68 FLRA No. 93

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3911, AFL-CIO
(Union)

and

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
(Agency)

0-AR-5077

_____

DECISION

May 13, 2015

_____

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

I. Statement of the Case

Arbitrator David J. Weisenfeld issued an award determining, as relevant here, that the Agency's grievance response was timely and that the Agency did not violate the parties' agreement by maintaining its transit-subsidy program despite budgetary issues surrounding the Budget Control Act of 2011[1] (sequestration) and the need to furlough staff. The Union filed exceptions concerning both the Arbitrator's determination that the Agency's grievance response was timely (arbitrability determination) and the Arbitrator's determination that the Agency did not violate the parties' agreement (merits determination), as well as the award as a whole.

The Union raises four substantive exceptions concerning the Arbitrator's arbitrability determination. First, the Union alleges that the Arbitrator based this decision on a series of nonfacts. Second, the Union alleges that this determination fails to draw its essence from the parties' agreement. Because exceptions challenging an arbitrator's procedural-arbitrability determination based on a nonfact or alleging that the determination fails to draw its essence from the parties' agreement provide no basis for finding an award deficient, we deny these exceptions.

Third, the Union contends that the Arbitrator exceeded his authority in making his arbitrability determination. Specifically, the Union alleges that the Arbitrator exceeded his authority by supplementing the parties' agreement and interpreting Article 38 of the parties' agreement. However, the Arbitrator did not add language to the parties' agreement, but merely interpreted portions of the parties' agreement necessary for an ultimate decision. Furthermore, the Arbitrator did not exceed his authority by interpreting the parties' agreement. As a result, we deny this exception.

Fourth, the Union alleges that the Arbitrator failed to conduct a fair hearing regarding the arbitrability determination. Because the Union does not demonstrate that the Arbitrator failed to conduct a fair hearing, we deny this exception.

The Union also raises three substantive exceptions concerning the Arbitrator's merits determination. First, the Union alleges that the merits determination was based on nonfacts. Because the alleged nonfacts either cannot be challenged as nonfacts or fail to demonstrate how, but for the alleged nonfact, the Arbitrator would have reached a different result, we deny this exception.

Second, the Union contends that the Arbitrator exceeded his authority by addressing three issues not before him. Because the three issues are consistent with and flow from the arguments raised before the Arbitrator, the Arbitrator did not exceed his authority by addressing these issues. As such, we deny these exceptions.

Third, the Union argues that the Arbitrator was biased. However, the Union's allegations fail to demonstrate that the Arbitrator was biased. Consequently, we deny this exception.

Finally, the Union maintains that the Arbitrator failed to conduct a fair hearing overall. Because the Union's contentions fail to demonstrate that the Arbitrator failed to conduct a fair hearing, we deny this exception.

II. Background

Facing a budgetary shortfall due to sequestration, the Agency decided to furlough staff. The Agency did not, however, eliminate its transit-subsidy program, created to subsidize the cost of and encourage the use of public transportation. In response to these actions, the Union filed a grievance alleging that by not eliminating the transit subsidy, the Agency violated the parties' agreement, specifically Article 8. Article 8 states, in pertinent part, that "[i]n an atmosphere of mutual respect, all employees shall be treated fairly and

[1] Pub. L. 112-25 (Aug. 2, 2011).

equitably and without discrimination in regard to their political affiliation, [u]nion activity, race, color, religion, national origin, gender, sexual orientation, marital status, age, or non-disqualifying handicapping condition."[2]

The matter was unresolved, and the parties submitted it to arbitration.

As relevant here, the parties stipulated to two issues: (1) "[w]as the Agency's . . . grievance response untimely? If so, what shall be the remedy";[3] and (2) "[d]id the Agency's decision to maintain the transit subsidy, despite budgetary issues relating to [sequestration], and the need to furlough staff, breach the [parties' agreement]? If so, what shall be the remedy?"[4]

As to the first issue, Article 38 of the parties' agreement states that a response to a grievance is due "[w]ithin thirty . . . calendar days after the receipt of the written grievance."[5] In the instant case, the thirtieth calendar day after the receipt of the written grievance fell on a Saturday, and the Union received the Agency's response the following Monday. The Union argued at arbitration that, because the Union received the Agency's response two days after the deadline, it was untimely. The Agency argued that, because the deadline fell on a weekend, the deadline was extended until the next business day, making its grievance response timely. Interpreting the parties' agreement and looking to the Authority's Regulations for guidance, the Arbitrator determined that the Agency's grievance response was timely.

