

72 FLRA No. 148

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2338  
(Union)

and

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
JOHN J. PERSHING  
VETERANS ADMINISTRATION MEDICAL CENTER  
POPLAR BLUFF, MISSOURI  
(Agency)

0-AR-5699<sup>1</sup>

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DECISION

April 28, 2022

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

**I. Statement of the Case**

The Union filed a grievance alleging that the Agency owed certain bargaining-unit employees a pay differential for work performed on Saturdays (Saturday premium pay). In a merits award, Arbitrator Raleigh Jones found that the Agency violated the parties' collective-bargaining agreement by failing to (1) pay some employees Saturday premium pay and (2) provide the Union information necessary to ascertain to whom the Agency owed backpay. The Arbitrator directed the parties to try to resolve the remedy themselves.

When the parties were unable to agree, the Arbitrator issued a remedial award that determined the amounts of backpay owed to each employee and denied the Union's requests for interest and overtime. The Union filed exceptions to the remedial award on several

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<sup>1</sup> 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. See *U.S. Dep't of the Air Force, Scott Air Force Base, Ill.*, 72 FLRA 526, 531 (2021) (Chairman DuBester concurring) (consolidating cases involving same parties and arbitration proceeding).

grounds, including that it was contrary to the Back Pay Act (the Act).<sup>2</sup>

After the Arbitrator issued the remedial award, the Union submitted an application for attorney fees, which the Arbitrator denied in a fee award. The Union filed exceptions to the fee award on several grounds, including that it was contrary to the Act.

For the reasons that follow, we modify the remedial award to conform with the Act, and we remand the fee award to the parties for resolution or resubmission to an arbitrator.<sup>3</sup>

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

The parties' parent organizations<sup>4</sup> had a long-standing dispute over whether employees classified in certain occupational series were eligible to receive Saturday premium pay. Following a national settlement resolving the issue, employees reported to the Union that the Agency was not paying them in accordance with the settlement. The Union requested information concerning whether the Agency was paying eligible employees Saturday premium pay. The Agency provided some of the requested information.

In January 2019, the Union filed a grievance alleging that the Agency violated (1) the parties' agreement by failing to pay Saturday premium pay and (2) the parties' agreement and §§ 7114(b)(4) and 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute)<sup>5</sup> by failing to provide information necessary to determine who had been improperly paid. The grievance proceeded to arbitration. Absent stipulation, the Arbitrator framed the issues, in relevant part, as whether the Agency violated the parties' agreement by failing to pay eligible employees Saturday premium pay and provide the Union the required information.

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<sup>2</sup> 5 U.S.C. § 5596.

<sup>3</sup> In its fee-award exceptions, the Union requests an expedited, abbreviated decision under § 2425.7 of the Authority's Regulations. See Fee-Award Exceptions at 22-23. After considering the circumstances of this consolidated case, including its "complexity, potential for precedential value, and [dis]similarity to other, fully detailed decisions involving the same or similar issues," 5 C.F.R. § 2425.7, we find that an expedited, abbreviated decision is inappropriate and deny the Union's request. *E.g., AFGE, Nat'l Immigr. & Naturalization Serv. Council*, 69 FLRA 549, 550 (2016).

<sup>4</sup> See Fee-Award Exceptions, Attach. 1 (Merits Award) at 4 (naming the American Federation of Government Employees National Veterans Council and the U.S. Department of Veterans Affairs as the "national entities of the . . . parties").

<sup>5</sup> 5 U.S.C. §§ 7114(b)(4), 7116(a)(1), (8).

In a December 2019 merits award, the Arbitrator found that the Agency violated the parties' agreement by failing to provide Saturday premium pay to some eligible employees. The Arbitrator directed the Agency to "pay those employees for the [Saturday premium pay] they did not receive," but left the amounts for the parties to decide.<sup>6</sup> If the parties failed to agree on the remedy, then the Arbitrator would hold a hearing to resolve the issue. The Arbitrator also found that the Agency violated the parties' agreement by taking "years to supply certain [Saturday premium pay] information to the Union"<sup>7</sup> and directed the Agency to supply information concerning specified employees.

