

66 FLRA No. 163

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 511
(Union)

0-AR-4542

DECISION

August 14, 2012

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Paul Eggert 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.¹

The Arbitrator found that the Agency failed to comply with certain aspects of its established performance standards and elements, and violated several Office of Personnel Management (OPM) regulations, when it rated the grievant's performance. The Arbitrator directed the Agency to, among other things, reappraise the grievant. For the reasons that follow, we deny the Agency's exceptions.

¹ In addition, as discussed further below, the Authority issued an Order to Show Cause (Order) directing the Agency to explain why its exceptions should not be dismissed as interlocutory. The Agency filed a response to the Order, and the Union filed an untimely reply to the Agency's response.

II. Background and Arbitrator's Award

The grievant is an attorney. Nine months into the performance period at issue here (the performance period), the grievant received an interim appraisal. *See* Award at 5. The appraisal made "no mention of any negative performance, nor was any conveyed [orally by management] at the time." *Id.*

On the same day on which the grievant received her interim appraisal, the Agency received a letter (the letter) signed by seven Immigration Judges (the judges). *See id.* The letter stated that the grievant, who appears before the judges on immigration cases, had engaged in a "pattern of unprofessional conduct." *Id.*

Agency officials met with the grievant regarding the letter. *See id.* at 6. Because the allegations in the letter concerned potential misconduct, the officials informed her that the allegations needed to be investigated. *See id.* The Agency referred the matter to the Office of Professional Responsibility (OPR) for review and independent investigation. *See id.* The Agency was barred from conducting its own investigation while OPR investigated the allegations. *See id.* at 16.

Before the OPR investigation was complete,² the Agency rated the grievant for the performance period. *See id.* at 15-16. As relevant here, the Agency rated her as "fail[ing] to meet expectations" on two critical elements – "Advocates for/Represents the Agency" (the advocacy element) and "Provides Legal Advice" (the legal element). *Id.* at 8, 10. Because the grievant failed to meet at least one of her critical elements, she received an overall rating of "unacceptable."³ *Id.* at 3-4, 11.

The Union filed a grievance regarding the grievant's appraisal. The grievance was unresolved and submitted to arbitration, where the Arbitrator framed the issue as: "Did the [a]ppraisal violate federal statute or regulation or the [collective-bargaining agreement]? If so, what is the remedy?" *Id.* at 2.

As an initial matter, the Arbitrator found that the parties' collective-bargaining agreement is "totally silent regarding appraisal matters." *Id.* at 3. Thus, he addressed whether the Agency's appraisal of the grievant was consistent with the advocacy and legal elements and whether the appraisal violated OPM regulations.

The Arbitrator addressed the grievant's rating on the advocacy element, and found that the Agency purportedly based this rating on: (1) the grievant's

² The OPR investigator ultimately "found nothing to substantiate any allegations of 'misconduct.'" Award at 7.

³ Subsequently, the grievant was placed on a performance-improvement plan, which she successfully completed. *See* Award at 7.

interpersonal skills in court and in relation to coworkers, and (2) the letter. *See id.* at 18. With respect to the grievant's interpersonal skills in court, the Arbitrator found that the Agency relied on a complaint from a judge (separate from the letter) regarding the grievant's conduct. *See id.* The Arbitrator found that this report "had some clear relevance" to the grievant's appraisal. *Id.*

As to her interpersonal skills with coworkers, the Arbitrator found that some of the alleged incidents on which the Agency purportedly relied involved staff who complained about the grievant's "wish to work with her door closed, to avoid the noise of a busy corridor outside her door." *Id.* at 9. In this regard, the Arbitrator found that the staff did not like to have to "knock and await permission to enter" the grievant's office because they "felt [that the grievant] took too long to respond to their knocks, or did not respond nicely." *Id.* The Arbitrator found that other cited incidents involved "a complaint that [the grievant] did not clean up after herself in the office coffee room, on one occasion," and the grievant's "expressed exasperation with a fellow attorney's monopolizing" an office printer. *Id.*

The Arbitrator also found that the advocacy element did not permit the Agency to consider these "reported spats" when it rated the grievant. *Id.* at 18. The Arbitrator stated that, instead, the advocacy element "concerns representing the Agency in court and other related meetings." *Id.* Thus, the Arbitrator rejected the Agency's claim that the words "and others" in one of the related standards refers to "anybody else, including support staff and fellow attorneys, even though the spats had no possible nexus to courtroom activities" – "[i]n other words," that the advocacy element "mandates nice conduct vis[à-vis] all employees, always." *Id.* And the Arbitrator concluded that, by relying on the cited incidents regarding the grievant's interaction with coworkers, the Agency violated 5 C.F.R. § 430.206(b)(4) (§ 430.206(b)(4))⁴ or, alternatively, 5 C.F.R. § 430.206(b)(6) (§ 430.206(b)(6))⁵ and 5 C.F.R. § 430.208(b)(2) (§ 430.208(b)(2)).⁶ *See* Award at 18, 20.

