

**72 FLRA No. 38**

NATIONAL TREASURY  
EMPLOYEES UNION  
(Union)

and

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

0-AR-5510

—————  
DECISION

April 22, 2021

—————  
Before the Authority: Ernest DuBester, Chairman, and  
Colleen Duffy Kiko and James T. Abbott, Members

**I. Statement of the Case**

Arbitrator Susan T. Mackenzie found that the Agency did not violate the parties' master collective-bargaining agreement (master agreement), negotiated memoranda, or § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by unilaterally implementing a change to the way that the Agency evaluates employees' performance.

The Union argues that the award fails to draw its essence from the parties' agreements, the Arbitrator exceeded her authority, and the award is contrary to law. However, we find that the Arbitrator's award is a plausible interpretation of the parties' agreements, the award responds to the issue framed by the Arbitrator, and her conclusions are consistent with the applicable standard of law and Authority precedent. Therefore, we deny the exceptions.

**II. Background and Arbitrator's Award**

The Agency employs contact representatives and customer service representatives (CSRs, collectively) who service the Agency's customers by phone. Originally, the Agency did not permit CSRs to telework because it lacked the technology to secure calls remotely.

In 2012, the parties executed a "Memorandum of Understanding Covering Customer Service Operations Between the [Agency] and the [Union]"

(2012 agreement).<sup>1</sup> As relevant here, Part II, Section 1.D.1 of the 2012 agreement (Part II) stated: "The Employer has determined that . . . data reports [generated from the Agency's phone system] . . . will not be used to create a numerical rating for an employee."<sup>2</sup>

Subsequently, the parties executed a series of memoranda governing pilot telework initiatives (pilots) to test whether the Agency's technology would successfully allow CSRs to work remotely. The memorandum for the first pilot did not specifically address the use of data reports to evaluate performance, but stated that the 2012 agreement – including Part II – would continue to apply to CSRs. During negotiations for the second pilot, the Agency notified the Union of its position that it intended to use data reports to evaluate CSRs while teleworking pursuant to its management rights. The Agency also took the position that the 2012 agreement did not cover CSRs because when that agreement was negotiated no such coverage was contemplated.

The Union maintained that Part II's prohibition on the use of data reports applied to CSRs in the second pilot. The parties ultimately agreed on a memorandum governing the second pilot stating that the Agency would evaluate impacted employees consistent with applicable agreements. That memorandum included no reference to using data reports to evaluate employee performance.

After completing the two pilots, the Agency initiated bargaining on a third pilot by sending the Union a proposed memorandum (Tech Demo III memo). In its notice to the Union, the Agency indicated that it would use managerial reports "in an evaluative manner to ensure CSRs/CRs are adhering to their assigned duties," and that "[r]eports will be used to address performance and conduct related issues."<sup>3</sup>

During the third-pilot bargaining, the Union again asserted that the use of data reports to evaluate CSRs was prohibited by the 2012 agreement, and also proposed to expand the positions eligible to telework. The Agency countered that the 2012 agreement had expired, did not contemplate CSRs teleworking, and did not preclude bargaining over the use of data reports to evaluate the pilot participants' performance. Additionally, the Agency asserted that the proposal expanding the telework-eligible positions was "outside the scope of issues to be negotiated."<sup>4</sup> Subsequently, the Agency notified the Union of its intent to implement the Tech Demo III memo with a provision permitting the Agency to use data reports to evaluate CSRs when teleworking.

<sup>1</sup> Award at 3.

<sup>2</sup> *Id.* at 9 (quoting Part II).

<sup>3</sup> *Id.* at 4-5.

<sup>4</sup> *Id.* at 11.

Consequently, the Union filed a grievance, which advanced to arbitration. As relevant here, the Arbitrator framed the issues as:

Did the Agency engage in bad faith bargaining in its negotiation over or implementation of [the] Tech Demo III [memo] in violation of 5 U.S.C. § 7116(a)(1) and (5) or Article 47 of the [master agreement (Article 47)]?