When the parties failed to reach agreement on the backpay remedy, the Arbitrator directed them to "make an offer of proof regarding what their witnesses would testify to" if there were a hearing on the matter.<sup>8</sup> After considering briefs and evidence submitted first by the Agency and, a month later, by the Union, the Arbitrator issued the remedial award. In it, the Arbitrator accepted the factual research and calculations made by the Agency concerning which employees were eligible to receive Saturday premium pay and the amounts they were owed.

The Arbitrator awarded neither interest on the backpay nor attorney fees, stating that it was "not customary in arbitration for arbitrators" to do so.<sup>9</sup> However, the Arbitrator went on to state that, if a federal statute requires backpay awards to include these types of relief, "then the statute obviously controls."<sup>10</sup> The Arbitrator also declined to award overtime and shift differentials, determining that they were "separate matters."<sup>11</sup> Finally, the Arbitrator declined to find that the Agency violated federal law or committed an unfair labor practice, stating that the remedial award was "confined to the parties' [agreement]."<sup>12</sup>

The Union filed exceptions to the remedial award on January 27, 2021, and the Agency filed its opposition on February 16, 2021.

On January 26, 2021, the Union applied for attorney fees. In the fee award, the Arbitrator denied the application, citing the denial of attorney fees in the remedial award and stating that, "[a]fter reviewing all the materials submitted by the Union[,] . . . my findings above stand."<sup>13</sup>

<sup>6</sup> Merits Award at 18.

<sup>7</sup> *Id.*

<sup>8</sup> Remedial Award at 4.

<sup>9</sup> *Id.* at 33.

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

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

<sup>12</sup> *Id.*

<sup>13</sup> Fee Award at 1.

The Union filed exceptions to the fee award on February 24, 2021, and the Agency filed its opposition on March 16, 2021.

### III. Preliminary Matters

#### A. We deny the Agency's request to dismiss the Union's exceptions.

In its opposition to the exceptions, the Agency argues that the Authority should dismiss the exceptions to the remedial award because the Union served the Agency by email, in violation of the Authority's Regulations.<sup>14</sup> The Agency states that the Regulations allow for service by email only when the receiving party has agreed to it, which the Agency did not do.<sup>15</sup>

The Authority has declined to dismiss filings on the basis of minor deficiencies where the deficiencies did not harm the opposing party or impede its ability to respond.<sup>16</sup> Here, although the Agency did not agree to service by email, the Agency does not claim that it was harmed by the Union's service method.<sup>17</sup> Additionally, the Agency appears not to have been impeded because it filed an opposition to the Union's exceptions well before the deadline.<sup>18</sup> Therefore, in accordance with our precedent, we decline to dismiss the Union's exceptions.<sup>19</sup>

#### B. We deny the Union's motion for leave to file other documents.

Pursuant to § 2429.26 of the Authority's Regulations, the Union filed a motion for leave to file, and did file, other documents that relate to events that occurred after the Arbitrator issued the fee award.<sup>20</sup> As these post-arbitration events are not at issue, it is

<sup>14</sup> Remedial-Award Opp'n at 13.

<sup>15</sup> *Id.*; see also 5 C.F.R. § 2429.27(b)(6) (providing for email service "only when the receiving party has agreed to be served by email").

<sup>16</sup> *AFGE, Loc. 12*, 70 FLRA 348, 349 (2017) (then-Member DuBester concurring).

<sup>17</sup> See Remedial-Award Opp'n at 13.

<sup>18</sup> See Remedial-Award Exceptions at 25 (certifying exceptions were served on January 27, 2021); Remedial-Award Opp'n at 13 (certifying opposition was served on February 16, 2021); see also 5 C.F.R. § 2425.3(b) (stating that an "opposition must be filed within thirty . . . days after the date the exception is served").

<sup>19</sup> See *NTEU*, 69 FLRA 614, 616 (2016) (where union did not consent to email service, declining to dismiss agency exceptions served by email where union timely filed opposition and did "not allege that it suffered any harm").

<sup>20</sup> Remedial-Award Mot. for Leave at 1.

unnecessary to consider the documents.<sup>21</sup> Therefore, we deny the Union's motion.<sup>22</sup>

#### IV. Analysis and Conclusions

- A. The remedial award and the fee award are contrary to law, in part.

In its exceptions, the Union argues that the remedial award and the fee award are contrary to law.<sup>23</sup> When considering contrary-to-law claims, the Authority reviews the questions of law raised by the award and the exceptions de novo.<sup>24</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>25</sup> In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.<sup>26</sup>

- i. The remedial award is contrary to the Act.

