

72 FLRA No. 106

UNITED STATES
DEPARTMENT OF THE ARMY
CORPUS CHRISTI ARMY DEPOT
CORPUS CHRISTI, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2142
(Union)

0-AR-5559

DECISION

December 10, 2021

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

I. Statement of the Case

In this case, we remind arbitrators that they may not award compensatory damages to a grievant – no matter the number or severity of the violations that affect the grievant – unless a statute authorizes such payments.

After the Agency chose another applicant to fill a vacant supervisory position, the grievant filed a grievance challenging the selection process and requested information concerning the selection. Arbitrator Russell M. Guttschall found that the Agency’s selection process and denial of requested information violated the parties’ agreement, Agency and government-wide regulations, and the Federal Service Labor-Management Relations Statute (the Statute).¹ Although he found the record insufficient to establish that the Agency should have chosen the grievant for the vacant position, the Arbitrator awarded the grievant backpay, front pay, and priority consideration for future vacancies for which he was qualified.

The Agency filed exceptions challenging the award on many bases. We agree with the Agency’s argument that the Arbitrator exceeded his authority by

addressing the denial of information requests that were not part of the grievance, and we set aside the affected portions of the award. Further, we agree with the Agency’s arguments that the backpay and front-pay remedies are contrary to law, so we set aside those remedies. All of the Agency’s remaining arguments are denied.

II. Background and Arbitrator’s Award

The Agency posted a vacancy announcement for a General Schedule (GS)-12 supervisory position (the position) and selected another employee (the selectee), rather than the grievant. The grievance asserted that the Agency had not followed the required selection procedures under the parties’ agreement and Agency regulations. The Agency denied the grievance, and the Union requested arbitration. Further, the Union requested information concerning the selection process, but the Agency declined to provide much of the requested information.

On the first day of the arbitration hearing, both parties submitted a list of proposed issues to the Arbitrator. In addition, the Agency introduced as evidence all of the documents that it did not provide to the Union. Therefore, at arbitration, the Union asked the Arbitrator to draw an adverse inference against the Agency because it refused to provide the information before the arbitration hearing.

During arbitration, the Agency submitted a substantially revised list of proposed issues to the Arbitrator – including several newly raised objections to the grievance’s arbitrability. The Union argued that the Arbitrator should not consider the revised issues submission.

In his award, the Arbitrator framed the issues before him as: (1) “[D]id the Agency violate applicable procedures required in filling the position . . . ?” and (2) “If so, what is the remedy?”²

Turning first to the dispute about the Agency’s revised issues submission, the Arbitrator determined that two provisions of the parties’ agreement precluded the Agency from offering arguments on topics that the Agency did not include in its initial issues submission. The first provision – Article 23, Section 7 – stated, “Disputes of grievability/timeliness, *not resolved at the local level*, may be referred to arbitration”³ Because the Agency’s new arbitrability objections in its revised issues submission were never raised at the local level

² Award at 2.

³ *Id.* at 28 (quoting Collective-Bargaining Agreement (CBA) Art. 23, § 7).

¹ 5 U.S.C. §§ 7101-7135.

during the grievance process, the Arbitrator found that the first provision prohibited the Agency from raising those objections halfway through the hearing. The second provision – Article 24, Section 6 – stated, “Arbitrability questions shall be submitted to an arbitrator *as a threshold issue*.”⁴ The Arbitrator found that this provision required the Agency to submit all of its arbitrability objections at the “beginning of arbitration, not halfway through it.”⁵ On the basis of those two provisions, the Arbitrator concluded that the Agency had waived all of the arbitrability objections that did not appear in its initial issues submission.⁶

Next, the Arbitrator considered the Union’s motion for an adverse inference. The Agency argued that the Arbitrator should deny the motion because it concerned a matter that was not part of the grievance, and the Arbitrator agreed with the Agency’s argument that the “Union never filed a grievance based on the denial of the information request[s].”⁷ Nevertheless, the Arbitrator granted the Union’s motion because he found that the parties’ agreement and § 7114(b)(4) of the Statute⁸ entitled the Union to the requested information.⁹ The Arbitrator stated that he would presume that the requested information, “if provided[,] would have been beneficial to the Union and harmful to the Agency.”¹⁰

The Arbitrator then examined provisions from the parties’ agreement that apply to merit placement and promotion. Article 15, Section 5 provided that the negotiated grievance procedure may be invoked “to address any concerns regarding the selection process” except the “[m]ere failure to be selected for promotion *when proper procedures are used*.”¹¹ Consequently, the Arbitrator evaluated whether the Agency failed to follow “proper procedures,” such as the Agency’s merit

promotion and placement plan,¹² when filling the position.

First, the Arbitrator found that the Agency improperly awarded the selectee points for a “false qualification”¹³ and, consequently, showed favoritism towards the selectee.

Second, the Arbitrator found that the selecting official failed to sign a selection-process memorandum (the memorandum) and, as such, violated an Agency regulation.

Third, the Arbitrator found that the memorandum required signatories to affirm that “[w]hen one or more of the applicants/candidates . . . is a . . . business associate[,] I will immediately and willingly inform the hiring official and recuse myself from all involvement in any aspect of the hiring process.”¹⁴ The Arbitrator found that two interviewers and the selecting official were “business associate[s]” of the selectee because they had worked closely with him for an extended period of time at the Agency.¹⁵ By failing to recuse themselves, the Arbitrator found that the interviewers and selecting official violated the memorandum.

Fourth, the Arbitrator found that the Agency violated an internal regulation that required interviewers to “have comprehensive knowledge of the requirements to successfully perform the vacancy and be able to critically discern the job-related qualifications of the candidates competing for the position.”¹⁶ That regulation also “strongly recommended to use diverse [interview-]panel members (e.g., [subject-matter experts] from outside the immediate directorate).”¹⁷ The Arbitrator found that none of the interviewers had the knowledge or ability that the regulation required, and that the Agency and selecting official disregarded, without explanation, the strong recommendation to “use diverse [interview-]panel members” from outside the immediate directorate.¹⁸

⁴ *Id.* (quoting CBA Art. 24, § 6).

⁵ *Id.*

⁶ As relevant here, the Arbitrator found that, because these arguments did not appear in the Agency’s initial issues submission, the Agency waived its arguments that: (1) Army Regulation 690-300 precluded the grievance; and (2) the Agency had not elected to bargain to include selections for supervisory positions within the scope of the negotiated grievance procedure.

⁷ *Id.* at 38.

⁸ 5 U.S.C. § 7114(b)(4). This section concerns an agency’s obligation to furnish certain data to a union upon request and to the extent not prohibited by law. *Id.*

⁹ In connection with his determination to grant the motion, the Arbitrator also found that the Agency committed an unfair labor practice by denying the Union the requested information in violation of § 7114(b)(4). Award at 35, 47.

¹⁰ *Id.* at 40.

¹¹ *Id.* at 2 (quoting CBA Art. 15, § 5).

