69 FLRA No. 77

UNITED STATES
DEPARTMENT OF THE AIR FORCE
JOINT BASE ELMENDORF-RICHARDSON
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1101
(Union)

0-AR-5182

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DECISION

August 31, 2016

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

I. Statement of the Case

The Agency issued an employee (the grievant) an oral admonishment because the grievant was argumentative during a telephone conversation with an Agency supervisor (the initiating supervisor). The Agency wrote a letter documenting the admonishment (the admonishment letter) and placed it in the grievant's personnel file. Ultimately, the admonishment letter was reduced to a telephone-etiquette-expectation letter (the etiquette letter) and placed in the grievant's file for six months. Arbitrator John R. Swanson found that the Agency violated the parties' collective-bargaining agreement and Air Force Instruction (AFI) 36-704 by failing to conduct an "investigation before issuing the admonishment."[1] As part of his awarded remedy, the Arbitrator directed the Agency to "cease and desist" from issuing admonishments without first conducting an investigation.[2] There are nine substantive questions before us.

The first question is whether the award is deficient because the Arbitrator erred by considering the Union's allegedly untimely statement of issues. And the second question is whether the award is deficient because the grievance was rendered moot when the Agency removed the etiquette letter from the grievant's file. Because the Agency's arguments directly challenge the Arbitrator's procedural-arbitrability determinations – and such determinations may not be directly challenged in the manner argued by the Agency – the answer is no.

The third question is whether the Arbitrator relied on nonfacts. Because the alleged nonfacts were disputed at arbitration, or the Agency fails to demonstrate that – but for the alleged nonfacts – the Arbitrator would have reached a different conclusion, the answer is no.

The fourth question is whether the award is contrary to § 7122(a)(1) or (2) of the Federal Service Labor-Management Relations Statute (the Statute).[3] Because the Agency fails to explain how the award violates either of these provisions, the answer is no.

The fifth question is whether the award is contrary to law because the Arbitrator misapplied the U.S. Supreme Court's decision in *Cornelius v. Nutt*.[4] Because the Arbitrator's statements regarding *Cornelius* are dicta, the answer is no.

The sixth question is whether the award fails to draw its essence from the parties' agreement because the Arbitrator interpreted the agreement as requiring a particular investigatory procedure. Because the Agency does not establish that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

The seventh question is whether the award is contrary to an Agency-wide regulation because the Arbitrator interpreted the parties' agreement as requiring an investigatory procedure that allegedly conflicts with the "recommended" procedure provided in AFI 36-704.[5] Collective-bargaining agreements – rather than agency-wide regulations – govern the disposition of matters to which they both apply. Therefore, the parties' agreement – not AFI 36-704 – governs this matter's disposition, and the answer is no.

The eighth question is whether the Arbitrator exceeded his authority by interpreting the parties' agreement as prospectively requiring the Agency to follow a particular investigatory procedure. Because the prospective portion of the awarded remedy is directly responsive to the issue as framed by the Arbitrator, the answer is no.

The ninth question is whether the Arbitrator exceeded his authority by directing the Agency to

[1] Award at 8 (emphasis omitted).
[2] *Id.* at 9.
[3] 5 U.S.C. § 7122(a)(1), (2).
[4] 472 U.S. 648 (1985).
[5] Exceptions Br. at 5 (emphasis omitted).

implement the investigatory procedure with regard to non-grievants. Because the Arbitrator failed to limit the prospective portion of the awarded remedy to the grievant, the answer is yes. Accordingly, we modify the awarded remedy to clarify that it applies only to the grievant.

II. Background and Arbitrator's Award

After ending a phone conversation with the grievant, the initiating supervisor contacted the grievant's supervisor and informed him that the grievant had been argumentative during their conversation. As a result, the grievant's supervisor issued the grievant an oral admonishment and placed the corresponding admonishment letter in the grievant's personnel file.

The Union filed a grievance alleging, in relevant part, that the Agency failed to conduct an investigation before disciplining the grievant. As a remedy, the Union requested that the Agency remove the admonishment letter from the grievant's file.

During the grievance process, the Agency reduced the discipline, replacing the admonishment letter with the etiquette letter in the grievant's file. But the Agency removed the etiquette letter from the grievant's file six months later, before the arbitration hearing. Nevertheless, the grievance was unresolved and submitted to arbitration.

