

72 FLRA No. 103

UNITED STATES
DEPARTMENT OF THE AIR FORCE
SCOTT AIR FORCE BASE, ILLINOIS
(Agency)

and

NATIONAL ASSOCIATION OF
INDEPENDENT LABOR
LOCAL 19
(Union)

0-AR-5635¹

DECISION

December 10, 2021

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

I. Statement of the Case

In this case, we reaffirm that agencies must abide by lawful scheduling restrictions that they agree to include in collective-bargaining agreements, even if they later find those restrictions inconvenient.

The Agency changed the grievants' schedules from two consecutive weeks of training per quarter to one day of training every other week. The new training schedule also altered the grievants' assigned shifts on training days, resulting in the loss of premium pay. The Union argued that the Agency violated a provision of the parties' agreement that specifies that "scheduled, required training . . . will only be changed when special circumstances . . . exist that necessitate scheduling off normal hours."² In a merits award, Arbitrator Gerard A. Fowler agreed that the Agency violated the

¹ This case involves two sets of exceptions challenging two related arbitration awards. Because both sets of exceptions involve the same parties and arise from the same arbitration proceeding, we have consolidated them for decision. *E.g.*, *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 960 & n.1 (2015) (citing *U.S. DOJ, U.S. Marshals Serv., Just. Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 19 n.1 (2012)) (consolidating cases involving same parties and arising from same arbitration proceeding).

² Merits Award at 11 (quoting Collective-Bargaining Agreement (CBA) Art. 52, § 10).

agreement and awarded the grievants backpay (merits award). In a later decision, the Arbitrator granted the Union's request for attorney fees (fee award).

In exceptions to the merits award, the Agency argues that limitations on changes to the training schedule violate management's rights to determine internal-security practices and assign work. Because the Arbitrator merely enforced a lawful scheduling restriction to which the Agency agreed, the merits award does not excessively interfere with management's rights. And for the reasons explained further below, we also dismiss or deny the Agency's other challenges to the merits award.

Further, in a contrary-to-law exception to the fee award, the Agency argues that the Arbitrator could not address the fee request until the Authority resolved the Agency's exceptions to the merits award. Because the Arbitrator had the discretion to award fees before the merits award became final and binding, we deny the Agency's exception.

II. Background and Arbitrator's Awards

The grievants' positions as police officers involve "regular[,] required training."³ The grievants previously completed their training during a dedicated two-week period each quarter. However, the Agency notified the Union that, due to "mission requirements," the Agency planned to change the "training schedule" so that the grievants participated in training on a single day every other week.⁴ In addition, the new biweekly training shift would not correspond to the grievants' ordinarily scheduled work shifts. The notice stated that the changes would take effect in roughly six weeks.

The Union originally requested impact-and-implementation bargaining over the schedule changes but later determined that such bargaining was unnecessary because the Agency's planned changes were covered by the parties' agreement. Subsequently, the Agency notified the Union that the effective date for the changes would be delayed by an additional two weeks.

After the changes took effect, the Union filed grievances on behalf of three employees alleging that the changes violated the agreement and the *Code of Federal Regulations* (C.F.R.). The grievances went to arbitration, and the parties agreed to resolve all three of them using a representative hearing on one of the grievances. The Arbitrator framed two issues: (1) "Did the Union timely file . . . its grievance within ten . . . workdays of the effective date of the change in schedule rather than the

³ *Id.* at 23.

⁴ Merits-Award Exceptions, Attach. 1, Agency's Ex. 2, Notification of Training-Schedule Change at 2.

notification of the change . . . ?”⁵ and (2) “Did the Agency violate . . . Article 52, Section 10” of the agreement and 5 C.F.R. § 610.121(a)(3)?⁶

As for the grievance’s timeliness, the Arbitrator focused on Article 47, Section 10 of the agreement, according to which a “grievance . . . shall be filed within ten . . . workdays of the incident or learning of the incident being grieved.”⁷ The Arbitrator found that the “incident” was the “actual” implementation of the new training schedule because, unlike the actual implementation, the notice of the new schedule was subject to change.⁸ As evidence that the notice was tentative, the Arbitrator emphasized that the effective date in the Agency’s original notice was later delayed. Because the Union filed its grievance within ten workdays of the actual schedule changes, the Arbitrator found the grievance timely. Then, the Arbitrator turned to the grievance’s merits.