¹² The Arbitrator held that the merit promotion and placement plan was “incorporated into the negotiated grievance procedure,” *id.* at 29 (emphasis omitted), because Article 15, Section 6(a) of the agreement stated that grievances could be filed “when the placement action does not conform to the requirements of the merit promotion and related placement plan,” *id.* at 2 (emphasis omitted) (quoting CBA Art. 15, § 6(a)).

¹³ *Id.* at 41.

¹⁴ *Id.* at 42 (emphasis omitted) (quoting Memorandum, cl. 3).

¹⁵ *Id.* at 43 (alteration in original).

¹⁶ *Id.* (emphasis omitted).

¹⁷ *Id.* (emphasis omitted).

¹⁸ *Id.* at 44.

Fifth, the Arbitrator found that the selecting official admitted violating an Agency regulation that required him to “thoroughly consider all information” that he received regarding the candidates for the vacancy.¹⁹

Sixth, the Arbitrator found that the Union proved violations of 5 C.F.R. §§ 300.103 and 335.103. Both of those government-wide regulations required the Agency to make selections based solely on job-related criteria, as determined through a professional job analysis.²⁰ The Arbitrator found that the Agency had not performed such an analysis, and “[n]o one had a common understanding of the job-related criteria.”²¹

Seventh, the Arbitrator found it difficult to determine whether the Agency violated the requirement under 5 C.F.R. § 335.103(b)(3) that “[d]ue weight shall be given to performance appraisals and incentive awards.”²² Thus, “[b]ased on the presumption that documents not produced . . . would reflect badly on the Agency,” the Arbitrator concluded that the Agency violated the requirement.²³

Eighth, the Arbitrator concluded that, although the Agency showed the selectee favoritism in the selection process, “there was insufficient evidence to establish that the [grievant] should have received more points” than the selectee in the candidate-scoring process.²⁴

After completing his merits analysis, the Arbitrator concluded that “instat[ing]” the grievant “to the position . . . would be improper because there [wa]s insufficient evidence to establish a proper ranking,” and three other applicants scored higher than the grievant in the previous ranking.²⁵ So, instead, the Arbitrator directed the Agency to “grant the grievant priority for the next available GS[-]12 supervisory position for which he is qualified.”²⁶

The Agency argued that any remedy would violate its management right under § 7106(a)(2)(C)(i) of the Statute – namely, the right “with respect to filling positions, to make selections for appointments from . . . among properly ranked and certified candidates for promotion.”²⁷ But the Arbitrator denied that argument because he found that § 7106(a)(2)(C)(i) was “[s]ubject to” § 7106(b),²⁸ and the parties had negotiated under § 7106(b)(2)²⁹ to “provide relief to employees ‘when proper [selection] procedures are [not] used.’”³⁰ In the grievant’s case, because the Agency did not use proper selection procedures and did not properly rank candidates for the position, the Arbitrator found that he had the authority to remedy those violations without transgressing § 7106(a)(2)(C)(i).³¹

On the question of monetary remedies, the Arbitrator disagreed with the Agency’s contention that he could not award the grievant such remedies unless the Arbitrator determined that the Agency should have selected the grievant for the position. The Arbitrator determined that “many violations by the Agency completely discredit the previous selection process,” and “[t]o eliminate compensation to the grievant[] based on that discredited process would be unreasonable and unfair.”³² Thus, the Arbitrator awarded the grievant backpay at the GS-12 rate, beginning on the date of the previous selection action, as well as front pay until the grievant obtained a GS-12 position.³³

¹⁹ *Id.* (emphasis omitted).

²⁰ See 5 C.F.R. § 300.103(a) (job-analysis requirement); *id.* § 300.103(b) (requiring employment practices to be based on job-related criteria); *id.* § 335.103(b)(1) (requiring that “[a]ctions under a promotion plan . . . must be based solely on job-related criteria”); *id.* § 335.103(b)(3) (incorporating by cross-reference § 300.103’s requirements for “[m]ethods of evaluation for promotion and placement”).

²¹ Award at 45.

²² 5 C.F.R. § 335.103(b)(3).

²³ Award at 45.

²⁴ *Id.* at 47.

²⁵ *Id.* at 48.

²⁶ *Id.* The Arbitrator further specified that “[s]uch priority shall continue if he is not successful in obtaining the position.” *Id.* However, the Arbitrator did not remove the selectee from his position or direct the Agency to re-run the previous selection process.

²⁷ *Id.* at 32 (emphasis omitted) (quoting Exceptions, Attach., Agency’s Ex. 10, Agency’s Post-Hr’g Br. at 22 (quoting 5 U.S.C. § 7106(a)(2)(C)(i))).

²⁸ *Id.* (alteration in original) (quoting 5 U.S.C. § 7106(a)).

²⁹ 5 U.S.C. § 7106(b)(2).

³⁰ Award at 32 (second alteration in original) (quoting CBA Art. 15, § 5 (“Mere failure to be selected for promotion when proper procedures are used is not a basis for a formal complaint.” (emphasis omitted))); see also *id.* at 33 (quoting 5 C.F.R. § 335.103(d) (“[T]he procedures used by an agency to identify and rank qualified candidates [for promotion] may be proper subjects for . . . grievances . . .”).

³¹ See *id.* at 30, 32-33, 47-48.

³² *Id.* at 48 n.15.

³³ *Id.* at 48. The Arbitrator also retained jurisdiction to resolve remedial disputes.

The Agency filed exceptions to the award on October 25, 2019, and the Union filed an opposition on December 3, 2019.³⁴

III. Analysis and Conclusions

- A. The Arbitrator exceeded his authority by resolving a dispute concerning the Agency's denial of the information requests.

Arbitrators exceed their authority when they resolve an issue not submitted to arbitration.³⁵ When the parties fail to stipulate the issue, the arbitrator may frame the issue on the basis of the subject matter of the grievance.³⁶ Here, the Agency argues that the Arbitrator exceeded his authority because he addressed an issue that "was never grieved" – the Agency's denial of the Union's information requests.³⁷

Without a doubt, arbitrators have the authority to frame issues when the parties do not, or are unable to, agree what issues are before the arbitrator.³⁸ However, here, the parties agreed that the information-requests issue was not part of the grievance submitted to arbitration,³⁹ and the Arbitrator's framed issues did not

include the denial of the information requests.⁴⁰ Accordingly, the Arbitrator exceeded his authority by addressing the denial of the information requests⁴¹ and finding that the denial violated the parties' agreement, government-wide regulations, and the Statute.⁴² Thus, we find that the arbitrator exceeded his authority and set

³⁴ The Union's opposition includes requests for the Authority to modify the awarded remedies. Opp'n Br. at 29-30. These requests are exceptions to the award, and § 7122(b) of the Statute requires such exceptions to be filed "during the [thirty]-day period beginning on the date the award is served on the party." 5 U.S.C. § 7122(b). Further, § 2429.23(d) of the Authority's Regulations states that the "[t]ime limit[] established in . . . [§] 7122(b) may not be extended or waived." 5 C.F.R. § 2429.23(d). The Union filed its opposition outside the thirty-day period for filing exceptions, so we dismiss the Union's exceptions as untimely. *U.S. Dep't of the Army, U.S. Army Garrison, Fort Drum, N.Y.*, 66 FLRA 402, 402 n.1 (2011) (dismissing untimely exceptions included in a union's opposition); *SSA, Off. of Lab. Mgmt. Rels.*, 60 FLRA 66, 67 (2004) (same).

