65 FLRA No. 111

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1917
(Union)

0-AR-4649

_____

DECISION

February 16, 2011

_____

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 an award of Arbitrator Martin Ellenberg 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 Agency and the Union also filed supplemental submissions.

The Arbitrator concluded that the letter of reprimand (reprimand) that the Agency issued to the grievant was not for just cause, as defined by the pertinent provisions of the parties' collective bargaining agreement (parties' agreement). Award at 15, 16. As a remedy, the Arbitrator ordered that the Agency void the reprimand and remove it, as well as any reference to it, from the grievant's personnel records. *Id.* at 16. For the reasons set forth below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

In a letter, the Agency informed the grievant, a Legal Assistant, that he was being placed on leave restriction. *Id.* at 2. The letter stated that the grievant must follow a set procedure for requesting sick and annual leave and warned him that, if he failed to follow these procedures, then "other disciplinary action for [absence without leave (AWOL)] and/or failure to follow instructions may be taken" against him. *Id.* After receiving this letter, the grievant was late to work on two separate occasions; in both instances, the grievant failed to follow the proper procedures for reporting his tardiness. *Id.* at 2-3. Subsequently, the grievant received a reprimand in which he was charged with failure to follow instructions and AWOL. *Id.*

The Union filed a grievance over the issuance of the reprimand.[1] *Id.* at 3. The matter was unresolved and was submitted to arbitration. *Id.* The parties stipulated to the following issue: "Was the . . . [r]eprimand . . . issued to [the grievant] for appropriate cause and to promote the efficiency of the [s]ervice? If not, what shall be the remedy?" *Id.*

The Arbitrator found that the Agency had not issued the reprimand for just cause.[2] *Id.* at 15-16. The Arbitrator determined that the Agency could not rely on Article 35, Section M of the parties' agreement to show that the reprimand was for just cause.[3] *Id.* at 14. The Arbitrator found that, because the language of Article 35, Section M of the parties' agreement states that "[h]abitual tardiness will not be excused and may be corrected through the implementation of disciplinary action[,]" the Agency may discipline an employee for tardiness only if it is habitual. *Id.* at 13; *see also id.* at 14. Although the Agency cited to a memorandum titled "Work Schedule Warning" that it had issued to the grievant four years prior to the reprimand, the Arbitrator found that the Agency never designated the

1. The Union also filed a grievance over the leave restriction; however, because that grievance was submitted to a different arbitrator, the validity of the leave restriction is not before us. Award at 3, 13.

2. The Arbitrator noted that, because the validity of the leave restriction was put before another arbitrator, the only issue before him was whether the issuance of the reprimand violated the parties' agreement. *See id.* at 13.

3. The relevant provisions of the parties' agreement are set forth in the attached appendix.

grievant's tardiness as habitual in the memorandum. *See id.* at 14. According to the Arbitrator, the Agency, in its memorandum, merely warned the grievant that, in the future, he could be disciplined for habitual tardiness if his attendance did not improve. *Id.* Moreover, the Arbitrator noted that "there [wa]s no evidence that habitual lateness was considered to be at least part of the basis for issuing the [r]eprimand . . . ." *Id.*

The Arbitrator also found that the Agency could not rely on Article 36, Section D of the parties' agreement to demonstrate that the reprimand was for just cause. *Id.* at 15. The Arbitrator noted that, under Article 36, Section D, the Agency is required to counsel an employee regarding his use of sick leave and may request that an employee provide a medical certificate for each subsequent absence if that employee continues to abuse sick leave. *See id.*; *see also id.* at 14. Moreover, according to the Arbitrator, Article 36, Section D makes clear that, to require a medical certificate for absences of three days or less, a pattern of abuse must exist or the Agency must reasonably doubt the validity of the claim for the use of sick leave. *Id.* at 15. Relying on testimony, the Arbitrator found that, at the time "the [r]eprimand was issued, the Agency . . . did not consider [the grievant's] lateness or absences to be abusive and warranting counseling or a warning of pending discipline" and "believed his explanations to be truthful." *Id.*

The Arbitrator further determined that, because Article 39, Subsection B references Article 36, the Agency could not rely on Article 39 in claiming that the reprimand was for just cause. *Id.* Finally, the Arbitrator noted that, although Article 40, Section A requires that "leave should be 'consistent with law and applicable regulations[,]'" it contains no language suggesting when disciplinary action is appropriate. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the Arbitrator exceeded his authority by adjudicating the validity of the leave restriction. Exceptions at 6-9. According to the Agency, the Arbitrator did not come simply "to conclusions regarding facts underlying the other grievance [that] . . . were integral to the matter before [him]." *Id.* at 8 (internal quotations omitted). Rather, the Agency claims that he ruled on the leave restriction when he determined that Article 36, Section D of the parties' agreement "precluded the Agency from restricting [the] [g]rievent's leave usage by requiring medical certificates – one of the instructions in the [l]eave [r]estriction." *Id.* at 7; *see also id.* at 8.