As to the letter, the Arbitrator noted that, at the hearing, the grievant's supervisor testified that, in rating the grievant, he relied "chiefly" or "largely," but not "solely," on the letter. *Id.* at 8. But the Arbitrator found that, before it received the letter, the Agency was

prepared to ignore the grievant's other performance issues and give her "a pass" for the year. *Id.* at 14. *See also id.* at 13. Additionally, the Arbitrator determined that, once the Agency received the letter, it intended to wait to receive OPR's investigative report before it appraised the grievant, but when the report did not arrive after a certain amount of time, the Agency "started reviewing [other performance issues] to generate something that would support a sure-fire 'fail' appraisal without having to wait for" the OPR report. *Id.* Further, the Arbitrator determined that the Agency viewed the letter as "the most serious allegation by far involving [the grievant] for the appraisal year," *id.* at 15, as well as "the central, core issue of [the g]rievant's performance for the year," *id.* at 16.

The Arbitrator found that the Agency "had no clue what the [judges'] allegations [against] the grievant were[,] other than a generalized series of categories set forth in the [l]etter." *Id.* In addition, the Arbitrator noted that the Agency's Chief Counsel "did not state that he believed the allegations were true, or anything similar." *Id.* at 6. The Arbitrator also found that the allegations in the letter were "purely hearsay contentions" and that, by relying on the letter in appraising the grievant, the Agency "abdicated" its own responsibility to appraise the grievant and, instead, deferred to the judges' assessment. *Id.* at 17. In this regard, the Arbitrator determined that management "assume[d] the validity of the [l]etter," rather than conducting "an actual appraisal," and he stated that "there can be no 'appraisal' when there are only mere accusations, uninvestigated, unquestioned, unchallenged." *Id.* Accordingly, the Arbitrator found that the Agency violated 5 C.F.R. § 430.208(a)(1) and (2) (§ 430.208(a)(1) and (2)).⁷ Award at 17.

The Arbitrator further found that the Agency chose to rate the grievant, without the results of OPR's investigation, rather than extend the performance period and defer rating the grievant until it received the result of that investigation. *See id.* at 16. The Arbitrator determined that, at the arbitration hearing, the grievant's supervisor "never gave a full or convincing" explanation for why he did not extend the performance period, "other than the [period] was up, and [the Agency] had enough to adjudge [the grievant] as failing . . . [,] without gathering more evidence." *Id.* at 10. Because the Agency did not have the results of OPR's investigation, the Arbitrator found that the Agency could not validly evaluate the grievant's performance at the end of the performance

⁴ Section 430.206(b)(4) states that "[e]ach performance plan shall include all elements which are used in deriving and assigning a summary level."

⁵ Section 430.206(b)(6) states that "[a] performance plan established under an appraisal program that uses only two summary levels . . . shall not include non-critical elements."

⁶ Section 430.208(b)(2) states that "[c]onsideration of non-critical elements shall not result in assigning a Level 1 summary ('Unacceptable')."

⁷ Section 430.208(a)(1) and (2) states:

(1) A rating of record shall be based only on the evaluation of actual job performance for the designated appraisal period.