Did the Agency's unilateral implementation of [the] Tech Demo III [memo] violate 5 U.S.C. § 7116(a)(1) and (5) and/or Article 47 . . . ?

Did the Agency use data reports for evaluative purposes with regards to [t]eleworkers in violation of the [2012 Agreement] or the Telework Enhancement Act of 2010 [(Telework Act)]?<sup>5</sup>

The Arbitrator determined that the Agency did not violate § 7116(a)(1) and (5) of the Statute or Article 47 when it bargained over and unilaterally implemented the Tech Demo III memo.

As an initial matter, the Arbitrator found that, although the parties executed the 2012 agreement “when the technological changes under review in [the third pilot] were not contemplated,” the parties “acted in accordance with” Part II under the first two pilots.<sup>6</sup> She also found that the Agency unilaterally implemented a change when it included a provision in the Tech Demo III memo stating that the Agency may use data reports to evaluate CSR performance while teleworking. However, she found that the Agency properly implemented the change consistent with the master agreement, the 2012 agreement, and the Statute.

The Arbitrator based this conclusion on Article 1, Section 5 of the master agreement (Article 1.5), read together with Part II. Specifically, Article 1.5<sup>7</sup> states that provisions in the parties' agreements that include the wording “the [e]mployer has determined” mean that the Agency may make unilateral changes to these

determinations at any time if the Agency provides the Union notice and participates in any negotiations required by law.<sup>8</sup> And Part II states that “[t]he [e]mployer has determined that [data reports] . . . will not be used to create a numerical rating for an employee.”<sup>9</sup>

Based on Part II's wording, the Arbitrator found that Article 1.5 is “controlling,” and “expressly permits the Agency to . . . ultimately make unilateral changes ‘at any time’ in the application of provisions of agreements such as the 2012 [agreement]” so long as it provides notice and an opportunity to bargain over the impact and implementation of the change.<sup>10</sup> Therefore, the Arbitrator found that Part II “was not binding on the Agency in the context of the . . . Tech Demo III [memo negotiation]” because the Agency was allowed to unilaterally modify Part II as it applied to pilot participants while teleworking.<sup>11</sup>

The Arbitrator also found that the Agency gave the Union sufficient notice and an opportunity to bargain before implementation, as required by Article 47,<sup>12</sup> Article 1.5, and the Statute. Specifically, she found that the Agency provided sufficient notice to the Union when it raised its intended use of the data reports during bargaining on the previous pilot agreements. She also found that the Agency afforded the Union an opportunity to bargain over the impact and implementation of the change, but the “Union declined to negotiate over that implementation and it did not invoke impasse procedures.”<sup>13</sup>

Additionally, the Arbitrator rejected the Union's argument that the Agency was required to reopen the 2012 agreement in order to change its determination on the use of data reports. Rather, she found that the Agency did not engage in “bad faith bargaining” by not reopening the 2012 agreement.<sup>14</sup> And she concluded that the Agency unilaterally implemented the change “[o]nly after the parties had completed their mandated negotiations.”<sup>15</sup>

The Arbitrator then addressed the Union's argument that the Agency violated the Telework Act by using data reports to evaluate teleworking CSRs but not

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 13.

<sup>7</sup> Article 1.5 states: “Provisions in any collective[-]bargaining agreement between the [Agency] and [the Union] containing the phrase ‘the [e]mployer has determined’ . . . denote a unilateral determination by the [Agency] that is placed in the [a]greement for informational purposes. It is understood that such determinations may be unilaterally changed by the [Agency] at any time after notification to [the Union] and any negotiations required by law.” *Id.* at 7 (quoting Article 1.5).

<sup>8</sup> *Id.* at 13.

<sup>9</sup> *Id.* at 9 (quoting Part II) (emphasis added).

<sup>10</sup> *Id.* at 13.

<sup>11</sup> *Id.*

<sup>12</sup> As relevant here, Article 47 states that “[u]nless otherwise permitted by law, no changes will be implemented by the [e]mployer until proper and timely notice has been provided to the Union, and all negotiations have been completed including any impasse proceedings.” *Id.* at 8 (quoting Article 47).