³⁵ *U.S. Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, S.F., Cal.*, 55 FLRA 193, 194 (1999).

³⁶ *Nat'l Weather Serv. Emps. Org.*, 72 FLRA 1, 2 (2021) (*Weather Serv.*) (then-Member DuBester dissenting in part) (citing *U.S. Dep't of HHS, FDA, N.J. Dist.*, 61 FLRA 533, 535 (2006) (Member Pope dissenting)).

³⁷ Exceptions Br. at 55.

³⁸ *Weather Serv.*, 72 FLRA at 2.

³⁹ Opp'n Br. at 23; *see id.* at 22 (reiterating that "Union never grieved the information request"); Exceptions Br. at 55; *see also* Award at 38 (agreeing with Agency's contention that Union did not grieve denial of information requests). The dissent ignores both parties' continued assertions that the information-requests denial was never grieved – expressly or implicitly. *Compare* Opp'n Br. at 22 ("Union never grieved the information request"), *and* Exceptions Br. at 55 (asserting Union never grieved information-requests denial), *with* Dissent at 16 ("[T]he underlying grievance [did not] expressly include[] information-request issues." (emphasis added)).

⁴⁰ Award at 2 (framing issues to include whether "the Agency violate[d] applicable procedures required in filling the position" and, if so, what the remedy should be). Although the dissent suggests that an arbitrator's framing of the issues does not meaningfully constrain the arbitrator's authority, Dissent at 20 n.27 (citing cases that treat arbitrators' issues statements as irrelevant to scope of arbitral authority), that position contradicts longstanding Authority precedent. *E.g.*, *U.S. DOL*, 62 FLRA 153, 155-56 (2007) (Chairman Cabaniss concurring); *U.S. Dep't of the Navy, Puget Sound Naval Shipyard, Bremerton, Wash.*, 53 FLRA 1445, 1448-49 (1998) (Member Wasserman dissenting); *VA*, 24 FLRA 447, 451 (1986). In fact, the Chairman joined a decision applying that line of precedent despite a dissent that advocated the lax approach urged by the dissent in this case. *Compare SSA, Off. of Disability Adjudication & Rev.*, 64 FLRA 469, 470 (2010) (majority decision, joined by then-Member DuBester, affirming the proposition that "[o]nce the [a]rbitrator framed the issues, he was constrained from ruling on any unrelated substantive issues"), *with id.* at 472 (Dissenting Opinion of Chairman Pope) ("The majority sets aside the award . . . based on a curious theory that, once an arbitrator frames issues in one portion of an award, the arbitrator is precluded from resolving additional issues in another portion of the award."). Although the dissent distinguishes the *facts* in these previous decisions, Dissent at 19 n.27, that effort merely demonstrates that the *rule* at issue applies uniformly across a wide variety of circumstances, including the present case.

⁴¹ Award at 11-22 (exhaustive background concerning the information requests), 33-40 (one-third of merits analysis devoted to denial of information requests). The best illustration that the dispute over the denial was not "directly tied to . . . the merits of the grievance," Dissent at 19 (emphasis added), and did not "necessarily ar[ise] from . . . the issues that [the Arbitrator] framed," *id.* at 20 (emphasis added), is the fact that setting aside that portion of the award changes virtually nothing about the case's outcome. *Compare U.S. DHS, Fed. Emergency Mgmt. Agency*, 69 FLRA 444, 445 (2016) (Member Pizzella dissenting in part on other grounds) (where stipulated issue concerned whether agency violated upward-mobility program, it was not necessary for arbitrator to "conduct[] a general 'review of the [a]gency's promotion procedures'"), *with AFGE, Loc. 1770*, 67 FLRA 93, 94 (2012) (where issue was whether suspension was for just cause, arbitrator properly found it necessary to consider two misconduct charges on which agency based suspension). *Cf. U.S. DHS, U.S. CBP*, 68 FLRA 829, 833 (2015) (Authority's ability to resolve the merits of one group of arguments, even after finding that another group of arguments was barred, showed that the two groups of arguments were not inextricably intertwined).

⁴² Award at 41-42 (finding denial of information requests violated Article 23, Sections 9 and 14 of the agreement), 45-46 (finding information denial violated 5 C.F.R. § 335.103(b)(5)), 46-47 (finding information denial violated § 7114(b)(4) of the Statute).

aside the adverse-inference finding⁴³ and the related contractual, regulatory, and statutory violations.⁴⁴

- B. The Arbitrator's finding that the Agency waived certain arbitrability challenges draws its essence from the agreement.

The Agency contends that the award fails to draw its essence from the parties' agreement because the Arbitrator did not identify any contract wording to support his finding that the Agency waived certain arguments by failing to raise them until halfway through the arbitration hearing.⁴⁵

However, the Arbitrator did, in fact, identify two provisions in the agreement to support his waiver finding. First, he found that Article 23, Section 7 required that all "grievability/timeliness" disputes be raised "at the local level" in order to be considered at arbitration,⁴⁶ and he observed that none of the newly raised challenges in the Agency's revised issues submission were presented during the grievance process at the local level.⁴⁷ Second, he found that Article 24, Section 6 made "[a]rbitrability

questions . . . threshold issue[s],"⁴⁸ which the Arbitrator interpreted to mean that the Agency could not wait until halfway through the hearing to raise new arbitrability questions.⁴⁹ Because the Agency fails to even acknowledge the Arbitrator's reliance on these provisions, it does not demonstrate that the Arbitrator's interpretation of the agreement as permitting waiver is implausible.⁵⁰ Therefore, we deny the Agency's essence arguments.⁵¹

- C. The grievance satisfies the definition in § 7103(a)(9) of the Statute.

Section 7103(a)(9)(C)(i) of the Statute defines a "grievance" to include, as relevant here, "any complaint . . . by any employee [or] labor organization . . . concerning . . . the effect or interpretation, or a claim of breach, of a collective[-]bargaining agreement."⁵² The Agency contends that the grievant's complaint "did not relate . . . to a breach" of the agreement, so the complaint did not qualify as a "grievance" under § 7103(a)(9)(C)(i).⁵³ But the record flatly contradicts the Agency's contention because the grievance alleged multiple breaches of the agreement,⁵⁴ and the Arbitrator interpreted multiple provisions of the agreement in his

⁴³ The Arbitrator relied on his adverse-inference finding to support only one of his other determinations – specifically, his conclusion that the selection process failed to give due weight to "performance appraisals and incentive awards," as required by 5 C.F.R. § 335.103(b)(3). *Id.* at 45. Accordingly, we set aside that determination as well.