(2) An agency shall not issue a rating of record that assumes a level of performance by an employee without an actual evaluation of that employee's performance.

period. *See id.* at 15. The Arbitrator concluded that because the Agency failed to extend the performance period, it violated 5 C.F.R. § 430.208(g) (§ 430.208(g)).⁸ *See Award at 15-16.*

Next, the Arbitrator addressed the grievant's rating on the legal element. The Arbitrator noted that the grievant's appraisal stated that she had failed to: "prepare cases assigned to her for preparation," "properly assess cases on appeal," and "file court orders and other papers given to her for inclusion in alien administrative files." *Id.* at 19. The Arbitrator found that those were "minor failures to perform a few such actions" and "harmless errors at worst," but that they "d[id] exist on paper" and he "lack[ed] authority to reject them." *Id.*

Additionally, the Arbitrator determined that, in appraising the grievant on the legal element, the Agency relied on considerations that were "far beyond the limited scope" of that element – specifically, complaints from the grievant's coworkers regarding her interpersonal skills. *Id.* at 20. In this regard, the Arbitrator noted that the legal element requires employees to act "tactfully, diplomatically, professionally and courteously when responding to inquiries," but found it "clear from context[]" that "inquiries" refers to "those arising from the [Department of Homeland Security (DHS)] units seeking legal assistance, not from . . . staff at [the grievant's door seeking entry, or [asking] about the state of the coffee room." *Id.* at 19. On this basis, the Arbitrator again found a violation of § 430.206(b)(4). *See id.* at 20.

Based on the foregoing, the Arbitrator set aside the grievant's ratings for her advocacy and legal elements, as well as her overall rating. *See id.* at 21. He remanded the appraisal to the Agency with instructions to conduct a de novo review of her rating, consistent with his award. *See id.* He stated that, in conducting that review, the Agency would be required to fully investigate the letter, identify all evidence related to the grievant's allegedly poor performance, and allow the grievant an opportunity to respond to this evidence. *See id.* The Arbitrator stated that he would retain jurisdiction for four months from the date of the issuance of his award to "entertain any concerns about compliance" with the award. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency excepts to the Arbitrator's finding that it failed to comply with the terms of the advocacy

element. *See Exceptions at 8-9.* Specifically, the Agency contends that the Arbitrator erred in finding that this element requires "a nexus to courtroom activities," and argues that the element also includes the grievant's performance in "meetings, conferences, and other forums." *Id.* at 9. In addition, the Agency contends that the Arbitrator wrongly found that the term "and others" in the advocacy element "cannot include the grievant's [co]workers, private attorneys, other government attorneys and/or support staff," and asserts that the Arbitrator provided "no guidance as to who or what entities the term 'and others' might include in addition to the court and clients." *Id.*

The Agency also excepts to the Arbitrator's finding that it failed to comply with the two standards that relate to the legal element. *See id.* at 13. As for the first standard – that the grievant must complete "assignments on time, allowing sufficient opportunity for supervisory review and adjustments" – the Agency claims that the Arbitrator had no authority to find that the grievant's deficient performance constituted "harmless errors." *Id.* As for the second standard – that the grievant must deal "tactfully, diplomatically, professionally, and courteously when responding to inquiries" – the Agency argues that complaints from coworkers were "directly relevant" to this standard. *Id.* The Agency also excepts to the Arbitrator's findings of violations of §§ 430.206(b)(4), 430.206(b)(6), and 430.208(b)(2). *See Exceptions at 8-13.*

Additionally, the Agency excepts to the Arbitrator's findings of a violation of § 430.208(a)(1) and (2). *See Exceptions at 11-12.* The Agency asserts that it "did not simply defer" to the letter, but conducted an actual appraisal of the grievant's performance by considering "everything" in the grievant's personnel folder. *Id.* at 11.

Further, the Agency excepts to the Arbitrator's finding of a § 430.208(g) violation. *See Exceptions at 6-8.* Specifically, the Agency argues that it was not required to extend the grievant's rating period until OPR completed its investigation. *See id.* at 7. For support, the Agency cites OPM guidance (the OPM guidance) that states an agency need not extend an employee's rating period if that employee has been placed on a performance-improvement plan. *See id.* (citation omitted).

Finally, the Agency argues that the Arbitrator's remedies are contrary to management's rights under § 7106 of the Statute, and that the Arbitrator exceeded his authority by granting them. *See Exceptions at 5, 13-14.* Specifically, according to the Agency, the Arbitrator had no authority to direct the Agency to fully investigate the letter, identify all evidence related to the grievant's allegedly poor performance, or allow the grievant an

⁸ Section 430.208(g) states that, "[w]hen a rating of record cannot be prepared at the time specified, the appraisal period shall be extended."

opportunity to respond to that evidence. *See id.* at 13-14. In this regard, the Agency asserts that, under *U.S. Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.*, 53 FLRA 146 (1996) (*BEP*), if the Arbitrator was unable to “reconstruct” what the grievant’s appraisal or rating would have been had management acted properly, then “his authority [was] limited to simply remanding the case to [m]anagement for reevaluation, without detailed instructions as to how the Agency is to complete the performance rating.” Exceptions at 14.

