73 FLRA No. 61

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN
SERVICES
(Agency)

0-AR-5721

_____

DECISION

October 17, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members
(Chairman DuBester concurring)

I. Statement of the Case

This case involves a dispute over whether the Agency was allowed to implement a Federal Service Impasses Panel (the Panel) Decision and Order (Order) prior to the completion of bargaining on a successor collective-bargaining agreement (CBA). In a merits award, Arbitrator Roger P. Kaplan found that the Agency violated 5 U.S.C. § 7116(a)(1) and the parties' 2010 CBA when it implemented the Order before it completed bargaining on a successor CBA. The Arbitrator also issued a remedial award.

The Agency argues the merits award is contrary to the Federal Service Labor-Management Relations Statute (Statute) and Authority precedent. The Agency also files nonfact and exceeds-authority exceptions challenging the remedial award. The Agency's nonfact exception is barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations; therefore, we dismiss it. We also deny the Agency's contrary-to-law and exceeds-authority exceptions because they do not demonstrate how the merits award or the remedial award are deficient.

The Union argues the merits award is contrary to the Statute. The Union also argues the remedial award is contrary to law, fails to draw its essence from the 2010 CBA, and is based on a nonfact. Finally, the Union asks the Authority to remand the matter of attorney fees to the Arbitrator. We find the merits award is contrary to law, in part, because the Arbitrator failed to apply Authority precedent to find the Agency's actions constituted a violation of 5 U.S.C. § 7116(a)(5). We also grant the Union's request to remand the matter of attorney fees because the Arbitrator failed to adhere to Authority precedent. However, we deny the Union's remaining exceptions because they fail to demonstrate how the awards are defective.

II. Background and Arbitrator's Award

The instant dispute arose when the parties were negotiating a successor CBA. The 2010 CBA remained in effect while the parties were in negotiations, and the parties entered into negotiations over thirty-four articles of the 2010 CBA.

The parties started negotiating a successor agreement in June 2018. On August 8, the Agency filed a request for assistance with the Panel. On November 15, 2018, the Panel asserted jurisdiction over all but six of the disputed articles.[1] By the conclusion of the parties' proceedings before the Panel, the parties had withdrawn certain proposals and reached agreement on others. Ultimately, on April 1, 2019, the Panel issued the Order imposing contract language for nineteen articles. The six disputed articles over which the Panel had declined jurisdiction (the unresolved articles) remained unresolved.

On April 19, 2019, the Agency notified the Union that it would implement the Order. Subsequently, the Agency implemented the terms of the Order. The Union filed a grievance, arguing the Agency violated the Statute and the 2010 CBA by implementing the Order prior to completing bargaining on the successor CBA. When the grievance was not successfully resolved, the Union invoked arbitration.

The parties could not agree on a statement of the issues, so the Arbitrator framed the issues as whether the Agency violated 5 U.S.C. § 7116(a)(1), (5), and/or (8), or Article 2, Section 2 of the 2010 CBA when it implemented the Order before a complete successor CBA was in effect and whether the Agency's actions constituted a repudiation of the 2010 CBA in violation of 5 U.S.C.

[1] *U.S. Dep't of HHS*, 18 FSIP 077, at 2 (2019) (Order) ("In addition to the foregoing, the Panel declined jurisdiction over [six] [a]rticles presented in the Agency's request for assistance. In doing so, the Panel concluded that the Union raised colorable questions about whether the articles concerned permissive topics of bargaining.").

§ 7116(a)(1) and (5).[2] The Arbitrator bifurcated the proceedings into separate merits and remedial hearings.

As to the merits, the Arbitrator found the 2010 CBA was still in effect and the Agency lacked the authority to immediately implement the new provisions contained in the Order. Relying on Authority precedent, the Arbitrator determined that the "whole [CBA], not a portion of it . . . must . . . go through [a]gency[-h]ead [r]eview and be approved . . . in order to become an enforceable [CBA]."[3] The Arbitrator found the evidence, "made abundantly clear that at no time was there an 'integrated and complete' [CBA]."[4] "Indeed," the Arbitrator noted, "even at the time of the hearing, [the unresolved] articles were still in negotiation."[5] The Arbitrator reasoned that without a complete agreement, there could be no agency-head review, and without agency-head review, there could be no new CBA for the Agency to implement. As such, the Arbitrator concluded the Agency was required to follow the 2010 CBA. Therefore, because the Agency implemented language from the Order that was inconsistent with the 2010 CBA, the Arbitrator found the Agency violated 5 U.S.C. § 7116(a)(1).

Article 2, Section 2C of the 2010 CBA states that while the parties are negotiating a successor agreement, the 2010 CBA remains in effect "until a successor agreement is in place."[6] The Arbitrator also found the Agency violated this provision by applying the language in the Order to change employees' conditions of employment on multiple occasions.[7] For example, the Arbitrator found that the Agency's implementation of the Order – rather than conflicting provisions in the still-in-effect 2010 CBA – "affected a number of activities and operations within the Agency including[,] but not limited to[,] [o]fficial [t]ime, the telework program[,] and the time within which a response to a proposed suspension must be made."[8]

However, the Arbitrator determined the Agency did not violate 5 U.S.C. § 7116(a)(5) because its actions did not constitute a refusal to consult or negotiate in good faith. The Arbitrator also found the Union failed to present sufficient evidence to show the Agency violated 5 U.S.C. § 7116(a)(8).