The Agency claims that the award is contrary to law because the "[A]rbitrator bases [his] award on an interpretation of [the parties' agreement] that excessively interferes with management's right to discipline under § 7106(a)(2)(A) of the Statute . . . ." *Id.* at 9 (citing *SSA*, 32 FLRA 712, 715-16 (1988)). The Agency asserts that, by limiting its ability to "discipline an employee for any absence or related failure to follow instructions . . . [unless] the employee has been habitually tardy, . . . formally notified . . . of the 'habitual' nature of the tardiness, and . . . continues to be tardy[,]" the award excessively interferes with management's right to discipline. *Id.* at 11. Moreover, the Agency claims that, by interpreting the parties' agreement to require that employees cannot be disciplined "for failure to follow procedures if [they] ha[ve] not been formally counseled prior to the issuance of such instructions" and by ignoring the Agency's ability to demand appropriate medical certifications from its employees, the award affects management's right to discipline. *Id.*; *see also id.* n.5.

Also, the Agency asserts that the award fails to draw its essence from the parties' agreement. *Id.* at 12. The Agency claims that the Arbitrator ignored the existence of Article 36, Section C of the parties' agreement, requiring an employee to notify the Agency of a sick leave-related absence, and that the Arbitrator wrongfully "conclud[ed] that the Agency was not able to instruct the [g]rievant to call in or provide evidence of incapacity." *Id.* at 13; *see also id.* at 12. The Agency further contends that the Arbitrator disregarded the plain language of Article 35, Section M in concluding "that only 'habitual tardiness' could form the basis for discipline." *Id.* at 13. According to the Agency, Article 35, Section M allows it to draw from an employee's annual leave, compensatory leave, or leave without pay or charge an employee with AWOL if that employee is tardy for sixty minutes or less. *Id.* Also, the Agency asserts that the Arbitrator's determination that Article 36, Section D "prevent[s] the Agency from disciplining the [g]rievant for failure to provide medical certification if managers ha[ve] not provided formal counseling prior to issuing limiting instructions" is contrary to the plain language of that provision. *Id.*; *see also id.* at 14. The Agency notes that, under that provision, counseling must occur when the supervisor requests that the employee provide a medical certificate. *Id.* at 14. Moreover,

the Agency claims that the Arbitrator's finding that "Articles 39 and 40 [do] not allow discipline for leave abuse because they contain no language regarding discipline" disregards Article 31, which sets forth the only limitations on the Agency's ability to discipline as "just and sufficient cause" and "efficiency of the service." *Id.* at 14-15.

The Agency claims that the award is based on a nonfact because, although the Arbitrator noted both evidence and testimony demonstrating that the grievant was frequently absent from work and that the Agency engaged in various actions such as formal meetings, counseling, warnings, and removal of a desired assignment to address the grievant's tardiness, he improperly found that no discipline should be imposed. *Id* at 15-16. Additionally, the Agency asserts that the award is based on a nonfact because, in finding that the Agency failed to formally document "its displeasure with [the] [g]rievant's absences prior to the issuance of the [r]eprimand[,]" the Arbitrator "ignored the stipulated existence of the [l]eave [r]estriction, which specifically notes that the Agency finds [the] [g]rievant's pattern of unscheduled absences to be unacceptable." *Id.* at 16.

Finally, the Agency claims that the Arbitrator exceeded his authority by: (1) failing to adjudicate the stipulated issue and (2) addressing whether the grievant was habitually tardy, a charge not in dispute. *Id.* at 16-19.

B. Union's Opposition

The Union contends that the Agency has failed to prove that the award is deficient because arbitrators "have 'wide latitude to fashion remedies'" in disciplinary cases, and the Agency's exceptions essentially reflect its mere disagreement with the outcome. Opp'n at 5 (quoting *Dep't of the Air Force, Scott Air Force Base, Ill.*, 51 FLRA 675, 687 (1995)); *see also id.* at 6.