<sup>13</sup> *Id.* at 14.

<sup>14</sup> *Id.* at 15.

<sup>15</sup> *Id.* at 14.

subjecting non-teleworking CSRs to the same condition. On this claim, she found that the record contained no evidence demonstrating that the Agency used the data reports to evaluate CSRs in a way that resulted in such disparate treatment. And based on this finding, she concluded that addressing this issue “would be merely speculative and therefore outside of [her] jurisdiction” under the parties’ agreement.<sup>16</sup> The Arbitrator therefore denied the Union’s grievance.

On May 31, 2019, the Union filed exceptions to the award, and on July 3, 2019, the Agency filed an opposition to the Union’s exceptions.<sup>17</sup>

### III. Analysis and Conclusions

#### A. The award does not fail to draw its essence from the parties’ agreements.

The Union argues that the award fails to draw its essence from the 2012 agreement for several reasons.<sup>18</sup> 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.<sup>19</sup> In addition, an exception based on a misunderstanding of an award does not demonstrate that the award fails to draw its essence from the parties’ agreement.<sup>20</sup>

<sup>16</sup> *Id.*

<sup>17</sup> In its opposition, the Agency claims that the Union’s exceptions are procedurally deficient under the Authority’s Regulations and asks the Authority to dismiss them. According to the Agency, the Union failed to include with its exceptions to the Agency “complete copies of all the documents it claims it submitted to the Authority” and “a certificate or statement of service indicating which parties it served, the method of service, nature of documents served, and date of service.” Opp’n at 4; *see id.* at 2-3, 5. However, we need not determine whether the Union’s service of its exceptions was procedurally deficient. As indicated previously and discussed below, we deny the Union’s exceptions. This renders any procedural deficiency in the Union’s service of its exceptions on the Agency a harmless error. *U.S. Dep’t of Transp., FAA*, 68 FLRA 402, 403-04 (2015).

<sup>18</sup> Exceptions Br. at 9-19.

<sup>19</sup> *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing 5 U.S.C. § 7122(a)(2)); *AFGE, Council 220*, 54 FLRA 156, 159 (1998); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

<sup>20</sup> *E.g., U.S. Dep’t of HHS, Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 572 (2011) (citing *NAGE, Loc. R4-45*, 55 FLRA 789, 794 (1999) (essence exception based on misstatement of arbitrator’s award failed to demonstrate award was deficient)).

First, the Union claims that the Arbitrator erred by finding that the 2012 agreement is “not binding” on teleworking CSRs.<sup>21</sup> According to the Union, the 2012 agreement, and specifically Part II, apply to all CSRs, including the third pilot participants, and continues to apply as a past practice even if that agreement expired.<sup>22</sup> Second, the Union argues that, assuming the Arbitrator found the 2012 agreement had expired, its terms remain in effect because the Agency provided insufficient notice to terminate Part II and did not give the Union an opportunity to negotiate over this provision.<sup>23</sup>

The Arbitrator acknowledged that the parties had applied the terms of the 2012 agreement to CSRs under the first two pilots.<sup>24</sup> And, contrary to the Union’s claim, the Arbitrator neither found that the 2012 agreement excluded CSRs under the third pilot, nor that it had expired.<sup>25</sup> Rather, she found that, in accordance with the terms of both Part II and the master agreement, the Agency had preserved the discretion to modify its determination regarding the use of data reports to evaluate telework pilot participants.<sup>26</sup> Because the Union’s arguments are based on a misunderstanding<sup>27</sup> of the award, they provide no basis for finding that the award fails to draw its essence from the 2012 agreement.<sup>28</sup>

Third, the Union argues that the Arbitrator’s conclusion that the Agency did not violate the 2012 agreement by unilaterally changing its use of data reports “contravenes” the “express terms” of that agreement.<sup>29</sup> Specifically, the Union argues that Part II prohibits the use of data reports to assign CSRs a numerical rating, and

<sup>21</sup> Exceptions Br. at 9 (quoting Award at 13).