Finally, the Arbitrator found the Agency's actions, unilaterally implementing and acting on nineteen articles from the Order that were not part of the still-in-effect 2010 CBA constituted a repudiation of the 2010 CBA in violation of 5 U.S.C. § 7116(a)(1).[9]

In the remedial award, the Arbitrator considered the Union's requested remedies to redress alleged harms arising from the Agency's implementation of the Order. Specifically, the Union alleged the Agency's implementation of the Order harmed employees by eliminating the 2010 CBA's requirements that: employees not be subjected to polygraph examinations; the Agency give the Union notice before formal meetings; the Agency provide the Union with copies of settlement agreements; the Agency provide the Union an opportunity to meet with any newly hired bargaining-unit employee; supervisors consider certain circumstances in conducting performance appraisals; and supervisors conduct mid-year progress reviews. The Union also asked the Arbitrator to remedy the Agency's implementation of the Order where it resulted in the Agency: charging the Union rent for the use of office space; denying official time; restricting employees' use of annual and sick leave; changing employees' telework schedules; changing the distribution of awards and awards-pool funding; eliminating employee protections in the event of involuntary reassignments; changing merit-promotion and peer-review procedures; and changing adverse-action and disciplinary procedures.

As relevant here, the Arbitrator ordered the Agency to restore any leave taken due to denied official time requests with the exception of leave taken by two Union representatives to attend the 2020 Legislative Conference. On this latter point, the Arbitrator found there was not sufficient evidence to conclude that the Agency violated the 2010 CBA by denying the request for official time.[10] Specifically, the Arbitrator found "[t]he language of Section 6.B.16 [of the 2010 CBA[11]] on its face does not strongly support the Union's contention that attendance

[2] Merits Award at 3-4.
[3] *Id.* at 22 (citing *POPA*, 41 FLRA 795, 802 (1991)).
[4] *Id.* at 23 (noting that an "integrated and complete" CBA in this case would include "the language of all the articles that were not in dispute, all the articles that were negotiated and agreed upon by the parties, the provisions ordered by [the Panel,] and agreed upon language for the [unresolved] articles . . .").
[5] *Id.*
[6] *Id.* at 4 (quoting 2010 CBA).
[7] *Id.* at 26-27.
[8] *Id.* at 16-17.
[9] *Id.* at 28 (citing *U.S. DOJ, Fed. BOP*, 68 FLRA 786 (2015) (*U.S. DOJ*) (Member Pizzella dissenting in part); *Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 858 (1996)).
[10] Remedial Award at 13 (finding that "[t]he record [was] incomplete and insufficient," and declining to find that the denial of official time to attend the Legislative Conference violated the 2010 CBA based "[o]n the evidence in th[e] record").
[11] Article 10, Section 6.B is a provision of the 2010 CBA providing that official time for Union representatives shall be granted for twenty-three listed representational functions. *See* Union Exceptions, Attach. 7 at 38-40.

at [the 2020 Legislative Conference] falls within its parameters."[12]

The Union also argued that the Agency violated the 2010 CBA when it applied the terms of the Order in carrying out several disciplinary and adverse actions. The Arbitrator found that the Agency violated the 2010 CBA and ordered the Agency to rescind the suspensions of two employees: Wright and Casner.[13] Regarding those employees, the Arbitrator directed the Agency to "rerun" the disciplinary process following the provisions of the 2010 CBA.[14]

Concerning various other Union allegations that employees were harmed by the Agency's actions, the Arbitrator directed remedies in some instances, but declined the Union's requested remedies – including make-whole relief – in others. The Arbitrator also denied the Union's request for a "make[-]whole relief process to identify bargaining[-]unit employees entitled to make whole relief and the nature and specific amounts of such relief."[15] The Arbitrator based the denial on the fact that the Union failed to present evidence at the remedial hearing either identifying additional affected employees or proving how they were negatively impacted by the implementation of the Order.[16]

Finally, the Arbitrator ordered a notice posting and directed the Agency to "cease and desist from implementing the . . . Order before a complete successor CBA is in effect."[17] The Arbitrator retained jurisdiction to allow the Union to file a petition for attorney fees, but stated it "must be filed within [thirty] days of the date of [the remedial award]."[18]

On April 2, 2021, and April 9, 2021, respectively, the Union and the Agency filed exceptions to the Arbitrator's awards. Both parties subsequently filed oppositions to the other party's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments or evidence, including challenges to awarded remedies, that could have been, but were not, presented to the arbitrator.[19] The Agency argues that a portion of the remedial award – requiring it to rescind the suspension of Wright, pay backpay, and to reconduct the disciplinary process following the 2010 CBA – is based on a nonfact, because of grievance proceedings related to Wright's suspension that took place after the merits hearing but before the remedial hearing.[20] However, the Agency admits this argument and evidence were not presented to the Arbitrator at the remedial hearing.[21] Accordingly, we dismiss the Agency's exception.[22]

