72 FLRA No. 24

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
BOISE VETERANS ADMINISTRATION
MEDICAL CENTER
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1273
(Union)

0-AR-5576

DECISION

March 9, 2021

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

I. Statement of the Case

With this case, we remind arbitrators that they must limit their decisions to those issues submitted to arbitration.[1] We also remind agencies that merely complying with Occupational Safety and Health Administration (OSHA) standards does not demonstrate that an award of environmental-differential pay (EDP) is contrary to law.[2]

Arbitrator Pilar Vaile found that the grievants were entitled to EDP because they worked in close proximity to high-hazard microorganisms, high-hazard toxic chemicals, and/or low-hazard toxic chemicals.[3] The Agency argues that the Arbitrator's award is contrary to law, ambiguous and contradictory, fails to draw its essence from the parties' agreement, and that the Arbitrator exceeded her authority. As described below, the Agency fails to demonstrate how the award is contrary to law, ambiguous and contradictory, or fails to draw its essence from the parties' agreement. However, we agree that the Arbitrator exceeded her authority, in part. Accordingly, we vacate the award, in part.

II. Background and Arbitrator's Award

On July 30, 2015, the Union filed a grievance against the Agency alleging violations of the parties' agreement for failing to pay housekeepers EDP. On September 5, 2017, the Union amended the grievance to include linen and food service workers. The Agency denied the grievance, and the Union invoked arbitration.

The issue, as framed by the Arbitrator, was whether housekeepers, laundry and linen workers, and food service workers are entitled to an 8% or a 4% EDP based on occupational exposure to hazardous microorganisms and/or toxic chemicals.[4]

The Arbitrator found that the grievants "are occupationally exposed to highly hazardous . . . microorganisms through working with or in close proximity to (1) blood, bodily fluids, and [other potentially infectious material (OPIM)];[5] (2) red bagged hazardous waste;[6] (3) sharps;[7] [and] (4) . . . isolation

[1] *U.S. Dep't of HHS, Food & Drug Admin., N.J. Dist.*, 61 FLRA 533, 535 (2006) (*HHS*) (Member Pope dissenting).

[2] *See U.S. Dep't of VA, Cent. Ark. Veterans Healthcare Sys. Cent.*, 71 FLRA 593, 595 (2020) (*Arkansas Veterans*) (then-Member DuBester concurring).

[3] Award at 185.

[4] Award at 13 (stating the issue as follows: "Are housekeepers and linen and food service workers entitled [to] either an 8% or a 4% . . . environmental differential pay under Part II, Categories 4, 5[,] and/or 6 of [5 C.F.R. § 532.511, and Appendix A] based on their occupational exposure(s) to unusually severe hazards or working conditions, and resultant potential for serious personal injury that is not practically eliminated by [personal protective equipment (PPE)] or other safety measures?").

[5] The Arbitrator emphasized that housekeepers are exposed to hazardous microorganisms through exposure to urine, saliva, mucus, semen, and feces if cleaning guest rooms, and blood and bone fragments if cleaning operating rooms. *Id.* at 31. The Arbitrator also emphasized that the Agency admitted that all housekeepers clean up blood spills and bodily fluids. *Id.* at 32. The Arbitrator found that laundry and linen workers are exposed to hazardous microorganisms through removing and sorting laundry containing blood, urine, and feces. *Id.* at 33. The Arbitrator also noted that the Agency acknowledged that laundry workers are exposed to "biomaterial" regularly. *Id.* Finally, the Arbitrator found that food service workers are exposed to hazardous microorganisms through exposure to red bagged trays which, according to testimony, often contain visible OPIM. *Id.* at 34. The Arbitrator also found that food service workers are exposed to "bloody cotton balls, needles or needle caps, butterfly clips, and bodily fluids." *Id.*

[6] The Arbitrator noted that all waste from isolation rooms and all waste containing blood, bodily fluids, or OPIM is to be placed in red biohazard waste bags. *Id.* at 35. However, the Arbitrator found that the red bags punctured easily, that nurses regularly failed to tie the red bags, and that food service workers had to tear open tied red bags resulting in contents spilling onto other trays or the worker. *Id.* at 38. The Arbitrator also noted that testimony demonstrated that sharps sometimes ended up in the red bags. *Id.*

rooms."[8] The Arbitrator also found that the grievants were exposed to "hazardous drugs"[9] through cleaning the pharmacy and "clean room," and through blood, bodily fluids, and OPIM expelled from patients during a "24-hour chemo precaution period."[10] The Arbitrator also found that despite the risks of exposure to these "hazardous drugs" as noted by OSHA and a 2009 policy directive, the Agency "do[es] not seem to understand, accept, recognize, or take action based on it."[11] The Arbitrator found that the grievants are regularly exposed and required to use "toxic industrial" cleaning chemicals.[12] The Arbitrator also found that Agency testimony "reflect[ed] deep disregard or disdain for the safety of the [g]rievants . . . [and] supports the finding that the Agency has failed to identify, assess, and adequately protect the [g]rievants from, hazards related to the heavy-duty cleaning chemicals they use for extended periods of time."[13] The Arbitrator further found that safety procedures and protective equipment employed by the Agency failed to practically eliminate the potential for serious personal injury, that the Agency failed to follow its own safety policies, and that the training was inadequate.