The parties were unable to agree on a stipulated issue, and, prior to the arbitration hearing, the Union submitted a statement of issues (the Union's filing) to the Arbitrator. In addition to submitting issues for arbitration, the Union alleged, in the filing, that the Agency's conduct constituted an unfair labor practice (ULP). The Agency, in response, filed a brief with the Arbitrator arguing that he should not consider the Union's filing because it raised issues that were not properly grieved and were, therefore, untimely. The Agency also asked the Arbitrator to dismiss the grievance as moot because the Agency had already removed the etiquette letter from the grievant's file.

Regarding the Agency's contention that the issues raised by the Union's filing were untimely, the Arbitrator found that there were "no contractual time constraints that would prohibit the arbitration of the issue before [him]."[6] The Arbitrator also concluded that the matter was "not moot and the original issue of admonishment . . . [was] properly before [him]."[7]

At arbitration, the Arbitrator framed the issue, in relevant part, as whether the Agency's issuance of the admonishment letter was "done in compliance with" the parties' agreement and the AFI, and "[i]f not, what is the appropriate remedy?"[8]

On the grievance's merits, the Arbitrator determined that the "spirit and intent" of the parties' agreement, as well as the AFI, required the Agency to conduct an investigation before issuing the grievant an admonishment.[9] And the Arbitrator concluded that the Agency violated both the agreement and AFI 36-704 by failing to conduct such an investigation. In this regard, the Arbitrator found that the grievant's supervisor: prepared the admonishment letter without any input from the grievant; refused to allow the grievant to explain his version of the phone conversation; and "did not allow any inquiry from either [the grievant] or his [Union] representative" when he issued the admonishment.[10]

The Arbitrator also stated that "[n]o one involved in the [arbitration] hearing had any information as to who said what to whom" during the phone call between the grievant and the initiating supervisor.[11] In this regard, the Arbitrator stated that "[t]here can be no dispute" that the Agency relied on inadequate evidence.[12] The Arbitrator also stated that it was "undisputed" that the grievant's supervisor "did not comply with the provisions of the [parties' agreement] and AFI[36-704]."[13]

As a remedy, the Arbitrator directed the Agency, in relevant part, to "cease and desist" from issuing "[Union] member[s]" admonishments without first conducting an "inquiry or investigation."[14] In this regard, the Arbitrator found that an adequate investigation "requires [the Agency to seek] input from the employee being considered for the admonishment and [to permit] the involvement of a Union representative."[15] Additionally, the Arbitrator directed the Agency to place a letter (the letter of mistake) in the grievant's file, indicating that the Agency's issuance of the admonishment letter "was a mistake."[16]

Lastly, the Arbitrator acknowledged the Union's ULP claim. Specifically, citing *Cornelius*,[17] the Arbitrator stated that the claim was not appropriate for

[6] Award at 2.
[7] *Id.*
[8] *Id.* at 1.
[9] *Id.* at 8 (emphasis omitted).
[10] *Id.* at 7.
[11] *Id.*
[12] *Id.* at 9.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 10.
[17] 472 U.S. at 664 n.19.

resolution before him but could be appropriate "in the future" "if [the Agency] [did] not comply with the [parties' agreement] and AFI procedures."[18]

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

III. Preliminary Matters

A. The Agency's exceptions are properly before the Authority.

In its opposition, the Union requests that the Authority dismiss the Agency's exceptions under § 2429.27 of the Authority's Regulations[19] because the Agency failed to serve its exceptions on the proper Union representative.[20] In relevant part, § 2429.27(a) provides that a party filing a document "is responsible for serving a copy upon all counsel of record or other designated representative(s)."[21]

Here, the Agency failed to serve the Union's representative of record; however, the Agency did serve its exceptions on the Union's president. And, in response, the Union timely filed an opposition to the Agency's exceptions. The Authority has declined to dismiss filings on the basis of minor deficiencies where the deficiencies did not impede the opposing party's ability to respond.[22] Because the Union's ability to file an opposition was not impaired by the Agency's failure to serve the proper Union representative, we decline to dismiss the Agency's exceptions.