<sup>22</sup> *Id.* at 10-12.

<sup>23</sup> *Id.* at 12-15.

<sup>24</sup> Award at 13.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Member Abbott notes, as he has before, that whether a party understands or misunderstands an award is quite irrelevant and, more importantly, does not constitute a basis upon which to dismiss or deny an exception. *See U.S. Dep’t of VA*, 71 FLRA 992, 995 n.1 (2020) (Dissenting Opinion of Member Abbott); *U.S. DOD, Def. Logistics Agency, Richmond, Va.*, 71 FLRA 729, 733 (2020) (Concurring Opinion of Member Abbott) (“We serve the federal labor-management relations community more effectively when we explain our rationale rather than when we attempt to read the minds of parties and engage in irrelevant analysis.”). The Union may have been incorrect, but it does not mean they “misunderstood.”

<sup>28</sup> *NTEU, Chapter 26*, 66 FLRA 650, 654 (2012) (denying essence exception that was based on misunderstanding of award). Because the Union misreads the Arbitrator’s findings on this issue, we need not address the Union’s arguments regarding whether Part II is a “permissive” subject of bargaining or that the award “eliminates . . . ‘the covered-by doctrine.’” Exceptions Br. at 12-15 & n.11.

<sup>29</sup> Exceptions Br. at 15-17.

Part II, Section 1.D.2 of the 2012 agreement<sup>30</sup> allows the Agency to use data reports solely as a “performance indicator,” which is an alert to monitor the CSRs’ work more closely.<sup>31</sup>

However, as the Arbitrator found, and the Union acknowledges, Article 1.5 states:

Provisions in any collective[-]bargaining agreement between the [Agency] and [the Union] containing the phrase ‘the [e]mployer has determined’ . . . denote a unilateral determination by the [Agency] that is placed in the [a]greement for informational purposes. It is understood that such determinations may be unilaterally changed by the [Agency] at any time after notification to [the Union] and any negotiations required by law.<sup>32</sup>

And, as discussed previously, Part II is prefaced by the phrase “[t]he [e]mployer has determined.”<sup>33</sup> Based upon the plain language of these provisions, we find no basis for granting the Union’s essence exception.

More specifically, the Union’s exception disregards the Arbitrator’s application of Article 1.5 to find that the prefatory phrase in Part II permitted the Agency to make unilateral changes to its use of data reports upon providing the Union notice and an opportunity to engage in impact and implementation bargaining over the change.<sup>34</sup> As the Arbitrator found that the Agency was permitted to make the unilateral change, the Agency was not restricted to solely using data reports as a performance indicator under Part II, Section 1.D.2.<sup>35</sup> Therefore, these arguments do not

establish that the award fails to draw its essence from the 2012 agreement.

Fourth, the Union argues that the award does not draw its essence from Articles 1.5 and 47 because the Arbitrator erroneously found that the Agency provided sufficient notice of its unilateral change in the use of data reports.<sup>36</sup> According to the Union, the Agency’s notice was insufficient under these provisions, particularly because the Agency did not reopen the entire agreement.<sup>37</sup>

Contrary to the Union’s arguments, neither Article 1.5<sup>38</sup> nor Article 47<sup>39</sup> requires the Agency to reopen the 2012 agreement to implement a unilateral change.<sup>40</sup> Additionally, neither provision establishes a specific type of notice to satisfy the requirement that the Agency provide notice of a change.<sup>41</sup> Consequently, the Union does not establish that the Arbitrator’s finding that the Agency provided sufficient notice<sup>42</sup> fails to draw its essence from the master agreement.

Fifth, the Union argues that the award fails to draw its essence from Article 47 because the Agency implemented the Tech Demo III memo before negotiations were complete and without “declar[ing] impasse over any of the disputed provisions prior to implementing its final offer.”<sup>43</sup> However, while Article 47 requires that all negotiations, including any impasse proceedings, be completed before the Agency can implement a change, the provision does not require the Agency to declare impasse. To the extent that the Union challenges the Arbitrator’s factual findings that negotiations were complete and that the Union failed to invoke impasse proceedings, that disagreement does not demonstrate that the award fails to draw its essence from the parties’ agreement.<sup>44</sup>

Accordingly, because the Union fails to establish that the Arbitrator’s award is irrational, unfounded, implausible, or in manifest disregard of the parties’ agreement, we deny the Union’s essence exceptions.