[12] Remedial Award at 13.
[13] *See id.* at 28-29 (finding that, under the terms of the Order, the Agency gave Wright and Casner only one day to respond to their proposed suspensions instead of the fourteen days to which they were entitled under the 2010 CBA).
[14] *Id.* at 29-30.
[15] *Id.* at 32.
[16] *Id.* at 33-34 ("The requested claims process described by the Union in its brief is what should have occurred prior to the hearing that was held on remedy. The Union wanted an opportunity to: request information from the [Agency]; to submit a list of employees to [the Agency] that it claimed were entitled to a make whole remedy; and to have another hearing before the undersigned to resolve any remaining disputes over remedies. All of that could have and should have been done before the hearing that was held on remedies.").
[17] *Id.* at 36.
[18] *Id.* at 36-37.
[19] 5 C.F.R. § 2425.4(c) ("[A]n exception may not rely on any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or *challenges to an awarded remedy that could have been, but were not, presented to the arbitrator*." (emphasis added)); *id.* § 2429.5 ("The Authority will not consider any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or *challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the . . . arbitrator*." (emphasis added)).
[20] Agency Exceptions Br. at 13-17; *see also* Agency Exceptions, Attach. K at 3-4 (rescinding Wright's fourteen-day suspension, with backpay, and instead imposing a two-day suspension based on the information provided in the "Step 3 Grievance").
[21] Agency Exceptions Br. at 16 ("The [A]rbitrator's *lack of knowledge of this information* led him to draw the clearly erroneous conclusion of the fact that Wright and the Union had not enjoyed such an opportunity to vigorously defend against the discipline nor received a fair opportunity to have it rescinded or seriously reduced." (emphasis added)). We note that the Union states that it does not oppose the Agency's nonfact exception. Union Opp'n Br. at 8 n.7 ("Although the submission of documents and facts that are not part of the record in the case runs afoul of the [Authority's] regulations at 5 C.F.R. [§] 2429.5, [the Union] does not oppose the Agency's [nonfact exception]."). However, the Union's statement does not provide a sufficient basis for the Authority to depart from its precedent holding that we will not consider arguments or evidence that could have been, but were not, presented to the Arbitrator. *E.g.*, *IAMAW, Franklin Lodge No. 2135*, 73 FLRA 118, 119 n.7 (2022) (citing 5 C.F.R. §§ 2425.4(c), 2429.5).
[22] *See U.S. Dep't of the Army, White Sands Missile Range*, 72 FLRA 435, 439 (2021) (Chairman DuBester concurring); *U.S. DHS, U.S. CBP, U.S. Border Patrol, San Diego Sector*, 68 FLRA 642, 642-43 (2015).

IV. Analysis and Conclusions

A. The merits award is contrary to law, in part.

Both parties argue that the merits award is contrary to law. When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[23] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[24] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[25]

1. The Agency did not have the authority to implement the Order prior to completing bargaining on the successor CBA.

The Agency argues the Arbitrator's finding that it violated § 7116(a)(1) is contrary to the Statute and Authority precedent because it was implementing a valid order from the Panel.[26] According to the Agency, Authority precedent required it to implement the imposed language immediately.[27] The Agency is correct that the Order is binding on the parties.[28] However, the Order does not require the Agency to *implement* the nineteen articles prior to completing bargaining on the remaining articles, but instead requires the parties to *adopt* the nineteen articles into their final CBA.[29] This is consistent with § 7119(c)(5)(C) of the Statute, which ties the length of time the Order is binding on the parties to the term of the new CBA.[30] Further, Authority precedent requires the parties to satisfy their statutory bargaining obligations prior to *implementing* any change to conditions of employment.[31] Unlike the cases cited by the Agency, which involved Panel orders that resolved all remaining provisions,[32] here, as acknowledged by the Agency, there were six unresolved articles of the successor CBA *still under negotiation*.[33] Therefore, the Agency failed to

[23] *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)).
[24] *Id.*
[25] *Id.*
[26] Agency Exceptions Br. at 6-11.
[27] *Id.* at 8 (citing *AFGE, AFL-CIO, Loc. 1815*, 69 FLRA 309 (2016) (*Loc. 1815*); *AFGE, AFL-CIO, Loc. 3732*, 16 FLRA 318 (1984) (*Loc. 3732*)); *id.* at 11 (citing *AFGE, Nat'l VA Council*, 39 FLRA 1055 (1991); *NTEU*, 39 FLRA 848 (1991)).
[28] Order at 36.
[29] *Id.* ("the Panel hereby orders the parties to *adopt* the provisions as stated above" (emphasis added)).
[30] *See* 5 U.S.C. § 7119(c)(5)(C) ("Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties *during the term of the agreement* . . . ." (emphasis added)).
[31] *See U.S. DOJ, INS*, 55 FLRA 892, 902-03 (1999) (finding that an award requiring an agency to maintain the status quo while negotiating over conditions of employment was consistent with the Statute); *see also U.S. DOD, Domestic Dependent Elementary & Secondary Schs.*, 72 FLRA 601, 604-05 (2021) (Chairman DuBester concurring) (finding agency did not violate the Statute when it submitted an agreement for agency-head review because the Panel's order resolved all of the remaining provisions of the successor CBA); *NTEU*, 72 FLRA 182, 186 (2021) (upholding an award finding the agency *did not* violate the Statute when it implemented an agreement because the agency completed its contractual and statutory bargaining obligations prior to implementation).
[32] *See Loc. 1815*, 69 FLRA at 316 (finding that a party violated the Statute when it *refused to sign* an agreement which contained *all terms and conditions of the new CBA*); *Loc. 3732*, 16 FLRA at 330 (finding that a party violated the Statute when it *refused to sign* a *complete* ground-rules agreement that contained agreed-upon language and Panel imposed language). The Agency also cites a nonprecedential administrative law judge decision. Agency Exceptions Br. at 10 (citing *SSA, Off. of Disability Adjudication, Wash., D.C.*, 2015 WL 5965158 (Sept. 15, 2015) (*SSA*)). Like the prior cases, this case is distinguishable from the instant case because it deals with an unfair-labor-practice (ULP) allegation that occurred after the parties *completed* the negotiation process. *See SSA*, 2015 WL 5965158 at *9-10 (finding that the Agency did not violate the Statute by implementing the Panel-imposed language when the parties had completed the negotiation process on all proposals, but not the ratification process).
[33] *See* Agency Exceptions Br. at 12 ("[T]he Agency properly maintained the status quo on the six remaining [a]rticles that are *currently being negotiated*." (emphasis added)); *see also* Merits Award at 23 (finding that the parties could not have a reached an "'integrated and complete' agreement" when, "even at the time of the hearing, some articles were still in negotiation"). Similarly, the decisions cited by the Agency concerning calculation of the execution date for purposes of agency-head review also turn on whether negotiations were complete. *See* Agency Exceptions Br. at 11 (citing *AFGE, Nat'l VA Council*, 39 FLRA 1055 (1991) (finding the issuance date of the Panel decision constituted the date the agreement was executed for purposes of agency-head review *when the parties did not engage in further negotiations after the Panel decision was issued*); *NTEU*, 39 FLRA 848 (1991) (finding the issuance date of the interest award *did not* constitute the date the agreement was executed for purposes of agency-head review *when the parties engaged in further, substantive negotiations following the issuance of the award*)).