⁴⁴ Because of our resolution of this exceeded-authority argument, we need not address other Agency arguments about the adverse-inference finding or violations that were based on the information-requests denial. *See* Exceptions Br. at 26-30 (arguing adverse-inference finding is contrary to precedent, rules of evidence, and § 7114(b)(4)), 31-33 (arguing adverse-inference finding violates § 7116(d) of the Statute), 43-47 (nonfact challenges to findings about what information Union received, and whether Union grieved the denial); *see also, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 183, 185 n.42 (2019) (*BOP*) (then-Member DuBester dissenting) (where Authority's disposition of one argument moots other arguments, Authority need not address mooted arguments).

⁴⁵ Exceptions Br. at 51; *see also id.* at 53 (citing *U.S. Small Bus. Admin.*, 70 FLRA 525, 527-28 (2018) (then-Member DuBester concurring in part and dissenting in part)). 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).

⁴⁶ Award at 28 (emphasis omitted) (quoting CBA Art. 23, § 7).

⁴⁷ *Id.*

⁴⁸ *Id.* (emphasis omitted) (quoting CBA Art. 24, § 6).

⁴⁹ *Id.*

⁵⁰ The Agency notes that a "statutory bar to arbitral jurisdiction cannot be waived." Exceptions Br. at 53; *see also id.* at 22. But, with the exception of the argument addressed in part III.C. of this decision – concerning whether the grievance satisfied the definition set forth in § 7103(a)(9) of the Statute – none of the Agency's waived arguments identifies a statutory bar to jurisdiction. In particular, the Agency's argument that it did not elect to bargain to include selections for supervisory positions within the scope of the negotiated grievance procedure is not a statutory bar because, as the Agency notes, it is lawful for parties to include such disputes in their grievance procedure. Exceptions Br. at 20; *see also* note 51 below.

⁵¹ Because we deny the Agency's exception challenging the Arbitrator's waiver finding, we will not consider arguments that the Arbitrator found were waived. *See Headquarters, U.S. Army Training & Doctrine Command, Fort Monroe, Va.*, 34 FLRA 537, 539, 542 (1990) (where arbitrator refused to consider argument that was not raised before arbitration, and excepting party failed to show arbitrator's refusal was deficient, Authority did not consider argument on exceptions). Thus, we do not consider the Agency's contention that it did not bargain to include disputes over selections for supervisory positions within the negotiated grievance procedure. Exceptions Br. at 20-22 (presenting contention as a contrary-to-law argument), 40-42 (presenting as a nonfact argument), 48-51 (presenting as an essence argument), 56-57 (presenting as an exceeded-authority argument).

⁵² 5 U.S.C. § 7103(a)(9)(C)(i).

⁵³ Exceptions Br. at 39.

⁵⁴ Exceptions, Attach., Agency's Ex. 2, Step-One Grievance at 6 (alleging violations of Articles 15 and 23); Exceptions, Attach., Agency's Ex. 4, Step-Two Grievance at 9 (same).

award.⁵⁵ Thus, we deny the argument that the grievant's dispute was not a "grievance" under the Statute.⁵⁶

- D. The award and remedies do not excessively interfere with the Agency's management right under § 7106(a)(2)(C)(i) of the Statute.

The Agency argues that the award and remedies excessively interfere with the Agency's management right under § 7106(a)(2)(C)(i) – specifically, the right "with respect to filling positions, to make selections for appointments from . . . among properly ranked and certified candidates for promotion."⁵⁷ More generally, management's rights under § 7106(a)(2)(C) include the right to determine the qualifications, skills, and abilities needed to perform the work of a position and the right to determine whether applicants for the position possess such qualifications, skills, and abilities.⁵⁸

Under *U.S. DOJ, Federal BOP (DOJ)*,⁵⁹ the Authority applies a three-step test to determine whether an award or remedy excessively interferes with a management right. However, *DOJ* applies only where the award or remedy affects the specified management right.⁶⁰

To the extent that the Agency's argument involves alleged effects on the already completed selection process for the disputed position, the Arbitrator found that the candidates for that position were *not* properly ranked⁶¹ – a finding to which we defer because the Agency has not alleged, let alone shown, that it is a nonfact.⁶² Thus, any effects on the previous selection process do not implicate § 7106(a)(2)(C)(i), which concerns selections from "properly ranked" candidates only.⁶³

Next, the Agency argues that by enforcing the Agency's own conflict-of-interest rules – which required the interviewers and selecting official to recuse themselves from any selection actions involving business associates – the Arbitrator "refus[ed] to let management use supervisors . . . who have at any time worked with or supervised any of the applicants for a position."⁶⁴ But this argument misrepresents the award,⁶⁵ which held only that individuals who had worked with an applicant for an extended period of time were the applicant's business associates and, as such, must recuse themselves from selection actions involving that applicant.⁶⁶ More significantly, the Agency fails to establish how enforcing conflict-of-interest rules for interviewers and a selecting official affects the right to determine the qualifications, skills, and abilities needed to perform the work of a position or the right to determine whether applicants for a

⁵⁵ *E.g.*, Award at 32 (Art. 15, § 5), 40-41 (Art. 15, § 6), 41-42 (Art. 23, §§ 9, 14).

⁵⁶ Section 7103(a)(9) identifies several categories of complaints that fall within the definition of a "grievance," 5 U.S.C. § 7103(a)(9), but a complaint need not fit within more than one category to satisfy the statutory definition. Because the grievant's complaint could be part of the category that § 7103(a)(9)(C)(i) defines, we do not address the Agency's arguments that the grievant's complaint would not fit within the categories that § 7103(a)(9)(A), (B), or (C)(ii) defines. Exceptions Br. at 39-40; *cf. U.S. DOJ, Fed. BOP, Med. Facility for Fed. Prisons*, 52 FLRA 694, 698-99 (1996) (finding that where complaint was a "grievance" under § 7103(a)(9)(C)(i), Authority need not apply precedent concerning a "grievance" under § 7103(a)(9)(C)(ii)).

⁵⁷ Exceptions Br. at 22 (quoting 5 U.S.C. § 7106(a)(2)(C)(i)). The Authority reviews questions of law 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 conducting 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 establishes that they are nonfacts. *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (*CBP*).

⁵⁸ *E.g.*, *U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Newport News, Va.*, 57 FLRA 36, 39 (2001) (*Navy*) (citing *Ass'n of Civilian Technicians, N.Y. State Council*, 45 FLRA 17, 20 (1992)).

⁵⁹ 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.

⁶⁰ *U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 933 (2018) (*DOD*) (then-Member DuBester dissenting).

⁶¹ *See* Award at 48.

⁶² *CBP*, 67 FLRA at 690.

⁶³ 5 U.S.C. § 7106(a)(2)(C)(i); *see* Exceptions Br. at 23 (acknowledging that Arbitrator found candidates were not properly ranked and certified); *see also DOD*, 70 FLRA at 933 (*DOJ* framework does not apply where specified management rights are not affected).

⁶⁴ Exceptions Br. at 24.

⁶⁵ *SSA*, 63 FLRA 274, 277-78 (2009) (misrepresentation of award failed to establish violation of § 7106(a)(2)(C)).

⁶⁶ *See* Award at 10-11, 42-43.

position possess such qualifications, skills, and abilities.⁶⁷ Thus, we deny this argument.

