, the Arbitrator found that, although the Agency abolished the councils, the workload studies remained "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of bargaining" within the meaning of § 7114(b)(4) of the Statute. *Id.* at 48 (quoting § 7114(b)(4)). On this basis, the Arbitrator concluded that the Agency violated the Statute and the national agreement by withdrawing from Subsection 8.B. This resolution is directly responsive and confined to the stipulated issue. *See AFGE, Local 3979, Council of Prisons Locals*, 61 FLRA 810, 815-16 (2006) (as the award is directly responsive and confined to the stipulated issue, the arbitrator did not exceed his authority).

In contending that the Arbitrator resolved an issue not submitted to arbitration, the Agency misconstrues the stipulated issue. Contrary to the claim of the Agency, the parties did not stipulate for resolution "whether providing workload studies to partnering coun[cils] was a permissive subject of bargaining." Exceptions at 46. As the Agency does not establish that the Arbitrator resolved an issue not submitted to arbitration, the Agency provides no basis for finding that

¹¹ We note that in *Federal Bureau of Prisons v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011), *granting petition for review of United States Department of Justice, Federal Bureau of Prisons, Washington, D.C.*, 64 FLRA 559 (2010), the court rejected the Authority's application of the separate and independent grounds doctrine, finding that the award made no distinction between "the purportedly 'separate' statutory and contractual grounds for the award." *Id.* at 97. In contrast, in this case, the Agency acknowledged that the award is based on both contractual and statutory grounds when it contended both that the Arbitrator's conclusion that it violated its statutory duty to bargain was contrary to law and that the Arbitrator's conclusion that it violated the national agreement was also contrary to law. Exceptions at 39, 52-53. Consequently, this case is distinguishable from *Federal Bureau of Prisons v. FLRA*.

the Arbitrator exceeded his authority. Accordingly, we deny this exception.

The Agency's exception that the award fails to draw its essence from the national agreement is conditioned on the extent to which the Arbitrator interpreted Subsection 8.B to require the Agency to provide the workload studies to the National Union. *Id.* at 47. As the Arbitrator did not interpret Subsection 8.B to require the Agency to provide workplace studies to the National Union, the Agency provides no basis for finding that the award fails to draw its essence from the national agreement. Accordingly, we deny this exception.

- E. The order to post a notice signed by the Commissioner is not deficient.

The Agency argues that, in the event that the Authority does not set aside the Arbitrator's conclusions that the Agency violated the Statute, the Arbitrator's order to post a notice signed by the Commissioner as a remedy for the violation of the Statute is contrary to Authority precedent. However, as noted with respect to the Arbitrator's conclusion that the Agency violated the Statute and the national agreement by failing to bargain over the impact and implementation of terminating provisions constituting permissive subjects of bargaining, the Arbitrator based the award and remedies on both statutory and contractual violations. As the Agency has not challenged the notice as a deficient remedy for the violations of the national agreement, its challenge to the notice solely as a deficient remedy for the violations of the Statute does not provide a basis for finding the award deficient. Accordingly, we deny this exception. See *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 432 (2010).

V. Decision

The Agency's exceptions are denied.

Member Beck, Concurring:

I agree with my colleagues that the Agency's exceptions pertaining to Subsections 1.F. and 8.B. should be denied. I also agree that a strict reading of our precedent (concerning arbitral awards based on separate and independent grounds) dictates that the Agency's exceptions pertaining to Subsections 20.D.1., D.3., must be denied. This is particularly so because of the manner in which the parties stipulated the issues that were presented to the Arbitrator.

The Arbitrator was wrong to conclude that the Agency violated the Statute when it refused to negotiate over its decision to terminate permissive subjects of bargaining (Subsections 20.D.1, D.3., and H.) after the National Agreement expired. *U.S. Dep't of Justice, Fed. Bureau of Prisons, FCI Danbury, Danbury, Conn.*, 55 FLRA 201, 206 (1999) (upon the expiration of an agreement, a party's right to terminate unilaterally a permissive bargaining subject is not contingent on first satisfying a bargaining obligation as to the substance, impact or implementation of the change).

Further, because these provisions relate to permissive subjects, it was unnecessary and inappropriate for the Arbitrator to consider whether they constituted appropriate arrangements. See *Nat'l Air Traffic Controllers Ass'n., Rochester Local*, 56 FLRA 288, 291-92 (2000) (when a proposal is determined to be permissive in nature, it is unnecessary to address arguments concerning whether the proposal affects management rights or constitutes appropriate arrangements); *Nat'l Ass'n of Gov't Emps., Local R5-184*, 51 FLRA 386, 393 (1995) (if a proposal is resolved under § 7106(b)(1), the Authority will not consider contentions that the matter affects the exercise of management's rights under § 7106(a)).

Nonetheless, I join with my colleagues in the ultimate disposition of this matter, because the Agency fails to refute the Arbitrator's conclusion that the Agency also violated the National Agreement when it refused to bargain over the impact and implementation of its decision to terminate the permissive subjects of bargaining. Majority at 13. This finding by the Arbitrator constitutes a separate and independent basis for the award. It is well-established that, when an arbitrator bases his award on more than one ground, the excepting party must establish that the award is deficient on all grounds in order to prevail. *Id.* (citing *SSA, Fredericksburg Dist. Office*, 65 FLRA 946, 949 (2011); *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 435 (2010)).

Normally, an arbitrator's generalized assertion that a party "violated the parties' National Agreement"

would not be sufficient to establish a separate and independent ground for an award; we would expect the arbitrator to specify what section or sections of the agreement the party supposedly violated. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 86 (2011) (arbitrator's findings that agency violated Articles 6b-3 and 22, and failed to abide by Article 6b-2, of the parties agreement constitute separate and independent bases for the award); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Wash., D.C.*, 64 FLRA 559, 561 (2010) (arbitrator's finding that agency violated Article 3(d) of the parties' agreement constitutes a separate and independent grounds for the award); *Office of Pers. Mgmt.*, 61 FLRA 358, 358-59, 364 (2005) (arbitrator's finding that agency violated Article 15, Section 8 of the parties' agreement constitutes a separate and independent ground for the award).

In this case, however, the parties did not require the Arbitrator to determine that any particular section of the National Agreement was violated. Instead, the stipulated issue simply required the arbitrator to determine whether the Agency "violated the law, *the National Agreement and/or any other Agreement*" when it withdrew from the permissive subjects of bargaining. Award at 2 (emphasis added). In fact, the record does not indicate that the Agency made any argument as to whether the National Agreement did or did not obligate it to bargain over the impact and implementation of its decision to terminate permissive subjects. Further, the Agency has made no effort to explain to the Authority that the Arbitrator was incorrect in finding a bargaining obligation in the National Agreement.

Accordingly, I agree that, in these unusual circumstances, the Arbitrator's determination that the Agency violated the National Agreement constitutes a separate and independent ground.