The Arbitrator then considered whether the Agency's actions violated the parties' agreement. The Union argued that Article 8 encompassed three separate employee entitlements: (1) the right to be treated fairly, (2) the right to be treated equitably, and (3) the right to be treated "without discrimination" based on eleven listed criteria.[6] As support, the Union offered testimony and three arbitration awards (the proffered arbitration awards) that, according to the Union, involved and evaluated language similar or identical to that of Article 8. On the other hand, the Agency argued that Article 8 created a single entitlement based on the eleven enumerated criteria. After analyzing the parties' arguments and the submitted arbitration awards, the Arbitrator concluded that the language of Article 8 was a single phrase and that the words "fairly and equitably" did not "create substantive rights independent of other language in the [parties' agreement] and independent of the anti-discrimination language of Article 8."[7]

Furthermore, the Arbitrator found that, even were the Union's interpretation of Article 8 correct, the decision to continue the transit-subsidy program "was neither unfair nor inequitable."[8] The Arbitrator came to this conclusion based on the fact that "all Agency employees are equally eligible for the transit subsidy."[9] The Arbitrator also noted that, were the Agency to have eliminated the transit subsidy and redistributed those funds to all employees, an employee who had received the transit subsidy "would be suffering a greater loss of total compensation than the employee who had not been receiving the transit subsidy."[10]

In conclusion, the Arbitrator found that "[t]he Agency's decision to maintain the transit subsidy, despite budgetary issues relating to [sequestration], and the need to furlough staff, did not violate the [parties' agreement]."[11] Accordingly, he denied the grievance.

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

III. Preliminary Matters

A. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Union's exceptions.

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.[12]

The Union argues that the Arbitrator's interpretation of the parties' agreement was contrary to law and violated 5 U.S.C. § 2301(b)(2) "by effectively exorcising 'fairly and equitably' out of Article 8" of the parties' agreement and "giving [the] statutory language new meaning."[13] However, the record does not reflect any evidence or argument concerning 5 U.S.C. § 2301(b)(2), despite the fact that parties argued the meaning of the language "fairly and equitably" at arbitration.[14] Because the Union did not make this

[2] Award at 24 (quoting the parties' agreement).
[3] *Id.* at 2.
[4] *Id.* at 3.
[5] *Id.* at 4 (quoting the parties' agreement).
[6] *Id.* at 25 (internal quotation marks omitted).
[7] *Id.* at 27.
[8] *Id.* at 28.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 29.
[12] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).
[13] Exceptions at 25.
[14] *Id.*, Attach. 3, Union's Post-Hr'g Br. (Union's Post-Hr'g Br.) at 67-69.

argument before the Arbitrator, but could have done so, it may not do so now.[15]

The Union also contends that the Arbitrator failed to conduct a fair hearing when he applied portions of § 2429.21 of the Authority's Regulations to the Union, but did not apply other portions of the same Regulation to the Agency.[16] The Union argues that, although applying § 2429.21(a) of the Authority's Regulations to determine what occurs when a deadline falls on a weekend or holiday, the Arbitrator did not apply § 2429.21(b)(1)(i) of the Authority's Regulations to determine whether the Agency's response to the grievance was timely.[17] Had the Arbitrator done so, the Union continues, "he would have recognized that § 2429.21(b)(1)(i)" of the Authority's Regulations made certain Union evidence "exceedingly relevant" to the arbitrability determination.[18] However, the Union did not argue for the application of § 2429.21(b)(1)(i) of the Authority's Regulations at arbitration despite the fact that the Agency argued for the application of § 2429.21(a) of the Authority's Regulations.[19] The Union's argument could have been, but was not, raised before the Arbitrator.[20] As such, it cannot be raised now.[21]

Additionally the Union claims that the Arbitrator failed to conduct a fair hearing because he "interject[ed] during . . . testimony to ask a question to further his distortion of the issue."[22] The Union also contends that the Arbitrator's interjection of "carefully worded questions during the hearing" was a nonfact.[23] However, the Union failed to raise these concerns either during the hearing or in its post-hearing brief. Consequently, the Union cannot raise them now.[24]

We therefore dismiss these exceptions as barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations.

