65 FLRA No. 6

UNITED STATES
DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 243
(Union)

0-AR-4045

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DECISION

August 25, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Earle William Hockenberry 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.

The Arbitrator concluded that the selecting official's determination that the grievant did not meet the qualifications of a position for which she had applied violated the parties' collective bargaining agreement and the Agency's merit assignment program (MAP). For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant applied for promotion to a computer specialist position, but was informed by the office of human resources that she was not qualified because she failed to meet selective placement factors for the position. She filed a grievance that was submitted to arbitration where the parties stipulated that an issue for resolution was whether the selecting official's determination that the grievant did not meet the qualifications for the position was proper.[2]

Before the Arbitrator, the Union argued that the selecting official's determination violated the MAP and the agreement because the determination preceded the rating and ranking by the MAP panel and was not applied to all candidates. Award at 9. The Agency argued to the contrary that nothing prevented the human resources specialist from consulting the selecting official as a subject-matter expert for advice on whether the grievant met the selective qualification factors for the position. *Id.* at 10.

The Arbitrator found that the applications of only the grievant and three or four other applicants out of more than twenty-five applicants were sent by the human resources specialist to the selecting official prior to review by the MAP panel for evaluation of whether their applications met the selective placement factors for the position. He additionally found that it was the selecting official, and not the human resources specialist, who made the determination that the grievant was not qualified for the position. *Id.* at 15-16. The Arbitrator concluded that such conduct was inconsistent with the roles defined for the MAP panel and the selecting official in the MAP and the instructions to MAP panel members.[3] The Arbitrator also concluded that the conduct was not "supported or endorsed by" the MAP and the panel instructions. *Id.* at 15. Accordingly, he found that the selecting official's actions violated the MAP[4] and the agreement. *Id.*

In this regard, the Arbitrator explained that the MAP requires uniform and equitable consideration for promotion and establishes separate roles for the selecting official and the MAP panel to ensure that competing candidates are evaluated and ranked by the panel prior to consideration by the selecting official. He found that, in accordance with these roles, the panel rates the candidates as the end product of the

1. Member Beck's dissenting opinion is set forth at the end of the decision.

2. The Arbitrator also addressed whether: (1) the grievant was denied a promotion in retaliation for having filed grievances or a discrimination complaint; (2) the grievant was treated disparately in training or job assignments; and (3) the selecting official preselected the applicant selected for promotion. He found that the grievant had not proven any of these allegations. No exceptions have been filed to these findings, and they will not be addressed further.

3. The instructions reiterate the provisions of the MAP for members of MAP panels. *See* Award at 8-9.

4. The relevant provisions of the MAP are set forth in an appendix to this decision.

evaluation process and that any advice by the selecting official is normally provided before the panel considers actual applicants. The Arbitrator noted that there was no argument that the disputed promotion action occurred under other than normal circumstances. *Id.* at 15-16.

In the circumstances of this case, the Arbitrator concluded that the mandated roles and sequence requirements of the MAP were not followed. *Id.* He found that the selecting official's determination "blurs the roles of the appointed panel and the selecting official set out in the [MAP and] creates an additional step involving the selecting official that is not sanctioned in the [p]rogram[.]" *Id.* at 16 (footnote omitted). He also found that the selecting official's conduct was improper because it "occur[ed] prior to rating and ranking by the Panel of any candidates or an independent assessment of the [g]rievant's qualifications by the Office of Human Resources[.]" *Id.*

For all of these reasons, the Arbitrator found in resolution of the stipulated issue that the determination by the selecting official that the grievant did not meet the qualifications for the position was an improper interference with the promotion process. *Id.* at 18. In sum, he concluded that the determination violated the MAP, the MAP panel instructions, and the agreement. *Id.* at 16.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to management's rights to assign work under § 7106(a)(2)(B) and to make selections for appointments under § 7106(a)(2)(C). The Agency also contends that the award is contrary to the MAP and fails to draw its essence from the agreement.