Based on these findings, the Arbitrator sustained the grievance, finding that the grievants were entitled to EDP under 5 C.F.R. § 532.511, and Appendix A.[14] As remedies, the Arbitrator ordered the parties to exchange discovery for the purposes of determining the exposure of the individual grievants, and ordered the Agency to "initiate and complete a comprehensive review of all hazards and safety controls raised herein, and take any action . . . needed to meet its legal obligation to provide the grievants with a safe work environment."[15] The Arbitrator retained jurisdiction regarding the damages until "conclusion of the damages phase by either negotiated settlement or hearing before the undersigned."[16]

On December 22, 2019, the Agency filed exceptions to the Arbitrator's award. On January 31, 2020, the Union filed its opposition to the Agency's exceptions.[17]

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[7] The Arbitrator found that all grievants were exposed to microorganisms through improperly disposed of sharps. *Id.* at 39.

[8] *Id.* at 28. The Arbitrator found that housekeepers are exposed to microorganisms through cleaning isolation rooms. *Id.* at 44. The Arbitrator emphasized that while the Agency had policies to protect housekeepers who clean isolation rooms, the policies were not followed. *Id.* at 45-47.

[9] The Arbitrator apparently uses the term "hazardous drugs" to refer to high-hazard toxic chemicals. This is supported by the fact that the Arbitrator references category 4 of Appendix A, "Poisons (toxic chemicals) – high degree hazard," when discussing the issues alleged in the grievance. *Id.* at 8-9. We also note that neither party excepts to the use of "hazardous drugs" in referring to high-hazard toxic chemicals.

[10] *Id.* at 50-52.

[11] *Id.* at 57-58.

[12] *Id.* at 58. The Arbitrator emphasized that not only was the Agency unaware of hazard ratings for the chemicals the grievants used, but that Agency testimony regarding the hazard posed by cleaning chemicals was disturbing. *Id.* at 69-70 (finding the Agency dismissed the hazardousness of the chemicals stating that they "'don't deserve respect as chemicals' because they 'don't require decontaminating every inch of your body after [you're] done using them,' or 'full-face respirators,' or 'impervious chemical suits'").

[13] *Id.* at 71.

[14] As relevant here, Appendix A provides that employees are entitled to 8% EDP for being exposed to high-hazard microorganisms, if they demonstrate that they "work[] with or in close proximity to micro-organisms which involves potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease . . . [and] wherein the use of safety devices and equipment, medical prophylactic procedures . . . and other safety measures . . . have not practically eliminated the potential for such personal injury[;]" employees are entitled to 8% EDP for being exposed to high-hazard toxic chemicals, if they demonstrate that they "work[] with or in close proximity to [toxic chemicals] . . . which involves potential serious personal injury such as permanent or temporary, partial or complete loss of faculties and/or loss of life . . . wherein protective devices and/or safety measures . . . have not practically eliminated the potential for such personal injury[;]" and employees are entitled to 4% EDP for being exposed to low-hazard toxic chemicals, if they demonstrate that they "work[] with or in close proximity to [toxic chemicals] in situations for which the nature of work does not require the individual to be in as direct contact with, or exposure to, the more toxic agents as in the case with work described under high hazard . . . and wherein protective devices and/or safety measures have not practically eliminated the potential for personal injury." 5 C.F.R. pt. 532, subpt. E, app. A.

[15] Award at 185.

[16] *Id.*

[17] The Union filed a motion for a thirty-day extension of time to file its opposition. The Authority granted the Union's motion, in part, giving the Union until February 4, 2020 to file its opposition. Accordingly, the Union's Opposition is timely.

III. Preliminary Matters: The Agency's exceptions are not interlocutory.

The Union argues that the Agency's exceptions are interlocutory because the Arbitrator retained jurisdiction regarding the remedy of damages.[18] We disagree.