The Agency argues that the Authority should reject the Union's claim that the Arbitrator was biased because "[t]he Union . . . failed to state whether it had raised the issue of bias to the Arbitrator and to explain why it did not if it had not."[25] However, because all of the Union's allegations of bias stem from the Arbitrator's award itself, the Union could not have raised these contentions at arbitration, and §§ 2425.4(c) and 2429.5 of the Authority's Regulations do not bar them.[26]

B. One of the Union's exceptions fails to raise a recognized ground for review.

The Authority's Regulations enumerate the grounds upon which the Authority will review arbitration awards.[27] In addition, the Regulations provide that if exceptions argue that an arbitration award is deficient based on private-sector grounds not currently recognized by the Authority, then the excepting party "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions."[28] Furthermore, § 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support" the grounds listed in § 2425.6(a)-(c) of the Authority's Regulations, or "otherwise fails to demonstrate a legally recognized basis for setting aside the award."[29] Thus, an exception that does not raise a recognized ground is subject to dismissal.[30]

The Union argues that the award was "[c]ontrary to the Union's [d]uty to [f]air [r]epresentation."[31] This argument does not raise a ground for review currently recognized by the Authority, and the Union does not cite any legal authority that supports a conclusion that the argument raises a private-sector ground not currently recognized by the Authority.[32] As such, we dismiss this exception.

C. The Union's exceptions do not warrant dismissal for failing to meet Authority filing requirements.

The Agency contends that the Union's exceptions failed to meet the Authority's filing requirements because they "did not provide the [Agency]'s facsimile[,] or email address" and "did not provide the Arbitrator's telephone, facsimile or email address."[33] The Agency argues that, "[f]or failing to comply with the filing requirements, the Union's

[15] *AFGE, Local 1164*, 66 FLRA 74, 77 (2011) (*Local 1164*).
[16] Exceptions at 13.
[17] *Id.*
[18] *Id.*
[19] *Id.*, Attach. 4, Agency's Post-Hr'g Br. at 7.
[20] *U.S. Dep't of the Treasury, IRS*, 66 FLRA 342, 344-45 (2011).
[21] *Local 1164*, 66 FLRA at 77.
[22] Exceptions at 14.
[23] *Id.* at 17.
[24] *Local 1164*, 66 FLRA at 77.
[25] Opp'n at 2.
[26] *U.S. DOL*, 60 FLRA 737, 738 (2005) ("[T]he issue . . . arose from the issuance of the [a]rbitrator's award and, as such, it is not precluded by § 2429.5.").
[27] 5 C.F.R. § 2425.6(a)-(b).
[28] *Id.* § 2425.6(c).
[29] *Id.*
[30] *AFGE, Local 738*, 65 FLRA 931, 932 (2011); *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting in part).
[31] Exceptions at 31.
[32] *NAIL, Local 17*, 68 FLRA 97, 99 (2014).
[33] Opp'n at 2.

[e]xceptions should be rejected."[34] The Union's exceptions do include the Arbitrator's name and mailing address, as required by § 2425.4(a)(6) of the Regulations, as well as the name and address of the Agency's representative.

When considering an argument that the Authority should reject exceptions as procedurally deficient, the Authority considers whether a party is harmed.[35] The Agency does not argue that it has been harmed in any way by the omission of information. Consequently, we will consider the Union's exceptions.[36]

D. The Authority will consider the Union's supplemental submission.

The Union requested leave pursuant to § 2429.26 of the Authority's Regulations to submit additional documents, specifically the three proffered arbitration awards. Because the consideration of these supplemental documents would not alter our ultimate decision, we assume, without deciding, that these documents are properly before us.

IV. Analysis and Conclusions

A. The Arbitrability Determination

1. The arbitrability determination is not deficient as based on nonfacts or failing to draw its essence from the parties' agreement.