In a single paragraph, the Arbitrator discussed a different arbitration case in which another agency violated 5 C.F.R. § 610.121. But the Arbitrator did not explain how that other case related to the instant dispute.

Concerning the alleged contract violation, the Arbitrator examined Article 52, Section 10 of the agreement. That section states, in pertinent part, “Normally, scheduled, required training will take place during the assigned shift period and will only be changed when special circumstances (i.e., [] mass[-]training events) exist that necessitate scheduling off normal hours.”⁹ The Arbitrator found that this wording “is clear” that only special circumstances could justify scheduling required training outside employees’ normally assigned shifts.¹⁰

Addressing whether “special circumstances” justified the Agency’s changes to the training schedule, the Arbitrator found that “the bulk of the credible testimony . . . suggest[ed]” that the changes were “convenience driven,” rather than “mission driven.”¹¹ For example, the Arbitrator found that the training-schedule changes “did not include the criminal investigators, detectives[,] or other integral parts of the law[-]enforcement team” – all of whom would be expected to participate in any “mass[-]training event.”¹² Instead, “the training involved was regular[,] required training and not tied to any special circumstance or

event.”¹³ Although the Agency argued that there were benefits from changing the schedule to allow for jointly training police officers, the Arbitrator found that such an argument did “not justify a breach” of the agreement that the Agency negotiated.¹⁴ Thus, the Arbitrator sustained the grievance.

As for a remedy, the Arbitrator directed that the grievants were “to be made whole.”¹⁵ More specifically, “[o]n the dates that the [Agency] scheduled [the] grievants in violation of the [agreement],” the Arbitrator directed the Agency to “pay [them] overtime hours for those hours worked outside of [their] basic workweek hours while paying [them] for [their] normal shift’s hours (including the premium pay [they] normally earned).”¹⁶

Later, in the fee award, the Arbitrator granted the Union’s request for attorney fees.

The Agency filed exceptions to the merits award on May 21, 2020, and the Union filed an opposition on June 2, 2020. Separately, the Agency filed an exception to the fee award on June 16, 2020, and the Union filed an opposition on June 18, 2020.

III. Analysis and Conclusions

A. The Arbitrator’s timeliness determination draws its essence from Article 47, Section 10 of the agreement.

The Agency argues that Article 47, Section 10 of the agreement required the Union to file the grievance within ten workdays of Agency’s notice of its plan to change the training schedule, and, therefore, the Arbitrator’s determination to the contrary does not draw its essence from the agreement.¹⁷

Article 47, Section 10 states that a “grievance . . . shall be filed within ten . . . workdays of the incident or learning of the incident being grieved.”¹⁸ The Agency argues that the original notice of planned changes was the

⁵ Merits Award at 1.

⁶ *Id.* at 2.

⁷ *Id.* at 9 (quoting CBA Art. 47, § 10).

⁸ *Id.* at 22.

⁹ *Id.* at 11 (quoting CBA Art. 52, § 10).

¹⁰ *Id.* at 24 (quoting CBA Art. 52, § 10).

¹¹ *Id.* at 22.

¹² *Id.* at 23.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 24.

¹⁶ *Id.*

¹⁷ Merits-Award Exceptions Br. at 27-28. The Authority will find that 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. *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*).

¹⁸ Merits Award at 9 (quoting CBA Art. 47, § 10).

pertinent “incident”¹⁹ for purposes of this section, but the Arbitrator rejected that argument because the notice was tentative, as evidenced by the subsequent change to the effective date of the new training schedule.²⁰ The Arbitrator’s decision is consistent with the plain wording of the agreement, so the timeliness determination is not irrational, unfounded, implausible, or in manifest disregard of Article 47, Section 10.²¹ Consequently, we deny the essence exception.