The Authority has held that exceptions to an award are not interlocutory when the award represents a complete resolution of all of the issues submitted to arbitration.[19] Here, the Arbitrator resolved the issue as framed by her and determined that the grievants were entitled to EDP.[20] While the Arbitrator did "retain[] jurisdiction regarding remedy/damages until conclusion of the damages phase,"[21] the Authority has held that an award is final even though the arbitrator retained jurisdiction to assist the parties in the implementation of awarded remedies, including the specific monetary relief to be awarded.[22] The Arbitrator concluded that the grievants were entitled to 8% EDP for exposure to high-hazard microorganisms, 8% EDP for exposure to high-hazard toxic chemicals, and 4% EDP for exposure to low-hazard toxic chemicals.[23] It is clear to us that the Arbitrator's purpose in retaining jurisdiction was to assist the parties in implementing that remedy, specifically, the amount of monetary relief for each grievant. Therefore, the award is final, and the Agency's exceptions are not interlocutory. Accordingly, we review the exceptions.

IV. Analysis and Conclusions

A. The award is not contrary to law.[24]

The Agency argues the award is contrary to the 5 U.S.C. § 5343(c)(4) because it fails to apply OSHA permissible exposure limits,[25] fails to consider how microorganisms are transmitted in determining if the potential for serious personal injury is practically eliminated,[26] and fails to consider the existence of medical prophylactic procedures and antiserums which practically eliminate the potential for serious personal injury.[27]

The Agency argues that the award for EDP is contrary to law because it did not apply OSHA permissible exposure limits. Specifically, the Agency argues that 5 U.S.C. § 5343(c)(4) requires EDP to "be determined by applying occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970."[28] This is very similar to the argument made by the Agency in *U.S. Department of VA, Central Arkansas Veterans Healthcare System Central* (*Arkansas Veterans*).[29] Like in that case, the Agency has failed to demonstrate how the award is not in compliance with 5 U.S.C. § 5343(c)(4), but instead is merely disputing the weight the Arbitrator ascribed to evidence and testimony.[30] Furthermore, the Authority has held that it "will not find

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[18] Opp'n Br. at 8.

[19] *U.S. DOD Educ. Activity*, 70 FLRA 863, 864 (2018) (then-Member DuBester dissenting on other grounds) (citing *Cong. Rsch. Emp. Ass'n, IFPTE, Loc. 75*, 64 FLRA 486, 489 (2010); *U.S. Dep't of the Navy, Norfolk Naval Shipyard*, 63 FLRA 144, 144 n.* (2009)); *see also U.S. Small Bus. Admin.*, 70 FLRA 729, 729 (2018) (then-Member DuBester dissenting on other grounds) (citing *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div. Keyport, Keyport, Wash.*, 69 FLRA 292, 293 (2016)) (finding exceptions interlocutory because the arbitrator had not yet resolved the grievance on the merits).

[20] Award at 185.

[21] *Id.*

[22] *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1167 n.10 (2020) (then-Member DuBester concurring) (citations omitted); *AFGE, Nat'l Council of EEOC Locs. No. 216*, 65 FLRA 252, 253-54 (2010) (citing *U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 158 (2009); *U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007)); *see also NTEU, Chapter 164*, 67 FLRA 336, 337 (2014) ("Such an award is final for purpose of filing exceptions because, while the award may leave room for further disputes about compliance, the award does not indicate that the arbitrator or the parties contemplate the introduction of some new measure of damages.").

[23] Award at 185.

[24] The Authority reviews questions of law de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In conducting a de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party established that they are nonfacts. *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring).

[25] Exceptions Br. at 7 (arguing that entitlement to 8% EDP for exposure to "hazardous drugs" is contrary to 5 U.S.C. § 5343(c)(4) because award fails to apply OSHA permissible exposure limits); *id.* at 9 (arguing that entitlement to 4% EDP for exposure to toxic chemicals is contrary to § 5343(c)(4) because the award fails to apply OSHA permissible exposure limits).

[26] *Id.* at 12.

[27] *Id.* at 14.

[28] *Id.* at 7-8 (quoting 5 U.S.C. § 5343(c)(4)).

[29] 71 FLRA at 595 n.30.

[30] Exceptions Br. at 7-8 (arguing that the grievants are not exposed to "hazardous drugs" because OSHA does not have a permissible exposure limit for the high-hazard toxic chemicals evaluated in the award); *id.* at 9 (arguing that "no other chemical at [the Agency] exceeded OSHA exposure limits"); *id.* at 9-10 (arguing that the Arbitrator's finding that the chemicals were toxic is contrary to OSHA permissible exposure limits).

an award contrary to § 5343(c)(4) if it is consistent with 5 C.F.R. part 532, subpart E and Appendix A."[31] The Agency did not argue that the Arbitrator's failure to apply OSHA permissible exposure limits is contrary to 5 C.F.R. § 532.511, and Appendix A. Accordingly, we deny the Agency's exception as failing to demonstrate how the award is contrary to law.[32]

