64 FLRA No. 105

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
NATIONAL DISTRIBUTION CENTER
BLOOMINGTON, ILLINOIS
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 43
(Union)

0-AR-4351

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DECISION

March 23, 2010

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to two awards (the merits award and the remedy award, respectively) of Arbitrator John C. Fletcher filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions. In addition, the Authority issued an order to show cause why the exceptions should not be dismissed, to which the Agency filed a response. The Union then requested leave to file a supplemental submission.

As relevant here, in the merits award, the Arbitrator found that the Agency committed an unfair labor practice (ULP) and violated the parties' agreement by refusing to bargain over a change in past practice regarding the release and recall of temporary-intermittent employees. The Arbitrator directed a modified status quo ante (SQA) remedy, directed the parties to negotiate over an appropriate make-whole remedy, and retained jurisdiction until the parties' resolved outstanding issues. After the parties reached agreement on an appropriate make-whole remedy, the Arbitrator issued the remedy award, in which he approved the agreed-upon remedy.

For the reasons that follow, we deny the exceptions.

II. Background and Arbitrator's Awards

The Agency closed certain distribution centers and consolidated its functions in one particular distribution center, which the Agency decided to staff with predominantly intermittent employees. *See* Merits Award at 2. As relevant here, the Union requested to bargain over the release and recall of intermittent employees, but the Agency refused, asserting that the matter was "covered by" Article 14 of the National Agreement. [1]

The Union filed a grievance, which was unresolved and submitted to arbitration. *See id.* at 3. At arbitration, the parties stipulated the issue as: "Whether the Agency committed [a ULP] and violated Article [47] of the parties[']collective bargaining agreement (CBA) when it asserted the 'covered by' principle and refused to negotiate with the Union in regard to the release and recall of temporary intermittent employees at the [distribution center]?" [2] *Id.* at 4.

The Arbitrator concluded that "a valid past practice existed with respect to recall and release of . . . temporary-intermittent employees, a practice that was 'consistently exercised over a significant period of time [and was] followed by both parties'." *Id.* at 13 (citation omitted). Specifically, the Arbitrator found that, on individual tours of duty, management selected volunteers to be released, and if a sufficient number of people did not volunteer, then management would release them in order of inverse seniority. *See id.* at 13-14. In addition, the Arbitrator determined that this past practice was a condition of employment and that the Agency had an obligation to bargain with the Union before changing that practice. *See id.* at 15-16.

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1. The pertinent provisions of Article 14 are set forth in the appendix to this decision.

2. Although the Arbitrator cited Article 37 rather than Article 47, the parties both argue that the pertinent provision is Article 47. *See* Exceptions at 2 n.1; Opp'n at 7 n.2. Article 47 provides, in pertinent part:

> In accordance with 5 U.S.C., Chapter 71, to the extent permitted by law, either party may initiate mid-term bargaining by proposing changes in conditions of employment provided that such changes are not covered by this or any other collective bargaining agreement between the parties . . . . Unless otherwise permitted by law, no changes will be implemented by the Employer until proper and timely notice has been provided to the Union, and all negotiations have been completed including any impasse proceedings.

Merits Award at 5.

The Arbitrator addressed the Agency's argument that bargaining was not required because the matter was "covered by" Article 14 of the National Agreement. [3] The Arbitrator held that, although Article 14 involves release and recall for extended periods of time, "[t]he real issue here . . . is not periodic release and recall for extended periods of time but rather the early release from tour-of-duty at times when there exists insufficient work on a particular tour-of-duty for a temporary intermittent employee." *Id.* at 16. The Arbitrator found that Article 14 is "silent on that matter[.]" *Id.* The Arbitrator then noted the Agency's chief negotiator's testimony that "it was the intent of the parties to have all release/recall issue[s] covered by Article 14[,]" but he found that "nothing has been submitted to support this assertion." *Id.* at 17 (emphasis in original) (footnote omitted). The Arbitrator also found that the Union's National Executive Vice-President, and chief spokesperson for the Union, testified that "temporary-intermittent employees were never discussed during the negotiations over Article 14." *Id.* The Arbitrator credited this testimony "because temporary-intermittent employees are not specifically referenced in Article 14[.]" *Id.* The Arbitrator acknowledged that Article 14, Section 1 states that Article 14 applies to all Agency employees, but found that, although other sections of Article 14 "mention other types of employees, such as career/career conditional, seasonal and[/]or employees on term appointments," Article 14 "does not mention temporary-intermittent employees at any place in its text." *Id.* at 17 n.28. The Arbitrator then noted that Article 14, Section 2.B. contemplates five days' notice for release, and he stated that such a notice "obviously cannot be given in early tour-of-duty releases," and thus, Article 14, "fairly read, cannot be considered to embrace temporary-intermittent employees, who the Agency stressed replaced seasonal employees . . . because of the ability to be sent home early when work runs dry." *Id.* at 18 n.28. The Arbitrator concluded that the matter was not "covered by" Article 14. Alternatively, the Arbitrator found that the parties "have a past practice that is inconsistent with the contract, therefore, the covered-by defense does not apply." *Id.* at 17.