<sup>30</sup> Part II, Section 1.D.2 of the 2012 agreement states that: “The information obtained from [the data reports] may, however, be used as a performance indicator. For these purposes a performance indicator is merely something that alerts a manager to observe or monitor an employee’s work more closely.” Award at 9.

<sup>31</sup> Exceptions Br. at 15-17.

<sup>32</sup> *Id.* at 16 (quoting Article 1.5); *see also* Award at 7.

<sup>33</sup> Award at 9 (quoting Part II).

<sup>34</sup> *Id.* at 13-14.

<sup>35</sup> To the extent that the Union asserts a contrary-to-law claim under the essence exception heading, we find that this argument merely restates its contrary-to-law claim addressed in Section III.C below. *See* Exceptions Br. at 15-17; 23-24. As such, we do not address this portion of the Union’s essence exception separately. *See NAIL, Loc. 5*, 69 FLRA 573, 576 (2016) (essence claim not separately addressed where claim did nothing more than restate its contrary-to-law exception); *AFGE, Nat’l Border Patrol Council, Loc. 1929*, 63 FLRA 465, 467 (2009) (same).

<sup>36</sup> Exceptions Br. at 10, 17-19.

<sup>37</sup> *Id.* at 18.

<sup>38</sup> Award at 7 (quoting Article 1.5); *see also* Exceptions Br. at 16 (same).

<sup>39</sup> Award at 8 (quoting Article 47).

<sup>40</sup> *Id.* at 13-15.

<sup>41</sup> *Id.* at 13-14.

<sup>42</sup> *Id.* at 14-15.

<sup>43</sup> Exceptions Br. at 18; *see id.* at 14 n.13, 19.

<sup>44</sup> *SSA*, 66 FLRA 6, 9 (2011) (citing *AFGE, Loc. 12*, 61 FLRA 507, 509 (2006)).

B. The Arbitrator did not exceed her authority.

The Union claims that the Arbitrator exceeded her authority by failing to resolve one of the framed issues.<sup>45</sup> As relevant here, an arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration.<sup>46</sup> Where the parties fail to stipulate the issue, the arbitrator may formulate the issue on the basis of the subject matter before him or her, and this formulation is accorded substantial deference.<sup>47</sup> In those circumstances, the Authority examines whether the award is directly responsive to the issue the arbitrator framed.<sup>48</sup>

The Arbitrator framed the relevant issue as: “Did the Agency use data reports for evaluative purposes with regards to [t]eleworkers in violation of . . . the [Telework Act].”<sup>49</sup> The Union argues that the Arbitrator erred by failing to resolve the issue of whether the Agency’s “unilateral policy” on the Agency’s use of data reports was “facially discriminatory,” in violation of the Telework Act.<sup>50</sup>

Contrary to the Union’s claim, the plain wording of the framed issue did not require the Arbitrator to resolve whether the Agency’s “unilateral policy” – i.e., its *decision* to use data reports to evaluate CSRs when teleworking – was facially discriminatory.<sup>51</sup> Rather, it required the Arbitrator to resolve whether the “Agency[’s] use of data reports for evaluative purposes” violated the Telework Act.<sup>52</sup> Limiting her review to the framed issue, the Arbitrator analyzed the evidence demonstrating whether the “Agency’s use of data [reports] for evaluative purposes” or a “particular action” violated the Telework Act.<sup>53</sup> And, finding that the “record is silent as to any such use,” the Arbitrator concluded that the Agency did not violate the Telework Act.<sup>54</sup> Therefore, the award is directly responsive to the issue framed by the Arbitrator.

Accordingly, we deny the Union’s exceeds-authority exception.