The Union contends that the Arbitrator's arbitrability determination was based on nonfacts.[37] In this regard, the Union argues that the Arbitrator based this decision on the following nonfacts: (1) the Arbitrator stated that Article 38 referenced "days" rather than "calendar days";[38] (2) the Arbitrator stated that all witnesses agreed that the parties' agreement was silent on the timing matter when no witness stated so;[39] (3) the Arbitrator stated that both parties agreed that no previous arbitrator had addressed this issue while the transcript demonstrated the exact opposite;[40] (4) the Arbitrator stated that the parties did not have a binding past practice regarding this issue, ignoring his previous factual finding supporting a past practice;[41] (5) the Arbitrator stated that both parties agreed that their negotiators were aware of § 2429.21 of the Authority's Regulations when neither party agreed;[42] (6) the Arbitrator relied on Article 2, Section 2(A) of the parties' agreement in applying § 2429.21 of the Authority's Regulations when there was no testimony that this Regulation applied, there is no use of the term "calendar day" in the Regulation, and the Regulation as cited by the Arbitrator was published seven years after the establishment of the parties' agreement;[43] and (7) the Arbitrator relied on a nonfact when he "recast" a witness' testimony as informal and personal.[44]

The Union also contends that the Arbitrator's determination failed to draw its essence from the parties' agreement.[45] The Union argues that, given all of the evidence supporting its position and excluding evidence "outside the four corners of the agreement," the Arbitrator's determination did not draw its essence from the parties' agreement.[46]

An arbitrator's determination as to the timeliness of a grievance response constitutes a procedural-arbitrability determination.[47] An arbitrator's determination as to procedural arbitrability may be found deficient only on grounds that do not challenge the procedural-arbitrability determination itself.[48] Such grounds include arbitrator bias or the fact that the arbitrator exceeded his or her authority.[49] Exceptions challenging an arbitrator's procedural-arbitrability determination as based on a nonfact or alleging that the determination fails to draw its essence from the parties' agreement, however, provide no basis for finding an award deficient.[50] As such, these nonfact and essence exceptions fail to demonstrate that the award is deficient, and we deny them.

2. The Arbitrator did not exceed his authority regarding his arbitrability determination.

The Union alleges that the Arbitrator exceeded his authority by "effectively add[ing]" language to the parties' agreement and addressing an issue not before him.[51] Arbitrators exceed their authority when they fail

[34] *Id.*
[35] *AFGE, Local 44*, 67 FLRA 721, 722 (2014).
[36] *U.S. DOD, Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C.*, 42 FLRA 674, 677 (1991).
[37] Exceptions at 2-8.
[38] *Id.* at 3.
[39] *Id.*
[40] *Id.* at 4.
[41] *Id.* at 6.
[42] *Id.* at 6-7.
[43] *Id.* at 8.
[44] *Id.* at 16.
[45] *Id.* at 9.
[46] *Id.* at 10.
[47] *AFGE, Local 507*, 61 FLRA 88, 90 (2005).
[48] *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995).
[49] *Id.* at 186.
[50] *U.S. DHS, ICE*, 67 FLRA 711, 713 (2014); *AFGE, Local 2041*, 67 FLRA 651, 653 (2014).
[51] Exceptions at 11.

to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[52] Arbitrators do not exceed their authority when they address a matter that is necessary to decide a stipulated issue, or a matter that necessarily arises from issues specifically included in a stipulation.[53] Further, arbitrators do not exceed their authority when they resolve a matter closely related to the issue giving rise to the grievance.[54] In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective-bargaining agreement.[55] Moreover, even where a stipulated issue does not expressly include a particular matter, the arbitrator does not exceed his or her authority by addressing that matter if doing so is consistent with the arguments raised before him or her.[56]

Turning to the first allegation, the Union contends that the Arbitrator exceeded his authority by altering the terms of the parties' agreement.[57] Specifically, the Union alleges that the Arbitrator added language that allowed for a later filing date.[58] Despite the Union's allegations, the Arbitrator did not add language to the parties' agreement; he merely interpreted the language of the agreement as it was before him, finding that the agreement allowed for the extension of a deadline that falls on a weekend or holiday. As such, this exception fails to demonstrate that the Arbitrator exceeded his authority.

The Union also contends that the Arbitrator exceeded his authority when he addressed an issue not before him.[59] The Union alleges that the only question before the Arbitrator required "a simple yes or no [answer] on timeliness," but the Arbitrator went beyond the issue before him when he interpreted the language of Article 38 of the parties' agreement.[60] However, the Authority has determined that when an arbitrator interprets an agreement in order to resolve an issue before him, he does not exceed his authority when that interpretation goes directly to the issue before the arbitrator.[61] In order to determine timeliness, it was necessary for the Arbitrator to consider and interpret Article 38, which sets forth the procedural requirements for the grievance process. As such, the Arbitrator did not exceed his authority when he interpreted Article 38.