Based on the foregoing, the Arbitrator determined that the Agency committed a ULP and violated Article 47 of the parties' agreement by refusing to negotiate. *See id.* at 21. As a remedy, the Arbitrator directed a modified SQA remedy, specifically that the parties return to the past practice that existed in the distribution center immediately prior to the consolidation. *See id.* at 19. The Arbitrator noted that the Union also requested "a make whole remedy for employees negatively affected by the Agency's unilateral abandonment of an existing past practice[.]" *Id.* He also noted that "there was some anecdotal testimony that favoritism was being shown after a new policy was unilaterally implemented and that some employees who wished to stay may have been able to work while more senior employees volunteered to leave[.]" *Id.* at 19. However, the Arbitrator found that "this testimony was not sufficiently developed to fashion a meaningful remedy." *Id.* at 19-20. Accordingly, he directed the parties "to enter negotiations on this matter for the next 120 days with the purpose of effecting a remedy[]" and stated that, "[i]f after the expiration of that time span, disagreement or dispute obtains[,] an additional hearing will be scheduled before this Arbitrator to receive evidence on this issue, following which a remedy award will be made." *Id.* at 20. Finally, in the "Award" section of the merits award, the Arbitrator stated: "The Agency and the Union are directed to commence negotiations on an appropriate make-whole remedy for any employee affected by" the Agency's action, and that, "[i]f the parties are unable to resolve that matter within 120 days of the date of this award an evidentiary hearing will be scheduled to decide that matter." *Id.* at 21.

Subsequently, the parties jointly requested that the Arbitrator order certain specified make-whole relief for individual employees. *See* Remedy Award at 1. In the remedy award, the Arbitrator ordered the agreed-upon make-whole relief and found that the relief was warranted under the Back Pay Act, 5 U.S.C. § 5596. *See* Remedy Award at 1.

III. Positions of the Parties

A. Agency Exceptions

The Agency asserts that the Arbitrator exceeded his authority because he "materially change[d] the issue" by stating that "the real issue" was early release from tours of duty for temporary-intermittent employees. Exceptions at 17, 18.

The Agency also asserts that the Arbitrator erred by finding that the parties had a valid past practice. *See id.* at 19. In this connection, the Agency contends that the alleged practice does not satisfy the standards for "past practice" that are set forth in Authority precedent, and that the Arbitrator's finding of a past practice is based on a nonfact. *Id.* at 20, 23.

The Agency further contends that the Arbitrator's finding that the Agency's "'stated goal' in utilizing temporary intermittent employees was simply the ability to

3. The "covered by" test is set forth *infra*.

summarily send employees home when daily workloads declined, is not supported by the facts." *Id.* at 17. In this connection, the Agency asserts that "[w]hile daily work fluctuations were certainly not irrelevant in regard to the decision to hire temporary intermittent employees, handling such daily occurrences was not the sole reason for their hiring." *Id.*

In addition, the Agency contends that the Arbitrator erred as a matter of law by rejecting the Agency's "covered by" defense. *Id.* at 7-19. In this connection, the Agency acknowledges that "Article 14 does not specifically mention temporary intermittent employees," but contends that Article 14, Section 1 states that Article 14 applies to all Agency employees subject to periodic release and recall. *Id.* at 11. For support, the Agency cites: *U.S. Dep't of the Treasury, IRS, Denver, Colo.*, 60 FLRA 572, 574 (2005) (Chairman Cabaniss concurring) (*IRS Denver*), petition for review dismissed, *NTEU v. FLRA*, 452 F.3d 793 (D.C. Cir. 2006); *AFGE, Nat'l Border Patrol Council*, 54 FLRA 905, 910 (1998) (*Border Patrol Council*); *U.S. Dep't of the Air Force, 375th Combat Support Group, Scott Air Force Base, Ill.*, 49 FLRA 1444, 1453 (1994) (Member Talkin dissenting) (*Scott AFB*), recons. den., 50 FLRA 84 (1995); *Navy Resale Activity, Naval Station, Charleston, S.C.*, 49 FLRA 994, 998-99, 1002 (1994) (Member Talkin dissenting) (*Navy Resale Activity*); *USDA Forest Serv., Pac. Nw. Region, Portland, Or.*, 48 FLRA 857, 859 (1993) (*USDA*). *See* Exceptions at 11-12, 13-15. Further, the Agency claims that the Arbitrator "appears to have added a new requirement(s) to the 'covered by' principle, i.e., that the particular matter at issue must have been specifically discussed by the parties during negotiations and/or be directly addressed" by the agreement. *Id.* at 18.