B. Sections 2429.5 and 2425.4(c) of the Authority's Regulations do not bar the disputed affidavits.

Relying on § 2429.5 of the Authority's Regulations,[23] the Union contends that the Authority should not consider two affidavits that the Agency submitted with its exceptions because the affidavits were not presented to the Arbitrator.[24] Under §§ 2429.5 and 2425.4(c) of the Authority's Regulations, the Authority will not consider any evidence that could have been, but was not, presented to the arbitrator.[25] However, where an arbitration proceeding lacks a formal transcript, the Authority has permitted the parties to submit statements – including affidavits – that reflect what transpired.[26] While the Authority will not consider such statements as a substitute for a formal record of the arbitration proceeding, it will consider such statements to the extent that they constitute arguments in support of the submitting party's exceptions.[27]

Here, no transcript of the arbitration proceeding was produced,[28] and the affidavits submitted by the Agency recount the testimony provided by two witnesses at the arbitration proceedings.[29] Accordingly, consistent with Authority precedent, we find that §§ 2429.5 and 2425.4(c) of the Authority's Regulations do not bar the Agency from submitting the affidavits.[30] And we will consider the affidavits to the extent that they constitute arguments in support of the Agency's exceptions.[31]

IV. Analysis and Conclusions

A. The Arbitrator's procedural-arbitrability determinations are not deficient.

The Agency challenges: (1) the Arbitrator's "reli[ance]" on the Union's allegedly untimely filing;[32] and (2) the Arbitrator's determination that the grievance was not moot.[33] An arbitrator's determination regarding the timeliness[34] or mootness[35] of a grievance concerns the procedural arbitrability of that grievance. And, generally, the Authority will not find an arbitrator's procedural-arbitrability determination deficient on grounds that directly challenge the determination itself.[36] However, a procedural-arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or exceeded his or her authority.[37]

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[18] Award at 9.
[19] 5 C.F.R. § 2429.27.
[20] Opp'n at 2-3.
[21] 5 C.F.R. § 2429.27(a).
[22] *NAGE, Local R14-143*, 55 FLRA 317, 318 (1999) (citing *SSA, Branch Off., E. Liverpool, Ohio*, 54 FLRA 142, 145-46 (1998)).
[23] 5 C.F.R. § 2429.5.
[24] Opp'n at 3.
[25] 5 C.F.R. §§ 2425.4(c), 2429.5.
[26] *E.g., U.S. Dep't of the Treasury, IRS*, 66 FLRA 342, 344 (2011) (*IRS*) (Member Beck dissenting) (citing *SSA, Dall. Region*, 65 FLRA 405, 407 (2010) (*SSA*)).
[27] *E.g., id.* (citing *SSA*, 65 FLRA at 407).
[28] Exceptions Form at 6, 10-11; Exceptions Br. at 3.
[29] Exceptions Form, Ex. 18, Aff. (Aff. 1) at 1-2; Exceptions Form, Ex. 19, Aff. (Aff. 2) at 1-2.
[30] *See, e.g., IRS*, 66 FLRA at 344.
[31] *E.g., id.*
[32] Exceptions Br. at 5.
[33] *Id.* at 4-5.
[34] *NFFE, Local 479*, 67 FLRA 284, 285 (2014) (*Local 479*) (citing *AFGE, Council 33*, 66 FLRA 602, 604 (2012) (*AFGE*)).
[35] *E.g., NFFE, Council of Consol. Locals*, 52 FLRA 137, 140 (1996) ("[A]n arbitrator's determination regarding the mootness of a grievance or an issue is akin to an arbitrator's determination of procedural arbitrability.").
[36] *Local 479*, 67 FLRA at 285 (citing *U.S. Dep't of the Navy, Naval Air Station, Whiting Field*, 66 FLRA 308, 309 (2011) (*Navy*)).
[37] *U.S. Dep't of VA, Regional Off., Winston-Salem, N.C.*, 66 FLRA 34, 37 (2011) (citations omitted).

In addition, the Authority has stated that a procedural-arbitrability determination may be found deficient on the ground that it is contrary to law.[38] But, for a procedural-arbitrability determination to be found deficient as contrary to law, the appealing party must establish that the ruling conflicts with statutory procedural requirements that apply to the parties' negotiated grievance procedure.[39]

The Agency contends that the Arbitrator's award was "predicated upon" the issues raised in the Union's filing, which "were moot and/or untimely . . . and[,] therefore[,] . . . contrary to law, rule or regulation under § 7122(a)(1) [of the Statute]."[40] Insofar as the Agency is contending that the Arbitrator's timeliness and mootness determinations are contrary to § 7122(a)(1), the Agency has not explained how the procedural requirements in that statutory section apply to the parties' negotiated grievance procedure.[41] Therefore, that claim fails.