As to management's right to assign work, the Agency maintains that the right includes the assignment of individuals to evaluate applicants for positions. The Agency claims that the award affects the right because the award precludes assigning the determination of whether an applicant meets the selective qualification factors to a selecting official or subject-matter expert. Exceptions at 13-14. The Agency maintains that, consequently, the award is deficient as it pertains to the MAP because the MAP does not constitute an applicable law within the meaning of § 7106(a)(2). *Id.* at 15. In this regard, the Agency maintains that there is no support for finding that the MAP has the force and effect of law under the standards applied by the Authority. *Id.* at n.3.

As to whether the Arbitrator enforced a contract provision, the Agency notes that the Arbitrator did not find a violation of a specific provision of the agreement. However, the Agency asserts that, to the extent that the Arbitrator found that the Agency violated either Article 38, Section 9(A), or Article 2, Section 2, the award is contrary to § 7106(a)(2)(B) because neither provision was negotiated pursuant to § 7106(b). *Id.* at 15-19.

As to management's right to select, the Agency maintains that the right includes the right to determine whether applicants are qualified for the position. The Agency claims that the award affects management's right to select because the award negated management's determination that the grievant was not qualified for the position. *Id.* at 20. In contending that the award is deficient, the Agency primarily argues that, "to the extent that the Arbitrator interprets the MAP to have required the grievant's application to be sent to the MAP panel for rating and ranking[,]" the award is contrary to § 7106(a)(2)(C) because the MAP is not an applicable law and was not incorporated into the agreement. *Id.* at 20. The Agency alternatively argues that, even if the MAP were incorporated into the agreement, the award is still contrary to § 7106(a)(2)(C) because the incorporated MAP provision was not negotiated pursuant to § 7106(b)(3). *Id.* at 21.

As to the MAP, the Agency maintains that, as found by the Arbitrator, the MAP constitutes an Agency regulation and that the Authority defers to an agency's interpretation of its own regulations when the interpretation is not clearly erroneous or inconsistent with the regulation. *Id.* at 9. In the Agency's view, nothing in the MAP precludes a human resources specialist from seeking advice from a subject-matter expert, including a selecting official, on whether an applicant meets selective qualification factors. *Id.* at 7. In addition, the Agency argues that the Arbitrator's interpretation of the MAP is without support because he prescribed an incorrect standard of proof and improperly placed the burden of proof on the Agency rather than the Union. *Id.* at 9. The Agency also argues that, to the extent the Arbitrator applied the MAP to have required the human resources specialist to refer the grievant to the MAP panel, the award is contrary to the MAP because only candidates determined to be qualified may be referred to the panel. *Id.* Consequently, the Agency asserts that the award is deficient because it is contrary to the MAP, as the Agency interprets the MAP, and such

interpretation is not plainly erroneous or inconsistent with the MAP. *Id.*

As to essence, the Agency argues that, to the extent that the Arbitrator found a violation of either Article 38, Section 9(A), or Article 2, Section 2, the award is deficient because it does not represent a plausible interpretation of the agreement. *Id.* at 10-11.

B. Union's Opposition

As to management's rights, the Union disputes that the award affects the rights cited by the Agency. Opp'n at 18, 23. However, the Union argues that, to the extent the award does affect those rights, the award is not deficient. In this regard, the Union argues that the Arbitrator enforced provisions of Article 38 of the agreement and provisions of the MAP that were incorporated into the agreement by Article 2 and that these provisions were negotiated pursuant to § 7106(b)(2) or (b)(3) of the Statute. *Id.* at 19, 24. The Union also argues that the MAP has the force and effect of law and, thus, constitutes an applicable law within the meaning of § 7106(a)(2). *Id.* at 24.

As to the MAP, the Union additionally claims that, because the MAP was incorporated into the agreement, any alleged conflict between the award and the MAP is a question of contract interpretation and essence and not a question of whether the award is contrary to an Agency regulation. *Id.* at 9. In this regard, the Union contends that the Arbitrator's interpretation of the MAP draws its essence from its provisions.