The Agency further contends that the modified SQA remedy fails to satisfy the standards set forth in Authority precedent and that the remedy would: (1) unduly disrupt Agency operations; and (2) be "impractical and unworkable" due to the extensive reorganization and realignment of work and because the alleged past practice operated differently at different facilities. *Id.* at 24-25. For support, the Agency cites: *Dep't of Transp., FAA*, 19 FLRA 472, 477 (1985) (*Transportation*); *FAA, Wash., D.C.*, 19 FLRA 436, 436-37 (1985); and *U.S. Dep't of HUD*, 58 FLRA 33, 35 (2002) (*HUD*) (Chairman Cabaniss dissenting and then-Member Pope concurring on other grounds).

B. Union Opposition

The Union argues that the Agency's exceptions are untimely because they challenge only findings that were made in the merits award. Opp'n at 8-11. For support, the Union cites: *Portsmouth Naval Shipyard*, 15 FLRA 181 (1984) (*Portsmouth*); *Office of Pers. Mgmt.*, 61 FLRA 358 (2005) (*OPM*) (then-Member Pope dissenting in part on other grounds), *recons. den.* 61 FLRA 657 (2006); and *NAGE, Local R4-45*, 55 FLRA 789 (1999).

With regard to the merits of the Agency's exceptions, the Union contends that the Arbitrator did not exceed his authority because his statement that the "real issue" was release from tours of duty for temporary-intermittent employees was directly responsive to the Agency's reliance on a "covered by" defense. *See* Opp'n at 18-19. The Union also contends that the award is not based on a nonfact because the matter of whether the parties had a past practice was a factual matter that the parties disputed before the Arbitrator. *See id.* at 12-14. In addition, the Union argues that the Arbitrator's rejection of the "covered by" defense is not deficient. *See id.* at 14-15. Finally, the Union argues that the modified SQA remedy is not deficient because the Agency has offered no evidence to support its claim of undue disruption and has failed to otherwise demonstrate that the remedy is deficient. *See id.* at 19-21.

IV. Preliminary Issues

The Authority issued an order to show cause, directing the Agency to show cause why its exceptions are timely filed. *See* Order to Show Cause (Order) at 2. In support of the order, the Authority cited *U.S. Dep't of the Navy, Mare Island Naval Shipyard, Vallejo, Cal.*, 52 FLRA 1471 (1997) (*Mare Island*), *recons. den.* 53 FLRA 267 (1997).

The Agency filed a response, asserting that the merits award did not become final until the Arbitrator issued the remedy award. *See* Agency Response (Response) at 6. The Agency asserts that the arbitrators in *OPM*, 61 FLRA 358, and *Mare Island*, 52 FLRA 1471, "ruled on the specifics" of the make-whole remedies that they awarded and did not leave "the nature of any remedial issues to the subsequent negotiation of the parties." Response at 5. By contrast, the Agency contends that the Arbitrator in this case found the evidence insufficient to award an appropriate remedy and directed the parties to negotiate over such a remedy. *See id.* at 5-6. In addition, the Agency claims that, unlike *NAGE, Local R4-45*, 55 FLRA 789 — where the second award that issued was an amended award and the original award was considered final — the instant case is more akin to a situation where an arbitrator reserves jurisdiction over a remedial issue and the award does not

become final until issuance of a supplemental decision addressing that issue. *See* Response at 4-5.

The Union filed a motion for leave to file a reply to the Agency's response to the order to show cause. In its motion, the Union requests leave to: (1) respond to the Agency's response to the Authority's citation to *Mare Island*; and (2) argue that the Agency's exceptions are untimely even if the time period for filing exceptions began with service of the remedy award rather than the merits award. *See* Union Motion (Motion) at 1-2.

Based on the foregoing, it is necessary to determine two issues: (1) whether to grant the Union's motion to file a supplemental submission; and (2) whether the Agency's exceptions are timely. We discuss those two issues separately below.

A. We grant the Union's motion and consider its supplemental submission.

Although the Authority's regulations do not provide for the filing of supplemental submissions, § 2429.26 of the Authority's regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate. *Cong. Research Employees Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004). The Authority has granted such leave where, for example, the supplemental submission responds to arguments raised for the first time in an opposing party's filing. *See id.* (granting leave for union to file response to arguments raised for first time in agency's opposition). However, where a party's supplemental submission raises issues that the party could have raised in a previous submission, the Authority has denied a request to consider the supplemental submission. *See U.S. Dep't of the Army, Corps of Eng'rs, Portland Dist.*, 61 FLRA 599, 601 (2006), *recons. den.* 62 FLRA 97 (2007).