With regard to the Union's filing, the Agency also alleges that the Arbitrator erred by "rel[ying] upon" the filing because it was untimely.[42] According to the Agency, there "[was] no provision" in the parties' agreement that permitted the Union to add issues in its filing that had not been introduced in the grievance.[43] However, the Agency fails to cite any evidence that the Arbitrator "relied"[44] on the Union's filing to support his award or determine the issue at arbitration. And, even assuming that he did, he found that there were "no contractual time constraints [that] would prohibit the arbitration of the issue before [him]."[45] To the extent that this finding addresses the timeliness of the issues raised by the Union's filing, it constitutes a procedural-arbitrability determination.[46] Because the Agency's exception directly challenges that determination, it provides no basis for finding the award deficient.[47]

The Agency also further challenges the Arbitrator's mootness determination, claiming that the grievance was moot because the Agency had removed the etiquette letter from the grievant's file prior to the arbitration hearing.[48] However, the Agency's claim that the matter was moot directly challenges the Arbitrator's determination that the matter was "not moot."[49] Thus, consistent with the principles set forth above, the Agency's contention provides no basis for finding the award deficient.[50]

Based on the foregoing, we deny these exceptions.

B. The award is not based on nonfacts.

The Agency argues that the award is based on nonfacts.[51] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[52] 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.[53]

The Agency challenges the Arbitrator's finding that the Agency "was required to engage in an investigation [before issuing the grievant an oral admonishment] and failed to do so."[54] To the extent that the Agency is challenging the Arbitrator's interpretation of the parties' agreement and his legal conclusion regarding the AFI, this exception provides no basis for finding that the award is based on a nonfact.[55] Further, to the extent that this exception challenges a factual finding, the Agency concedes that the parties disputed before the Arbitrator all of the matters raised by this nonfact exception.[56] As stated above, 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.[57] Accordingly, we deny this exception.

The Agency also argues that the award is based on a nonfact because the Arbitrator erroneously found: (1) that "[n]o one involved in the hearing had any

[38] *Id.* (citations omitted).
[39] *Local 479*, 67 FLRA at 285 *(*citation omitted).
[40] Exceptions Br. at 3.
[41] *See Local 479*, 67 FLRA at 285-86.
[42] Exceptions Br. at 5.
[43] *Id.*
[44] *Id.*
[45] Award at 2.
[46] *See Local 479*, 67 FLRA at 285.
[47] *See id.* (noting that an arbitrator's procedural-arbitrability determination will not be found deficient on a ground that directly challenges the ruling itself, including a claim that the procedural-arbitrability determination fails to draw its essence from the parties' agreement (citing *AFGE*, 66 FLRA at 604; *Navy*, 66 FLRA at 309)).
[48] Exceptions Br. at 3-5.
[49] *Id.*
[50] *See, e.g.*, *AFGE, Local 2328*, 66 FLRA 149, 151 (2011).
[51] Exceptions Form at 9-10; Exceptions Br. at 4.
[52] *AFGE, Local 3974*, 67 FLRA 306, 308 (2014) (*Local 3974*) (citing *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*Local 1984*)).
[53] *Id.* (citing *Local 1984*, 56 FLRA at 41).
[54] Exceptions Form at 9.
[55] *See Local 3974*, 67 FLRA at 308 ("[N]either legal conclusions nor conclusions based on the interpretation of a collective-bargaining agreement may be challenged as nonfacts." (citations omitted)).
[56] Exceptions Form at 10.
[57] *Local 3974*, 67 FLRA at 308 (citing *Local 1984*, 56 FLRA at 41).

