

71 FLRA No. 157

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3571
(Union)

0-AR-5421

DECISION

June 11, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member Abbott dissenting in part;
Member DuBester dissenting in part)

I. Statement of the Case

Where an arbitrator expressly limits the issues before him to an employee's performance assessments for two specific years, we find that the arbitrator exceeds his authority by directing an agency to take additional actions when conducting *future* assessments of the employee. Further, we overrule previous Authority precedent to the contrary.¹

Arbitrator Gregory J. Lavelle found that the Agency violated the parties' collective-bargaining agreement by lowering the grievant's performance rating for two years without showing that the grievant failed to satisfy any specific performance standard. Accordingly, for both of those years, the Arbitrator directed the Agency to raise the grievant's rating in one of two critical elements. The Arbitrator also directed the Agency to conduct "future assessment[s] of the [g]rievant" in accordance with six criteria for communicating performance expectations and documenting errors.²

Of primary importance here, the Agency argues that the Arbitrator exceeded his authority because a portion of the remedies relates only to future performance years. Because the Arbitrator framed the issues as limited to two specific performance years, we agree with

the Agency that he exceeded his authority by awarding additional relief that would apply only to future performance assessments. Therefore, we set aside that portion of the remedies.

The Agency also asserts that, by requiring changes to the grievant's performance ratings, the remainder of the remedies violates management's rights to direct employees and assign work. But because the Arbitrator made findings that support his direction to change those ratings, we find that this portion of the remedies does not violate the asserted management rights.

Finally, we deny the Agency's nonfact exception because it fails to establish a deficiency in the award.

II. Background and Arbitrator's Award

The grievant's performance assessments include ratings, from level one to level five, in several elements. In 2015 and 2016, the Agency rated the grievant at level three in all of her performance elements. The Union filed grievances challenging both years' assessments, and contended that, if the Agency had followed the agreement's procedures for performance evaluations, then the grievant would have received level-five ratings in two elements.

At arbitration, the Arbitrator framed the issues as "whether the [Union] . . . established by a preponderance of the evidence that the [Agency] violated a pertinent provision of law, including the [parties' agreement], or misapplied a relevant fact when it evaluated the performance of the [g]rievant in her assessments for 2015 and/or 2016."³ Regarding performance assessments, and as relevant here, Article 21, Section 5(D) of the parties' agreement states, "[i]f there are numeric performance standards[,] they will be clearly identified in the employee's performance plan" (Section 5(D)).⁴

The Arbitrator found that "[t]here was an amazing paucity of information provided to support" the Agency's assessments of the grievant.⁵ In addition, he faulted the Agency because its "complaints" about the grievant's performance did not "set forth a specific standard to be met to be rated as outstanding."⁶ For example, although the Agency lowered the grievant's rating due to an alleged backlog of cases, the Arbitrator found that "no specific evidence" supported that

¹ See Part III.A. and note 18 below.

² Award at 6.

³ *Id.* at 3.

⁴ Exceptions Br. at 7 n.9 (quoting Collective-Bargaining Agreement (CBA) Art. 21, § 5(D)).

⁵ Award at 4.

⁶ *Id.*

allegation, and the Agency did not compare the grievant's backlog to those of other employees.⁷ Further, the Arbitrator found that, if there was a specific "standard" for an acceptable backlog, then the Agency failed to identify that standard, as Section 5(D) required.⁸ Thus, he held that the Agency should not have lowered the grievant's rating due to an asserted backlog.

The Arbitrator then compared the grievant's work to the bulleted criteria that appeared under the performance elements for which the grievant contested her ratings. The Arbitrator noted that, according to the Agency, an employee could receive a level-five rating in a particular performance element without satisfying all of the "bullet[s]" under that element.⁹

With regard to the first contested performance element, job knowledge, based on the evidence presented at the hearing, the Arbitrator found that it contained four bullets, and the grievant performed at level five in three of them. The Arbitrator cited a lack of information about the fourth bullet, but he also found that there was no allegation that the grievant failed to satisfy that bullet. Accordingly, the Arbitrator determined that the Agency should have rated the grievant at level five in the job-knowledge element. As for the second contested element, the Arbitrator found that the evidence supported the grievant's level-three rating.

As remedies, the Arbitrator directed the Agency to: (1) raise the grievant's job-knowledge rating to level five for both 2015 and 2016; and (2) "with respect to future assessment[s] of the [g]rievant," satisfy six criteria for communicating performance expectations and documenting errors.¹⁰

⁷ *Id.* at 5.

⁸ *Id.* (citing CBA Art. 21, § 5(D)).