The Agency also argues the award of 8% EDP for exposure to high-hazard microorganisms is contrary to law because it fails to consider how microorganisms are transmitted.[33] However, the Agency does not explain how failing to consider how microorganisms are transmitted is contrary to 5 U.S.C. § 5343(c)(4) or 5 C.F.R. § 532.511.[34] Furthermore, based on the record, the Arbitrator did consider transmission in finding that the grievants were exposed to highly hazardous microorganisms "through working with or in close proximity to . . . blood, bodily fluids, and OPIM."[35] The Agency failed to except to this factual finding as a nonfact; therefore, we defer to it.[36] As such, the Agency

[31] *U.S. Dep't of the Army, Corpus Christi Army Depot Corp., Corpus Christi, Tex.*, 56 FLRA 1057, 1065 (2001).

[32] *Arkansas Veterans*, 71 FLRA at 595. The Agency also argues that the award of 4% EDP is contrary to law because the Arbitrator "impermissibly consider[ed the] Agency's safety practices in determining whether chemicals are hazardous." Exceptions Br. at 10-11. The Agency points to two statements made by the Arbitrator that are clearly dicta to support its exception. *See* Award at 76-77 ("[B]ecause of the poor safety controls utilized by the Agency, . . . the inherent potential for injury is heightened."), 174 ("In the *alternative*, the undersigned finds that [g]rievants' potential for serious personal injury while working with the hazardous cleaning chemicals is aggravated by the Agency's dysfunctional safety control system, thereby entitling them to a 4% EDP on that basis." (emphasis added)). The Authority has held that statements that are not essential to the [a]rbitrator's decision are dicta, and dicta does not provide a basis for finding an award deficient. *See SSA, Off. of Hearings Operations*, 71 FLRA 687, 689 (2020) (*SSA-OHO*) (then-Member DuBester dissenting) (citing *AFGE, Council of Prison Locs. 33, Loc. 3690*, 69 FLRA 127, 131 (2015)). Both statements were not essential to the decision, but were the Arbitrator's commentary on the Agency's poor safety controls. As such, we deny this exception. For the same reasons, we also deny the Agency's exception arguing that the award is contrary to law because the Arbitrator considered the "susceptibility" of the grievants in awarding EDP. Exceptions Br. at 17-18; Award at 57 ("[T]he evidentiary record indicates that some of the [g]rievants are already immunocompromised. Many of the [g]rievants are [v]eterans and . . . are statistically more likely to have compromised immune systems."), 112 ("The results of the questionnaires indicate a number of [h]ousekeepers may have generally compromised health."). Again, both statements are not essential to the decision and are therefore dicta. *See SSA-OHO*, 71 FLRA at 689. Accordingly, we deny this exception.

[33] Exceptions Br. at 12-14. The Agency also argues that the award of 8% EDP for exposure to microorganisms is contrary to law because, according to the Agency, the Arbitrator found that the risk was practically eliminated. *Id.* at 16-17. However, this assertion is incorrect. Award at 176-81 (finding that the Agency has not practically eliminated the risks of serious personal injury). The statement the Agency is referring to is a summary of Agency witness testimony, not the Arbitrator finding that the Agency practically eliminated the risk. *See id.* at 167 ("While Ms. Gillis conceded that housekeepers cleaning up diarrhea from the bathroom floor can contract [hepatitis] C, she stressed that would only occur '[i]f . . . you're not wearing appropriate PPE.'"); *id.* ("She opines that although the possibility of dangerous exposures cannot be eliminated entirely, the risk of serious injury from such exposure can be and is practically eliminated here."). Accordingly, we deny the exception. *See U.S. Dep't of Educ., Off. of Fed. Student Aid*, 71 FLRA 1105, 1107 n.17 (2020) (then-Chairman Kiko dissenting) (citing *AFGE, Loc. 1897*, 67 FLRA 239, 241 (2014) (Member Pizzella concurring)) (finding an exception based on a misunderstanding of the award does not demonstrate that the award is deficient).

[34] Exceptions Br. at 12-14. Section 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 . . . support a ground" listed in § 2425.6(a)-(c). 5 C.F.R. § 2425.6(e)(1). Accordingly, the Authority will deny an exception when a party does not provide arguments to support its exception. *See U.S. Dep't of HHS, Food & Drug Admin.*, 71 FLRA 913, 914 (2020) (then-Member DuBester concurring) (citing *AFGE, Loc. 2328*, 70 FLRA 797, 798 (2018)).