The Union also argues that the Agency's contention that the Arbitrator adjudicated the validity of the leave restriction is without merit. *Id.* at 6-10. The Union contends that the Arbitrator expressly acknowledged that he lacked jurisdiction over the leave restriction. *See id.* at 7. According to the Union, the Agency fails to offer any proof demonstrating that the Arbitrator found that the leave restriction was unenforceable. *Id.* at 7 & n.1. The Union contends that the Agency failed to demonstrate "that the other grievance somehow precluded the [A]rbitrator from considering the meaning and effect of Article 36[, Section D]" and that the Arbitrator's sole purpose in considering Article 36, Section D was to determine whether the Agency had cause to issue a reprimand. *Id.* at 7-8.

The Union contends that the Arbitrator's interpretation of the award does not affect management's right to discipline its employees. *Id.* at 10-13. The Union argues that an arbitrator has great latitude in interpreting and applying a collective bargaining agreement. *Id.* at 11 (citing *Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 316 (1990)). According to the Union, the Arbitrator's interpretation of Article 37, Section M does not "prevent the Agency [from] exercising its right to impose discipline." *Id.* at 13; *see also id.* at 12. Additionally, the Union contends that the Arbitrator's interpretation of Article 35, Section M is entitled to deference because the parties bargained for his interpretation of their agreement. *Id.* at 13.

Finally, the Union argues that the Agency's contention that the award is based on a nonfact is without merit because the Agency merely disagrees with the Arbitrator's interpretation of the evidence and testimony. *Id.* at 13-15. Moreover, the Union contends that the Agency's argument that the Arbitrator failed to adjudicate the stipulated issue is meritless because "[t]he [A]rbitrator engaged in extensive contract interpretation and determined that no 'cause' existed for the grievant's [r]eprimand." *Id.* at 15; *see also id.* at 16.

IV. Preliminary Matter

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. *See, e.g., U.S. Dep't of the Treasury, IRS, Nat'l Distribution Ctr., Bloomington, Ill.*, 64 FLRA 586, 589 (2010) (*IRS, Bloomington*); *Cong. Research Emps. 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. *IRS, Bloomington*, 64 FLRA at 589. 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. *Id.*

The Agency filed a motion requesting leave from the Authority, under 5 C.F.R. § 2429.26, to file a supplemental submission in order to respond to the Union's opposition. The Agency requests that the Authority review its supplemental submission because the Union raises a "new" argument in its opposition. Supplemental Submission at 1-3. The Agency claims that, for the first time in its opposition, the Union argues that the award cannot affect management's right to discipline because "the Arbitrator did not bar the Agency from imposing discipline . . . ." *Id.* at 1. Also, the Agency requests that the Authority review its supplemental submission because the Union makes two contradictory arguments in its opposition. *Id.* at 3-4. According to the Agency, the Union cannot argue both that the Arbitrator did not adjudicate the leave restriction and that the Arbitrator had the right to ignore the existence of the leave restriction. *Id.*

Although the Agency claims that the Union raised a "new" argument in its opposition, the Union merely responded to the Agency's exception challenging the award's impact on management's right to discipline. *See U.S. Dep't of the Army Corps of Eng'rs, Portland Dist.*, 61 FLRA 599, 601 (2006) (finding that, because the Union's opposition did not raise new matters that the agency did not have the opportunity to address in its exceptions, the agency should have raised its argument in its exceptions); *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 52 FLRA 622, 625 (1996); *cf. U.S. Dep't of the Army, Corps of Eng'rs, Walla Walla Dist., Pasco, Wash.*, 63 FLRA 161, 161-62 (2009) (considering the agency's supplemental submission because it challenged an issue first raised in the opposition, namely whether the agency was authorized to file the exceptions). Similarly, the Agency's argument that the Union made conflicting arguments in its opposition does not merit granting leave to file a supplemental submission. *See AFGE, Local 2823*, 64 FLRA 1144, 1146 (2010) (finding that the Union's allegation that the Agency's opposition contained conflicting statements did not merit granting leave to file a supplemental submission). Consequently, we deny the Agency's request and decline to consider the supplemental submission. *Id.* Because the Union's subsequent submission was intended to address the arguments raised for the first time in the Agency's supplemental submission, the Union's submission is moot and willnot be considered. *See U.S. Dep't of the Army, Corps of Eng'rs, Portland Dist.*, 62 FLRA 97, 98 (2007).