In addition, the Agency contends that the remedy of priority consideration excessively interferes with management's § 7106(a)(2)(C)(i) right because "management is effectively prevented from hiring the best qualified applicant for upcoming supervisory positions for which [the g]rievant might be at least minimally qualified."⁶⁸ In other words, the Agency contends that "[m]anagement would be required to promote [the g]rievant to a supervisory position, regardless of his qualifications."⁶⁹ Under the three-step *DOJ* framework, the first question asks whether the arbitrator found a violation of a contract provision, and the second question asks whether the remedy reasonably and proportionally relates to that violation.⁷⁰ But the Agency "assume[s]" for the sake of its excessive-interference argument that the answers to the first and second questions are both yes.⁷¹ Therefore, we focus on the final *DOJ* question – whether the remedy excessively interferes with management's § 7106(a)(2)(C)(i) right.⁷²

In describing the effects of the challenged remedy, the Agency admits that "management could decline to select [the g]rievant for a given supervisory position," notwithstanding his entitlement to priority consideration.⁷³ But the Agency attempts to temper its admission by asserting that it would be in a "perilous position" if it did not select the grievant for a future vacancy because he could challenge the Agency's action.⁷⁴ However, that consequence exists regardless of whether the grievant receives priority consideration. More importantly, the Authority has previously held that priority-consideration remedies do not excessively interfere with management's § 7106(a)(2)(C)(i) right, as long as the candidate with priority consideration is not exempt from the minimum qualifications, skills, and abilities that the Agency establishes for any future

vacancies.⁷⁵ As the awarded remedy does not relieve the grievant of the obligation to demonstrate that he possesses the minimum qualifications, skills, and abilities for future vacancies,⁷⁶ we find that the remedy does not excessively interfere with management's right under § 7106(a)(2)(C)(i).

E. The monetary-compensation remedies are contrary to the Back Pay Act and the doctrine of sovereign immunity.

Even though the Arbitrator found that there was insufficient evidence to show that the Agency should have selected the grievant for the position, the Arbitrator awarded the grievant backpay as though he had established his entitlement to the position.⁷⁷ Explaining his decision, the Arbitrator stated that the grievant deserved compensation for the Agency's many violations.⁷⁸ The Agency argues that the backpay remedy is contrary to the Back Pay Act (the Act).⁷⁹

As relevant here, in order justify an award of backpay under the Act, an arbitrator's findings must establish that a violation "resulted in" an employee's loss of some pay.⁸⁰ Here, the Arbitrator explicitly found that the evidence was insufficient to establish that the grievant lost any pay due to the Agency's violations.⁸¹ Therefore, the backpay remedy is contrary to the Act, and we set it aside.⁸²

Further, the Agency argues that the Act does not authorize front pay, and that the front-pay remedy violates the doctrine of sovereign immunity,⁸³ according to which the federal government is immune from monetary damages unless a federal statute waives that

⁶⁷ *Navy*, 57 FLRA at 39 (setting forth rights that § 7106(a)(2)(C) protects); see also *DOD*, 70 FLRA at 933 (*DOJ* framework does not apply where specified management rights are not affected).

⁶⁸ Exceptions Br. at 23.

⁶⁹ *Id.*

⁷⁰ *DOJ*, 70 FLRA at 405.

⁷¹ Exceptions Br. at 23 ("assuming arguendo that there was a contract violation and that the remedy reasonably and proportionally relates to that violation" (italics omitted)).

⁷² See *DOJ*, 70 FLRA at 405.

⁷³ Exceptions Br. at 23.

⁷⁴ *Id.*

⁷⁵ See, e.g., *U.S. Dep't of the Treasury, IRS, Large & Mid-Size Bus. Div., Omaha, Neb.*, 60 FLRA 742, 744 (2005) (Chairman Cabaniss concurring); *SSA, Chi. Region, Cleveland Ohio Dist. Off., Univ. Circle Branch*, 56 FLRA 1084, 1090 (2001); *SSA, Branch Off. E. Liverpool, Ohio*, 54 FLRA 142, 147-48 (1998); see also *Laurel Bay Tchrs. Ass'n OEA/NEA*, 49 FLRA 679, 686-88 (1994) (finding priority consideration was a negotiable procedure under § 7106(b)(2)).

⁷⁶ Award at 48 (directing Agency to grant grievant priority consideration "for the next available GS[-]12 supervisory position for which he is qualified" (emphasis added)).

⁷⁷ *Id.* at 47, 48 & n.15.

⁷⁸ *Id.* at 48 n.15.

⁷⁹ Exceptions Br. at 33-36 (citing 5 U.S.C. § 5596).

⁸⁰ *NTEU, Chapter 143*, 68 FLRA 871, 873-74 (2015).

⁸¹ Award at 47, 48 & n.15.

⁸² Because we are setting aside the backpay remedy, we need not address the Agency's additional contentions that this remedy is contrary to 5 C.F.R. § 550.804(a) and (c), Exceptions Br. at 33, 35-36, or that it constitutes an award of unlawful punitive damages against the federal government, *id.* at 33-34. *BOP*, 71 FLRA at 185 n.42.

⁸³ Exceptions Br. at 33-36.

immunity.⁸⁴ The Authority has recognized that the Act does not authorize front pay,⁸⁵ and the Union concurs that the front-pay remedy is contrary to law.⁸⁶ Thus, we set aside the front-pay remedy as well.⁸⁷

IV. Decision

As explained above, we grant the Agency's exceptions, in part, and deny them, in part; and we modify the award to set aside: (1) the resolution of the information-requests dispute; (2) the adverse-inference finding and related contractual, regulatory, and statutory violations; and (3) the backpay and front-pay remedies. But we do not disturb the priority-consideration remedy. We also dismiss the Union's untimely exceptions.

⁸⁴ *U.S. DHS, U.S. CBP*, 68 FLRA 524, 525 (2015) (describing the doctrine of sovereign immunity).

⁸⁵ *U.S. Dep't of HHS, Gallup Indian Med. Ctr., Navajo Area, Indian Health Serv.*, 60 FLRA 202, 212 (2004).

⁸⁶ Opp'n Br. at 18.

⁸⁷ Because we are setting aside the front-pay remedy, we need not address the Agency's additional contentions that it is contrary to 5 C.F.R. § 550.804(a) and (c). Exceptions Br. at 36; *BOP*, 71 FLRA at 185 n.42.

Member Abbott, concurring:

It is not uncommon for parties who are engaged in litigation – whether before a court or an arbitrator – to request information from the other as they prepare for trial or hearing. That is one part of the litigative process. Sometimes the requesting party gets the information requested and sometimes not. Some information must be provided, but some information may not be exchanged for any number of reasons – there is no obligation to do so, it is privileged, it is not available, or it is not relevant. When the parties do not agree whether certain information must be provided, the parties may bring that matter to the arbitrator or judge as a pre-hearing, evidentiary issue, which is typically resolved before the hearing or trial under the rules of civil procedure or under the parties’ collective-bargaining agreement (CBA) if it includes a provision concerning pre-arbitral process. In this case, the Union’s request is simply an evidentiary matter that should have been resolved before the hearing.