The Union argues that the remedial award violates the Act because the Arbitrator "refused" to award overtime, shift differentials, or interest when awarding backpay to employees affected by the Agency's failure to provide Saturday premium pay.<sup>27</sup> The Act entitles employees to recover "pay, allowances, or differentials" that they "would have earned or received" absent "an unjustified or unwarranted personnel action."<sup>28</sup> And under the Act, "interest must be paid" on backpay awards.<sup>29</sup> Where an arbitrator's backpay award does not properly reflect what a grievant would have received absent an unjustified or unwarranted personnel action, the

Authority will modify the award to bring it into compliance with the Act.<sup>30</sup>

Here, the Arbitrator found that, because the Agency failed to pay eligible employees Saturday premium pay,<sup>31</sup> it owed them backpay for the unpaid wages.<sup>32</sup> But, the Arbitrator denied the Union's request for overtime and shift differential payments that may also have been impacted by the Agency's unjustified and unwarranted personnel action.<sup>33</sup> Thus, the backpay remedy does not necessarily reflect what these employees would have received absent the unjustified and unwarranted personnel action, as required by the Act.<sup>34</sup>

The Arbitrator also denied the Union's request for interest on the backpay because, in the Arbitrator's view, it was "not customary."<sup>35</sup> However, the Arbitrator stated that, "[i]n the event a federal statute requires that any backpay award . . . include interest, then the statute obviously controls."<sup>36</sup> As the Act *does* control here, the Arbitrator's denial of interest is deficient as a matter of law.<sup>37</sup>

Accordingly, we modify the award to make it consistent with the Act by including interest and any overtime or shift differentials that the employees would have been entitled to but for the Agency's unjustified and unwarranted personnel action.<sup>38</sup>

<sup>21</sup> See *U.S. Dep't of the Army, Def. Language Inst., Monterey, Cal.*, 65 FLRA 668, 668 n.1 (2011) (finding it unnecessary to consider supplemental filing concerning a procedural "error [that was] not at issue").

<sup>22</sup> See *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*, 63 FLRA 406, 407 (2009) (denying request to file supplemental submission that was deemed unnecessary).

<sup>23</sup> Remedial-Award Exceptions at 5, 6-7; Fee-Award Exceptions at 5.

<sup>24</sup> *AFGE, Loc. 2076*, 71 FLRA 1023, 1026 n.26 (2020) (then-Member DuBester concurring) (citing *AFGE, Loc. 933*, 70 FLRA 508, 510 n.13 (2018)).

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

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

<sup>27</sup> Remedial-Award Exceptions at 6-7.

<sup>28</sup> 5 U.S.C. § 5596(b)(1)(A)(i); see *U.S. Dep't of VA, Consol. Mail Outpatient Pharmacy Leavenworth, Kan.*, 72 FLRA 455, 456 (2021) (noting that a "violation of a collective-bargaining agreement constitutes an unjustified or unwarranted personnel action" under the Act).

<sup>29</sup> *AFGE, Council of Prison Locs., Loc. 405*, 67 FLRA 395, 398 (2017) (quoting *NATCA*, 64 FLRA 906, 907 (2010) (*NATCA*)); see also 5 U.S.C. § 5596(b)(2)(A).

<sup>30</sup> *U.S. Dep't of VA, Med. Ctr., Cincinnati, Ohio*, 57 FLRA 782, 783 (2002) (*Med. Ctr.*).

<sup>31</sup> Remedial Award at 34.

<sup>32</sup> *Id.* at 34-35.

<sup>33</sup> *Id.* at 33.

<sup>34</sup> See *Med. Ctr.*, 57 FLRA at 783 (finding backpay remedy contrary to law where method of calculating overtime did not "properly reflect what the grievants would have been entitled to" absent the unjustified and unwarranted personnel action); *Dep't of the Navy, Phil. Naval Shipyard, Phil. Pa.*, 28 FLRA 574, 576 (1987) (*Navy*) (finding backpay contrary to law where grievants were entitled to overtime pay, but were awarded only straight pay).

<sup>35</sup> Remedial Award at 33.