Consequently, we deny this exception.

3. The Arbitrator did not fail to conduct a fair hearing regarding procedural arbitrability.

The Union argues that the Arbitrator failed to conduct a fair hearing concerning procedural arbitrability.[62] An award will be found deficient on the grounds that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or conducted the proceeding in a manner that so prejudiced a party as to affect the fairness of the proceeding as a whole.[63]

The Union claims that the Arbitrator's conclusion that the Agency's grievance response was timely was "not supported by the testimony or the [parties' agreement]"[64] and that the Arbitrator distorted witness testimony.[65] However, these arguments do not demonstrate that the Arbitrator refused to hear or consider pertinent and material evidence, or conducted the proceeding in a manner that so prejudiced the Union as to affect the fairness of the proceedings as a whole. Accordingly, we deny this exception.

B. Merits Determination

1. The merits determination was not based on nonfacts.

The Union argues that the Arbitrator based his merits determination on several nonfacts.[66] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[67] The Authority has long held that disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be given to such evidence, provides no basis for finding the award deficient as based on a nonfact.[68]

[52] *NFFE, Local 858*, 63 FLRA 227, 229 (2009) (*Local 858*).
[53] *Id*. at 229-30.
[54] *Id*. at 230.
[55] *U.S. DHS, U.S. ICE*, 65 FLRA 529, 532 (2011) (*ICE*).
[56] *Id*. at 536.
[57] Exceptions at 11.
[58] *Id.*
[59] *Id.* at 12.
[60] *Id.*
[61] *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 60 FLRA 721, 725 n.5 (2005).
[62] Exceptions at 12-17.
[63] *AFGE, Local 1668*, 50 FLRA 124, 126 (1995) (*Local 1668*).
[64] Exceptions at 13.
[65] *Id.* at 13-14.
[66] *Id.* at 17.
[67] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[68] *NFFE, Local 1968*, 67 FLRA 384, 385-86 (2014).

Several of the Union's nonfact exceptions concern the meaning of Article 8. Regarding the Arbitrator's interpretation of Article 8, the Union alleges the following nonfacts: (1) the Arbitrator stated that "[s]everal senior Agency officials asserted that . . . they were not aware of any consideration of reducing or eliminating" the travel subsidy when the testimony indicated otherwise;[69] (2) the Arbitrator mischaracterized one of the proffered arbitration awards;[70] (3) the Arbitrator "[m]ischaracterize[d] the Union's [p]urpose" in providing the proffered arbitration awards;[71] (4) the Arbitrator stated that the Union "had searched the entirety of [Authority] rulings"[72] for interpretations of Article 8 or similar language when the Union had stated only that it had searched for arbitration rulings and "[n]owhere did the Union indicate . . . how extensive or complete its arbitration database was from which it could draw arbitration decisions";[73] and (5) the Arbitrator stated that in one of the proffered arbitration awards "[i]t is unclear . . . whether the contract there contained specific language equivalent to" Article 8, when the language in the offered arbitration award was "identical."[74]

All of these alleged nonfacts concern the Union's argument that Article 8 should be read as containing three separate rights, as compared to a single right. However, the Union does not explain how, but for these alleged nonfacts, the Arbitrator would have reached a different result. Specifically, the Union does not address the Arbitrator's finding that, even applying the Union's interpretation of Article 8, the actions of the Agency "were not unfair" and did not violate the parties' agreement.[75] Consequently, we deny these nonfact exceptions.[76]

Additionally, the Union alleges that the "[m]athematical [a]nalysis" done by the Arbitrator was a nonfact.[77] The Arbitrator stated that "the employee formerly receiving the transit subsidy would be suffering a greater loss of total compensation than the employee who had not been receiving the transit subsidy."[78] The Union asserts that "[n]either [p]arty introduced evidence that would support such a conclusion."[79] However, the Arbitrator's statement was part of a hypothetical situation used by the Arbitrator to demonstrate the flaws in the Union's position. The Arbitrator's use of a hypothetical situation is not a fact that can be challenged as a nonfact. Therefore, we deny this exception.