satisfy its statutory bargaining obligations.[34] As such, the finding that the Agency violated the Statute is consistent with Authority precedent. Accordingly, we deny the Agency's contrary-to-law exception.

The Agency also argues the Arbitrator's finding that the Agency violated Article 2, Section 2C of the 2010 CBA is contrary to law because the Agency was allowed to implement the Order under the Statute.[35] As discussed above, Article 2, Section 2C of the 2010 CBA states that while the parties are negotiating a successor agreement, the 2010 CBA remains in effect "until a successor agreement is in place."[36] As we have upheld the Arbitrator's determination that the Agency did not have the authority to implement the Panel-imposed articles prior to completing bargaining on the successor CBA, the Agency has failed to demonstrate how the Arbitrator's conclusion that this implementation violated the 2010 CBA is contrary to law. We deny the exception.[37]

2. The merits award is contrary to § 7116(a) of the Statute, in part.

The Union first argues that the merits award is contrary to law because the Arbitrator failed to apply the correct legal standard for determining if the Agency also violated § 7116(a)(5) and (8) by unilaterally implementing the Order before a complete successor CBA was negotiated.[38] When resolving a grievance that alleges an unfair labor practice (ULP) under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (ALJ).[39] Therefore, in resolving the grievance, the Arbitrator must apply the same standards and burdens that are applied by ALJs under § 7118 of the Statute.[40]

Section 7116(a)(5) requires an agency to fulfill its statutory obligation to bargain in good faith over conditions of employment, which encompasses bargaining over the terms of a successor CBA.[41] Further, the Authority has held an agency violates § 7116(a)(5) when it fails to maintain the status quo until the completion of bargaining.[42] The Arbitrator found the Agency implemented the Order prior to completing bargaining on six unresolved articles of the successor CBA,[43] and the contract language implemented was inconsistent with the 2010 CBA.[44] Therefore, the Agency's failure to maintain the status quo until completing bargaining on the successor CBA was a violation of § 7116(a)(5) of the Statute. As such, we grant the Union's exception, and modify the merits award to include a violation of § 7116(a)(5).

Next, the Union argues the merits award is contrary to law because the Arbitrator failed to apply Authority precedent in determining whether the Agency's repudiation of the 2010 CBA also constituted a violation of § 7116(a)(5).[45] Where the Authority finds that a party's failure to bargain violated § 7116(a)(1) and (5) of the Statute, the Authority has found it unnecessary to decide whether the party's conduct also constituted a repudiation in violation of § 7116(a)(1) and (5).[46] In this regard, the

[34] 5 U.S.C. § 7103(a)(12); *see also U.S. Dep't of the Treasury, IRS*, 64 FLRA 934, 938-39 (2010) (finding that a party does not bargain in good faith if it "insist[s] on piecemeal negotiations regarding mandatory subjects of bargaining").

[35] Agency Exceptions Br. at 12-13.

[36] Merits Award at 4 (quoting 2010 CBA).

[37] *See U.S. DOJ, Fed. BOP, Fed. Corr. Ctr., Petersburg, Va.*, 72 FLRA 477, 480 n.30 (2021) (Chairman DuBester concurring; Member Abbott concurring) (denying essence exception that reiterated previously denied contrary-to-law claim).

[38] Union Exceptions Br. at 12-15.

[39] *NTEU, Chapter 26*, 66 FLRA 650, 652 (2012) (citing *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 239 (2011); *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 431 (2010)).