<sup>36</sup> *Id.*

<sup>37</sup> See *Tidewater Va. Fed. Emps. Metal Trades Council*, 70 FLRA 288 (2017) (arbitrator's failure to include interest in backpay award was contrary to law); *NATCA*, 64 FLRA at 907 (award that did not include interest on backpay award was "deficient as contrary to law").

<sup>38</sup> See *Loc. 405*, 67 FLRA at 398 (modifying backpay award to include interest); *Med. Ctr.*, 57 FLRA at 783 (modifying the award to "properly reflect what [the grievants] would have received absent the contractual violation").

- ii. The Arbitrator's denial of attorney fees is contrary to the Act.

In its exceptions, the Union argues that the Arbitrator's denial of attorney fees in both the remedial award and the fee award is contrary to the Act.<sup>39</sup> When resolving exceptions to arbitration awards involving attorney fees, the Authority will ensure that the award complies with the applicable statutory standards.<sup>40</sup>

Under the Act, the Authority reviews attorney-fee awards using the standards established by 5 U.S.C. § 7701(g).<sup>41</sup> An arbitrator must provide a fully articulated, reasoned decision setting forth the specific findings supporting the fee determination on each of the pertinent statutory requirements.<sup>42</sup>

Here, the Arbitrator denied the Union's request for attorney fees in the remedial award and, after receiving the Union's application for attorney fees, in the fee award.<sup>43</sup> However, in neither of these awards did the Arbitrator provide any reasoning or make any findings linked to the statutory requirements for attorney fees under the Act. The Arbitrator's sole rationale was that attorney-fee remedies were "not customary."<sup>44</sup> Contrary to the Arbitrator's assertion, attorney fees are customary in cases involving backpay.<sup>45</sup> Further, the Arbitrator failed to provide any specific findings supporting his denial of attorney fees. Therefore, we vacate the Arbitrator's denial of attorney fees in the remedial award and fee award.

When the arbitrator has not sufficiently explained the attorney-fee determination, the Authority will examine the record to determine whether it permits the Authority to resolve any entitlement to attorney fees.<sup>46</sup> If the record is insufficient, then the Authority will remand the award for further proceedings.<sup>47</sup> Although the Union and the Agency make

several arguments as to whether attorney fees are appropriate in this situation,<sup>48</sup> the record is insufficient for us to determine whether the fees should be awarded, and, if so, in what amount. As such, we must remand the matter of attorney fees for further proceedings.

Accordingly, we modify the remedial award to remove the Arbitrator's determination on attorney fees. We also set aside the fee award in its entirety and remand the attorney-fee issue to the parties for resubmission to an arbitrator of their choice, absent settlement, for further findings.<sup>49</sup>

- iii. The Union fails to establish that the remedial award is contrary to the Statute.

The Union argues that the Arbitrator violated §§ 7114(b)(4) and 7116(a)(1) and (8) of the Statute by "refus[ing] to grant" the grievance's unfair-labor-practice (ULP) allegation that the Agency failed to provide information.<sup>50</sup> However, in the absence of a stipulation by the parties, the Arbitrator framed the issues for resolution without this statutory allegation.<sup>51</sup> Further, the Authority has held that, in the absence of a stipulation that includes a ULP issue, an arbitrator is not obligated to address and resolve such an issue.<sup>52</sup> As the ULP issue

<sup>39</sup> Remedial-Award Exceptions at 6; Fee-Award Exceptions at 4.

<sup>40</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 70 FLRA 195, 196 (2017) (*DOJ Pollock*).

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

<sup>42</sup> *Id.*

<sup>43</sup> Remedial Award at 33; Fee Award at 1.

<sup>44</sup> Remedial Award at 33.

<sup>45</sup> 5 U.S.C. § 5596(b)(1)(A)(ii); *see also U.S. Dep't of the Navy Commander, Navy Region Haw., Fed. Fire Dep't*, 72 FLRA 94, 95 (2021) (Chairman DuBester dissenting on other grounds) ("The [Act] does specifically authorize awards of attorney fees.").

<sup>46</sup> *DOJ Pollock*, 70 FLRA at 196; *U.S. Dep't of the Navy Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (*Fire Dep't*).

<sup>47</sup> *Fire Dep't*, 64 FLRA at 928.

<sup>48</sup> Fee-Award Exceptions at 7-12; Fee-Award Opp'n at 6-10.