Alternatively, the Union argues that, even if the MAP is not incorporated into the agreement, the award is not contrary to the MAP because the award is consistent with the MAP's plain meaning. *Id.* he Union maintains that the MAP makes clear that the human resources office is responsible for determining whether candidates are minimally qualified for positions and that a selecting official cannot evaluate qualifications until after the MAP panel has developed the best-qualified list. *Id.* at 29. The Union further maintains that, as the Arbitrator recognized, the MAP requires uniform and equitable consideration for promotions. Consequently, the Union asserts that the Arbitrator's finding that the selecting official reviewed some, but not all, of the applications supports the finding of a violation of the MAP because the selection process was neither uniform nor equitable. *Id.* at 14. Finally, the Union contends that the Authority should not defer to the Agency's interpretation of the MAP to find a conflict because the Agency's interpretation does not reflect the longstanding view of the Agency and is litigation inspired. *Id.* at 29-30.

As to Article 38 of the agreement, the Union contends that the award draws its essence from both Section 1(A) and Section 9(A). *Id.* at 15-16. As to Article 2, Section 2, the Union contends that the selecting official's determination violated the MAP and therefore Section 2, which incorporates the MAP. *Id.* at 14.

IV. Analysis and Conclusions

A. The award is not contrary to § 7106(a) of the Statute.

In resolving exceptions that contend that an award is contrary to a management right, the Authority first assesses whether the award affects the exercise of a right set forth in § 7106(a). The right to assign work under § 7106(a)(2)(B) includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom, or what positions, the duties will be assigned. *E.g., U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 558 (1999). The right to select under § 7106(a)(2)(C) includes the right to determine the qualifications needed to perform the work of a position and to determine whether applicants possess such qualifications. *E.g., U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Newport News, Va.*, 56 FLRA 339, 343 (2000). In this case, the Arbitrator concluded that the selecting official's determination that the grievant did not meet the qualifications for the position was improper. By precluding the selecting official from determining whether the grievant was qualified, the award affects management's rights to assign work and to select.

Both parties acknowledge that, if the MAP constitutes an applicable law within the meaning of § 7106(a)(2), then the award is not deficient. However, the parties dispute whether the MAP constitutes an applicable law.

A regulation constitutes an "applicable law" within the meaning of § 7106(a)(2) when it has "the force and effect of law." *NTEU*, 42 FLRA 377, 390-91 (1991), *enforcement denied on other grounds*, 996 F.2d 1246 (D.C. Cir. 1993). Regulations have the force and effect of law when they: (1) affect individual rights and obligations; (2) were promulgated pursuant to an explicit or implicit delegation of legislative authority by Congress; and (3) were promulgated in conformance with any

procedural requirements imposed by Congress. *Id.* at 391-93.

The Authority has considered whether agency regulations constitute an applicable law under the *NTEU* requirements in three cases: *U.S. Dep't of the Air Force, Air Force Academy, Colo. Springs, Colo.*, 59 FLRA 888 (2004) (*Air Force*) (then-Member Pope dissenting as to another matter); *U.S. Dep't of the Army, Army Missile Command, Army Commc'ns Command Agency, Redstone Arsenal, Ala.*, 59 FLRA 154 (2003) (then-Member Pope dissenting) (*Army*); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 55 FLRA 687 (1999) (*Navy*). In *Air Force* and *Navy*, the Authority held that the regulations had the force and effect of law and constituted applicable laws. In *Army*, the Authority held that there was no basis on which to conclude that the agency regulation had the force and effect of law.

In *Navy*, the Authority held that the agency's Performance Appraisal Review System (PARS) regulation met all three *NTEU* requirements. 55 FLRA at 691. The Authority first concluded that PARS affected individual rights and obligations, noting that a regulation affects individual rights when it is mandatory and establishes obligations of agencies and rights of employees. The Authority found that PARS obligated the agency to conduct the performance appraisal process in a certain manner and affected the right of employees to obtain a particular rating. *Id.* at 690. The Authority further concluded that PARS was promulgated pursuant to an explicit delegation of legislative authority by Congress because, under 5 U.S.C. § 4302, each agency is required to establish certain performance appraisal systems and PARS stated that it was developed under this authority. *Id.* at 690-91. As to the third requirement, the Authority explained that, to meet this requirement, the regulation must be promulgated in accordance with applicable statutory procedures and be within the scope of delegated duties. The Authority acknowledged that, to be validly promulgated under the Administrative Procedures Act (APA), many regulations must be published through notice of the proposed rule in the Federal Register with an opportunity for interested parties to comment. However, the Authority noted the exception set forth in 5 U.S.C. § 553(a)(2) to the notice and comment requirements of the APA for agency rulemaking involving a matter related to agency management or personnel. The Authority found that PARS was excepted from the notice and comment requirements under § 553(a)(2) and was otherwise promulgated in conformance with the procedural requirements of law, regulation and OPM policy. Accordingly, the Authority concluded that PARS was promulgated in conformance with the procedural requirements imposed by Congress. *Id.* at 691.