⁹ *Id.*

¹⁰ *Id.* at 6. The Arbitrator did not cite any provisions of the agreement to support his formulation of the criteria, which included identifying: (1) "in specific detail using empirical standards what steps the [g]rievant can take to achieve a rating of [five] in each and every" element; (2) "what types of errors of others discovered by the [g]rievant can be corrected by the [g]rievant"; (3) "what types of errors discovered by the [g]rievant should not be corrected by the [g]rievant"; (4) "a finite goal for the reduction of the backlog of cases not inconsistent with the backlog of cases" for similar employees; (5) "any issues with respect to [the grievant's] performance [that] might negatively impact her assessments"; and (6) "comments made by the [g]rievant [that] may be considered to be 'naysaying.'" *Id.*

The Agency filed exceptions to the award on October 17, 2018.¹¹

III. Analysis and Conclusions

A. The Arbitrator exceeded his authority by awarding relief for future performance years.

The Agency contends that the Arbitrator exceeded his authority by directing changes to future performance-assessment processes even though he framed the issues as being limited to the grievant's assessments for 2015 and 2016.¹² As relevant here, arbitrators exceed their authority by resolving issues not submitted to arbitration,¹³ or failing to confine remedies to the issues submitted for resolution at arbitration.¹⁴

¹¹ The Union requested a fifteen-day extension of the deadline to file its opposition. The Authority granted a seven-day extension and set November 28, 2018, as the filing deadline. Order at 1. The Union eFiled its opposition on November 29, 2018, at 12:46 a.m. E.T., and separately filed a motion requesting that the Authority accept the untimely opposition. Because the Union's motion cites only "minor, ordinary [eFiling] obstacle[s]" that do not excuse its untimely submission, *AFGE, Local 3961*, 68 FLRA 443, 445 (2015) (Member DuBester dissenting), we deny the motion and do not consider the opposition.

¹² Exceptions Br. at 11-12. The Agency also argues that the Arbitrator exceeded his authority by "[w]eighing the [e]vidence" regarding the grievant's performance. *Id.* at 10. But an arbitrator's authority inherently includes the power to evaluate evidence, and the Agency's disagreement with that evaluation does not establish that the Arbitrator exceeded his authority. See *NFFE, Local 1827*, 52 FLRA 1378, 1385 (1997) (challenges to arbitrator's evaluation of evidence and determination of weight accorded such evidence provided no basis for finding award deficient); *DOJ, Fed. BOP, Fed. Corr. Inst., El Reno, Okla.*, 32 FLRA 121, 123 (1988) (citing *Metro. Corr. Ctr.*, 31 FLRA 1059, 1060 (1988)) (contentions that arbitrator's evaluation of evidence exceeded arbitrator's authority provided no basis for finding award deficient). Therefore, we reject this argument.

¹³ *E.g.*, *U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995).

¹⁴ *Veterans Admin.*, 24 FLRA 447, 450 (1986) (VA).

In assessing the Agency's contention, we reexamine Authority precedent on the bounds of an arbitrator's remedial authority. The Authority has held that arbitrators lack the power to award relief to individuals who were not encompassed within a grievance because doing so would be akin to deciding an issue that was not submitted to arbitration.¹⁵ Thus, arbitrators must limit their remedies to the individuals involved in a dispute. However, in *U.S. Department of the Army, U.S. Corps of Engineers, Northwestern Division (Corps)*, the Authority held that, even if parties include an explicit time limitation in the issues for arbitration, an arbitrator may direct an "agency to comply with [a] violated contract provision in conducting *future actions*."¹⁶ In other words, the Authority in *Corps* held that arbitrators need not limit their remedies to the time period specified in a dispute.

In cases where the issues for arbitration are explicitly limited to a particular time period, *Corps* empowers arbitrators to award relief that is *designed* to exceed the scope of the issues before them. Such outcomes directly conflict with the Authority's longstanding insistence that the issues submitted for arbitration – whether stipulated by the parties or framed by the arbitrator – constrain an arbitrator's remedial authority.¹⁷ Therefore, we overrule *Corps* insofar as it applied to cases in which the issues before an arbitrator were expressly time-limited.¹⁸ We find that, in such cases, an arbitrator's remedy must be limited not only to those "*whom* [the issues] covered," but also to the "*time frame* that [the issues] covered."¹⁹

¹⁵ See, e.g., *U.S. Army, Acad. of Health Scis., Fort Sam Houston, Tex.*, 34 FLRA 598, 600 (1990) (*Army*) (citing *U.S. Dep't of HUD*, 24 FLRA 442, 445 (1986) (*HUD*); *U.S. DOJ, Fed. Prison Sys., Fed. Corr. Facility, Fort Worth, Tex.*, 17 FLRA 278, 279-80 (1985) (*Fort Worth*)) (where stipulated issue concerned only one grievant's flextime schedule, remedy directing agency to rescind document that abolished flextime for all employees exceeded arbitrator's authority because remedy was not confined to the issue that was before the arbitrator); *AFGE, AFL-CIO, Nat'l INS Council*, 15 FLRA 355, 356-57 (1984) (*INS*) ("[T]he Arbitrator decided an issue not presented to him when he awarded relief . . . to 'other employees similarly situated,' as well as to the grievant[;] . . . consequently[,] the [a]rbitrator exceeded his authority.").