[35] Award at 28. The Arbitrator found that housekeepers are exposed to hazardous microorganisms through exposure to urine, saliva, mucus, semen, and feces if cleaning guest rooms and blood and bone fragments if cleaning operating rooms. *Id.* at 31. The Arbitrator also found that the Agency admitted that all housekeepers clean up blood spills and bodily fluids. *Id.* at 32. The Arbitrator found that laundry and linen workers are exposed to hazardous microorganisms through removing and sorting laundry containing blood, urine, and feces. *Id.* at 33. The Arbitrator also noted that the Agency acknowledged that laundry workers are exposed to "biomaterial" regularly. *Id.* Finally, the Arbitrator found that food service workers are exposed to hazardous microorganisms through exposure to red bagged trays which, according to testimony, often contain visible OPIM. *Id.* at 34. The Arbitrator also found that food service workers are exposed to "bloody cotton balls, needles or needle caps, butterfly clips, and bodily fluids." *Id.*

[36] *NLRB Prof'l Ass'n*, 71 FLRA 737, 739 (2020) (citing *U.S. DOJ, Fed. BOP*, 68 FLRA 728, 731 (2015)).

has failed to demonstrate that the award is contrary to law, and we deny this exception.

The Agency argues that the award is contrary to 5 C.F.R. § 532.511, and Appendix A because "it ignores the existence of medical prophylactic procedures and antiserums which practically eliminate the potential for serious personal injury."[37] However, the Agency's argument is merely disputing the Arbitrator's evaluation of the evidence in determining that the potential for serious personal injury has not been practically eliminated.[38] The Authority will not find an award deficient when the excepting party is merely disputing the evaluation of the evidence.[39] Accordingly, we deny this exception.

B. The award is not incomplete, ambiguous, or contradictory.[40]

The Agency argues the award is ambiguous and contradictory because the criteria for determining whether a particular chemical is hazardous are vague and contradictory,[41] the award is vague because it does not define what constitutes a dangerous microorganism,[42] and the award is vague because the Agency is unable to discern which hazards and safety controls it should review.[43] Despite the Agency's claims, the Arbitrator provided a clear standard for hazardous chemicals.[44] The Agency's assertion that it cannot implement the award because it does not know what a dangerous microorganism is under 5 C.F.R. § 532.511, and Appendix A, is confounding. Not only is the Agency charged with providing medical care to U.S. veterans, but Appendix A provides definitions of high-hazard microorganisms.[45] Similarly confounding is the Agency's claim that it does not know what hazards and safety controls it should review. In her 186-page award, the Arbitrator completes a thorough examination of the hazards faced by the grievants,[46] the Agency's insufficient engineering controls,[47] the Agency's "flawed" policies/procedures,[48] the Agency's "substandard" and ineffective training,[49] and the "numerous shortcomings with the Agency's [personal protective equipment (PPE)]."[50] Simply put, the Agency's assertion is not supported by the record. Because the Agency fails to demonstrate how the award is so unclear or uncertain to make it impossible to implement, we deny these exceptions for failing to establish that the award is deficient.[51]

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[37] Exceptions Br. at 14.

[38] *Id.* at 15 (arguing that it "provided unrebutted testimony that prophylaxis and proper treatment is very effective at preventing infection after a needlestick"); *id.* at 16 ("The Agency provided unrebutted testimony that the hepatitis B vaccine is effective at preventing an employee from contracting hepatitis B."); *id.* ("The Agency also provided unrebutted testimony that HIV prophylaxis is effective in preventing transmission, and that there is effective treatment for hepatitis C.").

[39] *AFGE, Loc. 2076*, 71 FLRA 1023, 1025 n.23 (2020) (then-Member DuBester concurring) (citing *AFGE, Loc. 953*, 68 FLRA 644, 646 (2015) ("[A] disagreement with the [a]rbitrator's evaluation of the evidence provides no basis for finding the award deficient.")).

[40] The Authority will find an award deficient when the award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible. *See U.S. Dep't of the Army, Corps of Eng'rs, Walla Walla Dist., Pasco, Wash.*, 63 FLRA 161, 163 (2009). Furthermore, the Authority has held that the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain. *See NATCA*, 55 FLRA 1025, 1027 (1999) (Member Wasserman dissenting).

[41] Exceptions Br. at 18-22.

[42] *Id.* at 21-22. The Agency also argues that the award of 8% EDP for exposure to microorganisms is contradictory because the Arbitrator found the risk was practically eliminated. *Id.* at 21. However, as discussed above, the Agency's assertion is incorrect. *Supra* note 33. Accordingly, we deny the exception. *See AFGE, Loc. 1698*, 70 FLRA 96, 99 (2016) (citations omitted) (denying exceptions that were based on previously denied exceptions).

[43] Exceptions Br. at 26-27.