B. The Agency does not establish that the awards are contrary to law.

The Agency argues that the merits and fee awards are contrary to government-wide regulations, statutes, and Authority precedent.²² However, when an opposing party agrees to interpret an award so as to avoid a deficiency alleged by an excepting party, the Authority has recognized the agreed-to interpretation of the award as binding, and has dismissed, as moot, any objections to the award based on a different interpretation.²³

We assess each of the Agency’s arguments below.²⁴

1. The Agency’s arguments concerning 5 C.F.R. § 610.121 are moot.

The Agency argues that the Arbitrator incorrectly applied 5 C.F.R. § 610.121 to resolve the grievance.²⁵ Although the Arbitrator framed the issues to include whether the Agency violated § 610.121(a)(3),²⁶ the Arbitrator did not affirmatively find that the Agency either complied with, or violated, that regulation.²⁷ At one point in the analysis, the Arbitrator discussed a different arbitration case that involved a violation of § 610.121,²⁸ but the Arbitrator did not relate that discussion to the instant dispute. Further, the Union contends that the Arbitrator “*did not apply*” § 610.121 and, consequently, that the Agency’s arguments about the regulation are “completely irrelevant” to the award.²⁹

Because the Union has agreed to interpret the award in a manner that does not involve applying § 610.121 to the present dispute, we recognize this agreed-to interpretation of the award as binding.³⁰ And in accordance with our adopted interpretation of the

¹⁹ Merits-Award Exceptions Br. at 28.

²⁰ Merits Award at 21-22.

²¹ See *OSHA*, 34 FLRA at 575-77.

²² When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *NTEU*, Chapter 24, 50 FLRA 330, 332 (1995) (citing *U.S. Dep’t of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *U.S. DOD, Dep’t of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings, unless the excepting party demonstrates that the findings are deficient as nonfacts. *NAGE, Loc. R4-17*, 67 FLRA 4, 6 (2012) (*NAGE*) (citing *U.S. Dep’t of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).

²³ See, e.g., *U.S. Dep’t of VA, VA Long Beach Healthcare Sys., Long Beach, Cal.*, 63 FLRA 332, 334 (2009) (*VA*) (where union agreed to “waive” portion of arbitral remedy, Authority found that remedy was unenforceable and dismissed challenge to it as moot); *U.S. Food & Drug Admin., Detroit Dist.*, 59 FLRA 679, 683 (2004) (*FDA*) (where union conceded that agency had authority to cancel telework agreements “due to a change in workload or duties,” Authority dismissed argument that award concerning telework effectively precluded agency from assigning duties that required physical office presence); *U.S. DOJ, INS, Jacksonville, Fla.*, 36 FLRA 928, 932 (1990) (*INS*) (where union conceded that award used terms “official warning” and “reprimand” synonymously, Authority dismissed, as moot, agency’s argument that was based on a different interpretation of “official warning”).

²⁴ Where a party makes an argument to the Authority that is inconsistent with its position before an arbitrator, the Authority applies §§ 2425.4(c) and 2429.5 of its Regulations to bar the argument. *NTEU*, 70 FLRA 57, 59 (2016) (*NTEU*) (citing *Broad. Bd. of Governors, Off. of Cuba Broad.*, 66 FLRA 1012, 1016 (2012)). The Agency argues that 5 U.S.C. § 6131 authorized changing the training schedule – notwithstanding the parties’ agreement – because the changes discontinued a compressed work schedule (CWS) in accordance with § 6131’s procedures. E.g., Merits-Award Exceptions Br. at 12, 24. At arbitration, however, the Agency argued that it “simply sought to change its employees['] tour of duty for two days per month, not terminate the CWS.” Merits-Award Exceptions, Attach. 6, Agency’s Post-Hr’g Br. at 49 (emphasis added). Because the Agency’s argument on exceptions regarding discontinuation of a CWS is inconsistent with the Agency’s position at arbitration, we dismiss the argument as barred by §§ 2425.4(c) and 2429.5. *NTEU*, 70 FLRA at 59.

²⁵ Merits-Award Exceptions Br. at 8-10 (arguing Arbitrator erroneously applied § 610.121 to employees on a CWS), 10-13 (arguing Arbitrator applied “incorrect standard of proof” under § 610.121).

²⁶ Merits Award at 2.

²⁷ We note that the Union did not file an exceeded-authority exception regarding the Arbitrator’s failure to squarely address one of the framed issues – specifically, whether the Agency violated 5 C.F.R. § 610.121(a)(3).

²⁸ Merits Award at 23-24.