<sup>49</sup> In light of this remand, we do not consider the Union's remaining exceptions to the fee award, all of which challenge the Arbitrator's denial of attorney fees. *See* Fee-Award Exceptions at 14 (arbitrator bias); *id.* at 15 (public policy); *id.* at 18 (nonfact); *id.* at 20 (essence); *id.* at 22 (exceeded authority). *See U.S. Dep't of Educ.*, 71 FLRA 516, 519 n.39 (2020) (then-Member DuBester concurring) (finding it "unnecessary to address" exceptions based on remanded issue).

<sup>50</sup> Remedial-Award Exceptions at 5. Member Abbott sympathizes with the Union's frustration regarding the Arbitrator's framing of the issues to exclude the statutory violations alleged in the grievance. *Compare* Merits Award at 2 (stating that the Union alleged the Agency violated 5 U.S.C. § 7114(b)(4) by failing to provide the Union the requested information and 5 U.S.C. §§ 7116(a)(1) and (a)(8) by "interfer[ing] with [the Union's] duties to represent its members") *with id.* (framing the issue as whether the Agency "violat[e]d the [parties' agreement] by failing to provide information to the Union"). However, deference to an arbitrator's framing of the issues is one of the consequences of electing to pursue statutory violations through the grievance process – as opposed to the process provided by the Statute. In his view, parties should elect the forum with the most expertise – in this case, filing an unfair-labor-practice charge with the Authority.

<sup>51</sup> Merits Award at 2 (listing the relevant issue as: "Did the [Agency] violate the [parties' agreement] by failing to provide information to the Union?").

<sup>52</sup> *AFGE, Loc. 1822*, 72 FLRA 595, 597 n.23 (2021) (Chairman DuBester concurring) (citing *AFGE, Council 215*, 66 FLRA 771, 774 (2012)).

was not before the Arbitrator, the remedial award does not violate the Statute by failing to resolve it.<sup>53</sup> Accordingly, we deny this exception.<sup>54</sup>

B. The exceptions challenging the Arbitrator's failure to hold a hearing do not establish that the award is deficient.

Because the remedial award was based on the Arbitrator's consideration of briefs and documentary evidence, rather than in-person testimony, the Union raises several exceptions.

The Union argues that the Arbitrator exhibited bias<sup>55</sup> by declining to (1) hold a hearing, and (2) "compel the [A]gency to supply all of the information the [U]nion requested."<sup>56</sup> The Union argues that these decisions by the Arbitrator deprived the Union of the opportunity to challenge the Agency's evidence or present evidence of its own.<sup>57</sup> Although the Union disagrees with these decisions, they concern the form and content of the arbitration process. The Authority has held that arbitrators have considerable latitude in managing arbitration proceedings.<sup>58</sup> Therefore, these decisions alone do not establish bias through improper means, partiality, or misconduct.<sup>59</sup>

The Union also alleges that the Arbitrator was biased in issuing an award based largely on evidence provided by the Agency.<sup>60</sup> This allegation is based on the Union's disagreement with the Arbitrator's evaluation of the evidence, which the Authority has found insufficient to establish bias.<sup>61</sup> Therefore, we deny the Union's bias exception.

For the same reasons that the Union argues the Arbitrator exhibited bias, the Union also argues that the remedial award is incomplete.<sup>62</sup> To establish that an award is deficient because it is incomplete, the excepting party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain.<sup>63</sup> Because the Union fails to argue, let alone demonstrate, that the remedial award would be impossible to implement due to a lack of clarity or certainty, we also deny this exception.<sup>64</sup>

The Union also asserts that the award was based on nonfacts.<sup>65</sup> Specifically, the Union contends that the award is based on unverified and noncredible evidence because the Arbitrator did not allow evidence or witnesses to be examined at a hearing.<sup>66</sup> But, as this nonfact exception challenges the Arbitrator's evaluation of the evidence, it provides no basis for finding the award deficient.<sup>67</sup> Therefore, we deny the Union's nonfact exceptions.

Finally, the Union alleges that the Arbitrator denied the Union a fair hearing<sup>68</sup> because, without a hearing, it was unable to rebut the evidence submitted by

<sup>53</sup> See *AFGE, Loc. 1101*, 70 FLRA 644, 646 (2018) (then-Member DuBester concurring) (denying several exceptions, including contrary-to-law, because arbitrator "was not required to address any statutory claims" where arbitrator framed issue to include "only contractual violations").