information as to who said what to whom" during the phone call between the grievant and the initiating supervisor;[58] and (2) that it was "undisputed" that the grievant's supervisor "did not comply with the provisions of the [parties' agreement] and [the] [AFI]."[59] Even assuming that these findings are clearly erroneous, the Agency has not shown that they were central facts underlying the award. The record reflects that the Arbitrator relied on other evidence to conclude that the Agency violated the parties' agreement and the AFI by failing to conduct an investigation. For instance, the Arbitrator found that the supervisor: refused to allow the grievant to explain his version of the phone call;[60] prepared the admonishment letter before meeting with the grievant;[61] and did not allow the grievant, or his Union representative, to ask any questions when the supervisor issued the admonishment letter.[62] The Agency has provided no basis for finding that, but for the Arbitrator's alleged factual errors, the Arbitrator would have reached a different conclusion. Therefore, we deny these exceptions.[63]

C. The award is not contrary to law.

The Agency contends that the award is contrary to law,[64] as discussed further below. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo, but defers to the arbitrator's underlying factual findings unless the excepting party establishes that they were based on nonfacts.[65]

1. The award is not contrary to § 7122(a)(1) or (2) of the Statute.

The Agency claims that the Arbitrator directed the Agency to issue the grievant a letter of mistake "in violation of . . . § 7122(a)(2)" of the Statute.[66] Similarly, the Agency also claims that the Arbitrator erred by relying on the Union's filing because the filing "failed to state a claim upon which relief could be based, and[,] therefore, is contrary to law, rule or regulation under . . . §[ ]7122(a)(1)."[67]

Section 7122(a)(1) and (2) of the Statute sets forth the grounds on which an arbitration award may be found deficient.[68] The Agency has not explained how the award violates either of these provisions; nor has it identified another law with which the letter of mistake conflicts. Accordingly, we deny this exception.[69]

2. The award is not contrary to *Cornelius*.

The Agency alleges that the award is contrary to law because the Arbitrator based his decision on "an incorrect application of"[70] *Cornelius*.[71] However, the Authority has found that statements by an arbitrator that are separate from the findings required to support the award are dicta and do not provide a basis for finding an award contrary to law.[72] Here, although the Arbitrator cited *Cornelius*,[73] there is no evidence that he considered it relevant to the issue of whether the Agency's issuance of the admonishment letter complied with the parties' agreement or the AFI. In this regard, the Arbitrator merely stated that the Union's ULP claim was not appropriate for resolution in this case, but could be appropriate "in the future" "if [the Agency] [did] not comply with the [parties' agreement] and [the] AFI."[74] Because this statement was unnecessary to the disposition of the grievance, it constitutes dictum and provides no basis for finding the award deficient.[75] Accordingly, we deny this exception.

[58] Exceptions Br. at 4 (quoting Award at 7).
[59] *Id.* (quoting Award at 9).
[60] Award at 7.
[61] *Id.*
[62] *Id.*
[63] *See U.S. Dep't of HHS, Food & Drug Admin., San Diego, Cal.*, 67 FLRA 255, 255-56 (2014).
[64] Exceptions Form at 4; Exceptions Br. at 3-5.
[65] *AFGE, Local 2152*, 69 FLRA 149, 151 (2015) (*Local 2152*) (citing *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012)).
[66] Exceptions Br. at 3-4.
[67] *Id.* at 3.
[68] *See* 5 U.S.C. § 7122(a)(1), (2).
[69] *See, e.g., U.S. Dep't of the A.F., Okla. City Air Logistics Ctr., Tinker A.F. Base, Okla.*, 47 FLRA 106, 108 (1993) (denying exception that failed to explain how challenged award conflicted with § 7122(a)(1)).
[70] Exceptions Br. at 3; *see also* Exceptions Form at 4 (arguing that "the Arbitrator misapplied" *Cornelius*).
[71] 472 U.S. 648.
[72] *E.g., U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Off. of Marine & Aviation Operations, Marine Operations Ctr., Va.*, 57 FLRA 430, 434 (2001) (*Dep't of Com.*) (citing *NFFE, Local 1827*, 52 FLRA 1378, 1384-85 (1997)).
[73] Award at 9.
[74] *Id.*
[75] *See Local 2152*, 69 FLRA at 151 (finding an arbitrator's statement – that a union could have filed a ULP charge – dictum (citing *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009))); *see also NLRB, Wash., D.C.*, 61 FLRA 41, 45 (2005) (finding that an arbitrator's statement "as to what might be appropriate in the future constitutes mere dict[um]" (citing *Dep't of Com.*, 57 FLRA at 434; *U.S. DOD, Def. Cont. Audit Agency, Cent. Region*, 51 FLRA 1161, 1165 (1996))).

