

## 72 FLRA No. 147

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
COUNCIL OF LOCALS 222  
(Union)

and

UNITED STATES  
DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT  
(Agency)

0-AR-5728

DECISION

April 21, 2022

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

## I. Statement of the Case

Arbitrator Joshua M. Javits issued an award finding that the Agency acted in bad faith during the parties' negotiations over official time, but did not act in bad faith regarding Union requests for information (RFIs). Therefore, he determined that neither party was the prevailing party and each was responsible for its own legal fees and expenses, in accordance with the parties' agreement. The Union filed exceptions to the award on exceeded-authority, nonfact, contrary-to-law, and essence grounds. Because the Union's arguments are inconsistent with the position it took before the Arbitrator or otherwise fail to demonstrate that the award is deficient, we dismiss the exceptions in part, and deny them, in part.

## II. Background and Arbitrator's Award

The parties were engaged in negotiations over Article 47 of their agreement, which addresses official time. They were unable to reach agreement and the Agency declared impasse. The Union then filed a grievance alleging that the Agency negotiated in bad faith, in violation of the Federal Service Labor-Management Relations Statute (Statute).<sup>1</sup> The parties could not resolve the dispute and proceeded to arbitration.

As relevant here, before the arbitration hearing, the Union submitted numerous RFIs to the Agency seeking information related to the Article 47 bargaining. In response, the Agency provided some information, requested clarification on some requests, and rejected others. On June 15, 2020,<sup>2</sup> the Union filed a prehearing statement with the Arbitrator and proposed as an issue whether the Agency "den[ie]d information contrary to [5 U.S.C.] § 7114(b)(4) in bad faith, as defined by 5 U.S.C. § 7116(a)." <sup>3</sup> The next day, the Union filed with the Arbitrator a motion entitled "Motion for Sanctions – Bad Faith Bargaining in Denial of Information Request under § 7114(b)(4)." <sup>4</sup> And during a subsequent pre-hearing conference in July, the Union argued that the "RFI issue is intermixed with bargaining and not separate." <sup>5</sup>

After the July conference, the Union submitted several additional RFIs to the Agency. Then, following the Agency's response to a July 31 RFI, the Union notified the Agency, in part, that "there is no agreement the Agency has complied in good faith with § 7114(b)(4)," and, once again, alleged that the Agency had engaged in "bad[-]faith bargaining over the 'RFI.'" <sup>6</sup> On August 13, the Union filed a second motion for sanctions with the Arbitrator alleging that the Agency's

<sup>1</sup> 5 U.S.C. § 7116 (a)(1), (5).

<sup>2</sup> Unless otherwise noted, all dates hereafter refer to 2020.

<sup>3</sup> Opp'n, Attach. 3, Union Pre-Hr'g Statement (June Statement) at 2.

<sup>4</sup> Opp'n, Attach. 3, June 16 Motion for Sanctions (June Motion) at 1 (requesting a notice-posting remedy if the Arbitrator found "that the Agency behavior described herein is a repeat of sanctioned behavior . . . for failure to bargain in good faith over an RFI related to the new 'CBA' bargaining, which this arbitration also entails"), 4-5; *see also* Exceptions, Attach. 10, Pre-Hr'g Conference Tr. (Tr.) at 14, 15, 46-47.

<sup>5</sup> Exceptions at 10 (citing Tr. at 97); *see also* Award at 43.

<sup>6</sup> Opp'n, Attach. 2, Union's Aug. 10 Reply (Aug. 10 Reply) at 1; *see also id.* at 3-18 (stating in regard to the Agency's response to certain Union requests: "This matter will be included in motion being filed at the Arbiter for bad faith bargaining."); *id.* at 20-22 (stating that the Union considers the information produced by the Agency in response to various requests to be "misrepresentation and bad faith bargaining by Agency for purposes of the disputed RFI").

“delay” in producing information responsive to the RFIs was “an example of bad faith bargaining.”<sup>7</sup> The Union further argued in an August 18 prehearing filing that the RFI dispute was both “[c]ritical to the [b]ad[-]faith [b]argaining [c]laim” and “encompassed in the bargaining and fact-finding for arbitration based [on] long-held caselaw and [a]rbitrator power over the fact-finding.”<sup>8</sup> The Union also asserted in this filing that Section 52.08 of the parties’ agreement “empowers the Arbitrator to decide or frame the issues to be decided” and that “[i]n framing the issues, the Union requests consideration to the factual/legal dispute(s) in the grievance and the disagreements over provision of data to the Union during the bargaining and toward the arbitration.”<sup>9</sup> And, after the arbitration hearing, the Union asserted in its post-hearing brief that the RFI issue was relevant to its bad-faith bargaining claim and that the issue had “[become] a matter for arbitration” based on the Arbitrator’s authority.<sup>10</sup>