²⁹ Merits-Award Opp’n Br. at 5; see also *id.* at 6 n.1 (“Nowhere in [the] decision does the Arbitrator address using the standard of proof under 5 C.F.R. [§ 610.121] . . .”).

³⁰ See *VA*, 63 FLRA at 334; *FDA*, 59 FLRA at 683; *INS*, 36 FLRA at 932.

award, we dismiss, as moot, the Agency's arguments that the Arbitrator misapplied § 610.121.³¹

2. The merits award is not contrary to the covered-by doctrine.

The covered-by doctrine applies as a defense to an alleged failure to satisfy a statutory bargaining obligation.³² The Agency asserts that the Arbitrator erred as a matter of law in applying the covered-by doctrine.³³ However, the Arbitrator did not address a statutory bargaining obligation.³⁴ Further, the Agency fails to identify where in the award the Arbitrator found that a matter was, or was not, covered by the agreement.³⁵ Thus, we deny the Agency's assertion that the award is contrary to the covered-by doctrine.³⁶

3. The Agency's contentions about the backpay remedy are moot.

The Arbitrator directed that the grievants were "to be made whole" so that, "[o]n the dates that the [Agency] scheduled [the g]rievants in violation of the [agreement]," the Agency should "pay [them] overtime hours for those hours worked outside of [their] basic

workweek hours while paying [them] for [their] normal shift's hours (including the premium pay [they] normally earned)."³⁷ The Agency contends that this remedy is contrary to the Back Pay Act (the Act)³⁸ because the remedy entitles some employees to greater compensation than they would have earned absent the training-schedule changes.³⁹

The Union asserts that the backpay remedy merely requires the Agency to place the grievants in the "position[s]" that they "would have occupied . . . but for the [Agency's] unjustified action" in violating the agreement.⁴⁰ In other words, the Union concedes that the backpay remedy requires only that the Agency make the grievants whole for losses that they suffered due to the training-schedule changes.⁴¹ And the Agency does not contend that a remedial direction to make the grievants whole would violate the Act.⁴²

Accordingly, we recognize as binding the agreed-to interpretation of the backpay remedy as merely requiring the Agency to make the grievants whole,⁴³ and we dismiss, as moot, the Agency's contentions that are

³¹ See *VA*, 63 FLRA at 334; *INS*, 36 FLRA at 932. The Agency contends that its arguments about § 610.121 also establish that the award is based on nonfacts. Merits-Award Exceptions Br. at 21-24. Even assuming that these arguments concern factual findings, we dismiss them as moot too, based on our adopted interpretation of the award as not involving the application of § 610.121. See *VA*, 63 FLRA at 334; *INS*, 36 FLRA at 932.

³² *U.S. DOD, Nat'l Guard Bureau, Adjutant Gen., Kan. Nat'l Guard*, 57 FLRA 934, 936 (2002).

³³ Merits-Award Exceptions Br. at 14-15.

³⁴ Merits Award at 2 (framing issues to include whether Agency violated agreement or C.F.R.), 24 (finding Agency violated agreement).

³⁵ See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 72 FLRA 343, 346 & n.30 (2021) (Member Abbott concurring; Chairman DuBester dissenting, in part, on other grounds) (finding the "covered-by doctrine did not apply because 'the [a]rbitrator's finding of a contractual violation d[id] not conflict with the doctrine'" (alterations in original) (quoting *U.S. Dep't of HUD*, 66 FLRA 106, 109 (2011))).

³⁶ In the covered-by section of its brief, the Agency also contends that, "as a matter of law, the Union's refusal to bargain" the impact and implementation of the schedule changes "was a waiver of [the Union's] right to challenge the Agency's action." Merits-Award Exceptions Br. at 18 (emphases added). We deny this contention as unsupported under § 2425.6(e)(1) of the Authority's Regulations because, although the contention identifies a recognized ground for review, the Agency does not provide supportive arguments or authority for the notion that a party's failure to bargain can waive that party's distinct statutory right to file a grievance. 5 C.F.R. § 2425.6(e)(1).

³⁷ Merits Award at 24.

³⁸ 5 U.S.C. § 5596.