B. Union’s Opposition

The Union argues that the award is not deficient. *See Opp’n* at 2-5.

IV. Preliminary Matters

The Authority issued an Order to Show Cause (Order) directing the Agency to explain why its exceptions should not be dismissed as interlocutory, *see* Order at 1, and gave the Union an opportunity to file a reply to any Agency response, *see id.* at 3. The Agency filed a response (response) to the Order, and the Union filed an untimely reply (reply) to the response.

A. We do not consider the Union’s untimely reply.

The Authority gave the Union the opportunity to file its reply within fourteen days of the Agency’s service of its response on the Union. Order at 3. The Union concedes that it did not timely file its reply, *see* Reply at 2, but requests that the Authority nonetheless consider it because: (1) the Agency addressed its response to “the Office of Chief Counsel” rather than the Union, *id.* at 1; and (2) the Union’s representative was out of the office for several weeks because of negotiations and illness, *id.* at 2.

Section 2429.23(b) of the Authority’s Regulations permits the Authority to waive an expired time limit in “extraordinary circumstances.” 5 C.F.R. § 2429.23(b). Neither of the Union’s reasons demonstrates the extraordinary circumstances required for waiving the expired deadline for filing its reply. As for the first reason, the Union concedes that it received the response four days after the Agency filed its response with the Authority. *See* Reply at 1 (noting that “[t]he Agency’s response was stamped in to the [Union representative’s] office” four days after the Agency served it on the Union). Thus, any error with respect to the Union’s address was harmless, because the Union still had time to either file its reply in a timely manner or request an extension of time. It did neither. As for the second reason – that the Union’s representative was out of the office because of work and illness – the Authority

previously has held that such reasons do not demonstrate the extraordinary circumstances required for waiving expired time limits. *See, e.g., AFGE, Local 1917*, 52 FLRA 658, 661 n.3 (1996) (Authority declined to waive filing deadline because representative was out of the office on leave). Accordingly, we do not consider the Union’s untimely reply.

B. The Agency’s exceptions are not interlocutory.

The Agency argues that its exceptions are not interlocutory, and that the award is final, because the Arbitrator resolved all of the issues submitted to arbitration. Response at 4. The Agency contends that, although the Arbitrator remanded the annual rating to the parties, the award is final because he provided a remedy for the Agency’s alleged violations. *Id.*

Section 2429.11 of the Authority’s Regulations pertinently provides that “the Authority . . . ordinarily will not consider interlocutory appeals.” 5 C.F.R. § 2429.11. Thus, the Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration. *See, e.g., U.S. Dep’t of Justice, Fed. Bureau of Prisons, Fed. Med. Ctr., Carswell, Tex.*, 64 FLRA 566, 567-68 (2010). Consequently, an arbitration award that postpones the determination of an issue submitted does not constitute a final award subject to review. *See id.* at 567. However, an arbitrator’s retention of jurisdiction to assist with the implementation of any awarded remedies does not prevent the award from being final. *See, e.g., U.S. Dep’t of Def., Dep’t of Def. Dependents Sch., Europe*, 65 FLRA 580, 581 (2011) (citing *AFGE, Nat’l Council of EEOC Locals No. 216*, 65 FLRA 252, 253-54 (2010)).

After concluding that the Agency violated OPM regulations, the Arbitrator remanded the grievant’s annual rating to the parties so that the Agency could re-evaluate the grievant in accordance with his instructions. *See* Award at 21. Although the Arbitrator retained jurisdiction to “entertain any concerns about compliance,” *id.*, the award contains no indication that the Arbitrator did anything more than retain jurisdiction to assist with implementation of his awarded remedies. Consistent with the foregoing, we find that the award is final and that the exceptions are not interlocutory. Accordingly, we resolve the exceptions.

V. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law in several respects. When an exception involves an award’s consistency with law, the Authority reviews any

question of law raised by the 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 the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. See *U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *U.S. DHS, U.S. Customs & Border Prot.*, 66 FLRA 567, 567-68 (2012) (*CBP*).