In the award, the Arbitrator framed the issue as “whether or not the Agency bargained in good faith during the parties’ mid-term negotiations over Article 47 in violation of 5 U.S.C. § 7114(a)(1) and (5).”<sup>11</sup> In deciding that issue, the Arbitrator noted that § 7114(b) of the Statute requires the parties to “approach the negotiations with a sincere resolve to reach a collective bargaining agreement” and also requires the Agency to provide data to the Union upon request.<sup>12</sup> He found that “the Agency was not intent on sincere and good faith bargaining”<sup>13</sup> over Article 47 in violation of § 7114(b)(1).<sup>14</sup>

However, after a review of the record, the Arbitrator concluded that the Agency did not act in bad faith regarding the RFIs. He found that the Union had argued that “an intrinsic part of [its] claim of bad faith

bargaining”<sup>15</sup> was that the Agency refused to provide the Union with the requested information in violation of § 7114(b)(4). The Arbitrator rejected that argument, finding that the Union’s claim was “not supported by the evidence.”<sup>16</sup>

Based on these findings, the Arbitrator sustained the grievance, in part and denied it, in part. And, as relevant here, the Arbitrator concluded that “neither the Union nor the Agency were the ‘prevailing party’ in accordance with [the parties’ agreement].”<sup>17</sup> Therefore, he determined that each party was responsible for its own legal fees and expenses.<sup>18</sup>

The Union filed exceptions to the award on April 25, 2021, and the Agency filed an opposition on May 25, 2021.

### III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar some of the Union’s arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider arguments that could have been, but were not, presented to the arbitrator.<sup>19</sup> This includes arguments that differ from, or are inconsistent with, a party’s arguments to the arbitrator.<sup>20</sup>

In each of its exceptions, the Union argues that the Arbitrator erred when he considered the RFI issue as part of its bad-faith bargaining claim.<sup>21</sup> However, before the arbitration hearing, the Union repeatedly stated that it was alleging “bad[-]faith bargaining” by the Agency in regard to the RFI responses.<sup>22</sup> And, contrary to its assertions on exceptions,<sup>23</sup> the Union expressly proposed as an issue for the Arbitrator whether the Agency’s actions regarding the RFIs – during bargaining and “for purposes of arbitrating the grievance” – violated the Statute or Authority precedent.<sup>24</sup> Further, the Union argued that the RFI issue was “[c]ritical to the [b]ad[-]faith [b]argaining [c]laim”<sup>25</sup> and “intermixed with bargaining and not separate.”<sup>26</sup> The Union also asserted in its post-hearing brief that the Agency’s failure to respond to the RFIs constituted “bad faith bargaining.”<sup>27</sup> And the Union repeatedly

<sup>7</sup> June Motion at 1 (“Agency’s obligations include good faith bargaining in providing information to the [U]nion” (citing 5 U.S.C. § 7114 (b)(4))); *see* Opp’n, Attach. 3, Aug. 13 Motion for Sanctions (Aug. Motion) at 2, 3 (“Further, it is properly the function of an arbitrator to determine the relevance and materiality of documents and other evidence requested by a party and whether their production should be ordered.” (citing *Dep’t of HHS, SSA*, 27 FLRA 706 (1987)); *see also id.* at 4.

<sup>8</sup> Opp’n, Attach. 3, Union’s Aug. 18, 2020 Proposed Issues for Arbitration and Sanctions Request (Aug. Proposed Issues) at 2.

<sup>9</sup> *Id.* at 1; *see also id.* at 2 (proposing the issue of “When bargaining with the Union (official time article), and/or for purposes of arbitrating the grievance, did the Agency deny information contrary to rules under § 7114(b)(4) and case precedent?”), 7 (requesting remedies for RFI issue).

<sup>10</sup> Exceptions, Attach. 4, Post-Hr’g Brief (Br.) at 20.

<sup>11</sup> Award at 33.

<sup>12</sup> *Id.* at 33-34 (citing 5 U.S.C. § 7114(b)(1), (4)).

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

<sup>14</sup> *Id.* at 16 (citing 5 U.S.C. § 7114(b)(4)), 43.

<sup>15</sup> *Id.* at 43.

<sup>16</sup> *Id.* at 44.

<sup>17</sup> *Id.* at 45-46.

<sup>18</sup> *Id.* at 46.

<sup>19</sup> 5 C.F.R. §§ 2425.4(c), 2429.5.