Although the Union wanted information that presumably they believed would prove to be helpful to their case, they never filed a grievance on the issue, and the Arbitrator never framed it, as one of the issues in dispute.¹ The fact that it was not submitted as an issue for resolution does not mean that the Arbitrator could not address it as an evidentiary matter. Evidentiary disputes that arise in the course of pre-hearing preparation are just that and should be addressed *as part of the pre-hearing process*.

When the parties’ CBA includes a provision that concerns the pre-hearing process, that matter should be raised as a grievance at the time the purported violation of the contract or § 7114(b)(4)² occurs. But the Union did not do this. They never grieved the Agency’s denial at the time it occurred, and the Arbitrator-framed issue statement does not identify the dispute regarding the information requests as an issue which will be resolved.

It is odd that the dissent attempts to characterize our approach as “overly technical”³ when our decision is quite simple. Neither the Union, the Agency, nor the Arbitrator defined the Agency’s failure to provide information as an issue subject to arbitrable review. Whether or not the Union tried to raise the information matter at hearing, it was not formally grieved, nor framed as an issue for the Arbitrator to resolve. Therefore, the Arbitrator exceeded their⁴ authority when the award

determined that the Agency’s failure to provide the information requested before the hearing violated the parties’ contract and § 7114(b)(4) and warranted a remedy.

Once again, the dissent characterizes “the scope of arbitral authority”⁵ in a manner that demands total obeisance.⁶ The notion that arbitrators have unchecked authority to define their own jurisdiction will lead to arbitral free-for-alls where grievants and their representatives may wait until the day of hearing to toss into the arbitral ballgame any matter, issue, or complaint that is only somewhat, minimally, or peripherally related to the original grievance submitted to arbitration. In the instant case, the Arbitrator framed the scope of the issue, yet chose to not specifically include the information request within said framing. As such, the Arbitrator goes beyond their own authority when addressing issues that, arguably, could have been placed within their authority to determine.

Finally, to the extent possible, parties should attempt to resolve disputes at the lowest possible level. What sense is there to the notion that a party may utilize the most time intensive and cost-producing method, when the same matter could be resolved prior to hearing with little cost and angst? If the parties can resolve the information request issue before it takes up pages of an arbitrator’s decision and serves as a basis for an exception to the Authority, they would be wise to do so. In the instant matter, the Union had the power to bring this matter to the Arbitrator before the hearing for possible resolution.⁷ The Arbitrator could have clearly articulated the information request as an issue but did not do so. As such, we and they are constrained by their choices.

¹ See Majority at 7 nn.39-40.

² 5 U.S.C. § 7114(b)(4).

³ Dissent at 16.

⁴ Member Abbott notes, for informational purposes, that the pronoun “their” is used here to be consistent in a continuing effort to conform Authority decisions to a gender-neutral format.

⁵ Dissent at 16.

⁶ See, e.g., *U.S. EPA, Region 5*, 70 FLRA 1033, 1035 n.16 (2018) (then-Member DuBester dissenting) (“Member Abbott notes that deference to arbitral factual findings does not mean blind obeisance. As we note below, the [a]rbitrator failed to apply the proper legal rigor as he reached his factual findings. In such circumstances, no deference, let alone blind obeisance, is warranted.”).

⁷ While the resolution of disputes is not always appropriate prior to hearing for a number of reasons, if a party knows that it has a dispute which is intertwined with a pending case, it should not be surprising that the opposing party objects to the expansion of the matter as being outside of the specified grievance and/or issue statement.

Chairman DuBester, concurring in part and dissenting in part:

I agree that: the Arbitrator's finding that the Agency waived certain eligibility challenges draws its essence from the parties' collective-bargaining agreement; the grievance satisfies the definition in § 7103(a)(9) of the Federal Service Labor-Management Relations Statute (the Statute);¹ and the monetary-compensation remedies are contrary to law. Further, while I continue to disagree with the test set forth in *U.S. DOJ, Federal BOP*,² I agree that the award is not inconsistent with management rights.

However, I do not agree that the Arbitrator exceeded his authority by resolving issues regarding the Agency's repeated failures to provide requested information. In reaching a different conclusion, the majority relies on the undisputed fact that neither the issues that the Arbitrator formally framed in the award nor the underlying grievance expressly included information-request issues.

In my view, that approach reflects an overly technical view of the facts of this case and the scope of arbitral authority. As discussed in greater detail below, throughout the entire grievance process, the grievant – and later the Union and the Arbitrator – expressly linked the repeated information requests to the processing of the grievance. Further, although the Arbitrator's framing of the issues did not expressly include an information-request issue, the Union submitted such an issue for his consideration – and he clearly considered that issue to be properly before him. Given these circumstances, I believe that the Arbitrator was within his authority to resolve the submitted issue.

The sequence of events here provides important context. In his first-step grievance, the grievant expressly stated that there was a pending information request that had been submitted in order to “obtain documents to validate the allegations made” in the grievance.³ And, for remedies, the grievance requested either a promotion or priority consideration for a future promotion, “dependent on the results of the investigation, documentation review, and review of the scoring panel.”⁴

When the Agency did not provide the requested information, the grievant repeatedly renewed his information request and repeatedly stated that he needed the information in connection with processing the

grievance.⁵ The Agency provided some, but not all, of the requested information.

Subsequently, the Agency held a first-step grievance meeting, despite the grievant's request for a continuance so that he could “gather the necessary information to establish the [alleged] violations.”⁶ The Agency did not provide the remaining, requested information.

The grievant then asked the Union shop steward (the steward) for his assistance, and the steward requested the information on the grievant's behalf.⁷ The Agency still did not provide it.

Then, the Agency issued its decision on the step-one grievance and acknowledged that, at the previous grievance meeting, the grievant had explained why the lack of information made it challenging to process his grievance and had further explained why he needed the information.⁸ But, again, the Agency did not provide the remaining information.

After the grievance moved to step two of the grievance procedure, the steward explained to the Agency why the Union needed the requested information.⁹ In response, the Agency stated that the Union would need to file an information request, and the steward replied that the previous information requests had satisfied the requirements of § 7114(b)(4) of the Statute.¹⁰ The Agency asked the Union to clarify its “particularized need” for the information,¹¹ and the steward responded, among other things, that the requested information was needed “to show that [the Agency's selection] protocol

¹ 5 U.S.C. § 7103(a)(9).

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

³ Award at 11.

⁴ *Id.*

⁵ *Id.* at 12 (request explained that grievant was making the request so that he could represent himself); *id.* at 13 (later request stating that the grievant was requesting the information “to determine whether or not a reason exists to grieve the selection [at issue] under Article 5, Section 5” of the parties' collective-bargaining agreement, and explaining why the criteria for information requests set forth in § 7114(b)(4) of the Statute were met); *id.* at 14 (grievant explained that he needed sanitized copies of the top four candidates' resumes “to evaluate the case” and that, without that information, “it [would] force [the grievant] to grieve the selection during the first[-] and [second-]step grievance process without sufficient documentation/evidence to support it”).

⁶ *Id.* at 14.