³⁹ See Merits-Award Exceptions Br. at 20-21. In addition, the Agency contends that, because *some* employees earned premium pay after the schedule changes, the Arbitrator could not award backpay to *other* employees for any premium-pay losses that they suffered due to the new training schedule. *Id.* at 21. Not only is this additional contention illogical, but also, the Agency fails to cite legal authority to support it. Thus, we deny the contention.

⁴⁰ Merits-Award Opp'n Br. at 8.

⁴¹ Compare *Dep't of HHS, SSA, Dall. Region, Dall., Tex.*, 32 FLRA 521, 525 (1988) (*HHS*) (explaining that the "purpose of a 'make-whole' remedy is to place individuals who have been adversely affected by an improper action in the situation where they would have been if the improper action had not occurred"), with Merits-Award Opp'n Br. at 8 (explaining what the backpay remedy requires using wording that parallels the Authority's description of the purpose of a make-whole remedy in *HHS*).

⁴² See, e.g., *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 101-02, 105-06 (2012) (finding that the Act authorized make-whole relief for employees who lost opportunities to work overtime due to agency's violations of parties' collective-bargaining agreement). In stating that the Agency does not contend that making the grievants whole would violate the Act, we have not considered the Agency's assertions that are dismissed as barred in note 44 below.

⁴³ See *VA*, 63 FLRA at 334; *FDA*, 59 FLRA at 683; *INS*, 36 FLRA at 932.

based on a different interpretation of the backpay remedy.⁴⁴

4. The merits award does not violate management's rights to determine internal-security practices or assign work.

As interpreted by the Arbitrator, Article 52, Section 10 of the agreement limits the Agency's discretion to change training schedules: "Normally, scheduled, required training will take place during the assigned shift period and *will only be changed when special circumstances . . . exist* that necessitate scheduling off normal hours."⁴⁵ The Arbitrator found that there were no special circumstances to justify changing the training schedule in a way that required the grievants to perform their training outside their normal shifts.⁴⁶ And because the Agency does not challenge the Arbitrator's finding about the absence of special circumstances as a nonfact, we defer to it in conducting our legal analysis.⁴⁷

The Agency argues that the merits award excessively interferes with management's rights to determine internal-security practices and assign work, under § 7106(a)(1) and (a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute),⁴⁸

respectively.⁴⁹ Under *U.S. DOJ, Federal BOP (DOJ)*,⁵⁰ the Authority applies a three-step test to determine whether an award or remedy excessively interferes with a management right.

The first question is whether the Arbitrator found a violation of a contract provision,⁵¹ and because the Arbitrator found that the Agency violated Article 52, Section 10, the answer to the first question is yes. The second question is whether the remedy reasonably and proportionally relates to the contract violation.⁵² The Authority has held that a backpay remedy for employees who lost compensation due to a contract-violating schedule change reasonably and proportionally related to that contract violation.⁵³ Applying that previous holding to the backpay remedy here, the answer to the second question is yes.

The final question is whether the Arbitrator's interpretation of Article 52, Section 10 excessively interferes with management's rights to determine internal-security practices and assign work.⁵⁴ "Generally, an award that simply requires an agency to adhere to a provision to which it agreed does not excessively interfere with its management's rights,"⁵⁵ unless the agency establishes that the contract provision is itself unlawful.⁵⁶ Here, the Agency does not contend that

⁴⁴ See *VA*, 63 FLRA at 334; *INS*, 36 FLRA at 932. Regarding the backpay remedy, the Agency also claims that: (1) "treating the training[-]day hours . . . as out-of-schedule overtime is contrary to law"; and (2) awarding overtime backpay to an employee on a CWS violates 5 U.S.C. § 6128(a) and 5 C.F.R. § 610.111(d). Merits-Award Exceptions Br. at 19-21. Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the Arbitrator. 5 C.F.R. §§ 2425.4(c), 2429.5. The Union specifically asked the Arbitrator to award an overtime-backpay remedy. Merits-Award Exceptions, Attach. 5, Union's Post-Hr'g Br. at 11. The Agency could have claimed at arbitration that such a remedy would violate out-of-schedule-overtime rules, 5 U.S.C. § 6128(a), and 5 C.F.R. § 610.111(d); but the record does not reflect that the Agency did so. Thus, §§ 2425.4(c) and 2429.5 bar these claims, and we dismiss them. *SSA*, 71 FLRA 798, 802 n.47 (2020) (*SSA*) (finding §§ 2425.4(c) and 2429.5 barred claims not presented below).