[44] Award at 182 ("Grievants working with one or more of the [twenty-nine] more hazardous cleaning chemicals or their like (or working with any cleaning chemical in any manner or duration that exceeds, or is sufficiently harmful as to presume that it exceeds until established otherwise, [permissible exposure limits] standards under OSHA, [Division of Occupational Safety and Health of California], [National Institute for Occupational Safety and Health], [The American Conference of Governmental Industrial Hygienists], or similar entities) are entitled to a 4% EDP . . . .").

[45] 5 C.F.R. pt. 532, subpt. E, app. A (defining high-hazard microorganisms as "micro[]organisms which involve[] potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease;" and "organisms pathogenic for man").

[46] Award at 168-75; *see also id.* at 109-11 (finding that the Agency conducts several types of hazard assessments, but fails to use the assessments to correct any of the issues uncovered).

[47] *Id.* at 176-77.

[48] *Id.* at 178; *see also id.* at 90-94 (finding that the policies are not enforced and are often violated by medical staff).

[49] *Id.* at 178-79; *see also id.* at 104-06 (finding that a large portion of the annual training is simply referring employees to the location of policies/procedures, but there is "no reason to believe [the training] has been functionally acquired by the [g]rievants").

[50] *Id.* at 181; *see also id.* at 129 (finding there are "clear patterns of benign neglect on the part of the Safety Officer regarding the selection of appropriate PPE for [g]rievants").

[51] *U.S. DHS, U.S. CBP*, 64 FLRA 916, 919 (2010) (denying a party's exception alleging the award was deficient as incomplete, ambiguous, or contradictory because the party failed to demonstrate how the award was impossible to implement).

C. The award draws its essence from the parties' agreement.[52]

The Agency argues that the remedy — that the Agency "initiate and complete a comprehensive review of all hazards and safety controls raised herein, and take any action . . . needed to meet its legal obligation to provide the [g]rievants with a safe work environment"[53] — fails to draw its essence from the parties' agreement because it conflicts with Article 29 of the parties' agreement.[54] According to the Agency, Article 29 requires "[s]pecific procedures for preventing and abating safety and health hazards [to] be jointly developed with the Union."[55] We fail to see how Article 29 conflicts with the remedy, as Article 29 simply requires the Agency to work with the Union if it changes the existing procedures in implementing the award. Furthermore, the Authority has held that an arbitrator has wide discretion to fashion a remedy.[56] As such, the Agency has failed to demonstrate how the remedy fails to draw its essence from the parties' agreement. Accordingly, we deny the Agency's essence exception.

D. The Arbitrator exceeded her authority, in part.[57]

The Agency argues that the Arbitrator exceeded her authority by requiring it to review all hazards and safety controls, because, by awarding such a remedy, the Arbitrator decided an issue not submitted to arbitration. We agree.

The Authority has held that "although the arbitrator is free to [frame] the issue, once the arbitrator has resolved that issue . . . the arbitrator has fulfilled his or her obligation to the parties. If the arbitrator proceeds to address other issues, the arbitrator exceeds his or her authority."[58] Here, the Arbitrator framed the issue as whether the grievants were entitled to an 8% or a 4% EDP based on exposure to hazardous microorganisms and/or toxic chemicals.[59] However, after resolving the framed issue, the Arbitrator went on to order the Agency to review the hazards and safety procedures discussed in the award.[60] Such a remedy is beyond her authority because it addresses an issue that was not submitted to arbitration.

Accordingly, we grant the Agency's exceeds-authority exception,[61] and we vacate the portion of the award requiring the Agency to "initiate and complete a comprehensive review of all hazards and safety controls raised herein, and take any action . . . needed to meet its legal obligation to provide the [g]rievants with a safe work environment."[62]

V. Order

We deny the Agency's contrary to law, ambiguous and contradictory, and essence exceptions, and grant the Agency's exceeds-authority exception, in part. Accordingly, we vacate the award, in part.

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[52] The Authority will find an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting 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. *Libr. of Cong.*, 60 FLRA 715, 717 (2005) (Member Pope dissenting) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

[53] Award at 185.

[54] Exceptions Br. at 26.

[55] *Id.*

[56] *SSA*, 71 FLRA 495, 496 (2019) (then-Member DuBester dissenting in part) (citing *Dep't of the Air Force, Scott Air Force Base, Ill.*, 51 FLRA 675, 687 (1995)).

[57] The Authority will find that an arbitrator exceeded his or her authority when he or she fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to those not encompassed within the grievance. *AFGE, Loc. 1617*, 51 FLRA 1645, 1647 (1996).