⁷ See *id.* at 14-15.

⁸ See *id.* at 17.

⁹ See *id.* at 15 (“The resumes are a crucial part of the puzzle and without them as evidence the [second] step will have the exact same outcome as the first, which is not, on our part, the desired outcome. The violations in the [agreement] have been pointed out so the reason for the need concerning the violation is already a talking point.”).

¹⁰ See *id.* at 16.

¹¹ *Id.*

[at issue in the grievance] was indeed in violation of federal law.”¹²

When the Agency still failed to provide the information, the Union *president* submitted an information request, stating that the request was being made under Article 5, Section 5 of the parties’ agreement so that the Union could “determine whether to grieve the action” under Article 23 of the agreement.¹³ The request explained that the information would “be used to assess whether a [p]rocedural or [r]egulatory [v]iolation under Article 15, Sections 5 and 6 of the [agreement] occurred during the selection process” at issue in the grievance, including assessing whether “any inconsistencies exist[ed].”¹⁴

Again, the Agency did not provide the information – until the first day of the arbitration hearing.¹⁵ Also that day, the Union submitted a responsive motion asking the Arbitrator to draw an adverse inference against the Agency and to strike the evidence,¹⁶ claiming that the previously withheld documents had been “crucial in the grievance process and the arbitration[.]”¹⁷ Separately, also the same day, the Union submitted a written list of proposed issues for the Arbitrator to resolve, which expressly included issues regarding the Agency’s failure to provide information.¹⁸

The arbitration hearing continued for three more days, spread out over the following two months. One month after the hearing closed – and three months after it began – the parties submitted post-hearing briefs. In its post-hearing brief, the Agency had the opportunity to, and did, respond at length to the Union’s positions regarding the submitted information-requests – including arguing that an adverse inference was not warranted because the Union was not entitled to the information.¹⁹

Not surprisingly, the Arbitrator addressed those issues at length in his award. Specifically, he found that the Agency’s year-plus delay in providing the requested documents “gave the Agency a substantial advantage in preparing for the grievance as well as the arbitration[.]”²⁰ with “[t]he difference in access” causing “substantial prejudice”²¹ to the Union because it had “damaged the Union’s ability to provide the full scope of evidence necessary to prove all the issues.”²² The Arbitrator determined that the Agency’s failure to provide the documents violated Article 23, Section 9, Step 1 of the parties’ agreement; Article 23, Section 14 of the agreement; Requirement 3 of 5 C.F.R. § 335.103; and § 7114(b)(4) of the Statute.²³ And he concluded that “the Union [was] entitled to an adverse inference against the Agency for the repeated improper and unlawful failure to provide documents in response to written requests for information that were crucial in the grievance process and the arbitration.”²⁴

In making these findings, the Arbitrator resolved an issue that a party had expressly submitted to him – both as a written, submitted issue and in a separate motion – and that was directly tied to how he should resolve the merits of the grievance. As I have stated previously, “[t]he Authority has consistently held that ‘in formulating and resolving the issues before them, arbitrators may rely on arguments that the parties raise in the proceeding.’”²⁵ That principle is fully consistent with

¹² *Id.* at 17.

¹³ *Id.* at 19.

¹⁴ *Id.*

¹⁵ *See id.* at 22.

¹⁶ *See id.* at 2, 22, 33.

¹⁷ *Id.* at 47.

¹⁸ *See* Exceptions, Attach. 26, Apr. 29, 2019 Union’s Proposed Issue(s) Presented at 1 (proposing that the Arbitrator resolve, among other issues: “[w]hether the Union is entitled to an adverse inference based on the Agency’s refusal and/or failure to provide relevant information specifically requested by the Union on numerous occasions, including, but not limited[] to[,] May 24, 2018, before the grievance process commenced[.]”); and “[w]hether the Agency should be allowed to submit evidence in its case, when the Union specifically requested but the Agency refused and/or failed to provide such evidence on numerous occasions, before the grievance process and arbitration[.]”).

¹⁹ *See* Exceptions, Attach. 10, Agency Post-Hr’g Br. at 36-43 (Agency Post-Hr’g Br.).

²⁰ Award at 35.

²¹ *Id.* at 39.

²² *Id.* at 40.

²³ *See id.* at 35, 41-42, 46-47.

²⁴ *Id.* at 48.

²⁵ *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 72 FLRA 146, 150 (2021) (Dissenting Opinion of Chairman DuBester) (quoting *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 966 (2015)).

well-established private-sector precedent.²⁶ Further, it is not dispositive that the Arbitrator did not expressly frame the information-request denials as an issue because his determinations regarding that issue – which included affording the Union an adverse inference concerning the information the Agency refused to provide – were both related to the grievance and necessarily arose from issues that the parties presented and the issues that he framed.²⁷

²⁶ See, e.g., *Madison Hotel v. Hotel & Rest. Emps., Loc. 25, AFL-CIO*, 144 F.3d 855, 858 (D.C. Cir. 1998) (it is “commonplace in arbitration proceedings” that “the scope of the issues develop[s] informally during the course of the parties’ presentations[.]”); *Aria Fire Sys., Inc. v. Sprinkler Fitters UA Loc. 709*, No. 2:16-cv-03522-CAS (RAOx), 2016 WL 6745323 at *6-7 (C.D. Cal. Nov. 14, 2016) (“Local 709 handed the arbitrator a packet describing the issues they had observed at the Project and wanted resolved Although formulated as an argument about the scope of the issues for arbitration, petitioner’s argument appears to be that these submissions were *untimely* because they had not been raised during the Step II meeting This is not a case where the parties submitted an issue to arbitration and the arbitrator doled out ‘his own brand of industrial justice[.]’ . . . by investigating and punishing disputes that were not before him.”); *Nat’l Gypsum Co. v. Oil, Chem. & Atomic Workers Int’l Union*, No. 97-0338, 1997 WL 358048, *4 (E.D. La. June 24, 1997) (footnotes omitted) (“[N]either the collective[-]bargaining agreement nor the grievance are the sole source of the arbitrator’s authority [T]he agreement to arbitrate a specific issue may be implied or established by the conduct of the parties. It is appropriate for the arbitrator to decide just what the issue was that was submitted to him and argued by the parties By the time of the hearing, the focus of the [u]nion’s argument had become more clear and the [u]nion had identified numerous sections of the [a]greement that it considered relevant and/or violated by the [c]ompany’s implementation of the day-off program. The arbitrator ultimately relied on those provisions, as well as others he viewed as relevant to the dispute.”). Cf. *Unite HERE Loc. 23 v. I.L. Creations of Md., Inc.*, 148 F. Supp. 3d 12, 22 (D.D.C. 2015) (finding party’s contention regarding arbitrator’s remedial authority “patently flawed . . . because it is based on the assumption that an arbitrator’s remedy must be limited to the confines of the initial grievance, an assumption that is not based in the [collective-bargaining agreement] and appears to have been plucked from thin air[.]”).