<sup>54</sup> The Union also argues that the award fails to draw its essence from several sections of the parties' agreement because the Arbitrator did not find the Agency "guilty of refusing to provide the information" in a "statutory request required by federal law." Remedial-Award Exceptions at 17-18. Just as nothing in the Statute required the Arbitrator to frame and resolve the alleged statutory violation, nothing in the cited provisions of the parties' agreement required the Arbitrator to frame and resolve the Union's statutory claim. Thus, for the same reasons we deny this contrary-to-law exception, we also deny the Union's essence exception. See *AFGE, Loc. 1633*, 71 FLRA 211, 213 (2019) (Member Abbott concurring; then-Member DuBester concurring in part and dissenting in part) (denying essence exception "based on the same arguments" as denied contrary-to-law exception).

<sup>55</sup> To establish bias, the excepting party must demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party. *NTEU, Chapter 299*, 68 FLRA 835, 839 (2015) (*Chapter 299*).

<sup>56</sup> Remedial-Award Exceptions at 11.

<sup>57</sup> *Id.* at 11-12.

<sup>58</sup> *U.S. Dep't of VA, Cent. Ark. Veterans Healthcare Sys. Cent.*, 71 FLRA 593, 594 (2020) (then-Member DuBester concurring).

<sup>59</sup> See *Chapter 299*, 68 FLRA at 839.

<sup>60</sup> Remedial-Award Exceptions at 11.

<sup>61</sup> See *AFGE, Loc. 3911, AFL-CIO*, 68 FLRA 564, 571 (2015) (finding exception that merely disagreed with the arbitrator's evaluation of witness credibility, analysis of documents, and conclusions "fail[ed] to demonstrate any bias on the part of the [a]rbitrator").

<sup>62</sup> Remedial-Award Exceptions at 9 (arguing that the Arbitrator's refusal to hold a hearing rendered the award "wholly incomplete").

<sup>63</sup> *AFGE, Loc. 2516*, 72 FLRA 567, 570 (2021).

<sup>64</sup> See *id.*

<sup>65</sup> To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *AFGE, Loc. 1594*, 71 FLRA 878, 880 (2020).

<sup>66</sup> Remedial-Award Exceptions at 15.

<sup>67</sup> See *Fraternal Ord. of Police, Lodge No. 168*, 70 FLRA 788, 790 (2018) (denying nonfact exception because it challenged the arbitrator's weighing of the evidence).

<sup>68</sup> The Authority will find that an arbitrator failed to conduct a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence or conducted the proceedings in a manner that so prejudiced a party as to affect the fairness of the proceedings as a whole. *AFGE, Loc. 3369*, 72 FLRA 158, 160 (2021).

the Agency.<sup>69</sup> However, the record indicates that the Union had one month after receiving the Agency's brief and documentary evidence to submit its own, which allowed the Union the opportunity to counter the Agency's positions.<sup>70</sup> As the Union has not established that the Arbitrator refused to hear or consider any pertinent evidence,<sup>71</sup> we find that it has not established that the arbitral proceedings were unfair.<sup>72</sup>

## V. Decision

We grant the Union's exception that the remedial award is contrary to the Act, and modify that award to include interest and any pay that the employees would have been entitled to but for the Agency's unjustified and unwarranted personnel action. We also modify the remedial award to remove the Arbitrator's denial of attorney fees. We deny all other exceptions to the remedial award. We grant the Union's contrary-to-law exception to the fee award, set that award aside, and remand the issue of attorney fees to the parties.

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<sup>69</sup> Remedial-Award Exceptions at 13.

<sup>70</sup> See Remedial Award at 1 (noting that the Agency filed its brief on September 25, 2020 and the Union filed its brief on October 25, 2020).

<sup>71</sup> See *id.* at 26 (Arbitrator finding that, in its brief, "the Union failed to rebut" the Agency's factual findings and calculations).

<sup>72</sup> See *AFGE, Loc. 1741*, 72 FLRA 501, 503 (2021) (Member Abbott dissenting on other grounds) (denying fair-hearing exception where excepting party had opportunity to challenge opposing party's claims after they were made).