<sup>20</sup> *Id.* §§ 2425.4(c), 2429.5; *see also NLRB*, 72 FLRA 334, 336 (2021) (*NLRB*) (citing *Dep’t of VA, Edith Nourse Rogers Mem’l VA Med. Ctr., Bedford, Mass.*, 71 FLRA 232, 233 (2019) (then-Member DuBester concurring)); *AFGE, Loc. 1415*, 69 FLRA 386, 388 (2016) (*Local 1415*).

acknowledged that the RFI issue “became a matter for arbitration” based on the Arbitrator’s authority.<sup>28</sup>

Because the Union’s arguments here are inconsistent with the position it took before the Arbitrator, we find that §§ 2425.4(c) and 2429.5 of the Authority’s regulations bar these arguments. Accordingly, we dismiss the Union’s exceeded-authority exception and the portions of the nonfact, contrary-to-law, and essence exceptions that rely on the barred arguments.<sup>29</sup>

<sup>21</sup> Exceptions at 12, 15-17 (arguing that by adding an issue to arbitration concerning the information requests, the Arbitrator “manifested an infidelity” to the agreement) *id.* at 11, 12, 16-17, 19, 28-30 (arguing that the Arbitrator exceeded his authority by resolving the RFI issue); *id.* at 16, 21, 24-25 (arguing that the award is based on a nonfact because the Arbitrator relied on RFIs which were not a part of the Union’s grievance); *id.* at 20-22, 25-26, 28 (arguing that the award is contrary to law because the Arbitrator failed to provide any legal basis for adding the RFIs to the issue for arbitration).

<sup>22</sup> *E.g.*, June Motion at 2, 6 (arguing that Agency’s responses to RFIs “demonstrate bad faith bargaining”); Aug. 10 Reply at 1, 3-18, 20-22; *see also supra* notes 3, 4, 6-9; Tr. at 82 (Union statement that RFI issue was “intermixed” with the bad-faith bargaining claim raised in the grievance), 99-100 (arguing that Sections 4.01 and 49.01 of the parties’ agreement provides “more than ample authority” for Arbitrator to find that the RFI issue was “consum[ed]” by the bad-faith bargaining claim in the grievance).

<sup>23</sup> Exceptions at 11.

<sup>24</sup> June Statement at 2; Aug. Proposed Issues at 1, 2, 7 (arguing why RFI dispute was before Arbitrator and referencing precedent in which the Authority found the Agency’s failure to provide information in response to an RFI to be a ULP (citing *U.S. Dep’t of HUD*, 71 FLRA 616 (2020) (then-Member DuBester concurring)); *see supra* notes 3, 8, 9.

<sup>25</sup> Aug. Proposed Issues at 2.

<sup>26</sup> *Id.*; Exceptions at 10 (citing Tr. at 97); *see also* Award at 43.

<sup>27</sup> Br. at 10, 81.

<sup>28</sup> June Motion at 1, 6; Aug. Motion at 3; Aug. 10 Reply at 20-22; Aug. Proposed Issues at 2; Br. at 20; Tr. at 74; *see also* Exceptions at 9-10 (listing as “incontrovertible facts” from the prehearing conference that the Union’s position was that “RFI issue is intermixed with bargaining and not separate” and that it “[did not] care if the issue of the RFI comes in”); Opp’n, Attach. 2, Union’s July 29, 2020 Email to Arbitrator at 1 (requesting that Arbitrator address motions and “the last [RFI] sent to [A]gency, . . . item by item . . . toward gaining the requested information,” or grant a “negative inference” against the Agency).

<sup>29</sup> *NLRB*, 72 FLRA at 336 (barring contrary-to-law argument that was inconsistent with argument before arbitrator); *Local 1415*, 69 FLRA at 389 (dismissing portion of exception that relied on argument that conflicted with argument before arbitrator); *Broad. Bd. of Governor’s Off. of Cuba Broad.*, 66 FLRA 1012, 1016 (2012) (barring argument that arbitrator exceeded her authority by resolving issue not before her because it was inconsistent with argument before arbitrator).