In *Air Force*, the Authority held that Air Force Instruction (AFI) 38-203, which pertained to procurement and contracting out, met all three *NTEU* requirements. 59 FLRA at 893. The Authority first concluded that AFI-28-203 affected individual rights and obligations because it was mandatory for contracting-out studies and established the obligations of the agency and the right of employees as they pertained to such studies. *Id.* at 891. The Authority further concluded that AFI-38-203 was promulgated pursuant to a delegation of legislative authority by Congress. *Id.* at 892. Finally, the Authority concluded that AFI 38-203 was promulgated in conformance with the procedural requirements imposed by Congress. *Id.* at 892-93.

In *Army*, the arbitrator specifically cited MICOM 690-12.5 and 690-28.11, agency regulations pertaining to promotion. The Authority concluded that the citations did not constitute express findings that the agency violated the regulations. However, assuming that the arbitrator implicitly found that the agency violated the regulations, the Authority determined that "there [wa]s no evidence or assertion that either regulation constitute[d] an applicable law within the meaning of § 7106(a)(2) of the Statute." 59 FLRA at 156.

Applying the foregoing here, there is no dispute that the MAP is mandatory and that it establishes the obligations of the Agency and the rights of employees with respect to promotions and assignments within the Agency. Accordingly, the first requirement of *NTEU* is satisfied. As to the second requirement, Congress has expressly authorized OPM to prescribe rules governing the competitive service. 5 U.S.C. § 3302. Consistent with this authority, OPM has promulgated rules governing agency promotion and placement programs from which the MAP specifically states that it is derived. MAP Section I (Purpose); Section III (Authority). In this regard, the express purpose of the MAP is to assure that employees receive equitable consideration for promotion and placement solely on merit and fitness. MAP Section I. Accordingly, the second requirement is satisfied because the MAP is consistent with, and derived from, authorized OPM-imposed requirements. *See Navy*, 55 FLRA at 690-91. As to the third requirement, § 553(a)(2) excepts matters relating to agency management and personnel from the notice and comment requirements of the APA. *Id.* at 691. As a matter relating to agency management and personnel, the promulgation of the

MAP was excepted from the notice and comment requirements of the APA. *See id.* The Agency does not contend that the MAP was not promulgated in conformance with the procedural requirements of law and OPM rules and policy. Moreover, the Agency maintains that the MAP is a binding regulation that governs the disposition of this matter. Accordingly, the third requirement is satisfied. The Authority's decision in *Army* does not establish otherwise because, unlike that case, the Union specifically asserts, and the record supports, that, under Authority precedent, the MAP has the force and effect of law.

Accordingly, we conclude that the MAP constitutes an applicable law within the meaning of § 7106(a)(2). As the effect on management's rights is based on the Arbitrator's enforcement of such applicable law, the Agency fails to establish that the award is contrary to § 7106(a). Consequently, we deny this exception.