D. The award does not fail to draw its essence from the parties' agreement.

The Agency contends that the award fails to draw its essence from the parties' agreement.[76] When reviewing an arbitrator's award, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[77] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[78] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[79] And the Authority will not find that an award fails to draw its essence from a collective-bargaining agreement when the excepting party fails to establish that the arbitrator's interpretation of that agreement conflicts with its express provisions.[80] Additionally, when an arbitrator interprets an agreement as imposing a particular requirement, and the parties' agreement is silent with respect to that requirement, that does not, by itself, demonstrate that the award fails to draw its essence from the agreement.[81]

Here, the Arbitrator interpreted the parties' agreement as requiring the Agency to conduct an investigation – including seeking input from the affected employee and permitting the involvement of a Union representative – before issuing an admonishment.[82] The Agency argues that the award fails to draw its essence from the parties' agreement because that investigatory procedure is "not contained in" the agreement.[83] However, the Agency's contention that the parties' agreement is silent on this matter does not – without more – demonstrate that the award fails to draw its essence from the agreement.[84] Moreover, the Agency has not identified any express provision of the agreement with which the Arbitrator's interpretation conflicts.[85] Therefore, the Agency has provided no basis for finding that the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, and we deny the exception.

E. The award is not inconsistent with a governing Agency regulation.

The Agency asserts that the award is contrary to Agency regulation because it conflicts with AFI 36-704.[86] An award is deficient if it is inconsistent with a "governing" agency regulation.[87] However, collective-bargaining agreements, rather than agency-wide regulations, govern the disposition of matters to which they both apply.[88]

The Agency claims that the AFI is the "governing regulation," and that the mandatory investigation procedure imposed by the Arbitrator conflicts with the "recommended" investigation procedure provided in the AFI.[89] However, the Arbitrator found that the Agency's failure to investigate violated the parties' agreement.[90] Therefore, even though the Arbitrator also found that the AFI was relevant, the parties' agreement governs the disposition of this matter.[91] And because the parties' agreement governs, the alleged inconsistency between the award and the AFI does not provide a basis for finding the award deficient.[92] Accordingly, we deny this exception.

[76] Exceptions Form at 10-11.
[77] *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (*Bremerton*) (citing 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998) (*Council 220*)).
[78] *Id.* (quoting *Council 220*, 54 FLRA at 159).
[79] *Id.* (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*)).
[80] *E.g.*, *U.S. Dep't of the A.F., Edwards A.F. Base, Cal.*, 68 FLRA 817, 819 (2015) (*Edwards*) (citing *OSHA*, 34 FLRA at 576).
[81] *E.g.*, *Bremerton*, 68 FLRA at 155 (citation omitted).
[82] *See* Award at 9.
[83] Exceptions Form at 10-11; *see also* Exceptions Br. at 5-6 (arguing that the parties' agreement does not provide investigatory requirements or "define . . . what an investigation consists of").
[84] *See Bremerton*, 68 FLRA at 155; *U.S. Dep't of the A.F., Ogden Air Logistics Ctr., Hill A.F. Base, Utah*, 35 FLRA 1267, 1271 (1990) ("As the agreement is silent on the matter interpreted by the [a]rbitrator, we have no basis on which to conclude that . . . the [a]rbitrator's interpretation of the agreement . . . fail[s] to draw its essence from the parties' collective[-]bargaining agreement.").
[85] *See Edwards*, 68 FLRA at 819.
[86] Exceptions Form at 5-6; *see also* Exceptions Br. at 5-6.
[87] *U.S. Dep't of the A.F., Seymour Johnson A.F. Base, N.C.*, 55 FLRA 163, 165 (1999) (*Seymour*) (quoting *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 192 (1990)).
[88] *E.g.*, *id.* at 165-66 (citing *U.S. Dep't of the Navy, Naval Training Ctr., Orlando, Fla.*, 53 FLRA 103, 108-09 (1997) (*Naval Training Ctr.*)).
[89] Exceptions Br. at 5 (emphasis omitted).
[90] *See* Award at 8-9.
[91] *See Seymour*, 55 FLRA at 166 (citing *Naval Training Ctr.*, 53 FLRA at 108-09).
[92] *Id.*

F. The Arbitrator did not exceed his authority by directing the Agency to prospectively follow an investigatory procedure, but did exceed his authority to the extent that the remedy applies to individuals other than the grievant.