C. The award is not contrary to law.

The Union contends that the award is contrary to law for several reasons.<sup>55</sup> When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception *de novo*.<sup>56</sup> In applying the standard of *de novo* review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law.<sup>57</sup> In making this assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are nonfacts.<sup>58</sup>

First, the Union contends that the Arbitrator did not apply the proper legal framework when she determined that the Agency did not violate § 7116(a)(1) and (5) of the Statute by unilaterally changing its use of data reports when it implemented the Tech Demo III memo.<sup>59</sup> According to the Union, the Arbitrator erroneously applied a “totality of the circumstances” test and relied on Authority precedent analyzing whether an agency engaged in bad-faith bargaining in violation of the Statute.<sup>60</sup>

It is well established that before changing conditions of employment, an agency must provide the union with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain.<sup>61</sup> Contrary to the Union’s claim, the Arbitrator both articulated and applied this legal standard when she concluded that the Agency did not violate § 7116(a)(1) and (5) of the Statute because the Agency had satisfied its obligations before it unilaterally implemented the Tech Demo III memo.<sup>62</sup> The Arbitrator did not apply the precedent cited by the Union to draw this conclusion, but rather to resolve the issue of whether the Agency also engaged in bad-faith bargaining in violation of the Statute and parties’ agreement by declining to open the 2012 agreement before making the change.<sup>63</sup>

The Union also argues that the Arbitrator failed to resolve whether all requisite negotiations were complete. On this point, the Union contends that the

<sup>45</sup> Exceptions Br. at 26-27.

<sup>46</sup> *U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996).

<sup>47</sup> *E.g., AFGE, Loc. 522*, 66 FLRA 560, 562 (2012) (*Local 522*); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 887, 891 (2000); *U.S. Dep’t of the Army, Corps of Eng’rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).

<sup>48</sup> *Local 522*, 66 FLRA at 562.

<sup>49</sup> Award at 2.

<sup>50</sup> Exceptions Br. at 28.

<sup>51</sup> *Id.*

<sup>52</sup> Award at 14 (emphasis added).

<sup>53</sup> *Id.* (emphasis added).

<sup>54</sup> *Id.*; *see id.* at 15; *Local 522*, 66 FLRA at 562.

<sup>55</sup> Exceptions Br. at 19-26.

<sup>56</sup> *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (*NTEU*) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).

<sup>57</sup> *U.S. DOD, Dep’ts of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

<sup>58</sup> *E.g., AFGE, Nat’l INS Council*, 69 FLRA 549, 552 (2016) (*INS Council*).

<sup>59</sup> Exceptions Br. at 20.

<sup>60</sup> *Id.*

<sup>61</sup> *E.g., U.S. Dep’t of the Interior, U.S. Geological Surv., Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 737 (2015).

<sup>62</sup> Award at 12-14.

<sup>63</sup> *See id.* at 12, 14.

Arbitrator did not determine whether its proposal to expand telework-eligible positions was negotiable such that the Agency had a duty to bargain over it or else invoke impasse procedures under Article 47.<sup>64</sup> Although the Union asserts that an agency is obligated to bargain over negotiable proposals addressing a change in conditions of employment,<sup>65</sup> it has not demonstrated that the proposal was negotiable, or otherwise within the duty to bargain. Moreover, the Arbitrator found that the Agency satisfied its statutory and contractual bargaining obligations before it implemented the Tech Demo III memo.<sup>66</sup> The Arbitrator's failure to specifically mention the Union's proposal neither establishes that she failed to consider it nor that the award is contrary to law.<sup>67</sup>

Next, the Union challenges the Arbitrator's determination that the Agency did not violate Article 47 and § 7116(a)(1) or (5) of the Statute because Part II was "not binding" on the Agency.<sup>68</sup> Specifically, the Union asserts that because the Agency elected to "bargain[] over and agreed to [Part II] that is concededly negotiated pursuant to § 7106(b)(1), that provision is fully enforceable in arbitration[,] and survives "until the Agency provides notice to the [Union] to reopen the agreement."<sup>69</sup>

<sup>64</sup> Exceptions Br. at 20-22. The Arbitrator noted that the Agency had asserted that it had no duty to bargain over the proposal because it was "outside the scope" of the issues subject to bargaining. Award at 11.