⁴⁵ Merits Award at 11 (emphasis added) (quoting CBA Art. 52, § 10).

⁴⁶ *Id.* at 22-23 (crediting grievant's testimony that no special circumstances existed, and declining to credit other witnesses' testimonies that Agency changed the training schedule to accommodate a "mass[-]training event" or other special circumstances).

⁴⁷ *NAGE*, 67 FLRA at 6 (Authority defers to arbitrator's underlying factual findings, unless excepting party demonstrates that they are deficient as nonfacts).

⁴⁸ 5 U.S.C. § 7106(a)(1), (a)(2)(B).

⁴⁹ Merits-Award Exceptions Br. at 25.

⁵⁰ 70 FLRA 398, 405-06 (2018) (then-Member DuBester dissenting). Under *DOJ*'s three-step framework, the first question is whether the arbitrator found a violation of a contract provision. *Id.* at 405. If so, then the second question is whether the arbitrator's remedy reasonably and proportionally relates to that violation. *Id.* If the answer to the second question is yes, then the final question is whether the arbitrator's interpretation of the provision excessively interferes with a § 7106(a) management right. *Id.* If the answer to that question is yes, then the arbitrator's award is contrary to law and must be vacated. *Id.* at 406.

⁵¹ *Id.* at 405.

⁵² *Id.*

⁵³ *U.S. DHS, U.S. CBP, Del Rio, Tex.*, 72 FLRA 236, 239 (2021).

⁵⁴ *DOJ*, 70 FLRA at 405.

⁵⁵ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 1172, 1176 (2020) (*Dublin*) (then-Member DuBester dissenting, in part).

⁵⁶ *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1169 & n.34 (2020) (*Student Aid*) (then-Member DuBester concurring) (where arbitration award "simply require[d] the [a]gency to abide by the [telework] procedures to which it agreed," and the agency did "not contend that the telework procedures in the parties' agreement [we]re themselves unlawful," the award did not excessively interfere with management's rights); see also *Dublin*, 71 FLRA at 1176 ("[A]n exception to this general rule would [apply] . . . if an agency can demonstrate that the arbitrator's interpretation of the [contract] provision encompasses subjects . . . beyond . . . [those to which] an agency can legally agree . . .").

Article 52, Section 10 is itself unlawful,⁵⁷ and the award “simply requires” the Agency to adhere to that provision⁵⁸ – specifically, the requirement to schedule training during an employee’s normally assigned shift unless special circumstances *necessitate* scheduling training outside an employee’s normal hours.⁵⁹ Consequently, the answer to the final *DOJ* question is no,⁶⁰ and we deny the Agency’s management-rights argument.⁶¹

5. The fee award is not premature under the Act.

The Agency notes that an arbitration award to which timely exceptions are filed does not become final and binding until those exceptions are resolved,⁶² but, here, the Arbitrator issued the fee award before the Agency’s timely exceptions to the merits award were resolved.⁶³ As such, the Agency contends that the Arbitrator prematurely resolved the Union’s attorney-fee request, in violation of the Act, because the Arbitrator issued the fee award before the merits award became final and binding.⁶⁴

⁵⁷ See Merits-Award Exceptions Br. at 25-27, 31-34 (management-rights arguments).

⁵⁸ *Dublin*, 71 FLRA at 1176; see *Student Aid*, 71 FLRA at 1169 & n.34.

⁵⁹ Merits Award at 24. Members Abbott and Kiko note that Article 52, Section 10 restricts the Agency’s ability to change employees’ assigned shifts for “scheduled, required training” only. *Id.* at 11 (quoting CBA Art. 52, § 10). Thus, this decision does not affect the Agency’s authority to change employees’ schedules in other circumstances that do not implicate Article 52, Section 10’s unique concerns.

⁶⁰ The Agency repeats its argument about internal-security practices and contends that the argument establishes that the award is based on a nonfact. Merits-Award Exceptions Br. at 26-27. But challenges to legal conclusions – such as the effect of § 7106 of the Statute – do not establish that an award is deficient as based on a nonfact. *U.S. Dep’t of the Navy, Phila. Naval Shipyard*, 39 FLRA 590, 605 (1995). Therefore, we deny this nonfact argument.