V. Analysis and Conclusions

A. The Arbitrator did not exceed his authority by adjudicating the validity of the leave restriction.

The Agency asserts that the Arbitrator exceeded his authority by adjudicating the validity of the leave restriction. Exceptions at 6-9. According to the Agency, the Arbitrator ruled on the leave restriction when he determined that Article 36, Section D of the parties' agreement "precluded the Agency from restricting [the] [g]rievant's leave usage by requiring medical certificates . . . ." *Id.* at 7; *see also id.* at 8.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). However, arbitrators do not exceed their authority by addressing an issue that is necessary to decide a stipulated issue or by addressing an issue that necessarily arises from issues specifically included in a stipulation. *See NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996); *Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 519 (1986). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *See U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999).

The Agency's contention that the Arbitrator exceeded his authority by adjudicating the validity of the leave restriction is without merit. The Arbitrator did not resolve any issues not before him. The Arbitrator merely determined that, in this case, the Agency could not rely on Article 36, Section D to demonstrate that the *reprimand* was issued for just cause. Award at 15. Moreover, the Arbitrator expressly found that, because the validity of the leave restriction was put before another arbitrator, the only issue before him was whether the issuance of the *reprimand* violated the parties' agreement. *See id.* at 13. Consequently, the Agency has failed to establish that the Arbitrator exceeded the scope of his authority by resolving an issue not submitted to arbitration. *See U.S. Dep't of Labor*, 62 FLRA at 155; *U.S. Dep't of Educ.*, 59 FLRA 820, 823 (2004) (determining that, while the arbitrator considered events that had been adjudicated in prior grievances, the arbitrator did not resolve any issues

not before him); *Gen. Serv. Admin.*, 47 FLRA 1326, 1331 (1993) (finding that the agency's contention that the arbitrator exceeded his authority by considering a performance evaluation that had been submitted to another arbitrator without merit because the arbitrator addressed an issue that was integrally related to the stipulated issue before him).

Accordingly, we deny the Agency's exception.

B. The award is not contrary to law.

The Authority reviews questions of law raised by exceptions to an arbitrator's 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 standard of de novo review, the Authority determines 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 determination, the Authority defers to the arbitrator's underlying factual findings. *Id.*

According to the Agency, the Arbitrator's determination that Article 35, Section M of the parties' agreement only allows the Agency to discipline an employee for being absent if his absence constitutes habitual tardiness excessively interferes with management's right to discipline. Exceptions at 11. Moreover, the Agency claims that, by interpreting Article 36, Section D of the parties' agreement to require that employees cannot be disciplined for failure to follow procedures unless they have been formally counseled and by ignoring the Agency's ability to demand appropriate medical certifications from its employees, the award improperly affects management's right to discipline. *Id.* & n.5.

The Authority recently revised the analysis that it will apply when reviewing management rights exceptions to arbitration awards. *See U.S. Envtl. Prot. Agency*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *Fed. Deposit Ins. Corp., Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC, S.F. Region*). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b). *Id.* Also, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority, under the revised analysis, assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *See id.* at 116-18. In concluding that it would apply an abrogation standard, the Authority rejected continued application of an excessive interference standard. *Id.* at 118.

In this case, the Arbitrator set aside the reprimand, thereby affecting management's right to discipline. *See, e.g., U.S. DOT, FAA*, 63 FLRA 383, 385 (2009) (finding that, because the arbitrator set aside a five-day suspension, management's right to discipline was affected) (*DOT*); *U.S. Dep't of Energy, Sw. Power Admin., Tulsa, Okla.*, 56 FLRA 624, 625 (2000) (determining that, because the arbitrator mitigated a two-day suspension to a one-day suspension, management's right to discipline was impacted) (*Dep't of Energy*).