As discussed above, the Union's supplemental submission raises two issues: (1) a response to the Authority's citation to, and the Agency's discussion of, the *Mare Island* decision; and (2) an assertion that the exceptions were untimely even relative to the remedy award.

The first issue responds to arguments raised for the first time in the Authority order and the Agency response. Consistent with the above principles, we consider the submission with respect to that issue.

The second issue is a matter that the Union could have raised, but did not raise, in its opposition. Nevertheless, the second issue addresses the timeliness of the exceptions, which is a jurisdictional issue that may be raised at any stage of the Authority's proceedings. *See Bremerton Metal Trades Council*, 59 FLRA 583, 584 (2004) (timeliness of exceptions is jurisdictional); *U.S. Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, S.F., Cal.*, 55 FLRA 193, 195 (1999) (jurisdictional issues may be raised at any stage). As such, we consider the submission with respect to that issue as well.

For the foregoing reasons, we grant the Union's motion and consider its supplemental submission.

B. The exceptions were timely filed.

Section 7122(b) of the Statute provides, in pertinent part, that exceptions to an arbitrator's award must be filed "during the 30-day period beginning on the date the award is served on the party[.]" *See also* 5 C.F.R. § 2425.1(b) ("The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date the award is served on the filing party."). However, absent extraordinary circumstances, the Authority will not resolve exceptions to an arbitration award until the arbitrator has issued a final decision on the entire proceeding. [4] *See id. See also* 5 C.F.R. § 2429.11 ("The Authority . . . ordinarily will not consider interlocutory appeals.")

There is no dispute that the Agency did not file its exceptions within thirty days beginning on the date of service of the merits award. Consistent with the above-stated principles, if the merits award completely resolved all of the issues submitted to arbitration, then that award was final for purposes of filing exceptions, and the Agency's exceptions are untimely. By contrast, if the merits award did not completely resolve all of the issues submitted to arbitration — and those issues were not fully resolved until the remedy award — then the timeliness of the Agency's exceptions would be judged relative to the date of service of the remedy award. Thus, it is necessary to determine whether the merits award was final for purposes of filing exceptions.

An award is not considered final — and exceptions to such an award are considered interlocutory — when the arbitrator has not made a final disposition as to a remedy. *See id.* In this connection, where an arbitrator did not make a final disposition as to a monetary remedy, but directed parties to determine whether a monetary remedy would be appropriate, the Authority found that the award was not final. *See U.S. Dep't of the Treasury, Customs Serv., Tucson, Ariz.*, 58 FLRA 358, 359 (2003). Similarly, the Authority found that an award

4. No extraordinary circumstances are alleged here.

was not final where an arbitrator found the record "inadequate and/or insufficient" to effect an appropriate remedy and directed parties to "meet for the purpose of [e]ffecting an agreement on an appropriate financial arrangement" to settle the matter. *U.S. DOD, Army & Air Force Exch. Serv.*, 38 FLRA 587, 587 (1990). The Authority also found that an award was not final where an arbitrator found that an agency violated a collective bargaining agreement by changing employees' schedules and, without determining whether any employees were entitled to overtime, directed the parties to review the affected employees' work schedules to make that determination. *See Phila. Naval Shipyard*, 33 FLRA 868, 868-69 (1989).

By contrast, an award was considered final — and exceptions were not found interlocutory — where an arbitrator awarded a particular monetary remedy and left to be determined only the specific amounts to be awarded. *See U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007) (Chairman Cabaniss and then-Member Pope dissenting in part on other grounds). *See also U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 58 FLRA 498, 499 (2003).

Here, before the Arbitrator, the Union requested, among other things, that "affected employees be[] made whole with back pay and lost benefits." Merits Award at 11. As discussed previously, with regard to this request, the Arbitrator "note[d] that there was some anecdotal testimony that favoritism was being shown after a new policy was unilaterally implemented and that some employees who wished to stay may have been able to work while more senior employees volunteered to leave[.]" *Id.* at 19. However, he stated that "this testimony was not sufficiently developed to fashion a meaningful remedy." *Id.* at 19-20. Accordingly, he directed the parties to "enter negotiations on this matter . . . with the purpose of effecting a remedy[,]" and if disagreement remained after 120 days, then "an additional hearing will be scheduled . . . to receive evidence on this issue, following which a remedy award will be made." *Id.* at 20. Consistent with these findings, the Arbitrator stated, in the "Award" section of the merits award, the following: "The Agency and the Union are directed to commence negotiations on *an appropriate make-whole remedy* for any employee affected . . . . If the parties are unable to resolve that matter within 120 days . . . an evidentiary hearing will be scheduled to decide that matter." *Id.* at 21 (emphasis added).