¹⁶ 65 FLRA 131, 133 (2010) (Member Beck dissenting) (emphasis added).

¹⁷ E.g., *Army*, 34 FLRA at 600; *VA*, 24 FLRA at 450; *HUD*, 24 FLRA at 445; *Fort Worth*, 17 FLRA at 279-80; *INS*, 15 FLRA at 356-67.

¹⁸ *Corps*, 65 FLRA at 133.

¹⁹ *Id.* at 135 (Dissenting Opinion of Member Beck). Member Abbott observes that the only determination that is offensive in this case is the dissent's tiresome refrain that federal arbitrators have unfettered discretion to do as they please. The Authority has now held that the discretion afforded to federal arbitrators does not reach as far as the dissent continues to assert. See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst.*,

Here, the Arbitrator framed the issues to address the Agency's evaluation of the "performance of the [g]rievant in her assessments *for 2015 and/or 2016*,"²⁰ and he awarded relief that changed the grievant's rating for those years.²¹ But he also awarded additional relief that concerned only future performance assessments.²² Applying our newly revised standard, we find that, because the Arbitrator expressly limited the issues before him to performance assessments in 2015 and 2016, he exceeded his authority by awarding additional relief for future years.²³ Therefore, we grant this part of the Agency's exceeded-authority exception and set aside the portion of the remedies that concerned only future assessments.²⁴

Miami, Fla., 71 FLRA 660, 663-64 (2020) (Member Abbott concurring; Member DuBester dissenting). Member Beck's original dissent to *Corps* proved not only to be prescient, but also consistent with our recent decisions. He, unlike our dissenting colleague (who penned *Corps* for the Authority at the time), recognized that it remains a fundamental principle in arbitration that arbitrators must confine themselves to the issues submitted for resolution and are not free to assert their "own brand of industrial justice." *Corps*, 65 FLRA at 135.

²⁰ Award at 3 (emphasis added). Member DuBester "would not find that the Arbitrator framed the issue as narrowly as the majority contends." DuBester Dissent at 12. But the Arbitrator's time-limited framing is plain and unmistakable: "The *issue in th[is] case* has been determined to be whether the [Union] has established by a preponderance of the evidence that the [Agency] violated a pertinent provision of law, including the [parties' agreement], or misapplied a relevant fact when it evaluated the performance of the [g]rievant in her assessments for 2015 and/or 2016." Award at 3 (emphasis added). Absent a stipulation, the Authority defers to an arbitrator's formulation of issues, but "once the issues have been framed, the arbitrator's authority in deciding the case has been defined." *SSA, Office of Disability Adjudication & Review*, 64 FLRA 469, 470 (2010) (Chairman Pope dissenting). Thus, we are not persuaded by the dissent's attempt to obfuscate the explicit temporal limits in the Arbitrator's issue statement.

²¹ Award at 6.

²² *Id.*

²³ Cf. *Corps*, 65 FLRA at 136 (Dissenting Opinion of Member Beck) (explaining that more generally formulated issues, without an express time limitation, could have supported prospective relief, but the parties limited the issues statement to May 2009, thereby constraining the arbitrator's remedial authority).

²⁴ Because we are setting aside this portion of the remedies as exceeding the arbitrator's authority, we do not address the Agency's argument that the same portion fails to draw its essence from the parties' agreement. Exceptions Br. at 12-13 & n.12; see *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 573 n.18 (2018) (Member DuBester dissenting).

- B. The Arbitrator did not base the award on a nonfact by overlooking a requirement for a level-five rating.

The Agency argues that the Arbitrator's award is based on a nonfact because, according to the Agency, the Arbitrator found that the grievant earned a level-five rating in job knowledge without determining that the grievant performed at a level five on a "sustained basis," as required.²⁵ The Arbitrator examined the grievant's level-five performance standards, which state under job knowledge that, "on a sustained basis, the employee will" perform in the manner described in the four accompanying bullets.²⁶ The Arbitrator then evaluated the grievant's performance with respect to each bullet individually.²⁷ And he concluded that a preponderance of the evidence²⁸ – including the grievant's testimony, which he credited – showed that the grievant's performance satisfied the level-five standards.²⁹ Further indicating that the Arbitrator gave each performance requirement careful consideration, he did not grant the grievance with respect to both contested elements.³⁰ Rather, he found that the evidence supported a level-five rating for job knowledge only.³¹

The Agency's nonfact argument merely challenges the Arbitrator's evaluation of the evidence regarding the grievant's performance, and such a challenge does not establish that the award is based on a nonfact.³² Consequently, we deny this exception.

- C. The Arbitrator's direction to change the grievant's performance rating does not excessively interfere with management's rights.