The Agency does not dispute that Article 35, Section M and Article 36, Section D constitute arrangements, but it asserts that the Arbitrator's interpretation of Article 35, Section M "excessively interferes with [its] right to discipline [because his interpretation] prevent[s] [it] from disciplining [employees in situations] where it has an undeniable rationale for doing so." Exceptions at 11; *see U.S. DOT, FAA*, 65 FLRA 171, 174 (2010) (noting that the agency did not dispute the arrangement requirement). The Agency's assertion is without merit. As interpreted and applied by the Arbitrator, Article 35, Section M of the parties' agreement precludes the Agency from disciplining an employee for tardiness only if tardiness is not habitual. Award at 13, 14. Although the Arbitrator's interpretation of the agreement limits the Agency's ability to discipline an employee for tardiness, the Agency is not precluded from disciplining an employee for tardiness in all cases. *See EPA*, 65 FLRA at 118 (finding that the agreement did not abrogate the agency's right to assign work because the agreement did not necessarily preclude disclosure of employee medical records to local coordinators in all cases). Instead, the parties' agreement, as interpreted by the Arbitrator, preserves the Agency's right to discipline an employee for habitual tardiness. *See id.* (finding that the agency's right to assign work was not abrogated because the agreed-upon arrangement preserved the agency's ability to request, obtain, and evaluate medical information).

Also, the Agency's contention that the Arbitrator's interpretation of Article 36, Section D excessively interferes with its right to discipline is meritless. The Agency misstates the Arbitrator's interpretation and application of Article 36, Section D. The Arbitrator did not find that the Agency may not discipline employees for failure to follow procedures unless they have been formally counseled. *See* Award at 13-14 (noting simply that Article 36, Section D states that an employee will be counseled). Moreover, the Arbitrator did not ignore the Agency's ability to demand medical certifications from its employees. *See id.* at 14, 15 (citing to Article 36, Section D which allows an employer to require an employee to provide a medical certificate under certain circumstances). Rather, the Arbitrator found that the Agency could not rely on Article 36, Section D in arguing that it issued the reprimand for just cause because the Agency failed to demonstrate that the prerequisites for requiring an employee to provide a medical certificate were met. *See id.* at 15. Based on testimony, the Arbitrator found that the Agency could not have properly disciplined the grievant for failing to provide a medical certificate because the Agency did not consider the grievant's absences to be abusive or doubt the validity of the grievant's claims. *Id.* Consequently, because Article 36, Section D preserves the Agency's right to discipline employees without formal counseling in some situations, the Agency has failed to demonstrate that the award abrogates its right to discipline its employees.[4]

Accordingly, we deny the Agency's exception.

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

The Agency asserts that the award fails to draw its essence from the parties' agreement. Exceptions at 12. The Agency claims that the Arbitrator ignored the existence of Article 36, Section C of the parties' agreement when he wrongfully "conclud[ed] that the Agency was not able to instruct the [g]rievant to call in or provide evidence of incapacity." *Id.* at 13; *see also id.* at 12. Also, the Agency asserts that the Arbitrator disregarded the plain language of Article 35, Section M when he concluded that "only 'habitual tardiness' could form the basis for discipline." *Id.* at 13. The Agency claims that the Arbitrator's determination that "Article 36[, Section D] prevent[s] the Agency from disciplining the [g]rievant for failure to provide medical certification" because managers did not formally counsel the grievant prior to issuing limiting instructions is contrary to the plain language of that provision. *Id.*; *see also id.* at 14. Finally, the Agency claims that the Arbitrator's finding that "Articles 39 and 40 [do] not allow discipline for leave abuse because they contain no language regarding discipline" disregards Article 31 which only limits the Agency's ability to discipline for just cause. *Id.* at 14; *see also id.* at 15.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that 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 collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context because it is the arbitrator's construction of the agreement for which the parties have bargained. *Id.* at 576.

Contrary to the Agency's assertions, the Arbitrator's interpretation of the parties' agreement is not implausible or irrational. Although the Agency contends that the Arbitrator ignored the existence of Article 36, Section C in determining whether the

4. Member Beck agrees with the conclusion to deny the Agency's exceptions. He does not agree, however, with his colleagues' analysis of the contrary to law exception insofar as they address the question of whether the award affects the exercise of an asserted management right. For the reasons discussed in his concurring opinion in *EPA*, 65 FLRA 113, Member Beck concludes that where, as here, the Arbitrator is enforcing a contract provision that has been accepted by the Agency as a permissible limitation on its management's rights, it is inappropriate to assess whether the provision itself is an appropriate arrangement or whether it abrogates a § 7106(a) right. *Id.* at 120 (Concurring Opinion of Member Beck). The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *Id.*; *see also FDIC, S.F. Region*, 65 FLRA at 107. Member Beck concludes that the Arbitrator's award is a plausible interpretation of the parties' agreement. Accordingly, Member Beck agrees that the Agency's contrary to law exception should be denied.

reprimand was for just cause, the Arbitrator cited Article 36, Section C in his award. Award at 13. Moreover, the award does not fail to draw its essence from Article 36, Section C because the Arbitrator never found that the Agency could not require its employees to call in before taking anticipated sick leave. *See id.* (noting that Article 36, Section C requires an employee to notify the Agency about unanticipated sick leave).