⁶¹ The Agency also argues that the Arbitrator exceeded his authority because the award violates management’s rights. Merits-Award Exceptions Br. at 31-34. But where an exceeded-authority argument merely restates an already denied management-rights argument, the Authority has denied the exceeded-authority argument without separate analysis. *E.g.*, *U.S. Dep’t of VA, Montgomery Reg’l Off., Montgomery, Ala.*, 65 FLRA 487, 490 n.7 (2011). Because we have already denied the Agency’s management-rights argument, we deny the exceeded-authority reiteration of that argument too. See *id.*

⁶² Cf. 5 U.S.C. § 7122(b) (“If no exception to an arbitrator’s award is filed . . . during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding.”).

⁶³ See Fee-Award Exceptions Br. at 4.

⁶⁴ *Id.* at 3-4.

In support of its argument, the Agency relies on Authority precedent that says that – in the absence of a negotiated agreement on the topic⁶⁵ – requests for attorney fees under the Act “must be filed within a reasonable period of time *after the award becomes final and binding.*”⁶⁶ However, this precedent concerns the *latest* point at which a party may timely file a request for attorney fees.⁶⁷ Other precedent clearly establishes that fee requests may alternatively be filed – and resolved – during earlier stages of the dispute-resolution process. For example, as long as the resulting grant or denial of fees otherwise complies with the Act and its implementing regulations,⁶⁸ an arbitrator may resolve an attorney-fee request simultaneously with the merits of a dispute.⁶⁹ Consequently, the Agency is incorrect that an arbitrator must postpone the resolution of an attorney-fee request until the underlying merits decision is final and binding. We deny the Agency’s contention accordingly.⁷⁰

IV. Decision

We dismiss, in part, and deny, in part, the Agency’s exceptions.

⁶⁵ According to the Agency, the parties have not negotiated an agreement on this specific issue. *Id.* at 4.

⁶⁶ *Id.* (emphasis added by Fee-Award Exceptions Br.) (quoting *AFGE, Loc. 1923*, 48 FLRA 1117, 1120 (1993) (*Loc. 1923*) (citing *Dep’t of the Air Force Headquarters, 832d Combat Support Grp. DPCE, Luke Air Force Base, Ariz.*, 32 FLRA 1084, 1094 (1988))).

⁶⁷ See *Loc. 1923*, 48 FLRA at 1120.

⁶⁸ 5 C.F.R. § 550.807 (the Act’s implementing regulations on payment of reasonable attorney fees).

⁶⁹ *E.g.*, *Fraternal Order of Police, Pentagon Police Lab. Comm.*, 65 FLRA 781, 784 (2011) (summarizing previous Authority decisions that held “it is not premature to request attorney fees as part of” a merits award, and arbitrators “may rule on requests . . . simultaneous to rendering” a merits decision); *U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 1148, 1152 (2010) (same).

⁷⁰ The Union asks the Authority to award additional attorney fees to compensate for expenses that the Union incurred in connection with its opposition to the Agency’s exceptions to the merits award. Merits-Award Opp’n Br. at 11 (asking that Union “be awarded the additional fees incurred”). However, we deny this request because the Arbitrator, rather than the Authority, is the “appropriate authority” under 5 C.F.R. § 550.807(a) to resolve any attorney-fee request concerning oppositions to exceptions to the arbitration awards. *E.g.*, *U.S. Dep’t of the Army, U.S. Army Garrison, Fort Drum, N.Y.*, 66 FLRA 402, 404-05 & n.11 (2011) (quoting 5 C.F.R. § 550.807(a) (“[A] request may be presented only to the appropriate authority that corrected or directed the correction of the unjustified or unwarranted personnel action.”)).

Chairman DuBester, concurring:

I agree with the Decision to dismiss, in part, and deny, in part, the Agency's exceptions. While I continue to disagree with the test set forth in *U.S. DOJ, Federal BOP*,* I agree that the award is not inconsistent with management rights.

* 70 FLRA 398, 405 (2018) (then-Member DuBester dissenting).