[40] *Id.*

[41] *See AFGE, Loc. 1367*, 63 FLRA 655, 656 (2009) (*Loc. 1367*) (citing *AFGE, Nat'l Council of HUD Locs. 222, AFL-CIO*, 60 FLRA 311, 314 (2004)); *U.S. INS, Wash., D.C.*, 55 FLRA 69, 75 (1999) (*INS*) (Member Wasserman dissenting); 5 U.S.C. § 7116(a)(5) ("[I]t shall be an [ULP] for an agency to refuse to consult or negotiate in good faith with a labor organization as required by [the Statute]."); *id.* § 7103(a)(12) (defining collective bargaining as "the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees . . . to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees").

[42] *INS*, 55 FLRA at 76; *see also Loc. 1367*, 63 FLRA at 657 (noting there are limited circumstances where an agency does not violate its duty to bargain in good faith by changing the status quo prior to completion of bargaining).

[43] Merits Award at 16 (finding that the Agency implemented the Order in April 2019); *id.* at 23 (finding that there was not an "'integrated and complete' agreement" and that "even at the time of the hearing, some articles were still in negotiation").

[44] *Id.* at 24 (finding that the Agency took actions "based on the language ordered by [the Panel] that were not consistent with the 2010 CBA").

[45] Union Exceptions Br. at 14-15.

[46] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Oxford, Wis.*, 68 FLRA 593, 594 (2014) (*BOP Oxford*) (Member Pizzella dissenting on other grounds) (citing *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*, 63 FLRA 406, 408 n.1 (2009), *recons. denied*, 63 FLRA 600 (2009)); *see also U.S. Dep't of the Treasury, IRS, Plantation, Fla.*, 64 FLRA 777, 780 n.11 (2010) ("As the finding that the [a]gency repudiated the oral agreement supports a conclusion that the [a]gency violated § 7116(a)(1) and (5), it is unnecessary to determine whether the [a]gency also violated § 7116(a)(1) and (5) by effecting a unilateral change to conditions of employment.").

Authority has stated that a finding of repudiation "would be only cumulative and would not materially affect the remedy."[47] Because we modified the award to include a violation of § 7116(a)(5) above, and the Arbitrator found the Agency's repudiation violated § 7116(a)(1),[48] a finding that the Agency's repudiation also violated § 7116(a)(5) would be only cumulative. Additionally, the Arbitrator ordered the Agency to "cease and desist from implementing the . . . Order before a complete successor CBA is in effect."[49] This remedy, in effect, is the same remedy the Authority awards in findings of repudiations – ordering the party to comply with the repudiated provision.[50] As such, finding an additional violation would not materially affect the remedy. Therefore, we find it unnecessary to decide whether the Agency's repudiation of the 2010 CBA violated § 7116(a)(5), or whether the Arbitrator erred by failing to make such a finding.[51]

The Union also argues the Arbitrator erred as a matter of law by not finding a violation of § 7116(a)(8) based on the Agency's violation of § 7114(c).[52] However, the Arbitrator did not find that the Agency violated § 7114(c). Instead, in concluding that the Agency remained bound by the 2010 CBA until the parties had completed negotiations over a successor agreement, the Arbitrator noted that there could not be piecemeal Agency-head review under § 7114(c) if the parties were still in ongoing negotiations.[53] As a consequence, the Arbitrator found that the Agency's "implementation of purported contract language that had not been incorporated into the CBA in a manner prescribed by 5 U.S.C. [§] 7114 denied . . . employees the benefit of the collective bargaining process," thereby violating § 7116(a)(1).[54] Because the Union's exception is based on a misunderstanding or mischaracterization of the award, we deny it.[55]

B. The Arbitrator did not err in declining to order the Agency to restore annual leave taken by two Union representatives to attend the Legislative Conference.

The Union argues that a portion of the remedial award – declining to order the Agency to reimburse leave taken by two Union representatives to attend the Union's annual Legislative Conference – fails to draw its essence from the 2010 CBA because it disregards the plain language of Section 6.B.16 of the 2010 CBA.[56]

The Authority will find an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the appealing party establishes 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.[57] Furthermore, mere disagreement with the arbitrator's interpretation and application of a CBA does not provide a basis for finding an award deficient.[58]

The Arbitrator determined that the plain language of Section 6.B.16 "on its face does not strongly support the Union's contention that attendance at [the Union's] Legislative Conferences falls within its parameters."[59] The Union's argument fails to identify any language in the 2010 CBA that conflicts with the Arbitrator's

[47] *BOP Oxford*, 68 FLRA at 594; *see also Majestic Towers, Inc.*, 353 NLRB 304, 304 n.3 (2008) (unnecessary to find additional violations of the same sections of National Labor Relations Act because they "would be cumulative and would not materially affect the remedy . . .").
[48] Merits Award at 28.
[49] Remedial Award at 36.
[50] *See, e.g.*, *U.S. DOJ*, 68 FLRA at 790.
[51] *See BOP Oxford*, 68 FLRA at 594.
[52] Union Exceptions Br. at 15 (arguing Arbitrator's finding that Agency did not violate § 7116(a)(8) "contradicts his conclusion that the Agency's actions did not comply with 5 U.S.C. § 7114(c)").
[53] *See* Merits Award at 23-24 ("Absent an 'integrated and complete' agreement, there could be no valid [a]gency[-]head [r]eview. Absent [a]gency[-]head [r]eview, there could be no new CBA.").
[54] *Id.* at 25.
[55] *See U.S. DHS, U.S. CBP*, 71 FLRA 243, 245 (2019) (Member Abbott concurring) (denying contrary-to-law exception because the agency misconstrued the award); *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 70 FLRA 924, 929 (2018) (then-Member DuBester concurring, in part, and dissenting, in part) (rejecting exceeded-authority arguments that were premised on a misunderstanding of the award).
[56] Union Exceptions Br. at 16-18. As relevant here, Section 6.B.16 provides: "representatives shall be granted official time for participation in . . . any other representational functions . . . to include: to meet with members of Congress and their staffs on matters relating to bargaining unit conditions of employment." Union Exceptions, Attach. 7 at 38-40.
[57] *NAGE*, 71 FLRA 775, 776 (2020) (*NAGE*) (citing *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017)).
[58] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 1262, 1264 (2020) (*Miami*) (then-Member DuBester concurring); *SSA*, 71 FLRA 580, 581 (2020) (*SSA II*) (then-Member DuBester concurring) (citing *SSA*, 71 FLRA 352, 353 (2019) (then-Member DuBester concurring); *U.S. DOL (OSHA)*, 34 FLRA 573, 575-76 (1990)).
[59] Remedial Award at 13.