Stated differently, in the merits award, the Arbitrator did not find that make-whole relief was appropriate and merely direct the parties to negotiate over the details of such relief. Rather, he found that the record was insufficient to determine whether any such relief was appropriate. Thus, this situation is akin to the situations discussed above where the Authority found that an award was not final and that exceptions were interlocutory.

As for the decisions cited in the Authority order and by the Union, both *OPM*, 61 FLRA at 361, and *Mare Island*, 52 FLRA at 1474-76, involved situations where arbitrators awarded a remedy in their first awards and merely provided the details of the remedies in their second awards; as discussed above, that is not the situation here. Further, *Portsmouth*, 15 FLRA at 181-82, involved a situation where an arbitrator issued an award, retained jurisdiction, and subsequently responded to the parties' requests for clarification by reiterating findings from his award; unlike the instant case, it did not involve an arbitral direction to negotiate over a remedy and a retention of jurisdiction in the event that the parties did not agree to such a remedy. Finally, in *NAGE, Local R4-45*, 55 FLRA 789, the arbitrator found, in his first award, that the agency violated the parties' agreement in "spirit[,]" but summarily "denied" the grievance without granting a remedy. *Id.* at 790. The arbitrator later issued an amended award in which he granted the grievance in part and provided a remedy directing the agency to comply with the agreement. *Id.* The agency then filed an exception challenging only the finding from the first award that the agency had violated the "spirit" of the agreement, and the Authority found the exception untimely because the alleged deficiency arose only from the original award. *Id.* at 791-93. Thus, in *NAGE, Local R4-45*, the arbitrator's first award effectively was final at the time it was issued; here, by contrast, the case was still open when the Arbitrator issued the merits award. For these reasons, the decisions cited in the Authority's order and by the Union are inapposite.

Further, we note that, in the merits award, the stipulated issue before the Arbitrator did not expressly include an issue as to what the appropriate remedy should be. *See* Merits Award at 4. However, before the Arbitrator, both the Union and the Agency made arguments regarding what an appropriate remedy should be. Accordingly, we find that the issue before the Arbitrator in the merits award included an appropriate remedy in the event that a violation was found and that, consequently, the merits award did not resolve all of the issues that were before the Arbitrator.

For the foregoing reasons, we find that the merits award did not become final until the Arbitrator issued the remedy award, and that the time limit for filing exceptions did not begin until the issuance of the remedy award. With regard to whether the exceptions were filed timely within thirty days beginning on the date of service of the remedy award, the Authority's regulations provide that, if the last day of the thirty-day period falls on a weekend or federal holiday, then the due date for the exceptions is the end of the next day that is not a weekend day or federal holiday. 5 C.F.R. § 2429.21(a). In addition, the time period is extended five days if the arbitrator served the award on the filing party by mail, and is further extended if the time period then ends on a weekend or federal holiday. 5 C.F.R. § 2429.22; 5 C.F.R. § 2429.21(a).

The remedy award was served on the parties on January 25, 2008. [5] Counting thirty days beginning on January 25, the due date for filing exceptions was February 23. Because February 23 was a Saturday, the due date for filing then became "the end of the next day" that is not a weekend or federal holiday, i.e., Monday, February 25. 5 C.F.R. § 2429.21(a). Because the award was served on the parties by mail, the time period is extended for five days, until Saturday, March 1, and then is further extended until Monday, March 3. *See* 5 C.F.R. § 2429.22; 5 C.F.R. § 2429.21(a). As the exceptions were filed on February 29, we find that the exceptions were timely filed.

V. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority by stating that the "real issue" was the early release from the tour of duty for temporary-intermittent employees. Exceptions at 18. An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed by the grievance. *See U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996). Arbitrators do not exceed their authority when their awards are responsive to a stipulated issue. *Nat'l Ass'n of Indep. Labor, Local 6*, 63 FLRA 232, 235 (2009).

The stipulated issue before the Arbitrator was whether the Agency committed a ULP and violated the parties' agreement "when it asserted the 'covered by' principle and refused to negotiate with the Union in regard to the release and recall of temporary intermittent employees[.]" Merits Award at 4. In determining whether the Agency asserted a valid "covered by" defense, the Arbitrator assessed whether the Agency failed to bargain over daily release from tours of duty for temporary-intermittent employees. The Arbitrator's resolution of this issue was directly responsive to the stipulated issue. Accordingly, the Agency does not demonstrate that the Arbitrator exceeded his authority in this regard, and we deny the exception.