The Agency contends that the Arbitrator exceeded his authority by: (1) directing the Agency to prospectively follow a specific investigatory procedure before issuing an admonishment;[93] and (2) directing the Agency to apply that procedure "both towards the [grievant]" and toward all other bargaining-unit employees.[94] 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.[95] However, the Authority accords an arbitrator's interpretation of a stipulated issue, or the arbitrator's formulation of an issue to be decided in the absence of a stipulation, the same substantial deference that it accords an arbitrator's interpretation and application of a collective-bargaining agreement.[96] Nevertheless, if a grievance is limited to a particular grievant, then the remedy must be similarly limited.[97]

Here, the parties did not agree to a stipulated issue.[98] The Arbitrator framed the issue as whether the Agency complied with the parties' agreement and the AFI and, if not, "what is the appropriate remedy?"[99] The Arbitrator resolved the issue, finding that the Agency failed to conduct an investigation, as required by the parties' agreement, before issuing the grievant the admonishment.[100] The Arbitrator further determined that the "appropriate remedy"[101] was to direct the Agency to "cease and desist" from issuing admonishments without seeking "input from the [affected] employee . . . and [permitting] the involvement of a Union representative."[102] Because the awarded remedy is directly responsive to the issue as framed by the Arbitrator – and it is well established that an arbitrator may prospectively direct an agency to comply with a violated contract provision[103] – we find that the Agency has failed to show that the Arbitrator exceeded his authority on this basis.

However, the Union filed the grievance on behalf of the grievant only.[104] Therefore, the Arbitrator was authorized to resolve the grievance only as it pertained to the grievant.[105] Yet, the Arbitrator failed to limit the awarded remedy to the grievant and, instead, expressly directed the Agency to implement the investigatory procedure with regard to the "[Union] member[s]."[106] Accordingly, we find that the Arbitrator exceeded his authority in that respect,[107] and we modify the award, as detailed further below, to clarify that the awarded remedy applies only to the grievant.[108]

V. Decision

We modify the first paragraph of the awarded remedy[109] to provide the following: "The Agency will cease and desist from entering letters of admonishment into the grievant's file without any inquiry or investigation. Such inquiry requires input from the grievant and the involvement of a Union representative."

We deny the Agency's remaining exceptions.

[93] Exceptions Form at 11-12; Exceptions Br. at 3.
[94] Exceptions Br. at 5.
[95] *E.g.*, *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 66 FLRA 712, 715 (2012) (*Treasury*) (citing *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996)).
[96] *Id.* (citing *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 243 (2011); *U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999)).
[97] *U.S. Dep't of the Army, U.S. Corps of Eng'rs, Nw. Div.*, 65 FLRA 131, 133 (2010) (*Army*) (Member Beck dissenting in part) (citing *U.S. Dep't of Energy, Oak Ridge Off., Oak Ridge, Tenn.*, 64 FLRA 535, 538 (2010)).
[98] Opp'n at 4; Exceptions Form at 12.
[99] Award at 1.
[100] *Id.* at 8-9.
[101] *Id.* at 1.
[102] *Id.* at 9.
[103] *E.g.*, *Treasury*, 66 FLRA at 715 ("[I]t is well established that, where an arbitrator has found a contractual violation with regard to a particular action, the arbitrator may direct prospective relief, including directing the agency to comply with the violated contract provision in conducting future actions." (citations omitted)); *see also id.* (noting that "the Authority grants an arbitrator broad discretion to fashion a remedy that the arbitrator considers to be appropriate" (citations omitted)).
[104] Exceptions Form, Ex. 2, Grievance at 1.
[105] *E.g.*, *Army*, 65 FLRA at 133.
[106] Award at 9.
[107] *See, e.g.*, *Army*, 65 FLRA at 134 (finding that an arbitrator exceeded his authority because he directed an agency "to implement [a] . . . [p]rocedure generally and [did] not limit its application to the grievant"); *see also U.S. EPA*, 57 FLRA 648, 651 (2001) (finding that an arbitrator exceeded his authority by "defin[ing] the contractual rights of additional bargaining[-]unit employees who were not a part of the issue submitted to him" instead of just the grievant); *NLRB*, 27 FLRA 435, 438-39 (1987).
[108] *See, e.g.*, *Army*, 65 FLRA at 134.
[109] Award at 9.