In addition, the Authority has held that arbitrators are empowered to interpret and apply agency rules in the resolution of grievances under the Statute. *SSA, Region IX*, 65 FLRA 860, 863 (2011) (Member Beck dissenting as to application) (*Region IX*). When evaluating exceptions asserting that an award is contrary to a governing agency rule or regulation, the Authority will determine whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, the rule or regulation. *Id.*

1. The Advocacy and Legal Elements

As stated above, the Agency excepts to the Arbitrator's finding that it failed to comply with the terms of the advocacy and legal elements. See Exceptions at 8-10, 13. Even assuming that these elements and their related standards are governing Agency rules – and, thus, that the standards of review set forth above apply – we find, for the following reasons, that the award is not contrary to those elements and standards.

The advocacy element states: “*Advocates for/Represents the Agency*: Represents the [DHS] at meetings, conferences, and other forums; reviews, prepares, and presents cases for trial and on appeal.” Award, Attach. B. at 3. The element lists four performance standards. *Id.* One standard addresses the conduct of “negotiations,” and two involve employees’ conduct when they “appear[] in court.” *Id.* The remaining standard – the one on which the Agency purportedly relied in evaluating the grievant (the disputed advocacy standard) – states:

Dealings with courts, clients, and others, oral and written, are conducted in a courteous, diplomatic, cooperative, and forthright manner; communications take place in a timely manner; keeps informed about, and attends on time, relevant meetings, conferences, and briefings, and contributes when

appropriate; anticipates foreseeable problems, and alerts supervisor, when necessary, in a timely manner.

Id. (emphasis added).

The Arbitrator found that nothing in the advocacy element or its related standards indicates that the grievant could be rated on the basis of “reported spats” with fellow attorneys and support staff. Award at 18. Rather, he found that the advocacy element “concerns representing the Agency in court and other related meetings.” *Id.* Accordingly, he rejected the Agency’s position that the element “mandates nice conduct vis[-]à[-]vis all employees, always.” *Id.*

Nothing in the plain wording of the advocacy element demonstrates that the Arbitrator erred in this regard. The plain terms of the element make clear that it concerns employees’ “[a]dvoca[cy]” for, and “represent[ation]” of, the Agency at “meetings, conferences, and other forums,” as well as the “review[], prepar[ation], and present[ation] of cases for trial and on appeal.” Award, Attach. B at 3. Nothing in this plain wording, or in the use of “others” in the disputed advocacy standard, indicates that it applies to “spats” with coworkers outside the context of employees’ advocacy and representation in court and related meetings. Award at 18. Although the Agency notes that the words “[when incumbent appears in court]” do not preface the disputed advocacy standard, Exceptions at 9, the Arbitrator did not find to the contrary. In this connection, the Arbitrator found that the standard relates to the grievant’s representation in not only court, but also “other related meetings.” Award at 18. Further, the Agency argues that the Arbitrator erroneously interpreted “others” as precluding the grievant’s “[co]workers, private attorneys, other government attorneys[,] and/or support staff.” Exceptions at 9. But the Arbitrator did not find that “others” could not include such individuals in the appropriate circumstances – i.e., in court and “other related meetings.” Award at 18. And the Agency’s statement that the Arbitrator did not define “others” does not provide a basis for finding that his award is contrary to the terms of the advocacy element. Accordingly, we find that the Agency has not demonstrated that the award is “inconsistent with the plain wording of, or is otherwise impermissible under,” the advocacy element. *Region IX*, 65 FLRA at 863. Thus, the Agency has not demonstrated that the Arbitrator erred by finding that the Agency failed to comply with the advocacy element.

The legal element states: “*Provides Legal Advice*: Provides litigation support, legal assistance, and legal advice to the U.S. Attorneys’ Offices and the operational units of the [DHS].” Award, Attach. B at 4. One standard for this element requires employees to “demonstrate[] a solid knowledge of the relevant statutes,

regulations, case law, agency legal positions, and policies.” *Id.* Another standard (the work-completion standard) requires employees to “[c]omplete[] assignments on time, allowing sufficient opportunity for supervisory review and adjustment; work[] independently within guidelines established by supervisor.” *Id.* And the remaining standard (the responsiveness standard) states: “Provides accurate and timely responses to inquiries; identifies options; distinguishes between viable and non-viable options; presents arguments for and against viable options; makes logical and supportable recommendations; *deals tactfully, diplomatically, professionally, and courteously when responding to inquiries.*” *Id.* (emphasis added).