determination that the Agency's denial of official time for the Legislative Conference did not violate Section 6.B.16, but instead argues for its preferred interpretation.[60] Accordingly, we deny the Union's essence exception.[61]

The Union also argues the Arbitrator's denial of official time for Union stewards to attend the Legislative Conference is based on a nonfact.[62] 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.[63] However, a challenge to an arbitrator's interpretation of the parties' agreement cannot be challenged as a nonfact.[64]

The Union argues that "unrebutted record evidence" demonstrates Section 6.B.16 of the 2010 CBA authorizes official time for the types of representational activities performed at the Legislative Conference.[65] The Union's nonfact exception challenges the Arbitrator's interpretation of the 2010 CBA – finding "[t]he language of Section 6.B.16 on its face does not strongly support the Union's contention that attendance at [the] Legislative Conferences falls within its parameters."[66] Further, the Union's exception relies on the same essence argument rejected above. Therefore, we deny this exception.[67]

C. The Arbitrator had the authority to award the challenged remedies.

In its exceeded-authority exception, the Agency argues the Arbitrator erred in requiring the Agency to rescind the suspensions of Wright and Casner, pay backpay, and reconduct the disciplinary process for those employees following the procedures provided by the 2010 CBA.[68] Specifically, the Agency asserts the disciplinary actions were not encompassed in the issues submitted to arbitration; and therefore, the Arbitrator erred by addressing them.[69]

As relevant here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration.[70] However, arbitrators have broad discretion to fashion remedies they consider to be appropriate.[71] Further, arbitrators do not exceed their authority where the award and remedies are directly responsive to the framed issues.[72]

Here, the issues, as framed by the Arbitrator, were whether the Agency's actions constituted violations of the Statute and the 2010 CBA, and if so, what were the appropriate remedies.[73] The Arbitrator found the Agency violated the Statute and the 2010 CBA in implementing the Order. After sustaining the grievance on the merits, the Arbitrator conducted a remedial hearing, at which the Union argued the Agency's failure to adhere to the 2010 CBA in adjudicating disciplinary actions adversely affected Wright and Casner.[74] Therefore, the

[60] Union Exceptions Br. at 17 (arguing "[t]he Arbitrator's interpretation is not a plausible interpretation and manifests a disregard of the [2010 CBA] because, on its face, the plain wording of Article 10, Section 6.B.16 makes it evident that official time must be granted for [attendance at the Union's Legislative Conference]").

[61] *See Miami*, 71 FLRA at 1264 (denying an essence exception because it was mere disagreement with the arbitrator's interpretation and application of the parties' CBA); *SSA II*, 71 FLRA at 581 (same); *see also SSA*, 70 FLRA 227, 230 (2017) (finding an excepting party's attempt to relitigate its interpretation of an agreement and the evidentiary weight given by the arbitrator fails to demonstrate the award is deficient).

[62] Union Exceptions Br. at 18-21.

[63] *U.S. Dep't of VA, VA Puget Sound Health Care Sys., Seattle, Wash.*, 72 FLRA 441, 443 (2021) (Chairman DuBester concurring).

[64] *AFGE, Nat'l Council of Field Lab. Locs.*, 71 FLRA 1180, 1181 (2020) (*Field Labor Locs.*).

[65] Union Exceptions Br. at 18.

[66] Remedial Award at 13.

[67] *See Field Labor Locs.*, 71 FLRA at 1182 (denying nonfact exception because it challenged arbitrator's contractual interpretation); *NAGE*, 71 FLRA at 777 (citing *NAGE, SEIU Loc. 551*, 68 FLRA 285, 288 (2015)) (denying nonfact exception that restated previously denied essence exception).

[68] Agency Exceptions Br. at 17-21.

[69] *Id.* at 17.

[70] *U.S. Small Bus. Admin.*, 71 FLRA 655, 656 n.13 (2020) (then-Member DuBester dissenting) (citing *Int'l Bhd. of Elec. Workers, Loc. 121*, 71 FLRA 161, 162 n.13 (2019) (then-Member DuBester concurring)).

[71] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 67 FLRA 552, 554 (2014) (*Coleman*) (Member Pizzella dissenting on other grounds) (citing *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 861 (2012); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 66 FLRA 388, 391 (2011)).