Also, the Arbitrator's interpretation of Article 35, Section M is not implausible or irrational. The Arbitrator's interpretation of Article 35, Section M does not prevent the Agency from drawing on an employee's annual leave, compensatory leave, or leave without pay or charging an employee with AWOL if that employee is tardy for sixty minutes or less. *See id.* at 13, 14. Rather, as interpreted by the Arbitrator, Article 35, Section M simply prohibits the Agency from disciplining an employee for such tardiness unless it is habitual. *See id.* Consequently, the Arbitrator's interpretation of Article 35, Section M does not fail to draw its essence from the agreement.

Although the Agency asserts that the Arbitrator's interpretation of Article 36, Section D is contrary to the plain meaning of that provision, its assertion is without merit. As noted above, the Arbitrator never found that, because the Agency failed to provide counseling to the grievant before issuing limiting instructions, it was prohibited, under Article 36, Section D of the parties' agreement, from disciplining the grievant for failure to provide a medical certification. *See id.* at 15. Instead, the Arbitrator found that the Agency could not rely on Article 36, Section D to support its assertion that it issued the reprimand for just cause because the Agency failed to prove that it considered the grievant's absences to be abusive or doubted the validity of the grievant's claims. *Id.*

Finally, the Agency misinterprets the Arbitrator's findings regarding Articles 39 and 40. Contrary to the Agency's assertions, the Arbitrator did not determine that Articles 39 and 40 do not allow discipline for leave abuse. *See id.* Rather, the Arbitrator simply found that Articles 39 and 40 were inapposite. *See id.*

Accordingly, we deny the Agency's exception.

D. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). The Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at hearing. *AFGE, Local 376*, 62 FLRA 138, 141 (2007) (Chairman Cabaniss concurring). In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a finding that can be challenged as a nonfact. *U.S. DHS, U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 129, 131 (2007) (*DHS*). Further, a challenge to the weight accorded evidence and testimony does not provide a basis for finding that an award is based on nonfacts. *U.S. Dep't of Veterans Affairs Med. Ctr., Richmond, Va.*, 63 FLRA 553, 556 (2009).

The Agency asserts that the award is based on a nonfact because, although the evidence and testimony demonstrate that the grievant was frequently absent from work and that the Agency engaged in various actions to address the grievant's tardiness, the Arbitrator erroneously concluded that no discipline should be imposed. Exceptions at 15-16. Because the Agency's assertion effectively challenges the Arbitrator's interpretation of the term "habitual" in the parties' agreement, it provides no basis for finding the award deficient as based on a nonfact. *See DHS*, 62 FLRA at 131.

Also, the Agency claims that the award is based on a nonfact because, by finding that the Agency did not formally document its displeasure with the grievant's leave usage prior to issuing the reprimand, the Arbitrator disregarded the existence of the leave restriction. *Id.* at 16. Because the Agency does not point to, and the award does not contain, a factual finding on this point, its claim is without merit. *See SSA, Office of Hearings & Appeals*, 58 FLRA 405, 407 (2003) (denying the agency's nonfact exception because the arbitrator did not make the finding alleged to constitute a nonfact).

Accordingly, we deny the Agency's exception.

E. The Arbitrator did not exceed his authority by failing to adjudicate the stipulated issue and by addressing a matter not at issue.

As noted above, 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 within the grievance. *See U.S. Dep't of Def., Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996).

The Agency's contentions that the Arbitrator exceeded his authority by failing to address the stipulated issue and by addressing whether the grievant was habitually tardy are without merit. The Arbitrator's award, which orders that the reprimand be voided and removed from the grievant's file because it was not issued for appropriate cause, is directly responsive and properly confined to the stipulated issue. *See AFGE, Local 3979, Council of Prisons Locals*, 61 FLRA 810, 815 (2006) (*AFGE, Local 3979*); *U.S. Dep't of Educ.*, 59 FLRA at 823 (finding that the arbitrator's award ordering a retroactive promotion with backpay for the grievant based on the requirements of Article 18 of the agreement was directly responsive and properly confined to the issue that he framed). Moreover, although the Agency did not charge the grievant with habitual tardiness, and the parties' stipulated issue does not include the phrase "habitual tardiness," the issue arose in the context of resolving whether the reprimand was issued for just and sufficient cause and is consistent with the arguments made before the Arbitrator. *See SSA, Balt., Md.*, 57 FLRA 181, 183 (2001) (finding that, although the parties' stipulated issue did not explicitly set forth the issue of bona fide consideration as the dispute, that issue arose in the context of resolving whether the grievant was improperly not selected and was consistent with the arguments made before the arbitrator). Consequently, because the Arbitrator's award is responsive and confined to the stipulated issue, the Agency has failed to demonstrate that the Arbitrator exceeded his authority.[5] *See AFGE, Local 3979*, 61 FLRA at 815. Accordingly, we deny the Agency's exception.