<sup>65</sup> Exceptions Br. at 21.

<sup>66</sup> Award at 11, 14 (finding that the Agency implemented the Tech Demo III memo "[o]nly after the parties had completed their mandated negotiations").

<sup>67</sup> See *U.S. Dep't of VA, Med. Ctr., Memphis, Tenn.*, 34 FLRA 893, 896 (1990) (citing *Army Materials & Mechs. Rsch. Ctr.*, 32 FLRA 1156, 1158 (1988)) (arbitrator's failure to specify or discuss particular items of evidence that were considered and on which the award is based does not render an award deficient); see also *SSA*, 69 FLRA 363, 366 (2015) (Member Pizzella concurring) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Elkton, Ohio*, 63 FLRA 280, 283 (2009); *U.S. Dep't of Transp., FAA*, 59 FLRA 491, 493 (2003)) (explaining that an administrative law judge's failure to cite evidence does not demonstrate that he or she did not consider it). To the extent that the Union challenges the Arbitrator's factual findings that the Union declined to engage in impact and implementation bargaining or impasse procedures over the change, the Union does not challenge these facts as nonfacts, and we defer to these findings. *INS Council*, 69 FLRA at 552.

<sup>68</sup> Exceptions Br. at 23-24.

<sup>69</sup> *Id.* at 23 (citing *SSA, Balt., Md.*, 66 FLRA 569, 572 (2012) ("the Authority has held that a contractual election to bargain over matters covered under § 7106(b)(1) is a matter of contract interpretation"); *U.S. Dep't of Transp., FAA, Alaskan Region*, 62 FLRA 90, 92 (2007) (agency conceded provision negotiated under § 7106(b)(1)); *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 393, 396 (2000) ("whether there has been bargaining and agreement on any matters covered under § 7106(b)(1) rests entirely on the arbitrator's construction of the agreement").

However, even assuming that Part II concerned a § 7106(b)(1) matter – which the Arbitrator did not address – the Arbitrator interpreted Part II, together with Article 1.5, as permitting the Agency to unilaterally implement a change on the use of data reports at any time after notice and impact and implementation bargaining was satisfied.<sup>70</sup> For the reasons discussed previously in Section III.A., we find the Arbitrator's interpretation to be a plausible interpretation of the agreements. Accordingly, the Union's argument regarding the Arbitrator's interpretation of the provisions does not establish that the award is contrary to law.<sup>71</sup>

Finally, the Union contends that the award is contrary to the Telework Act because the Arbitrator erred by requiring the Union to "establish that employees have been actually harmed, from a remedial perspective, by the unilateral policy change."<sup>72</sup> However, the Arbitrator did not find that the Union had to establish that employees were actually harmed by the Agency's *policy change itself*.<sup>73</sup>

Rather, as discussed in Section III.B., above, the issue before the Arbitrator was whether the "Agency's use of data [reports] for evaluative purposes"<sup>74</sup> resulted in disparate treatment among particular CSRs. Addressing this issue, the Arbitrator found that the record did not contain evidence of such disparate treatment.<sup>75</sup> And the Union does not challenge this finding as a nonfact. Therefore, the Union's argument does not establish that the award is contrary to law.

Accordingly, we deny the Union's contrary-to-law exceptions.

#### IV. Decision

We deny the Union's exceptions.

<sup>70</sup> Award at 13-14.

<sup>71</sup> See *AFGE, Council of Prison Locs., Council 33*, 68 FLRA 757, 759 (2015) (denying contrary-to-law exception where the challenged arbitral finding relied on contractual provision and excepting party had not shown arbitrator's interpretation of that provision failed to draw its essence from the parties' agreement).

<sup>72</sup> Exceptions Br. at 24.

<sup>73</sup> See Award at 14-15.

<sup>74</sup> *Id.* at 14.

<sup>75</sup> *Id.* at 15.