[72] *U.S. Dep't of VA, Nashville Reg'l Off., VA Benefits Admin.*, 72 FLRA 371, 374 (2021) (*Nashville*) (Member Abbott concurring) (citing *U.S. Dep't of VA Med. Ctr., Richmond, Va.*, 70 FLRA 900, 901 (2018) (then-Member DuBester concurring); *U.S. Dep't of the Treasury, IRS, Off. of Chief Couns.*, 70 FLRA 783, 784 n.15 (2018) (then-Member DuBester dissenting)).

[73] Merits Award at 3-4; *see also* Remedial Award at 3 ("I find that the issue is what are the appropriate remedies for the [ULP] committed by the Agency and the violation by the Agency of [the 2010 CBA]?").

[74] *See* Union Exceptions, Attach. 8 at 55-57 (testimony on how Casner was negatively affected by the Agency's failure to adhere to the 2010 CBA); Union Exceptions, Attach. 12 at 37-39 (Union argument in post-hearing brief that Arbitrator should rescind, with backpay, the suspensions of Wright and Casner); *see also* Union Exceptions, Attach. 2 at 69-71 (testimony on how Wright received twenty-four hours to respond to proposed discipline instead of fourteen days required by 2010 CBA).

remedy – requiring the Agency to rescind and "rerun" the suspensions of Wright and Casner[75] – is directly responsive to the question of appropriate remedies for the Agency's violation of the Statute and the 2010 CBA. As such, the Agency has not shown the Arbitrator's selection of remedy resolved an issue not submitted to arbitration.[76] Accordingly, we deny the Agency's exception.

D. The Union fails to demonstrate the remedial award is contrary to law.

The Union argues the remedial award is contrary to the Statute and Authority precedent because it fails to provide make-whole relief.[77] Specifically, the Union asserts the Statute and Authority precedent require the Arbitrator to award a make-whole remedy.[78]

When an arbitrator finds a party has committed a ULP, the Authority defers to the arbitrator's judgment and discretion in the determination of the remedy.[79] Thus, unless a party establishes a particular remedy is compelled by the Statute, the Authority reviews remedy determinations of arbitrators in ULP grievance cases just as the Authority's remedies in ULP cases are reviewed by the federal courts of appeals.[80] This means 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]."[81] The Authority has emphasized making such a showing is a heavy burden.[82]

The Union cites to decisions of the Authority and the U.S. Court of Appeals for the District of Columbia Circuit stating make-whole relief is an *appropriate* remedy, but none of these cases hold that make-whole relief is *required* in any particular circumstances.[83] As such, the Union does not establish make-whole relief is compelled by law, rule or regulation, or that the Arbitrator's remedy determinations are a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Statute. Accordingly, we deny the Union's exception.[84]

E. We grant the Union's request to remand the matter of attorney fees.

The Union also requests the Authority remand the matter of attorney fees because the Arbitrator erred in requiring a petition for attorney fees to be filed by May 5,

[75] Remedial Award at 29-30.

[76] *Nashville*, 72 FLRA at 374 (denying exceeds-authority exception because remedy was directly responsive to the framed issue); *Coleman*, 67 FLRA at 554 (denying exceeds-authority exception because the agency failed to demonstrate the remedy fashioned by the arbitrator resolved an issue not submitted to arbitration).

[77] As stated above, when an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo. *U.S. DOL, Off. of Workers' Comp.*, 72 FLRA 489, 490 (2021) (Member Abbott concurring) (citing *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021)). In applying the de novo standard of review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* In making this assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are based on nonfacts. *Id.* (citing *AFGE, Loc. 2002*, 70 FLRA 812, 814 (2018)).

[78] Union Exceptions Br. at 21-26.

[79] *NTEU*, 66 FLRA 406, 408 (2011) (citing *NTEU*, 64 FLRA 833, 838 (2010); *NTEU, Wash., D.C.*, 48 FLRA 566, 571 (1993)).

[80] *Id.* (citing *U.S. Dep't of Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 436 (2010)).

[81] *Id.* (quoting *NTEU v. FLRA*, 647 F.3d 514, 517 (4th Cir. 2011)).

[82] *Id.* (citation omitted).

[83] Union Exceptions Br. at 22-23 (citing *Dep't of HHS, SSA, Dallas Region, Dallas, Tex.*, 32 FLRA 521 (1988); *U.S. DOJ, BOP, Safford, Ariz.*, 35 FLRA 431, 444-45 (1990); *U.S. Dep't of HHS, SSA*, 50 FLRA 296, 299-300 (1995); *NTEU v. FLRA*, 856 F.2d 293, 296 (D.C. Cir. 1988); *Dep't of the Navy, Norfolk Naval Shipyard, Portsmouth, Va.*, 15 FLRA 867 (1984); *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Ocean Serv., Coast & Geodetic Surv., Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1023 (1998); *U.S. Dep't VA, VA Med. Ctr., Martinsburg, W. Va.*, 67 FLRA 400, 402 (2014)). The Union also cites *Department of Treasury, IRS*, 16 FLRA 235, 243-44 (2011), however, the Union has failed to provide the correct citation and we are unable to identify the case the Union references. Therefore, the Union has failed to adhere to § 2425.4(a)(2) of the Authority's Regulations, which require the excepting party to "ensure that [the exceptions are] self-contained and that it sets forth, in full, the following . . . [a]rguments in support of the stated grounds, including . . . citations of authorities . . . ." 5 C.F.R. § 2425.4(a)(2). To the extent the Union meant to cite to *Department of Treasury, IRS, Wage & Investment Division*, 66 FLRA 235, 243-44 (2011), that case does not mention make-whole relief or have any bearing on the argument presented.