B. The award is not contrary to the MAP.

In the resolution of grievances under the Statute, arbitrators are empowered to interpret and apply agency rules and regulations. An arbitration award that conflicts with a governing agency regulation is deficient under § 7122(a)(1) of the Statute. *E.g., U.S. Dep't of Transp., Fed. Aviation Admin.*, 64 FLRA 513, 514 (2010). In reviewing arbitration awards for consistency with agency regulations, the Authority reviews the questions of law raised by the award and the exception *de novo*.[5] *Id.*

An agency's interpretation of its own regulations is controlling unless it is "plainly erroneous or inconsistent" with the language of the regulation. *Id.* (quoting *FLRA v. U. S. Dep't of the Treasury, Fin. Mgmt. Serv.*, 884 F.2d 1446, 1454 (D.C. Cir. 1989)) (*FLRA v. Treasury*). However, consistent with the approach of the courts, the Authority declines to defer to an agency's "litigative position[]." *Id.* (quoting *FLRA v. Treasury*, 884 F.2d at 1455)). In this regard, the Authority has explained that such positions may not reflect the views of the agency head and may have been developed "hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views." *Id.* Accordingly, for an agency's interpretation to be entitled to deference, the interpretation asserted in exceptions must have been publicly articulated prior to "litigation[.]" *Id.* (quoting *Nordell v. Heckler*, 749 F.2d 47, 48 (D.C. Cir. 1984)).

In the Agency's view, nothing in the MAP precludes a human resources specialist from seeking advice from a subject-matter expert, including a selecting official, on whether an applicant meets selective qualification factors. To the extent that this constitutes the Agency's interpretation of the MAP to which it alleges the Authority must defer, the Agency does not assert that this interpretation of the MAP reflects the views of the Agency head rather than the litigative position of the Agency before the Authority. *See id.* There is also no indication that this interpretation was developed in a manner that reflects deliberate consideration or that it was previously publicly articulated. *See id.* (citing *FLRA v. Treasury*, 884 F.2d at 1455). As such, the Agency has not established that its interpretation of the regulation is entitled to deference. *See id.*

In circumstances where an agency fails to establish that deference is due its alleged interpretation of an agency regulation, the Authority independently assesses whether the arbitrator's interpretation of the regulation is consistent with its provisions. *Id.* The Union argued to the Arbitrator that the selecting official's determination violated the MAP because it was not applied to all candidates. In assessing the selecting official's determination, the Arbitrator found that the MAP requires uniform and equitable treatment. In this regard, MAP, Section I (Purpose) specifically provides that employees will receive equitable treatment, and Section II (Policy) specifically provides that all vacancies will be treated uniformly. In finding a violation of the MAP, the Arbitrator found that the selecting official reviewed some, but not all, of the applications for the vacancy.[6] It is not disputed that these provisions must be strictly applied. Section XIII of the MAP expressly provides for the remedy awarded by the Arbitrator "[w]hen there is a failure to adhere strictly to the provisions of" the MAP. Award at 8. The Agency does not address these findings in its exception. Consequently, the

5. In this regard, the Union asserts that the MAP was incorporated into the agreement and that any alleged conflict between the award and the MAP is a question of contract interpretation that should be resolved under the deferential essence standard. Opp'n at 10. However, the Union concedes that the Arbitrator did not specifically interpret the agreement to incorporate the MAP. *Id.* at 10 n.13. Moreover, the Arbitrator treated the MAP and the agreement separately. *See* Award at 15-16. Consequently, we review *de novo* whether the award conflicts with the MAP.

6. The dissent argues that the requirement of uniformity applies to vacancies, not to candidates. *See* Dissent at 13. However, the dissent does not demonstrate that the vacancy was treated uniformly, particularly given the Arbitrator's finding that the selecting official reviewed some, but not all, of the applications for the vacancy.

Agency fails to demonstrate that, contrary to the conclusion of the Arbitrator, it strictly treated the grievant equitably and the vacancy uniformly, as required by the MAP.

Further, the Agency does not demonstrate how the selecting official's determination prior to evaluation by the MAP panel is strictly consistent with the mandated roles and sequence requirements of the placement process. The MAP assigns the office of human resources, the selecting official, and the rating and ranking panel distinct roles in the selection process. Pursuant to Section V of the MAP, the human resources office is responsible for screening applications and evaluating candidates for positions. Section IX of the MAP emphasizes that evaluations will be made by the human resources office and specifies only one exception: when the selecting official specifically requests the establishment of a panel. In such cases, the panel determines the qualifications, and the selecting official advises the panel on the interpretation of qualifications, but has no vote. The Arbitrator found that the selecting official, rather than the human resources specialist, determined that the grievant was not qualified prior to the establishment of the MAP panel, and there is no dispute that the selecting official did not request the establishment of a panel. This finding supports the Arbitrator's conclusion that the selecting official's determination violated the MAP.[7]