B. The merits award is not based on nonfacts.

The Agency asserts that the Arbitrator's finding of a past practice is a nonfact. In this regard, in arbitration cases, the Authority addresses issues as to whether a past practice exists under the nonfact framework. *See NTEU, Chapter 66*, 63 FLRA 512, 514 n.3 (2009) (*Chapter 66*). [6] To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See U.S. Dep't of the Air Force, Lowry AFB, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry AFB*). The Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties had disputed before the arbitrator. *Id.* at 594 (citing *Nat'l Post Office Mailhandlers v. U.S. Postal Serv.*, 751 F.2d 834, 843 (6th Cir. 1985).

Before the Arbitrator, the parties disputed whether the parties had a past practice regarding early release from tours of duty of temporary-intermittent employees. *See* Merits Award at 10 (Union argument that practice existed); *id.* at 12 (Agency argument that it did not). As this matter was disputed before the Arbitrator, the Agency's argument does not demonstrate that the award is based on a nonfact, and we deny the exception.

The Agency also challenges, as "not supported by the facts[,]" the Arbitrator's finding that temporary-intermittent employees were hired because they could be sent home early when there is no work to be performed. Exceptions at 17. We construe this challenge as alleging that the award is based on a nonfact. Although the Agency asserts that there were additional reasons for hiring temporary-intermittent employees, it concedes that "daily work fluctuations were certainly not irrelevant in regard to the decision to hire" such

5. All dates in this section of the decision are 2008.

6. As noted further below, where the issue concerns whether the arbitrator improperly interpreted a past practice, the Authority considers the issue under the essence standard. *See Chapter 66*, 63 FLRA at 514 n.3.

employees. Id. The Agency's challenge provides no basis for concluding that the Arbitrator's finding is clearly erroneous and, thus, does not demonstrate that the award is based on a nonfact. *See Lowry AFB*, 48 FLRA at 593.

Accordingly, we deny the nonfact exceptions.

C. The awards are not contrary to law.

The Agency argues that the awards are contrary to law, specifically Authority precedent involving: (1) the "covered by" defense to alleged failures to bargain; and (2) SQA remedies. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award *de novo*. *See NTEU, Chapter 24,* 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA,* 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See NFFE, Local 1437,* 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. "Covered By" Precedent

In assessing whether a matter is "covered by" a collective bargaining agreement, the Authority applies a two-pronged test. Under the first prong, the Authority assesses whether the subject matter is "expressly contained in" the collective bargaining agreement. *United States Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993) (*HHS*). If the subject matter is not expressly contained in the agreement, then the Authority applies the second prong of the analysis. Under the second prong, the Authority examines whether the matter is "inseparably bound up with and … thus [is] plainly an aspect of … a subject expressly covered by the contract." *Id.* That analysis considers the parties' intent and bargaining history. *U.S. DHS, Customs & Border Prot., Wash., D.C.*, 63 FLRA 434, 438 (2009) (citing *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.,* 56 FLRA 809, 814 (2000)). In order to satisfy the second prong, a matter must be more than "tangentially" related to a contract provision; the party asserting the "covered by" defense must show that the subject matter "is so tied to [the contract provision] that 'the negotiations are presumed to have foreclosed further bargaining[.]'" *SSA*, 64 FLRA 199, 203 (2009) (quoting *HHS*, 47 FLRA at 1018) (Member Beck dissenting in part on other grounds).

With regard to the first prong of the "covered by" test, as discussed above, the Arbitrator found that Article 14 does not explicitly address "the early release from tour-of-duty" for "temporary intermittent employee[s]." Merit Award at 16. This finding is consistent with the plain wording of Article 14. As an initial matter, Article 14 does not define "release and recall" or give any indication that it applies to early release from individual tours of duty. In addition, as the Arbitrator found, although Article 14, Section 1 states that it applies to all Agency employees, subsequent sections of Article 14 discuss various types of employees but "do[] not mention temporary-intermittent employees at any place in [their] text." Id. at 17 n.28. Further, as the Arbitrator found, when this absence of wording is considered in the context of Section 2.B.'s requirement that the Employer attempt to give five days' notice for early releases, it is reasonable to conclude, as the Arbitrator did, that Article 14 does not include temporary-intermittent employees, who were hired, at least in part, "because of the ability to be sent home early when work runs dry." *Id.* at 17-18 n.28. For these reasons, we find, in agreement with the Arbitrator, that the subject matter at issue — early release from tours-of-duty for temporary-intermittent employees — is not expressly contained in Article 14.