The Union further contends that all of these alleged nonfacts would "collectively change the outcome of the" award.[80] Assuming, without deciding, that the Union can aggregate nonfacts in this manner, the analysis above demonstrates that, for all but a single alleged nonfact, the Union fails to show that these alleged nonfacts, even in the aggregate, affected the Arbitrator's decision; as to the remaining alleged nonfact, it is not a fact that can be challenged as a nonfact. Consequently, even as a whole, these alleged nonfacts still fail to demonstrate that the Arbitrator based the award on a nonfact. Accordingly, we deny these nonfact exceptions.

2. The Arbitrator did not exceed his authority regarding the merits determination.

The Union contends that the Arbitrator exceeded his authority regarding the merits determination.[81] As noted above, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[82] Arbitrators do not exceed their authority by addressing a matter that is necessary to decide a stipulated issue, or by addressing a matter that necessarily arises from issues specifically included in a stipulation.[83] Further, arbitrators do not exceed their authority by resolving matters closely related to the issue giving rise to the grievance.[84] In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective-bargaining agreement.[85] Moreover, even where a stipulated issue does not expressly include a particular matter, the arbitrator does not exceed his or her authority by addressing that matter if doing so is consistent with the arguments raised before him or her.[86]

The Union posits that the Arbitrator exceeded his authority by addressing three issues not before him: (1) the fairness of the transit-subsidy program;[87] (2) the fairness of the transit-subsidy program in prior and subsequent years;[88] and (3) the fairness of the Union's

[69] Exceptions at 17 (quoting Award at 23).
[70] *Id.* at 17-18.
[71] *Id.* at 18-19.
[72] Award at 26.
[73] Exceptions at 20.
[74] *Id.* at 21.
[75] Award at 28.
[76] *U.S. Dep't of the Treasury, IRS*, 66 FLRA 528, 529 (2012).
[77] Exceptions at 21.
[78] Award at 28.
[79] Exceptions at 21.
[80] *Id.* at 17.
[81] *Id.* at 22.
[82] *Local 858*, 63 FLRA at 229.
[83] *Id.* at 229-30.
[84] *Id.* at 230.
[85] *ICE*, 65 FLRA at 532.
[86] *Id.* at 536.
[87] Exceptions at 22.
[88] *Id.* at 23.

requested remedy.[89] Concerning these issues, the Arbitrator stated (1) that it "is the essence of fairness" where "all Agency employees [were] equally eligible for the transit subsidy,"[90] (2) that if the transit-subsidy program were fair in the years prior to and after budget cuts due to sequestration, the budget cuts did not "change the transit[-]subsidy program from permissible to a contract violation;"[91] and (3) that, if the Union's requested remedy were implemented, "the employee formerly receiving the transit subsidy would be suffering a greater loss of total compensation than the employee who had not been receiving the transit subsidy."[92]

Although these matters were not expressly included in the issues before the Arbitrator, they are consistent with and flow from the arguments raised before the Arbitrator. The Union argued at arbitration that the Agency violated the parties' agreement by continuing the transit-subsidy program during sequestration, which "created unfairness."[93] Furthermore, the Union argued that "the unfairness of continuing to pay [the] transit subsidy to eligible employees and essentially funding the continuance of the transit subsidy by furloughing ineligible employees for additional hours" was clear.[94] As such, the Arbitrator's discussion of the fairness of the program as well as the fairness of the Union's requested remedy was consistent with and flowed from the central question of the fairness of the Agency's actions and what, if anything, should be the remedy. As such, the Arbitrator did not exceed his authority by addressing these matters.[95] Accordingly, we deny this exception.

3. The Arbitrator was not biased regarding the merits determination.

The Union alleges that the Arbitrator was biased in his merits determination.[96] To establish that an arbitrator was biased, the moving party must demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party.[97] A party's assertion that an arbitrator's findings were adverse to that party, without more, does not demonstrate that an arbitrator was biased.[98]

In part, the Union contends the Arbitrator was biased in five instances. First, the Union argues that the Arbitrator demonstrated bias when he "dismisse[d] the impact" of documentary evidence by "'blam[ing]' the document on communications staff to diminish its relevance."[99] In his award, the Arbitrator gave no weight to a piece of documentary evidence that he said presented an "apparent inconsistency" that was "significantly troubling" regarding the genesis of the decision to maintain the transit subsidy.[100] However, the Arbitrator decided that the issue was "ultimately irrelevant" because "what the Agency considered, how it considered it, or even whether it considered it, does not matter because what it did – maintain the transit subsides – did not violate" the parties' agreement."[101]