#### IV. Analysis and Conclusions

##### A. The award is not based on nonfacts.

The Union argues that the award is based on a nonfact because the Arbitrator relied on pre-grievance RFIs that “were not in the record.”<sup>30</sup> To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>31</sup> As relevant here, the Authority has held that arguing that no evidence exists to support an arbitrator’s finding does not demonstrate that an award is based on a nonfact.<sup>32</sup> Further, disagreement with an arbitrator’s evaluation of evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.<sup>33</sup>

The Arbitrator found that the Agency “provided extensive documents and information to the Union as part of the mid-term negotiations and indeed the grievance process itself.”<sup>34</sup> The Union’s argument that no evidence supports the Arbitrator’s finding does not provide a basis for finding the award based on a nonfact.<sup>35</sup> Nor is it supported by the record. Rather, the record indicates that the Agency introduced evidence of pre-grievance RFIs and its responses at arbitration.<sup>36</sup> Thus, to the extent that the Union challenges the Arbitrator’s evaluation of this evidence, that challenge also does not provide a basis for finding that the award is based on a nonfact.<sup>37</sup>

Accordingly, we deny the Union’s nonfact exception.

##### B. The award is not contrary to law.

The Union argues that the award is contrary to law because the Arbitrator did not “properly address the

<sup>30</sup> Exceptions at 25.

<sup>31</sup> *NLRB Pro. Ass’n*, 68 FLRA 552, 554 (2015) (citing *U.S. Dep’t of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014); *U.S. Dep’t of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).

<sup>32</sup> *U.S. Dep’t of VA, John J. Pershing Med. Ctr., Poplar Bluff, Mo.*, 68 FLRA 852, 854 (2015) (VA Pershing) (then-Member DuBester concurring; Member Pizzella dissenting on other grounds) (citing *U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 836, 842 (2000); *NAGE, Loc. R4-45*, 55 FLRA 695, 700 (1999)).

<sup>33</sup> *E.g.*, *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018) (*Local 12*); *U.S. Dep’t of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015).

<sup>34</sup> Award at 44.

<sup>35</sup> *VA Pershing*, 68 FLRA at 854.

<sup>36</sup> Opp’n, Attach. 1 at 2-85 (Agency arbitration exhibits concerning RFIs during bargaining).

<sup>37</sup> *Local 12*, 70 FLRA at 583.

RFI criteria imposed by [Authority] precedent[.]”<sup>38</sup> In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo.<sup>39</sup> In applying a de novo standard of review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.<sup>40</sup> Under this standard, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are nonfacts.<sup>41</sup> Challenges to an arbitrator’s evaluation of the evidence or an arbitrator’s reasoning do not demonstrate that an award is contrary to law.<sup>42</sup>

Under § 7114(b)(4) of the Statute, an agency is obligated, upon request, to furnish a union information that is necessary for the union to effectively carry out its representational obligations, which includes the processing of employee grievances.<sup>43</sup> The Union argues that the Arbitrator erred because he failed to evaluate the Agency’s responses to determine their relevancy, and instead relied on the number of requests to which the Agency responded.<sup>44</sup>

Although the Arbitrator noted the extensive amount of information and data the Agency provided, he found that due process required him to examine the “information necessary to each side.”<sup>45</sup> And after reviewing the entire record, the Arbitrator found that the Union “failed to prove that the Agency acted in bad faith by failing to provide adequate information to the Union’s requests as alleged.”<sup>46</sup> The Union’s disagreement with the Arbitrator’s conclusion that the Agency satisfied its

obligation does not establish that the award is contrary to § 7114(b)(4) of the Statute.<sup>47</sup>

The Union also argues that the award is contrary to law because the Arbitrator “failed to order a [notice] posting as a remedy.”<sup>48</sup> Where an arbitrator finds that a party has committed an unfair labor practice, the Authority defers to the arbitrator’s judgment and discretion in the determination of the remedy.<sup>49</sup> Therefore, unless a party establishes that a particular remedy is compelled by the Statute, the Authority upholds the arbitrator’s remedy determination unless the determination is “a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute].”<sup>50</sup> Here, the Union does not point to any law, rule, or regulation requiring the Arbitrator to award a notice-posting remedy.<sup>51</sup> And the Union does not assert, or provide any basis for finding, that the Arbitrator’s denial of a posting was a “patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute].”<sup>52</sup> Therefore, the Union does not demonstrate that the Arbitrator’s failure to order a notice posting is contrary to law.

Consequently, we deny the Union’s contrary-to-law exception.

C. The award does not fail to draw its essence from the parties’ agreement.

The Union argues that the award fails to draw its essence from the parties’ agreement because the Arbitrator directed the parties to share equally the cost of his fees.<sup>53</sup> The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any

<sup>38</sup> Exceptions at 22.

<sup>39</sup> *AFGE, Loc. 3954*, 72 FLRA 403, 404 (2021) (Member Abbott concurring) (citing *U.S. Dep’t of the Interior, Bureau of Land Mgmt., Eugene Dist. Portland, Or.*, 68 FLRA 178, 180 (2015) (*Interior*)).

<sup>40</sup> *Id.* (citing *Interior*, 68 FLRA at 180).