[58] *HHS*, 61 FLRA at 535 (quoting *U.S. Dep't of Transp., FAA*, 60 FLRA 584, 587 (2005) (Member Pope dissenting)) (internal quotations omitted). *But see U.S. Dep't of the Treasury, IRS, Kansas City, Mo.*, 71 FLRA 1007, 1010 (2020) (then-Member DuBester dissenting in part) (finding that an arbitrator did not exceed his authority by providing a remedy that was directly responsive to the issues submitted to arbitration).

[59] Award at 13.

[60] *Id.* at 185.

[61] Exceptions Br. at 23. The Agency also argues that the Arbitrator exceeded her authority by requiring it to review all hazards and safety controls discussed in the award, because, by awarding such a remedy, the Arbitrator provided relief to employees other than the grievants. *Id.* at 24-25. Because we vacate this portion of the award on other grounds, we do not reach the Agency's exception. *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 574 n.18 (2018) (then-Member DuBester dissenting) (finding it unnecessary to address the remaining arguments when an award has been set aside).

[62] Award at 185.

Member Abbott, concurring:

I write separately to emphasize the disturbing testimony, arguments, and practices of the Agency revealed in the record.

Before the Arbitrator, the Agency's Safety Officer testified that "safety data sheets are meant to be more protective and more prohibitive . . . because [they] cover[] the butt of the manufacturer[; it] is what they rely on to say, okay, well, we let you know all of the hazards that we know about to the nth degree so that we're covered if something goes wrong[; safety data sheets] . . . always look scary even when they're for non-hazardous chemicals."[1] The same Agency official also testified that "these chemicals don't deserve respect as chemicals . . . [because] these chemicals . . . don't require decontaminating every inch of your body after [grievants are] done using them . . . [t]hey don't require full-face respirators and they don't require impervious chemical suits."[2] Such a disregard for warning labels and such a hyperbolic view of hazardous chemicals by one of the individuals responsible for safety at the Agency is shocking. When hearing the title Safety Officer, one imagines that the Agency is proactive and serious in ensuring compliance with safety standards, training, and equipment. However, as the record demonstrates, this is far from the truth.

I also find multiple arguments made by the Agency appalling. The Agency argued that the grievants are not exposed to "hazardous drugs" because Occupational Safety and Health Administration does not have a permissible exposure limit for the high-hazard toxic chemicals evaluated in the award.[3] A *permissible* exposure limit is setting the maximum amount of exposure that is safe. If there is not a limit, that means that *any* exposure is hazardous. Such an argument demonstrates that the Agency will employ any means to avoid paying environmental-differential pay (EDP) to employees – and thus places money above the safety of its employees.

The Agency also argued that the grievants were not entitled to EDP because the potential risk for serious personal injury caused by exposure to high-hazard microorganisms was practically eliminated because prophylaxis is effective in preventing transmission of HIV and there is an effective treatment for hepatitis C.[4] Not only does the Agency apparently believe that all employees should be placed on a preexposure prophylaxis — which has a litany of side effects and potential long-term health issues[5] — to prevent them from contracting HIV, the Agency also believes that because there is a *treatment* for a lifelong chronic disease, it does not have to pay EDP when it fails to provide proper protection to employees from *contracting* the disease in the first place. Furthermore, hepatitis C and HIV are but a few of the multitude of infectious diseases present in a hospital environment.

Finally, the record reveals practices and procedures at the Agency that demonstrate neglect for the safety of the grievants. The Arbitrator found that the Agency's Safety Office discourages the reporting of "sharps" incidents;[6] that "[g]rievant encounters with an improperly disposed of sharp . . . [is] a question of when, not if";[7] and the "sharps" policy has been violated repeatedly.[8] The Arbitrator also found that the Agency fails to follow its own policies regarding the identification of isolation rooms, thereby exposing the grievants.[9] Further, the Agency admitted that it does not have an accurate list of the chemicals used by the grievants, which is required by Agency policy to be updated yearly.[10] Even more disturbing is that Agency policy prevents grievants from wearing personal protective equipment (PPE) in the halls even if they are

[1] Exceptions, Attach. 3, Tr. Vol. 3 (Tr. Vol. 3) at 164; *see also* Award at 70.

[2] Tr. Vol. 3 at 152.

[3] Exceptions Br. at 7-8

[4] *Id.* at 16 ("The Agency also provided unrebutted testimony that HIV prophylaxis is effective in preventing transmission, and that there is effective treatment for hepatitis C.").