Second, the Union argues that the Arbitrator demonstrated bias when he "mischaracterized testimony from the Agency that support[ed] the Union[']s] position."[102] Specifically, the Union argues the Arbitrator stated that testimony beneficial to the Union was "taken out of context and mischaracterized."[103] In his award, the Arbitrator evaluated this testimony as "responsive to a carefully framed question not matching the facts of the case . . . [and] taken out of context" by the Union.[104]

Third, the Union alleges that the Arbitrator demonstrated bias when he "present[ed] the language of [a proffered arbitration award] in a highly distorted manner" and edited that award "to match his position that [the author of that award] did not base her decision on Article 8."[105] The Arbitrator noted that, although the arbitrator in that case found a violation of Article 8, she did so without any analysis specific to Article 8. In quoting the proffered arbitration award, the Arbitrator omitted portions of the award alluding to analysis of a separate section of those parties' agreement.

Fourth, the Union argues that the Arbitrator "blatantly misrepresent[ed] the relevance" of the proffered arbitration awards.[106] The Union alleges that the Arbitrator demonstrated bias when he stated that "[i]t is unclear from the [proffered arbitration awards] whether the contract there contained specific language equivalent to our Article 8."[107] In support, the Union cites the

[89] *Id.*
[90] Award at 28.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 24.
[94] Union's Post-Hr'g Br. at 69.
[95] *ICE*, 65 FLRA at 536.
[96] Exceptions at 25.
[97] *AFGE, Local 3438*, 65 FLRA 2, 3 (2010) (*Local 3438*).
[98] *AFGE, Local 3354*, 64 FLRA 330, 332 (2009) (*Local 3354*).
[99] Exceptions at 26.
[100] Award at 23.
[101] *Id.*
[102] Exceptions at 27.
[103] *Id.* 27 (internal quotation marks omitted).
[104] Award at 27.
[105] Exceptions at 27.
[106] *Id.* at 28.
[107] *Id.* (quoting Award at 26).

Authority's decision reviewing that award as containing language almost identical to Article 8.[108]

Finally, the Union argues that the Arbitrator "wr[ote] off the evidence that [a witness] was not a credible witness."[109] The Union contends that the Arbitrator demonstrated bias by finding an Agency witness credible after the Union introduced evidence to show that the witness was not credible.[110]

Although the Union alleges bias on the part of the Arbitrator, each of its allegations amounts to nothing more than a disagreement with (1) the Arbitrator's evaluation of the evidence, including his evaluation of witness credibility; (2) his analysis, including that of the proffered awards; or (3) his ultimate conclusion. There is no evidence that the award was procured by improper means, that there was partiality or corruption on the Arbitrator's part, or that the Arbitrator was guilty of misconduct by which the rights of any party were prejudiced.[111] The Union's contentions simply constitute a disagreement with the Arbitrator's findings, reasoning, and conclusions, and are an attempt to relitigate the matter before the Authority. These contentions provide no basis for finding the award deficient and fail to demonstrate any bias on the part of the Arbitrator.[112]

In addition to the above allegations, the Union also alleges that the Arbitrator was biased because he (1) stated that "the Union's contention that the Agency's grievance response was untimely . . . should be ignored because it would be disastrous to the Agency,"[113] and (2) "attacked the Union's arguments in the Union brief, [but] failed to counter or address Union arguments made in its brief which he could not rebut, [and] made arguments . . . beneficial to the Agency . . . that the Agency did not even advance on its own."[114]

As to the first allegation, it mischaracterizes the Arbitrator's statement. Rather than stating that he must make a certain finding because of that finding's effect on the Agency, the Arbitrator simply stated that, were the Union's position correct, it "could potentially be disastrous for the Agency" because it would mean that "the Agency is barred from asserting in this proceeding any of the issues and defenses asserted in the grievance response."[115] Nowhere does the Arbitrator assert that, because of this potential result, the Union's contention should be ignored.

As to the second allegation, the Union does not identify any arguments that the Arbitrator made that were "beneficial to the Agency . . . that the Agency did not even advance on its own."[116] Consequently, this allegation by the Union is unsupported, and we deny it under § 2425.6(e)(1) of the Authority's Regulations.[117] Furthermore, the Arbitrator was not required to address every argument raised by the Union.[118]

The Union's allegations fail to demonstrate that the Arbitrator was biased. Consequently, we deny this exception.