The Agency argues that the grievant had certain performance deficiencies with respect to the work-completion standard, and that the Arbitrator improperly stated that these deficiencies were “harmless errors at worst.” Exceptions at 13 (citation and internal quotation marks omitted). Although the Arbitrator did make that statement, he also found that the deficiencies “do exist on paper,” and that he “lack[ed] authority to reject them.” Award at 19. Thus, he did not discount those deficiencies, and the Agency provides no basis for finding the award contrary to the work-completion standard.

The Agency also argues that the Arbitrator erred by finding that complaints from the grievant’s coworkers were not relevant to the responsiveness standard. The Arbitrator interpreted that standard, along with the legal element and the other standards concerning that element, and found it “clear from context[]” that the “inquiries” referred to in the responsiveness standard “are those arising from the DHS units seeking legal assistance, not from inquiries by staff at [the g]rievant’s door seeking entry, or inquiries about the state of the coffee room.” *Id.* The standard does not define “inquiries,” and the Agency provides no basis for finding that the Arbitrator’s interpretation of that term conflicts with the plain wording of the standard or the legal element.

Accordingly, we find that the Agency has not demonstrated that the award is “inconsistent with the plain wording of, or is otherwise impermissible under,” the legal element. *Region IX*, 65 FLRA at 863. Thus, the Agency has not demonstrated that the Arbitrator erred in finding that the Agency failed to comply with the legal element.

For the foregoing reasons, we deny the Agency’s exceptions to the Arbitrator’s findings that the Agency failed to comply with the advocacy and legal elements.

2. Sections 430.206(b)(4), 430.206(b)(6), and 430.208(b)(2)

The Agency excepts to the Arbitrator’s findings that it violated §§ 430.206(b)(4), 430.206(b)(6), and 430.208(b)(2).

The Authority has held that, when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to demonstrate that the award is deficient. *NFFE, Local 1001*, 66 FLRA 647, 649 (2012). The Arbitrator’s finding that the Agency failed to comply with the terms of the advocacy and legal elements by relying on the grievant’s interactions with coworkers when it appraised the grievant provides a basis – separate and independent from his findings of §§ 430.206(b)(4), 430.206(b)(6), and 430.208(b)(2) violations – for his conclusion that the Agency was precluded from relying on those interactions when it appraised the grievant. As the Agency has not demonstrated that the Arbitrator’s findings of failure to comply with the advocacy and legal elements are deficient, and those findings provide a separate and independent basis for his award, it is unnecessary to resolve the Agency’s arguments that the Arbitrator erred in also finding violations of §§ 430.206(b)(4), 430.206(b)(6), and 430.208(b)(2). Thus, we do not resolve them.

Finding that the Agency was precluded from relying on the grievant’s interactions with coworkers when it appraised the grievant does not resolve whether the Agency also was precluded from relying on the letter when it appraised the grievant. The Arbitrator’s findings of violations of § 430.208(a)(1) and (2) are based on the Arbitrator’s determination that the Agency was precluded from relying on the letter. Thus, it is necessary to separately resolve the Agency’s exceptions regarding § 430.208(a)(1) and (2), and we do so below.

3. Section 430.208(a)(1) and (2)

As noted previously, § 430.208(a)(1) and (2) requires agencies to base employees’ performance ratings on an evaluation of employees’ actual job performance, not an assumed level of performance. *See supra* note 7. The Arbitrator found that the Agency violated § 430.208(a)(1) and (2) because, by relying on the letter, the Agency did not conduct an evaluation of the grievant’s actual job performance. *See* Award at 17. In this regard, he determined that the letter contained “only mere accusations, uninvestigated, unquestioned, unchallenged.” *Id.* Also in this regard, he determined that the Agency did not investigate the allegations in the letter, *see id.* at 9, and noted that the Agency’s Chief Counsel “did not state that he believed the allegations were true, or anything similar,” *id.* at 6.

These determinations indicate that the Arbitrator made a factual finding that the grievant's supervisor and the Agency's Chief Counsel did not *know* whether the allegations in the letter were true. The Agency does not challenge that factual finding as a nonfact, and, as such, we defer to that finding. *See CBP*, 66 FLRA at 567-68. Further, that finding supports the Arbitrator's legal conclusion that, insofar as the Agency relied on the letter in evaluating the grievant, that evaluation was not "based only on the evaluation of actual job performance," § 430.208(a)(1), and it "assume[d] a level of performance by [the grievant] without an actual evaluation of [the grievant's] performance," § 430.208(a)(2). Accordingly, we find that the Arbitrator did not err in concluding that the Agency violated § 430.208(a)(1) and (2) by relying on the letter, and we deny the Agency's exceptions to that conclusion.