[5] According to the Centers for Disease Control and Prevention, there are two medications approved as preexposure prophylaxis for HIV, TRUVADA and DESCOVY. *See* Centers for Disease Control and Prevention, *About PrEP*, https://www.cdc.gov/hiv/basics/prep/about-prep.html (last visited March 3, 2021). Side effects of TRUVADA include worsening of hepatitis B infection, kidney problems, kidney failure, severe liver problems, bone problems, headache, and stomach pain. *See* TRUVADA, *Important Safety Information*, https://www.truvada.com/truvada-safety/important-safety-information (last visited March 3, 2021). Side effects of DESCOVY include worsening of hepatitis B infection, kidney problems, kidney failure, severe liver problems, diarrhea, nausea, headache, fatigue, and stomach pain. *See* DESCOVY, *Important Safety Information for DESCOVY for PrEP*, https://www.descovy.com/ (last visited March 3, 2021).

[6] Award at 40 (finding that the Agency has "an improperly narrow definition of 'sharps' and 'confirmed sharps incidents,' and does not encourage their reporting").

[7] *Id.* at 44.

[8] *Id.* at 93-94.

[9] *Id.* at 46 (noting that housekeepers testified that isolation doors are left open and/or have cleaned a room as a "regular room" before it was marked as "isolation"); *id.* at 47 (finding that Agency records indicate that the issuance of timely and accurate isolation orders is an ongoing problem); *id.* at 80 (finding that the isolation order compliance rate averaged 68%-77%).

[10] *Id.* at 112-15.

transporting and/or cleaning a potential hazard,[11] and the Agency routinely fails to provide appropriate PPE to the grievants.[12]

While the remedy requiring the Agency to conduct a comprehensive review of its safety procedures was vacated,[13] I strongly urge the Agency to complete the Arbitrator's insightful suggestion to safeguard the safety and well-being of its employees who face these risky exposures in performing their day-to-day duties.

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[11] *Id.* at 128-29 (finding that Agency policy prevents the grievants from wearing PPE in the halls to avoid contaminating a clean area); Exceptions, Attach. 2, Tr. Vol. 2 at 72 (Agency witness testifying that gowns "aren't supposed to leave the room.").

[12] *Id.* at 129 (finding that there are "clear patterns of benign neglect on the part of the Safety Officer regarding the selection of appropriate PPE for [g]rievants"); *id.* at 130 (finding that the Agency failed to provide grievants with the PPE required under its policies); *id.* (finding that the Agency purchased and supplied non-medical grade gloves to the grievants).

[13] Majority at 10.

Chairman DuBester, dissenting in part:

I agree with the majority's conclusions in Parts A, B, and C of the decision that the Agency has not demonstrated the award is contrary to law, ambiguous and contradictory, or fails to draw its essence from the parties' agreement. However, I do not agree with the majority's conclusion in Part D that the Arbitrator exceeded her authority by directing the Agency to review all hazards and safety controls.

The majority finds that by awarding this remedy, the Arbitrator resolved an issue not submitted to arbitration. But the Authority has consistently found that arbitrators "do not exceed their authority by addressing any issue that . . . necessarily arises from issues specifically included in an issue before [them]."[1]

Here, the Arbitrator framed the issue as whether the grievants are "entitled [to] either an 8% or a 4% . . . environmental differential pay [(EDP)] . . . based on their occupational exposure(s) to unusually severe hazards or working conditions, and resultant potential for serious personal injury that is not practically eliminated by [personal protective equipment (PPE)] or other safety measures."[2] And she noted that the Agency denied the Union's grievance based, in part, on the assertion that its "adherence to facility safety controls and PPE guidelines mitigate[d] any specific hazards."[3]

Moreover, during the arbitration hearing, the Agency specifically requested that the Arbitrator, to the extent that she found any entitlement to EDP, "'provide as much detail as possible regarding what specific chemicals, processes, job junctions, exposures, et cetera, create the EDP entitlement as well as how safety processes, PPE, training, et cetera, fail to practically eliminate the potential for injury . . . including how those things would need to be modified in order to effectively achieve practical elimination.'"[4]

Based on this undisputed record, it is clear that the Agency placed the adequacy of its existing hazards and safety controls squarely before the Arbitrator. Further, the Agency *invited* the Arbitrator to address the adequacy of its controls as part of her awarded remedies.

Under these circumstances, I believe it was well within the Arbitrator's remedial authority to require the Agency to review its hazard and safety controls and to take any necessary action to meet its legal obligation to provide the grievants a safe working environment. Accordingly, I dissent from the majority's decision to set aside this remedy.

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[1] *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div.*, 60 FLRA 530, 532 (2004) (citing *NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996); *Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 519 (1986)). And, both the Authority and federal courts have consistently emphasized the broad discretion to be accorded arbitrators in the fashioning of appropriate remedies. *Id.* (citing *AFGE, Loc. 916*, 50 FLRA 244, 246-47 (1995)).

[2] Award at 13.

[3] *Id.* at 14.

[4] *Id.* at 152 (quoting Exceptions, Attach. 2, Tr. Vol. 3 at 584).