VI. Decision

The Agency's exceptions are denied.

5. To the extent that the Agency claims that the award is based on a nonfact because the Arbitrator failed to adjudicate the stipulated issue, its contention constitutes nothing more than a bare assertion. Exceptions at 16, 19; *see U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Port of Seattle, Seattle, Wash.*, 60 FLRA 490, 492 n.7 (2004) (determining that, if a party fails to provide any arguments or authority to support its exception, the Authority will deny the exception as a bare assertion).

APPENDIX

Article 35, "Annual Leave," provides, in pertinent part:

> M. Habitual Tardiness. Habitual tardiness will not be excused and may be corrected through the initiation of disciplinary action. Tardiness of less than sixty (60) minutes, regardless of cause, at the discretion of the supervisor may be excused for adequate reasons. Depending on the circumstances the time may be charged to annual leave, compensatory leave, leave without pay or AWOL. If a charge against annual leave is made, it must be in multiples of fifteen (15) minutes, and the employee cannot be required to perform work for the period of leave charged against his or her account. . . .

Exceptions, Attach. 8 at 68.

Article 36, "Sick Leave," provides, in pertinent part:

> C. Sick Leave Request Procedures.
>
> (1) Anticipated Sick Leave. When an employee knows in advance that sick leave will be required, he or she shall request sick leave at the time the necessity for the leave is determined. Employees assigned to duty stations which have more than one 8-hour shift will provide notification at least one hour prior to beginning of the assigned shift.
>
> (2) Unanticipated Sick Leave. When the need for sick leave is unanticipated and sickness or injury prevents the employee from reporting to work, the employee shall notify the Employer as soon as possible. In no event shall the employee provide such notification to his or her supervisor later than one (1) hour after the normal time for reporting to work. When employees are assigned to a duty station which has an evening and/or midnight shift, the employee will provide notification at least one hour prior to the beginning of the assigned shift. If the degree of the employee's illness or injury prohibits compliance with the notification requirements provided above, the employee hall provide such notification as soon as possible. Acceptable evidence of such circumstances may be required.
>
> D. Evidence of Illness. Employees may be required to furnish acceptable evidence . . . to substantiate a request for sick leave if the sick leave exceeds three (3) consecutive workdays. . . . [S]upervisors may require medical certificates for absences of three (3) workdays or less when a pattern of abuse is reasonably suggested by an employee's chronic use of short periods of sick leave or when there is reasonable doubt as to the validity of the claim to such sick leave. When requiring medical certificates under such circumstances, the employee will be counseled by the supervisor that continued abuse of sick leave may result in a requirement to furnish a medical certificate for each subsequent absence or sick leave regardless of duration. . . .

Id. at 70.

Article 39, "Leave Without Pay," provides, in pertinent part:

> B. Matter of Right. The following employees are entitled, as a matter of right, to take leave without pay for the following purposes:
>
> . . . .
>
> (3) Family Necessity. An employee presenting acceptable documentation of need and who so requests in writing will be granted up to 12 weeks of leave without pay during any 12 month period as necessary to manage one or more of the following circumstances: . . . to care for a spouse, son, daughter, or parent of the employee when that person has a serious health condition. . . .

Id. at 74.

Article 40, "Leave for Family Responsibilities," provides, in pertinent part:

> G. Care for Family Members. Employees may take sick leave . . . to care for a family member who is incapacitated as the result of physical or mental illness, or injury. Annual Leave and Leave without Pay (including LWOP under the Family Medical Leave Act) may also be used for the purpose of caring for a family member. Employees may initially request leave for these purposes for a period of up to five (5) months. If circumstances require it, additional requests may be submitted. . . .

Id. at 77.