<sup>41</sup> *Id.* (citing *Interior*, 68 FLRA at 180-81).

<sup>42</sup> See *USDA, U.S. Forest Serv., Law Enf’t & Investigations, Region 8*, 68 FLRA 90, 94 (2014) (citing *USDA, Forest Serv.*, 67 FLRA 558, 560 (2014)) (challenges to an arbitrator’s evaluation of the evidence do not demonstrate award contrary to law); *AFGE, Council of Prison Locs C 33, Loc. 720*, 68 FLRA 452, 453 (2015) (citing *AFGE, Loc. 3652*, 68 FLRA 394, 400-01 (2015); *AFGE, Nat’l Council of Field Labor Locs.*, 67 FLRA 264, 265 (2014)) (challenges to an arbitrator’s reasoning provide no basis for finding award contrary to law).

<sup>43</sup> 5 U.S.C. § 7114(b)(4); see also *U.S. Dep’t of the Army, Army Corps of Eng’rs, Portland Dist., Portland, Or.*, 60 FLRA 413, 415 (2004) (citing 5 U.S.C. § 7114(b)(4)); *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 26 FLRA 630, 631 (1987).

<sup>44</sup> Exceptions at 25-26, 28.

<sup>45</sup> Award at 44.

<sup>46</sup> *Id.*

<sup>47</sup> *AFGE, Loc. 2338*, 71 FLRA 1185, 1188 (2020) (Member Abbott concurring) (citing *U.S. Dep’t of Air Force, 47th Flying Training Wing, Laughlin Air Force Base, Del Rio, Tex.*, 69 FLRA 639, 640 (2016) (then-Member DuBester concurring, in part, and dissenting, in part)); see also *NTEU, Chapter 32*, 67 FLRA 174, 176 (2014) (Member Pizzella concurring) (disagreement with arbitrator’s legal conclusion based on undisturbed factual findings does not establish that the award is contrary to law); *AFGE, Loc. 1441*, 70 FLRA 161, 164 (2017) (denying contrary-to-law exception where party challenged arbitrator’s reasoning).

<sup>48</sup> Exceptions at 42.

<sup>49</sup> *AFGE, Loc. 12*, 69 FLRA 360, 361 (2016) (*AFGE*) (citing *NTEU*, 66 FLRA 406, 408 (2011) (*NTEU*); *NTEU, Wash., D.C.*, 48 FLRA 566, 571 (1993)).

<sup>50</sup> *Id.* (citing *NTEU*, 66 FLRA at 408 (quoting *NTEU v. FLRA*, 647 F.3d 514, 517 (4th Cir. 2011)).

<sup>51</sup> Exceptions at 42.

<sup>52</sup> *AFGE*, 69 FLRA at 362 (quoting *NTEU*, 66 FLRA at 408).

<sup>53</sup> Exceptions at 32, 41.

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 collective-bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.<sup>54</sup>

After sustaining the grievance, in part, and denying it, in part, the Arbitrator determined that “neither the Union nor the Agency were the ‘prevailing party.’”<sup>55</sup> Therefore, the Arbitrator found that the parties were required to share arbitration expenses under Section 52.04 of the parties’ agreement.<sup>56</sup> Section 52.04 provides, in relevant part, that the arbitrator “shall indicate which party is the losing party,” who “shall pay the arbitrator’s fees and expenses” but if, “in the arbitrator’s judgment, neither party is the clear losing party, costs shall be shared equally.”<sup>57</sup>

The Union contends that the Arbitrator changed that section’s meaning by applying the term “prevailing” party instead of determining which party was the “losing” party.<sup>58</sup> One meaning of “prevail” is “to win.”<sup>59</sup> Therefore, because neither party won on all issues for arbitration, neither party was “the clear losing party.” Thus, the Arbitrator’s determination is consistent with Section 52.04, and the Union’s contrary argument does not establish that the award fails to draw its essence from the parties’ agreement.

Accordingly, we deny the Union’s essence exception.

## V. Decision

We dismiss the exceptions, in part and deny the exceptions, in part.

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<sup>54</sup> *NAGE*, 71 FLRA 775, 776 (2020) (citing *U.S. Dep’t of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017)).

<sup>55</sup> Award at 45-46. We have rejected the Union’s arguments that the Arbitrator erred in resolving the RFI issue in favor of the Agency.

<sup>56</sup> *Id.* at 46.

<sup>57</sup> Exceptions, Attach. 11 at 243.

<sup>58</sup> Exceptions at 41-42.

<sup>59</sup> *Prevail*, *The Oxford American Dictionary and Thesaurus* (Am. ed. 2003).