[84] *AFGE, Loc. 12*, 69 FLRA 360, 361-62 (2016) (denying argument that notice posting was required by the Statute to remedy ULP because party failed to show that a notice posting was compelled by the Statute or "that the [a]rbitrator's denial of posting remedy [was] a 'patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]'" (quoting *NTEU*, 66 FLRA at 408)); *NTEU*, 66 FLRA at 408 (denying exception arguing that arbitrator's failure to award make-whole relief was contrary to the Statute because the union failed to cite to any legal authority that required the remedy of make-whole relief).

2021.[85] The Union argues Authority precedent and the 2010 CBA allow the Union to file a petition for attorney fees when the award becomes final and binding, which according to the Union, would occur after the instant appeal is exhausted.[86]

Under Authority precedent applying the Back Pay Act and its implementing regulations, an attorney-fees request generally may be filed within a "reasonable time" after the backpay award becomes "final and binding."[87] An award does not become "final and binding" until, as relevant here, the Authority resolves any exceptions to the award.[88] However, parties may modify the general rule by agreeing to a time period within which attorney-fees requests must be filed with an arbitrator.[89] Further, a party *may* request attorney fees during the course of an arbitration proceeding, but nothing in the Back Pay Act and implementing regulations *requires* a party to do so.[90] In sum, absent a contrary agreement, the default rule is that an attorney-fee request under the Back Pay Act may be filed within a reasonable time *after* the backpay award becomes final and binding.[91]

Here, the Arbitrator – without referencing any provision of the parties' agreement – required the Union to file an attorney-fees request within thirty days of the issuance of the remedial award.[92] Because the parties did not agree to modify the default rule[93] – requiring a fee request to be filed a reasonable time *after* the backpay award becomes *final and binding* – the Arbitrator's imposition of a thirty-day limit is inconsistent with Authority precedent applying the Back Pay Act.[94] Accordingly, we grant the Union's exception and remand the matter of attorney fees back to the parties. Consistent with the precedent above, the Union may file a fee request within a reasonable time after the backpay award becomes final and binding – i.e. the issuance date of this decision.[95]

V. Decision

We grant the Union's contrary-to-law exception to the merits award. We also grant the Union's request to remand the matter of attorney fees to the Arbitrator because the Arbitrator erred in setting a thirty-day deadline. We dismiss in part, and deny in part, the remainder of the Agency's and the Union's exceptions. Accordingly, we modify the merits award to include a violation of § 7116(a)(5), uphold the remedial award in full, and remand the matter of attorney fees to the parties for resubmission to the Arbitrator absent settlement.

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[85] Union Exceptions Br. at 26-27.
[86] *Id.*
[87] *U.S. Dep't of VA, VA Hosp. Med. Ctr.*, 72 FLRA 677, 679 (2022) (*VA Hosp.*).
[88] *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Oakdale, La.*, 65 FLRA 35, 39 n.3 (2010) (*FCC Oakdale*) (finding award was final and binding once the Authority "fully resolved the [party's] exceptions"); *AFGE, Loc. 2054*, 58 FLRA 163, 164 (2002) (*Loc. 2054*) (citing *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 56 FLRA 848, 852 (2000)) (finding an award becomes final and binding when there are no timely exceptions filed or when the Authority denies timely filed exceptions).
[89] *AFGE, Loc. 44, Nat'l Joint Council of Food Inspection Locs.*, 67 FLRA 721, 722 (2014) (*Loc. 44*) (Member Pizzella dissenting on other grounds) (citing *Phila. Naval Shipyard*, 32 FLRA 417, 421 (1988) (*Naval Shipyard*)).
[90] *U.S. DOJ, Fed. BOP, Wash. D.C.*, 64 FLRA 1148, 1152 (2010) (citations omitted); *see also Naval Shipyard*, 32 FLRA at 420 ("While . . . requests [for attorney fees] may be submitted during the course of an arbitration proceeding, nothing . . . requires that a request for attorney fees be made before an award is final and binding.").
[91] *Loc. 44*, 67 FLRA at 722.
[92] Remedial Award at 36-37.
[93] The only mention of attorney's fees in the parties' agreement provides "[t]he Arbitrator shall possess the authority to . . . award back pay, interest, and attorney's fees in accordance with 5 CFR 550.801(a) . . . ." Union Exceptions, Attach. 7 at 199.
[94] *See VA Hosp.*, 72 FLRA at 679-80 (rejecting argument that attorney-fees request had to be filed within sixty days of the merits award because the parties did not agree to establish a sixty-day deadline for attorney-fees requests); *see also id.* at 680 (upholding an arbitrator's finding that a motion for attorney fees was timely because it was filed within a reasonable time after the merits award became *final and binding*).
[95] *See FCC Oakdale*, 65 FLRA at 39 n.3; *Loc. 2054*, 58 FLRA at 164.

Chairman DuBester, concurring:

I agree with the decision in all respects except one. Because I believe it is important for the Authority to clearly define the rights and obligations of the parties under the circumstances presented by this case, I would conclude that the Agency's repudiation of the 2010 collective-bargaining agreement also constituted a violation of 5 U.S.C. § 7116(a)(5).