With regard to the second prong of the "covered by" test, the Arbitrator considered conflicting witness testimony regarding the parties' intent and bargaining history and credited the Union's National Executive Vice-President's testimony that temporary-intermittent employees were never discussed during negotiations. The Agency provides no basis for finding that the Arbitrator erred in crediting this testimony. In addition, the Agency provides no basis for concluding that the early release of temporary-intermittent employees from individual tours of duty is more than "tangentially" related to the matters covered in Article 14, such that the bargaining over Article 14 is "presumed to have foreclosed further bargaining" over such early release. *SSA*, 64 FLRA at 203 (quotations omitted). Thus, the Agency does not demonstrate that the Arbitrator erred in finding that the Agency failed to establish the second prong of the "covered by" test. *See, e.g., U.S. Dep't of the Treasury, IRS*, 63 FLRA 616, 618 (2009) ("Based on the arbitrator's interpretation of the agreement and its bargaining history, we find that the matter . . . is [not] . . . inseparably bound up with the parties' agreement.").

The Authority decisions cited by the Agency are distinguishable from this case. In this regard, unlike the circumstances here, *IRS Denver* involved a union proposal that would have "circumvent[ed] the process" set forth in the agreement with respect to granting leave. 60 FLRA at 574. In addition, both *Border Patrol Coun-*

cil and *USDA* involved contract provisions that, unlike Article 14 here, comprehensively addressed the subject matter at issue. *See* 54 FLRA at 910 (details of certain employees "covered by" comprehensive provision regarding details); 48 FLRA at 859-60 (same). Similarly, unlike Article 14, the contract provision in *Scott AFB* "expressly addresse[d]" the subject at issue. 49 FLRA at 1453. Further, in *Navy Resale Activity*, the Authority adopted the judge's reliance on bargaining history, which supported the respondent's "covered by" argument, *see* 49 FLRA at 998, 1002; as discussed above, the Arbitrator found that bargaining history did not support such a finding in this case.

Finally, we reject the Agency's claim that the Arbitrator "appears to have added a new requirement(s) to the 'covered by' principle, i.e., that the particular matter at issue must have been specifically discussed by the parties during negotiations and/or be directly addressed" by the agreement. Exceptions at 18. In this connection, the Arbitrator applied the "covered by" test and, in determining whether the parties' intent and bargaining history supported a "covered by" finding, properly considered whether the subject matter at issue was discussed by the parties during negotiations. Thus, the Agency's claim is misplaced.

For the foregoing reasons, we deny the Agency's exception regarding the "covered by" doctrine.

2. SQA Precedent

The Agency argues that the modified SQA remedy is contrary to Authority precedent. Where an arbitrator has found a ULP and granted an SQA remedy, and a party has excepted to that remedy, the Authority has applied statutory standards to determine whether the remedy was deficient. *See U.S. DHS, U.S. Customs & Border Prot.*, 63 FLRA 505, 510 (2009) (applying statutory "special circumstances" standard to assess SQA remedy in case involving failure to bargain over substance of management decision). We note that, in a case where an arbitrator declined to award an SQA remedy in connection with an agency's failure to bargain over the impact and implementation of a management decision, the Authority stated that it "should uphold an arbitrator's remedy determinations unless it can be shown that these determinations are 'a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute.]" *NTEU*, 48 FLRA 566, 567 (1993) (citations and emphasis omitted). However, in that case, the Authority also assessed whether the arbitrator's award was "consistent with the remedial approach" set forth in *Federal Correctional Institution*, 8 FLRA 604, 606 (1982) (*FCI*). *FCI* established the factors that the Authority considers in determining whether an SQA remedy is appropriate where, as here, an agency has failed to bargain over the impact and implementation of a management decision. *NTEU*, 48 FLRA at 567. Consistent with this precedent, we apply the *FCI* factors to determine whether the Arbitrator's remedy is deficient.

The *FCI* factors are: (1) whether and when notice was given to the union by the agency concerning the change; (2) whether and when the union requested bargaining; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligation; (4) the nature and extent of the adverse impact on unit employees; and (5) whether and to what degree an SQA remedy would disrupt the efficiency and effectiveness of the agency's operations. *See U.S. Dep't of Navy, Naval Aviation Depot, Jacksonville, Fla.*, 63 FLRA 365, 370 (2009). The appropriateness of an SQA remedy must be determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy. *Id.* When an agency argues that an SQA remedy would disrupt the efficiency and effectiveness of the agency's operations, the Authority requires that the agency's argument be "based on record evidence." *U.S. DOD, Def. Commissary Agency, Peterson Air Force Base, Colo. Springs, Colo.*, 61 FLRA 688, 695 (2006) (citation omitted).