The Agency also contends that the Arbitrator's interpretation of the MAP is deficient because the Arbitrator prescribed an incorrect standard of proof and improperly placed the burden of proof on the Agency. If a standard of proof is set forth in applicable law or regulation or the parties' collective bargaining agreement, then the arbitrator must apply the prescribed standard. *E.g., U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 60 FLRA 869, 881 (2005). When no standard is prescribed, arbitrators are empowered to prescribe whatever standard they consider appropriate, and their awards will not be found deficient on the basis that they applied an incorrect standard of proof. *Id.* Moreover, unless otherwise provided, prescribing the standard of proof encompasses specifying which party has the burden of proof. *Id.* In this case, the Agency does not claim that law, regulation, or the agreement prescribed the standard of proof or which party had the burden of proof, and its contentions provide no basis for finding the award deficient. *See id.*

For all of these reasons, we deny this exception.

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

The Authority has consistently held that, when an arbitrator bases the award on two or more separate and independent grounds, the appealing party must establish that all of the grounds on which the arbitrator relied are deficient in order for the Authority to find that the award is deficient. *E.g., Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 892 (2010). As we have concluded that the Agency fails to establish that the award is contrary to the MAP, the Agency's essence exception provides no basis for finding the award deficient. *See id.* Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.

APPENDIX

The MAP provides, in pertinent part, as follows:

Section I. Purpose

> The Merit Assignment Program (MAP) . . . is hereby established to assure that all . . . employees . . . receive equitable consideration for promotion and placement based solely on merit and fitness. . . .

Section II. Policy

> All vacancies filled under the provisions of this Program will be treated uniformly and all candidates will be considered without regard to race, color, religion, national origin, marital status, age, sex, non-disqualifying physical handicap, political or labor organization affiliation, or any other non-merit factor. . . .

7. The Agency further claims that, to the extent that the Arbitrator concluded that the human resources specialist should have referred the grievant to the MAP panel, the award is inconsistent with the MAP. However, the Arbitrator made no such conclusion. Thus, we reject the claim.

In addition, we note that the dissent neither addresses the wording of the MAP requiring the Agency to "adhere strictly to the provisions of" the MAP – including the provisions designating which offices will engage in which aspects of the selection process – nor explains how the Agency adhered strictly to those provisions. Award at 8. Accordingly, the dissent does not demonstrate that the Arbitrator erred in concluding that the Agency violated the MAP.

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Section V. Responsibilities

A. Office of [Human Resources]. The Office of [Human Resources] is responsible for . . . [s]creening and evaluating qualifications against basic civil service requirements and standards.
. . . .

Section IX. Evaluation, Ranking, and Panels

A. All eligible candidates will be evaluated. . . . The evaluations will be made by the Personnel Office unless the selecting official specifically requests the establishment of a panel. . . .

B. Merit assignment panels will be constituted in the following manner:

1. A panel . . . will consist of at least three members . . . . When advice and guidance on the interpretation of qualifications is considered essential, the selecting official may advise the panel but has no vote. Such advice should normally be provided before the panel received the names and applications of the candidates.

Section XIII. Complaints and Corrective Actions

. . . . When there is a failure to adhere strictly to the provisions of the FPM, the DAO, or this [Program], corrective measures shall be applied [promptly] and in accordance with the corrective action guidance set forth in FPM Chapter 335.

Award at 5-8.

Member Beck, Dissenting:

I disagree with my colleagues that the Agency's contrary to regulation and essence exceptions should be denied.

The Arbitrator treated the Agency's Merit Assignment Program (MAP) as a binding Agency regulation. While it is not entirely evident to me that this is a correct characterization of the MAP, the Agency does not appear to take exception to such characterization.