The Authority has held that the evaluation of employee performance is an exercise of management's

rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute,³³ and the Agency argues that the award violates those rights because it changes the grievant's performance ratings.³⁴ For several reasons discussed further below, the Agency asserts that the award fails to satisfy the standards for evaluating management-rights claims under *U.S. DOJ, Federal BOP (DOJ)*.³⁵

At step one of *DOJ*'s three-part framework, the question is whether the Arbitrator found a violation of a contract provision.³⁶ The Agency argues that the Arbitrator did not find a contract violation.³⁷ But the Arbitrator found that the Agency incorrectly faulted the grievant for a backlog without citing any applicable standard for backlogs or backlog reduction.³⁸ And to support that finding, the Arbitrator relied on Section 5(D), which states, "[i]f there are numeric performance standards[,] they will be clearly identified in the employee's performance plan."³⁹ Thus, the Arbitrator found a violation of Section 5(D), and the answer to the first question is yes.

At step two, the question is whether the Arbitrator's remedy reasonably and proportionally relates to the contract violation.⁴⁰ The Arbitrator found that the Agency violated the procedures set forth in Section 5(D) of the collective-bargaining agreement when it lowered the grievant's job-knowledge rating based on an alleged backlog standard that was not clearly identified.⁴¹ As relief, the Arbitrator directed the Agency to revise the flawed assessments so that the grievant received a level-five rating in the job-knowledge element for 2015 and 2016.⁴² This relief reasonably and proportionally

²⁵ Exceptions Br. at 15. 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. *NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, provides no basis for finding that an award is based on a nonfact. *AFGE, Local 953*, 68 FLRA 644, 646 (2015) (*Local 953*) (citing *AFGE, Local 2382*, 66 FLRA 664, 668 (2012)).

²⁶ Exceptions, Attach., Joint Ex. 2 at A300 (2015 Performance Plan), A315 (2016 Performance Plan).

²⁷ Award at 5.

²⁸ *Id.* at 3 (setting Union's burden of proof at preponderant evidence).

²⁹ *Id.* at 5.

³⁰ *Id.* at 5-6.

³¹ *Id.*

³² *Local 953*, 68 FLRA at 646.

³³ *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 390 (2019) (*Comptroller*) (Member DuBester dissenting, in part) ("[T]he right to evaluate employee performance extends to the determination of the rating that management will assign to a given employee." (citing *NTEU*, 47 FLRA 705, 710 (1993)).

³⁴ Exceptions Br. at 6.

³⁵ 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting).

³⁶ *Comptroller*, 71 FLRA at 390 (citing *DOJ*, 70 FLRA at 405) (finding that *DOJ* applied to management-rights challenge to an arbitrator's direction to raise a performance rating).

³⁷ Exceptions Br. at 7 & n.9.

³⁸ Award at 4-5.

³⁹ Exceptions Br. at 7 n.9 (quoting CBA Art. 21, § 5(D)).

⁴⁰ *Comptroller*, 71 FLRA at 390 (citing *DOJ*, 70 FLRA at 405). The Agency claims that the portion of the remedies that concerned only future assessments is not reasonably and proportionally related to a violation of Section 5(D). Exceptions Br. at 9. But because we have already set aside that portion of the remedies, this claim is moot.

⁴¹ Award at 5.

⁴² *Id.* at 6.

relates to the contract violation,⁴³ so the answer to the second question is yes.

The third question is whether the Arbitrator's remedy excessively interferes with management's rights.⁴⁴ The Authority has previously held that an arbitral direction to raise a performance rating "*without finding that the grievant's . . . performance actually supported*" a higher rating excessively interfered with the rights to direct employees and assign work.⁴⁵ By contrast, here, the Arbitrator made credibility determinations and factual findings to support his conclusion that the grievant's performance merited level-five ratings in the job-knowledge element, due to the procedures established in Section 5(D).⁴⁶

Nevertheless, the Agency argues that the Arbitrator excessively interfered with management's rights by "reweigh[ing]" evidence.⁴⁷ We reject that argument because, under the Authority's previous decision on this question, an arbitrator *must* evaluate pertinent evidence before directing a changed performance rating.⁴⁸ In other words, the Arbitrator did not excessively interfere with management's rights by undertaking the very analysis that the Authority's precedent required of him. The Agency also argues that the Arbitrator "merely substituted his judgment for the

[A]gency's."⁴⁹ In fact, the Agency argued before the Arbitrator that he should apply a "preponderance of the evidence" standard to decide the dispute over the grievant's rating,⁵⁰ and the Arbitrator adopted and applied that standard.⁵¹ In addition, the Agency had the opportunity to provide evidence to establish that the procedures in Section 5(D) of the collective-bargaining agreement were met, but the Arbitrator found that the Agency's case suffered from "an amazing paucity of information . . . to support" its assessments of the grievant.⁵² Further, we have rejected the Agency's nonfact challenge to the Arbitrator's evaluation of evidence that supported his direction to change the grievant's ratings.⁵³ Thus, the answer to the third question is no.⁵⁴

Because the Agency has not shown that the award violates management's rights to direct employees and assign work, we deny this exception.⁵⁵

⁴³ See *Comptroller*, 71 FLRA at 390 (where arbitrator found that agency lowered grievant's performance rating based on factors that were not part of her performance standards, remedy that required "set[ting] aside the flawed rating and . . . chang[ing] the grievant's rating" to a higher level was reasonable and proportional).