The Agency argues that the modified SQA remedy would cause undue interruption to agency operations. However, the Agency does not cite any record evidence that supports a claim that the remedy would disrupt the efficiency and effectiveness of the Agency's operations. Accordingly, we find that the Agency's argument regarding disruption does not demonstrate that the remedy is inappropriate. *See id.*

As for the Authority decisions cited by the Agency, two of those decisions involved requests for SQA relief that would have required the respective agencies to undo reorganizations. *See Transportation*, 19 FLRA at 477; *FAA*, 19 FLRA at 436-37. The modified SQA remedy here does not require the Agency to undo its reorganization; it merely requires the Agency to return to its previous practice regarding release of temporary-intermittent employees from tours of duty. As such, *Transportation* and *FAA* are inapposite. With respect to *HUD*, 58 FLRA 33, that case involved a request for an SQA remedy that was impossible to implement because the employee who previously performed the duties at issue had retired, and there had been no finding of a practice regarding rotating the duties among certain employees, as the General Counsel

had requested. Here, by contrast, there is no basis for finding that it would be impossible for the Agency to reinstate the past practice that the Arbitrator found, and there was a finding that such a practice existed. Accordingly, *HUD* also is inapposite.

For the foregoing reasons, we find that the Agency has not demonstrated that the modified SQA remedy is deficient, and we deny the exception.

VI. Decision

The exceptions are denied.

Appendix

Article 14, "Release/Recall Procedures[,]" provides, in pertinent part:

> Section 1
> General Provisions
>
> A.
> The provisions of this article apply to all employees of the Internal Revenue Service subject to periodic release and recall.
>
> . . . .
>
> Section 2
>
> A.
> Basis For Release/Recall
> 1. The release and recall of career/career-conditional intermittent employees will be by IRS Enter On Duty (EOD) date of those employees possessing the skills needed.
> 2. The release and recall of seasonal employees and employees on term appointments will be accomplished by a combination of performance and seniority of those employees possessing the skills needed.
> 3. Separate lists will be established for seasonal, career/career-conditional, intermittent, and term employees.
>
> . . . .
>
> 7. The Employer has determined that term employees will be released before career status employees and will be recalled after career status employees are recalled.
>
> . . . .
>
> B.
> Notice of Release
> The Employer will make every effort to give at least five (5) days notice of release to employees unless prevented by unforeseen changes in inventory.
>
> . . . .
>
> D.
> Skills
> 1. Skills will be determined by the Employer. The Employer will assign skills in a fair and objective manner. During an employee's first year, a skill will be assigned to the employee following the successful completion of training and/or the learning curve. To retain a skill, an employee must

successfully complete update training each year. Should the Employer not provide the training, the employee will retain the skill. In the absence of any assignment of skill to an employee, the employee shall be presumed to possess those skills that have been assigned to other employees in identical positions (same title, series, and grade) within the employee's assigned organizational level. When skills are specifically assigned, it will be done by means of written notice.

2. The Employer will establish and maintain a current listing of the skills established for each organizational level.

3. When the Employer makes changes to the assignment of skills, the change will be made known to, and discussed with, the employee(s) affected in advance of implementing the change.

4. The Employer has determined that if an employee temporarily performs duties outside of their assigned organizational level due to a detail, temporary promotion, etc., the employee will not retain any skill code(s) gained during the temporary assignment for release and recall purposes. . . .

. . . .

Section 4
Career/Career-Conditional Intermittent
Release/Recall Procedures

A.
Release of Career/Career-Conditional Intermittent Employees

1. When it becomes necessary to place any or all of the career/career-conditional intermittent employees in an organizational level consistent with the general provisions of this article in a non-work status, the release will be based on a ranking of those employees who possess the skills required to perform the remaining work as set forth in subsection 4B below.

2. This ranking will be reflected on a list to be known as the release/recall list (intermittents).

3. The Employer has determined that those who rank lowest on the release/recall list will be placed in non-work status first and those ranking highest, last.

B.
Ranking Career/Career-Conditional Intermittent Employees for Release

1. The release/recall list will be constructed as follows:

(a) list all career/career-conditional intermittent employees in the appropriate organizational area on a release/recall list according to their IRS EOD dates; and

(b) those career/career-conditional intermittent employees with the earliest dates (most seniority) will be at the top of the list and those with the latest IRS EOD dates (least seniority) will be at the bottom of the list.

2. Employees will be informed of their position on the list.

C.
Recall of Career/Career-Conditional Intermittent Employees

1. The order of recall will be based on the release/recall list.

2. The Employer has determined that those highest on the list who possess the specific skills needed will be recalled first, those lowest on the list, last.

Exceptions, Attachment C at 51-54.