Assuming that the provisions of the MAP were binding on the Agency, I believe the Arbitrator's interpretation and application of the MAP in this case is neither plausible nor rationally derived from the plain language of that document. *U.S. Dep't of Veterans Affairs, Medical & Reg'l Ctr., Togus, Maine*, 55 FLRA 1189, 1196 (1999) (citing *Carter v. Tisch*, 822 F.2d 465, 468-69 (4th Cir. 1987) (award that is inconsistent with regulation's plain language is unenforceable); *U.S. Dep't of the Treasury, Brooklyn Dist., Brooklyn, N.Y.*, 51 FLRA 1487, 1494 (1996) (award that is contrary to the plain language of regulation must be set aside)).

The Arbitrator's core concern about how the Agency handled the selection process was that the personnelist who initially assessed the threshold qualifications of applicants informally sought input from the selecting official who would later make the final selection decision. The Arbitrator concluded that such conduct ran afoul of the MAP because "such conduct is not supported or endorsed by the clear language of the Agency's Merit Assignment Program." Award at 15. But this is not the correct approach when determining whether an employer engaged in impermissible conduct. The proper question is not whether the applicable contract or regulation affirmatively endorses the conduct in question; rather, the question is whether the contract or regulation *prohibits* the conduct in question. That which is not prohibited is permitted. *Shroyer v. New Cingular Wireless Servs. Inc.*, 498 F.3d 976, 992 (9th Cir. 2007) (citing *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 454-55 (2003) (actions not prohibited by agreement are permitted); *Gold Line Refining, Ltd. v. United States*, 54 Fed. Cl. 285, 290 (Fed. Cl. 2002) (EPA clause that is not prohibited by the FAR is permitted)). The MAP does not prohibit the Agency conduct that is the subject of the grievance.

The crux of the Arbitrator's reasoning in finding a violation by the Agency is that "the MAP requires

uniform and *equitable* consideration for Agency promotion actions . . . ." Award at 15 (emphasis in original). This is an over-generalization and a material misstatement of what the MAP actually requires.

To be sure, the MAP does use the phrase "equitable consideration" (MAP Section I), but it then goes on to explain precisely what is meant by this phrase, and thereby limits substantially the scope of what would otherwise be a vague phrase very much subject to interpretation. In the context of the MAP, "equitable consideration" is that which is "based solely on merit and fitness." MAP Section I. Thus, to establish agency conduct inconsistent with this requirement, a grieving party would need to prove that the Agency used selection criteria other than merit and fitness. No evidence was adduced to establish, and the Arbitrator did not find, that the grievant's non-selection was based on factors other than merit and fitness. Consequently, if the Arbitrator concluded that the grievant was not given "equitable consideration" within the meaning of the MAP, it is a conclusion that could only be reached by applying the pertinent MAP language in an overly expansive and implausible fashion.

Similarly, the Arbitrator misapplied the perceived requirement of uniformity. At Section II, the MAP states that:

> All vacancies . . . will be treated uniformly and all candidates will be considered without regard to race, color, religion, national origin, marital status, age, sex, non-disqualifying physical handicap, political or labor organization affiliation, or any other non-merit factor . . . .

Award at 5.

"Vacancies" and "candidates" are distinct terms that have different meanings. The requirement of uniformity applies to vacancies, not to candidates. To the extent the Arbitrator applied a uniformity requirement to the Agency's consideration of the grievant, he was misapplying language that self-evidently should not be applied to her as a candidate.[*]

As a "candidate" under the MAP, the grievant was entitled to be considered for promotion without regard to non-merit factors. Again, no evidence was adduced to establish, and the Arbitrator did not find, that the grievant's non-selection was based on any non-merit factor. Accordingly, to the extent the Arbitrator found a violation of the MAP, he did so by engaging in an implausible reading of the pertinent MAP language.

The Arbitrator's conclusions are inconsistent with the plain language of the MAP and do not represent a plausible interpretation of the parties' agreement.

[*] To the extent the Arbitrator may have obtained his perceived uniformity requirement from Article 38, Section 9 of the collective bargaining agreement, he misapplied contract language that should not have been applied to the grievant. This contractual uniformity requirement attaches only once a candidate reaches the "best qualified" stage of the selection process. Award at 4 (quoting Article 39, Section 9). The grievant never reached this stage.