⁴⁴ *Id.* (citing *DOJ*, 70 FLRA at 405).

⁴⁵ *Id.* at 391.

⁴⁶ Award at 5 (crediting grievant's testimony regarding her performance, crediting Agency witness's testimony regarding number of bulleted criteria that had to be satisfied to earn a level-five rating, and evaluating grievant's performance relative to four bullets under job knowledge); see also *id.* (finding "no specific evidence" supported Agency's backlog allegation against grievant).

⁴⁷ Exceptions Br. at 8; see also *id.* at 9-10. The Agency's management-rights exception also relies on its Personnel Policy Manual, *id.* at 9 n.10, and an argument that the Arbitrator lacked the power to "impose[] a particular score or rating . . . without first finding that the appraising official would have given [the grievant] that score had [the appraising official] properly followed the contract," *id.* at 8 (citing *U.S. Dep't of the Treasury, Bureau of Engraving & Printing, Wash., D.C.*, 53 FLRA 146, 154 (1997)). But the record does not show, and the Agency does not assert, that it presented either the manual or this argument below, so we do not consider them. See 5 C.F.R. §§ 2425.4(c), 2429.5.

⁴⁸ See *Comptroller*, 71 FLRA at 390-91 (setting aside remedy of changed performance rating where the arbitrator did not "find[] that the grievant's . . . performance actually supported" that rating (emphasis omitted)).

⁴⁹ Exceptions Br. at 8.

⁵⁰ Exceptions, Attach., Email from Agency's Counsel to Arbitrator (Sept. 14, 2018, 3:35 PM) at A323 (citing an Authority decision that "affirmed an arbitrator's application of a 'preponderance of the evidence standard' in reviewing an employee's performance appraisal").

⁵¹ Award at 3 (framing the issue to include a preponderant-evidence standard).

⁵² *Id.* at 4.

⁵³ See Part III.B. above.

⁵⁴ For reasons expressed in his dissenting opinion in *DOJ*, Member DuBester does not agree with application of the three-part framework set forth in that decision. 70 FLRA at 409-12. However, given the unique circumstances of this case, Member DuBester agrees that the award does not excessively interfere with management's rights.

⁵⁵ Chairman Kiko agrees that the Arbitrator was, as Member Abbott's dissent suggests, simply applying the procedures that had been negotiated in the collective-bargaining agreement. Abbott Dissent at 10 ("[A]n agency and its supervisors may not simply ignore processes or procedures If those procedures or policies are not followed, the arbitrator may address them . . ."). In Chairman Kiko's view, the Authority could have remanded this case to the Agency to reevaluate the numerical requirements of backlogged cases; but to do that would simply drag this case out even more than the four to five years it has already been languishing. As Member Abbott correctly points out in numerous decisions, most recently in *U.S. DHS, U.S. CBP*, 71 FLRA 744, 746 & n.1 (2020) (Concurring Opinion of Member Abbott) (Member Abbott concurring; Member DuBester dissenting), the taxpayers are paying the bill for the Union representatives, the Agency representatives, the grievant, and the supervisor, not to mention all of the employees of the Authority who have evaluated this case. The overall rating of the grievant remained; only one element in the rating was elevated. It is time to put this matter to bed.

IV. Decision

We deny, in part, and grant, in part, the Agency's exceeded-authority exception; and we deny the Agency's nonfact and contrary-to-law exceptions. Further, we set aside the portion of the awarded relief concerning future performance assessments.

Member Abbott, dissenting in part:

I would vacate the Arbitrator's award in its entirety.

I agree with Chairman Kiko that *U.S. Department of the Army, U.S. Corps of Engineers, Northwestern Division (Corps)*¹ should no longer be followed but I would take this opportunity to clarify that, whether or not issues pertaining to a grievant's performance rating are time-limited, arbitrators are without authority to direct a specific rating for a past, present, or future performance period.

I am troubled by the conclusion (sadly supported by some Authority precedent and the majority) that simply by making certain findings an arbitrator may substitute their own judgment for that of a supervisor and determine what a grievant's performance rating should be. There are few aspects of the supervisor-employee relationship that are more fundamental to efficiency and mission-accomplishment than the ability of the supervisor to evaluate and rate an employee's performance. When it comes to quantitative, qualitative, and numeric factors, it is the supervisor who has observed all aspects of the employee's performance and it is she alone who is in the best position to determine whether and at what level the employee has been performing against those elements contained in the employee's performance plan. It is counterintuitive then to believe that an arbitrator, who hears the testimony of one or several witnesses and looks at one or several submissions, is better positioned than is a supervisor to determine what rating is warranted.

This is no small matter. In *U.S. Department of Labor*,² we determined that an arbitrator does not have the power to bestow civil service status on an employee who was terminated at the end of a probationary period. The remedial act of the arbitrator – extending the employee's creditable service – while seemingly a minor remediation, consequentially would have bestowed permanent status if permitted to stand. Similarly, performance ratings are used to establish an employee's service computation date for determining their standing during a reduction-in-force action, and eligibility for performance-based cash awards.