²⁷ See *U.S. Dep’t of the Navy, Naval Surface Warfare Ctr., Indian Head Div.*, 60 FLRA 530, 532 (2004) (“Arbitrators do not exceed their authority by addressing any issue that is necessary to decide an issue before the arbitrator, or by addressing *any issue that necessarily arises from* issues specifically included in an issue before the arbitrator.”) (emphasis added) (internal citations omitted); *Air Force Space Div., L.A. Air Force Station, Cal. Activity*, 24 FLRA 516, 519 (1986) (noting that “the Federal courts permit an arbitrator to extend the award to *issues that necessarily arise from* the issues specifically included in a submission agreement or the arbitrator’s formulation of the issues submitted in the absence of a stipulation by the parties”) (emphasis added).

Here, in order to resolve the Union’s request for an adverse inference, the Arbitrator needed to resolve the Agency’s defense that the Union was not entitled to the information. See Agency Post-Hr’g Br. at 36-39. *U.S. DHS, Fed. Emergency Mgmt. Agency*, 69 FLRA 444, 445 (2016) (Member Pizzella dissenting in part on other grounds), cited by the majority, is not to the contrary. There, the arbitrator wholly failed to address a stipulated issue, addressed a different issue – that did not necessarily arise from the stipulated issue – and awarded a remedy. See *id.* at 445. That is not remotely similar to what occurred here. And, although I acknowledge that the majority cites it only as a “[c]f.,” Majority at 7 n.41, I note that *U.S. DHS, U.S. CBP*, 68 FLRA 829, 833 (2015) – where the Authority found that one particular legal argument regarding a remedy was not “inextricably intertwined” with other legal arguments regarding that remedy, *id.* – has no bearing here. Additionally, *U.S. DOL*, 62 FLRA 153, 155-56 (2007) (Chairman Cabaniss concurring) (*DOL*); *U.S. Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington*, 53 FLRA 1445, 1448-49 (1998) (Member Wasserman dissenting) (*Puget Sound*); *VA*, 24 FLRA 447, 451 (1986); and *SSA, Office of Disability Adjudication & Review*, 64 FLRA 469, 470 (2010) (Chairman Pope dissenting) (*SSA*) – also cited by the majority – are easily distinguishable from this case. In *DOL*, the arbitrator resolved a grievance that had been submitted to a *different* arbitrator and “the *stipulated* issue in the . . . grievance” before the *DOL* arbitrator did not involve issues regarding the other grievance. 62 FLRA at 155-56 (emphasis added). In *Puget Sound*, the Arbitrator awarded the grievant remedies despite having found no violation with regard to the stipulated issue. 53 FLRA at 1449. Similarly, in *VA*, the arbitrator found no violation with regard to the sole issue submitted, but nevertheless awarded a remedy. 24 FLRA at 451. And in *SSA*, the majority concluded that the arbitrator exceeded his authority by awarding travel expenses for a union representative where the travel-expense issue was “unrelated” to the issues that the arbitrator formulated, which were consistent with both parties’ proposed issue statements. 64 FLRA at 470.

The concurrence asserts that the Union did not submit information-request issues to the Arbitrator.²⁸ As discussed above, that is plainly wrong. Additionally, the concurrence appears to claim that the Union was required to raise those issues either as “pre-hearing, evidentiary issue[s]”²⁹ or as an entirely separate grievance. But the concurrence cites nothing – no provision of the parties’ collective-bargaining agreement, no judicial or administrative precedent, and no principles of arbitration law – to support such a notion. In fact, a review of the pertinent provisions of the parties’ agreement indicates that they do *not* impose such a requirement.³⁰

Contrary to the concurrence’s claims, I am neither “demand[ing] total obeisance” to arbitrators³¹ nor finding that they have “unchecked authority to define their own jurisdiction.”³² I am merely applying well-established principles, *cited* above, regarding arbitrators’ authority to resolve issues that parties put before them. Further, as discussed in detail above, the information-request issues were not “only somewhat, minimally, or peripherally related to the original grievance submitted to arbitration,” as the concurrence claims;³³ the grievant, and later the Union, repeatedly linked the information

Contrary to the majority’s implication, none of those decisions held, as a “rule,” Majority at 7 n.40, that arbitrators exceed their authority merely by resolving an issue that they do not expressly frame where, as here, the issues are not stipulated, the issue has been expressly submitted for resolution, and the issue is related to the grievance. Moreover, I would note that such a rule, which the majority appears to impose here, would be contrary to private-sector court decisions interpreting the scope of arbitrators’ authority. *See, e.g., Kroger Co. v. United Food & Com. Workers Union Loc. 876*, 284 F. App’x 233, 238 (6th Cir. 2008) (“Kroger relies heavily on the arbitrator’s statement of issues at the beginning of his [a]ward, in which the arbitrator stated that the substantive issue before him was: ‘did the company violate Article 10.10 . . . ?’ . . . However, as the [u]nion stresses, the parties did not agree to the arbitrator’s statement of issues, and the arbitrator’s [o]pinion makes clear that more than just Article 10.10 was before him.”); *Dana Inc. v. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Loc. Union No. 3062*, No. 5:19-cv-445-CHB, 2020 WL 5665061, *3 (E.D. Ky. Sept. 23, 2020) (“[T]he [a]rbitrator’s statement of the issue . . . is not dispositive. . . . The pivotal issue is not whether the [a]rbitrator framed the issue comprehensively[.] . . . The key inquiry is whether he exceeded the authority granted him by the parties to resolve their dispute.”).

²⁸ *See* Concurrence at 14 (“it was not submitted as an issue for resolution”); *id.* (the Union did not “defin[e] the Agency’s failure to provide information as an issue subject to arbitrable review[.]”).

²⁹ *Id.*

³⁰ *See* Exceptions, Attach. 11, Collective-Bargaining Agreement at 199-215 (Art. 23, Grievance Procedure); *id.* at 216-221 (Art. 24, Arbitration).

³¹ Concurrence at 15.

³² *Id.*

³³ *Id.*

requests to their ability to effectively process the grievance, and even the Agency effectively *admitted* that relationship by suddenly providing the information on the first day of the hearing.

Finally, the concurrence’s expressed concern that allowing the Arbitrator to consider the Agency’s failure to provide the requested information “will lead to arbitral free-for-alls where grievants and their representatives may wait until the day of hearing to toss [new issues] into the arbitral ballgame”³⁴ is particularly curious in the circumstances of this case. Here, the Agency waited until the first day of the arbitration hearing to introduce the (oft-previously-requested) information, and the Union asked the Arbitrator to draw an adverse inference from the prior, repeated failures to provide that information – failures that began more than a year before the arbitration hearing even began. Then, three months after the hearing started, the parties submitted post-hearing briefs, in which they had the opportunity to fully brief the information-request issues, and the Agency did so at length.

In other words, this was far from an “arbitral free-for-all[.]”³⁵ Indeed, the concurrence’s approach would reward parties for ignoring repeated information requests and stonewalling the requesting party up until the arbitration hearing – hardly an approach that would facilitate the resolution of disputes.

Accordingly, I would deny the exceeded-authority exception and resolve the other exceptions that challenge the Arbitrator’s information-request findings.

³⁴ *Id.*

³⁵ *Id.*