Member Pizzella, dissenting:

Ernestine, the telephone operator (played by Lily Tomlin during the run of Rowan and Martin's Laugh-In television series from 1968 to 1973), famously began her telephone conversations with the polite introduction, "[h]ave I reached the party to whom I am speaking?"[1]

Believe it or not, this case has made its way to the Federal Labor Relations Authority – a three-member, Presidentially-appointed, Senate-confirmed quasi-judicial body – and deals with nothing more than a telephone-etiquette letter (yes, there is such a thing).

Darryl Morgan is an employee in the Casualty Matters Office at the Air Force's Joint Base Elmendorf-Richardson. In that role, he is the point of contact for area service families after the death of a family member. The record does not explain how well Morgan carried out those duties. But what we do know is that Morgan was orally counseled by his supervisor and then issued a "telephone[-]etiquette" letter[2] on June 26, 2015, after he was "rude and argumentative" with a colleague, who worked in the Casualty Matters Office at a different Air Force Base.[3]

Raymond Galyas, president of AFGE Local 1101, filed a grievance on Morgan's behalf purportedly because the Agency did not fully investigate the incident, as Galyas argued was required by the parties' agreement and Air Force Instruction 36-704 before it could issue Morgan a telephone etiquette letter.[4]

Let's get a couple of things straight.

This case is about a telephone-etiquette letter. A telephone-etiquette letter is not a disciplinary action. It defines a supervisor's "expectations." In this particular letter, Morgan's commanding officer simply explains to Morgan that "our ability to interact positively with people in person, on the phone, or over email is a critical component to our success . . . and it is imperative that we be courteous and professional at every opportunity. . . . In our business, we need to create strong networks across the [] enterprise . . . when dealing with partner agencies."[5] And by the time this matter went to arbitration in January 2016, *the letter had already been removed* from Morgan's file.[6]

Contrary to the majority, therefore, I would conclude that this matter is moot and warrants no further review.

I also would not conclude, as does the majority, that the Arbitrator's interpretation of the parties' agreement is plausible or Air Force Instruction 36-704 required more than what the Agency did here.

According to the Arbitrator, the Agency was required to conduct a full "investigation."[7] But the Arbitrator never details how much investigation would be sufficient − depositions? lie-detector tests? requests for information? What we do know is that Morgan's commanding officer sat down with Morgan to give him an "opportunity to recount from his perspective the matter of the telephone call."[8]

It seems to me that a one-on-one discussion, under these circumstances, constituted sufficient investigation to support a telephone-etiquette letter, especially when, as here, that letter had a limited shelf life. Nothing in either the parties' agreement or the relevant Instruction requires anything more.

Unlike the majority, I would also conclude that the Arbitrator exceeded his authority.

The only issue before the Arbitrator was whether the telephone-etiquette letter issued to Morgan complied with the parties' agreement and Air Force Instruction 36-704.[9] Despite that narrow issue, the Arbitrator issued a far-reaching remedy that precludes the Agency from issuing *any* letter of admonishment to *any* AFGE bargaining-unit employee "without an[] inquiry or investigation." That remedy has nothing whatsoever to do with Morgan but instead passes judgment on how the Agency will investigate and process admonishment letters in the future and for all time.

That is not a question that was within the purview of this Arbitrator. He, thus, exceeded his authority.[10]

"One ringy-dingy, two ringy-dingy . . . "

Thank you.

[1] http://www.tvacres.com/comm_ernestine.htm.
[2] Exceptions Form, Ex. 6.
[3] Exceptions Form, Ex. 15 at 2.
[4] Exceptions Form, Ex. 8 at 2.
[5] Exceptions Form, Ex. 6.
[6] Exceptions Form, Ex. 15 at 1.
[7] Majority at 10.
[8] Award at 8.
[9] *Id.* at 1.
[10] *See U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 66 FLRA 712, 718 (2012) (Dissenting Opinion of Member Beck) (arbitrator exceeds his authority when he awards a "sweeping, prospective remedy [that] is neither necessary nor appropriate due to the limited nature" of the issue).