This is not to say that there are no aspects of the rating process that may be subject to arbitral review. Most certainly, an agency and its supervisors may not simply ignore processes or procedures – timeframes, number of mid-term evaluations, how (written or verbal) counselings will be conveyed (to name a few) – that are outlined in agency policies or the parties' negotiated

¹ 65 FLRA 131, 133 (2010) (Member Beck dissenting).

² 68 FLRA 927, 929 (2015) (Member Pizzella concurring).

collective-bargaining agreement.³ If those procedures or policies are not followed, the arbitrator may address them and direct a proportional remedy regarding the violated procedure, policy, or provision. In those cases, an appropriate remedy would include a remand to the agency to reevaluate the employee's rating using the appropriate procedures or applying the policy or provision correctly. Thus, while Chairman Kiko and I share concern with how long cases languish, I cannot agree that permitting the Arbitrator's unlawful remedy to stand will prove to bring this case to closure any sooner than if that award is vacated and the rating is returned for the supervisor to fill in the "amazing paucity of information" that the Arbitrator found was missing.⁴ Neither the Arbitrator, nor we, are in a position to fill that void. Only the consistent observations of the supervisor from 2015 and 2016, appropriately documented, can do that.

I agree with the determination that we made in *U.S. Department of the Treasury, Office of the Comptroller of the Currency* insofar as we held that awarding a grievant a numeric rating "without any consideration of whether the grievant's 'actual' [work] performance warranted" the rating.⁵ But, as noted above, I would go one step further. The majority acknowledges that "the evaluation of employee performance is an exercise of management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute."⁶ Thus, a plain reading of our Statute requires a conclusion that the "evaluation of employee performance" *is* the performance rating assigned to an employee by his supervisor. That is an exclusive management right. The actual rating *is not* a "procedure" or "arrangement" permitted by § 7106(b)(2) and (3) for which a remedy may be fashioned by an arbitrator.⁷

Accordingly, I dissent. I would conclude that any award that dictates to an agency what rating must be given to an employee excessively interferes with the plain language of § 7106(a)(2)(A) and (B).⁸ And, unlike the majority, I would also conclude that the Arbitrator's finding that "the evidence . . . showed that the grievance performance satisfied the level-five standards"⁹ is a nonfact because a fair rating can only be assigned after evaluating the entirety of the employee's performance.

Finally, although it does not change the facts of this case, it is noteworthy that Executive Order 13839 would exclude disputes concerning performance ratings from the grievance procedure altogether.¹⁰

³ Contrary to Chairman Kiko's attribution, Majority at 9 n.55, that is not what occurred here.

⁴ Majority at 8 (citing Award at 4).

⁵ 71 FLRA 387, 390 (2019) (Member DuBester dissenting, in part).

⁶ Majority at 6 (citing *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA at 390).

⁷ See 5 U.S.C. § 7106(b)(2)-(3).

⁸ See *id.* § 7106(a)(2)(A)-(B).

⁹ Majority at 6 (citing Award at 5).

¹⁰ Exec. Order 13839, 83 Fed. Reg. 25,343, 25,344 (May 25, 2018).

Member DuBester, dissenting in part:

I agree with the majority's decision to deny the Agency's nonfact and contrary-to-law exceptions. However, I disagree with the majority's conclusion in Part III.A of its decision that the Arbitrator exceeded his authority. And I strongly disagree with the majority's decision to overturn our long-standing precedent governing arbitrators' authority to award prospective relief to remedy a contractual violation.

The majority finds that the Arbitrator exceeded his authority because he limited the "time frame" of the issues to the grievant's 2015 and 2016 assessments but provided a remedy that addresses the grievant's future assessments.¹ And based on this finding, the majority overturns Authority precedent holding that, even where parties include an explicit time limitation in the issues for arbitration, an arbitrator may direct an "agency to comply with [a] violated contract provision in conducting future actions."² Both of these conclusions are wrong.

At the outset, I would not find that the Arbitrator framed the issue as narrowly as the majority contends. In determining whether the Agency violated the parties' agreement, the Arbitrator found that the assessment process it used to evaluate the grievant's performance, "as defined by . . . the [parties' agreement], is designed to enhance performance by providing employees a[n] opportunity to improve and to obtain their full potential *by being informed of specific requirements to be rated as outstanding* in the various assessment categories."³ Noting that it was "acknowledged" that the Agency "must follow the processes set forth in the [agreement] to make the assessment," the Arbitrator then determined that "[t]he question before [him] is whether the [Agency] complied with the [agreement] in making the assessments."⁴

Directly addressing these issues, the Arbitrator concluded that the Agency's assessment of the grievant lacked the details necessary to accurately appraise the grievant's performance. And he also found that the Agency failed to adequately inform the grievant of the standards by which it assessed her performance.