C. The Arbitrator did not fail to conduct a fair hearing.

The Union argues that, overall, the Arbitrator failed to conduct a fair hearing.[119] As noted above, an award will be found deficient on the grounds that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or conducted the proceeding in a manner that so prejudiced a party as to affect the fairness of the proceeding as a whole.[120] The Authority has consistently held that arbitrators have considerable latitude in the conduct of the hearing, and the fact that an arbitrator conducted a hearing in a manner that a party finds objectionable does not, in and of itself, provide a basis for finding an award deficient.[121]

The Union alleges that the Arbitrator failed to conduct a fair hearing because (1) he "[h]alted Union [q]uestioning [b]ut [n]ot Agency [q]uestioning";[122] (2) he "[r]efused to [c]ompel" a witness to appear;[123] and (3) he refused to give "[b]ona [f]ide [c]onsideration to the Union's [r]equest for [d]ocuments" from the Agency.[124]

Turning to the first allegation, the Union claims that the Arbitrator stopped the Union from examining a witness, but did not do likewise to the Agency. However, the record reveals that the Arbitrator stopped the Union only after the Union asked a witness the same rephrased question three times and received the same answer each

[108] *Id.* at 28-29 (citing *U.S. Dep't of VA, Veterans Integrated Serv. Network 13*, 56 FLRA 647 (2000)).
[109] *Id.* at 38.
[110] *Id.*
[111] *Local 3354*, 64 FLRA at 332.
[112] *U.S. Small Bus. Admin., Charlotte Dist. Office, Charlotte, N.C.*, 49 FLRA 1656, 1663 (1994).
[113] Exceptions at 37.
[114] *Id.*
[115] Award at 6 n.5.
[116] Exceptions at 37.
[117] 5 C.F.R. § 2425.6(e)(1) (an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c) of the Authority's Regulations).
[118] *Local 3438*, 65 FLRA at 3.
[119] Exceptions at 32.
[120] *Local 1668*, 50 FLRA at 126.
[121] *AFGE, Local 3947*, 47 FLRA 1364, 1373 (1993).
[122] Exceptions at 32.
[123] *Id.* at 33.
[124] *Id.* at 35.

time.[125] In conducting a hearing, arbitrators have considerable latitude, and nothing prevents an arbitrator from avoiding repetitious testimony or suggesting that the proceeding progress expeditiously.[126] Consequently, there has been no showing that the Arbitrator's conduct of the hearing was improper or prejudiced the Union.[127]

As to the final two allegations that the Arbitrator failed to conduct a fair hearing, the Union alleges that the Arbitrator failed to conduct a fair hearing because he refused to compel a witness to testify and refused to compel the Agency to produce certain documents. Additionally, the Union contends that the Arbitrator failed to give proper consideration to the Union's request for those documents. According to the Union, by not compelling the witness or the production of the requested documents, the Arbitrator "den[ied] the Union the ability to cross examine the deciding official, who . . . had considered eliminating the [t]ransit [s]ubsidy"[128] and prevented the Union "from getting the Agency's analysis of what would happen if [the Agency] cancelled the transit subsidy."[129] However, the Arbitrator determined that "what the Agency considered, how it considered it, even whether it considered it, does not matter because what it did – maintaining the transit subsidies – did not violate" the parties' agreement.[130] In light of this determination, the Union does not demonstrate that the evidence it wished to compel was pertinent and material. Therefore, the Union has not demonstrated that the Arbitrator failed to conduct a fair hearing.[131]

Because the Union has failed to demonstrate that the Arbitrator failed to conduct a fair hearing, we deny this exception.

V. Decision

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

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[125] *Id.*, Attach. 5, Tr. at 77 ("[Arbitrator]: I think you got the answer you're going to get . . . . It was three times. Let's move on.").
[126] *AFGE, Local 3979, Council of Prison Locals*, 61 FLRA 810, 814 (2006).
[127] *Id.*
[128] Exceptions at 34.
[129] *Id.* at 34-35 (quoting Tr. at 292).
[130] Award at 23.
[131] *Local 1668*, 50 FLRA at 126.