For instance, with respect to the grievant's alleged "backlog" of cases, the Arbitrator found that "there was no specific evidence of how" the backlog exceeded the Agency's standard or compared to the

backlog of other employees.⁵ And he also concluded that, if the grievant "was to be down-rated for 'backlog,' the standard for 'backlog' should have been communicated under Article 21, Section 5(D)" of the parties' agreement.⁶ Similarly, with respect to the Agency's reliance upon "complaints" regarding the grievant's performance, the Arbitrator noted that the Agency had provided "nothing which set forth a specific standard to be met to be rated as outstanding" with respect to this criterion.⁷

¹ Majority at 5.

² *Id.* at 4 (quoting *U.S. Dep't of the Army, U.S. Corps of Eng'rs, Nw. Div.*, 65 FLRA 131, 133 (2010) (*Corps*) (Member Beck dissenting)).

³ Award at 3 (emphasis added).

⁴ *Id.* at 4.

⁵ *Id.* at 5.

⁶ *Id.* As noted by the majority, this provision states that "[i]f there are numeric performance standards[,] they will be clearly identified in the employee's performance plan." Majority at 2 & n.4 (citing *Exceptions Br.* at 7 n.9 (quoting *Collective-Bargaining Agreement, Art. 21, § 5(D)*)).

⁷ Award at 4.

Consistent with these findings, the Arbitrator directed the Agency to take steps during future assessments of the grievant to address these deficiencies.⁸ Because these directives are directly responsive to the issues that were before the Arbitrator, I would find that they fall well within his broad discretion to fashion an appropriate remedy for the Agency's violations of the parties' agreement.⁹ And based on this finding, I would further conclude that there is no need to "reexamine"¹⁰ – much less "overrule"¹¹ – our decision in *U.S. Department of the Army, U.S. Corps of Engineers, Northwestern Division (Corps)*¹² to deny the Agency's exception.

In *Corps*, the Authority held that, even if parties include an explicit time limitation in the issues for arbitration, an arbitrator may direct an agency to "comply with [a] violated contract provision in conducting future actions."¹³ The majority concludes that *Corps* must be overturned because it

⁸ The Arbitrator directed the Agency to provide the grievant with "specific detail using empirical standards what steps the [g]rievant can take to achieve a rating of [five] in each and every category" and to "[t]imely document to the [g]rievant any issues with respect to her performance which might negatively impact her assessments." *Id.* at 6. And more specifically, he directed the Agency to "[i]dentify a finite goal for the reduction of the backlog of cases not inconsistent with the backlog of cases for persons in the classification of the [g]rievant," and to "[c]arefully analyze and document comments made by the [g]rievant which may be considered to be 'naysaying'" to ensure that comments made by her "in her role as advocate for the bargaining unit are not used as a reason to decline to rate [her] as a [five] in any category." *Id.*

⁹ *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div.*, 60 FLRA 530, 532 (2004) (*Indian Head*) ("Arbitrators do not exceed their authority by addressing any issue that is necessary to decide an issue before the arbitrator, or by addressing any issue that necessarily arises from issues specifically included in an issue before the arbitrator.") (internal citations omitted).

My colleague's assertion that this conclusion affords "unfettered discretion" on the part of arbitrators is unfounded. Majority at 5 n.19. As noted, the Arbitrator framed the issue before him to include whether the Agency complied with the parties' agreement in assessing the grievant, which included informing the grievant of the specific requirements to be rated as outstanding. Award at 3-4. Thus, he did not exceed his authority by addressing that issue in his awarded remedies. This conclusion is certainly not inconsistent with our decision in *SSA, Office of Disability Adjudication & Review*, 64 FLRA 469 (2010) (Chairman Pope dissenting), the case upon which my colleague relies for this assertion. Majority at 5 n.20. In *SSA*, we simply held that an arbitrator exceeded his authority by ruling on a "new substantive matter" that was "unrelated to the issues the Arbitrator had already formulated." 64 FLRA at 470.

¹⁰ Majority at 4.

¹¹ *Id.* at 5.

¹² 65 FLRA 131.

¹³ *Id.* at 133 (emphasis added).

"directly conflict[s] with the Authority's longstanding insistence that the issues submitted for arbitration . . . constrain an arbitrator's remedial authority."¹⁴ But, as with its prior decisions overturning long-standing Authority case law,¹⁵ the majority has failed to set forth a plausible rationale for discarding this well-established precedent.

At the outset, the *Corps* decision does not "directly conflict"¹⁶ with any of the decisions cited by the majority for this proposition. For instance, in *U.S. Army, Academy of Health Sciences, Fort Sam Houston, Texas*,¹⁷ the Authority concluded that the award's remedy – which directed the agency to rescind a directive that applied to all employees – exceeded the scope of the stipulated issue, which concerned only one grievant's flextime schedule. Similarly, in *AFGE, AFL-CIO, National INS Council*¹⁸ and *U.S. DOJ, Federal Prison System, Federal Correctional Facility, Fort Worth, Texas*,¹⁹ the Authority found that the arbitrators exceeded their authority because they awarded remedies that were not limited to the grievant.

The Authority reached a similar conclusion in *U.S. Department of HUD*,²⁰ where it vacated an award that was not limited to bargaining-unit employees. And in *Veterans Administration*,²¹ the Authority concluded that the arbitrator exceeded his authority because he directed the agency to allow the grievant to apply for future job vacancies after concluding that the agency *had not violated* the parties' agreement by terminating the grievant, which was the *sole issue* before the arbitrator.

¹⁴ Majority at 4-5 & n.17 (citing *U.S. Army, Acad. of Health Scis., Fort Sam Houston, Tex.*, 34 FLRA 598, 600 (1990) (*Army*); *Veterans Admin.*, 24 FLRA 477, 450 (1986) (*VA*); *U.S. Dep't of HUD*, 24 FLRA 442, 445 (1986) (*HUD*); *U.S. DOJ, Fed. Prison Sys., Fed. Corr. Facility, Fort Worth, Tex.*, 17 FLRA 278, 279-80 (1985) (*Fort Worth*); *AFGE, AFL-CIO, Nat'l INS Council*, 15 FLRA 355, 356-57 (1984) (*INS*)).

¹⁵ See, e.g., *NTEU*, 71 FLRA 703, 712 (2020) (Dissenting Opinion of Member DuBester); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 675 (2020) (Dissenting Opinion of Member DuBester); *OPM*, 71 FLRA 571, 578 (2020) (Dissenting Opinion of Member DuBester); *U.S. Dep't of Energy, W. Area Power Admin.*, 71 FLRA 111, 113 (2019) (Dissenting Opinion of Member DuBester); *U.S. Small Bus. Admin.*, 70 FLRA 525, 531 (2018) (Dissenting Opinion of Member DuBester); *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 409 (2018) (Dissenting Opinion of Member DuBester).

¹⁶ Majority at 4.

¹⁷ 34 FLRA at 600.

¹⁸ 15 FLRA at 356.

¹⁹ 17 FLRA at 278.

²⁰ 24 FLRA at 445.

²¹ 24 FLRA at 451.

Not one of these decisions compels us to reexamine our decision in *Corps*. Indeed, the *Corps* decision *explicitly recognized* the principle that “if a grievance is limited to a particular grievant, then the remedy must be similarly limited,”²² and it modified the challenged award to clarify that its prospective relief “applies only to the grievant.”²³ In short, the majority fails to demonstrate that our decision in *Corps* conflicts with Authority precedent, and its decision to overturn this precedent should be rejected on this basis alone.

But more fundamentally, the majority’s decision to vacate the Arbitrator’s award and overturn *Corps* offends the broad discretion properly afforded to arbitrators in fashioning appropriate remedies.²⁴ The Authority has long held that arbitrators are empowered to address any issue “that necessarily arise[s]” from the issues before them.²⁵ Applying this principle, the Authority has consistently concluded 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.”²⁶

In setting aside a portion of the Arbitrator’s award that is directly responsive to the issues before him, and which therefore falls squarely within the Arbitrator’s broad remedial authority, the majority simply ignores

these governing principles. And in the course of reaching this outcome, the majority overturns long-standing Authority precedent, and significantly limits the ability of arbitrators to direct future compliance with contract provisions, without articulating a plausible rationale for doing so.

Accordingly, I dissent.

²² *Corps*, 65 FLRA at 133.

²³ *Id.* at 134.

²⁴ *Indian Head*, 60 FLRA at 532 (“Both the Authority and Federal courts have consistently emphasized the broad discretion to be accorded arbitrators in the fashioning of appropriate remedies”); *see also Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 519 (1986) (*Air Force*) (same).

²⁵ *Indian Head*, 60 FLRA at 532; *Air Force*, 24 FLRA at 519 (noting that “the Federal courts permit an arbitrator to extend the award to issues that necessarily arise from the issues specifically included in a submission agreement or the arbitrator’s formulation of the issues submitted in the absence of a stipulation by the parties”); *see also United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (arbitrators commissioned to interpret and apply collective-bargaining agreements are expected to “bring [their] informed judgment[s] to bear in order to reach a fair solution of a problem,” and “[t]his is especially true when it comes to formulating remedies”).

²⁶ *U.S. Dep’t of the Treasury, IRS, Wash., D.C.*, 66 FLRA 712, 715 (2012) (Member Beck dissenting); *see also U.S. Dep’t of the Air Force, Joint Base Elmendorf-Richardson*, 69 FLRA 541, 547 (2016) (Member Pizzella dissenting) (“it is well[-]established that an arbitrator may prospectively direct an agency to comply with a violated contract provision”); *Air Force*, 24 FLRA at 520 (concluding that arbitrator did not exceed his authority by “fashioning an award . . . which directs the [agency] to comply with the terms of [the parties’] agreements, as interpreted by the [a]rbitrator”).