Finding that the Agency violated § 430.208(a)(1) and (2) by relying on the letter does not resolve whether the Agency was required to extend the performance period while it awaited the results of the OPR investigation. The Arbitrator's finding of a violation of § 430.208(g) is based on his determination that the Agency was required to extend the performance period in these circumstances. Thus, it is necessary to separately resolve the Agency's exception regarding § 430.208(g), and we do so below.

4. Section 430.208(g)

Section 430.208(g) provides: "When a rating of record cannot be prepared at the time specified, the appraisal period *shall* be extended. Once the conditions necessary to complete a rating of record have been met, a rating of record shall be prepared as soon as practicable." 5 C.F.R. § 430.208(g) (emphasis added).

Section 430.208(g) uses the word "shall." *Id.* The word "shall" indicates a mandatory direction, not a grant of discretion. *See, e.g., IFPTE, Local 29, Goddard Eng'rs, Scientists & Technicians Ass'n*, 61 FLRA 382, 384 (2005). Thus, the plain wording of § 430.208(g) indicates that if the Agency could not prepare the grievant's rating at the pertinent time, then it was required to extend the appraisal period. *See also Performance Ratings*, 63 Fed. Reg. 19,411, 19,412 (Apr. 20, 1998) (noting "*prohibition* against issuing . . . a rating of record that does not reflect actual performance, but assumes a level of performance without evaluation," and stating that "Congress intended Federal employees to be evaluated based upon the actual work they performed during the appraisal period" (emphasis added)); *U.S. Dep't of the Air Force, Air Force Materiel Command, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 59 FLRA 14, 15 (2003) (Chairman Cabaniss dissenting) (modifying arbitration award to require agency to extend grievant's appraisal period).

The Agency relies on the OPM guidance to argue that it had discretion not to extend the period. That guidance states, in pertinent part, that

[r]ating officials must prepare the rating of record when it is due based on their knowledge of the employee's performance at that time. If a rating official has reason to believe that information will soon become available that will significantly impact the evaluation of the employee's performance, *such as an investigation that is underway*, the agency *can extend* the appraisal period to capture that information in the rating of record.

New Regulations Clarify Rating of Record Definition, <http://www.opm.gov/perform/articles/dec98-3.asp> (Dec. 1998) (emphasis added) (OPM Guidance).

The Authority normally defers to OPM regulations on statutory matters that OPM has been given authority to interpret as long as the regulations constitute a reasonable interpretation of the statutory wording. *AFGE, Local 2006*, 65 FLRA 465, 469 (2011) (*Local 2006*). However, the Authority defers to other OPM guidance, such as opinion letters and manuals, only to the extent that they have "the power to persuade." *Id.* In assessing whether such guidance has the power to persuade, the Authority assesses whether the guidance is consistent with the pertinent statutory and regulatory provisions. *See id.*

The OPM guidance states that rating officials "can" extend a rating period to take into account information that is not yet available. OPM Guidance. To the extent that this wording means that agencies that are awaiting critical, performance-related information may rate employees rather than extend the rating period, this wording is inconsistent with the mandatory wording in § 430.208(g) and lacks the "power to persuade." *Local 2006*, 65 FLRA at 469. Accordingly, we do not defer to the OPM guidance, and we conclude that it does not provide a basis for finding that the Agency had discretion not to extend the rating period, if the grievant's rating of record could not be prepared at the time specified.

The next question is whether the Arbitrator correctly found that the rating of record could not be prepared at the time specified, so that § 430.208(g) required an extension of the performance period. In this connection, the Arbitrator found that the letter was a crucial part of evaluating the grievant's performance, and that the Agency viewed it as such. *See, e.g., Award at 8* (supervisor relied "chiefly" or "largely" on it); *id. at 13* (Agency "had some 'stuff' on" the grievant, "but

was willing to ignore it” before it received the letter, and “intended to wait” for investigative report, but when it didn’t arrive, “started reviewing [other performance issues] to generate something that would support a sure-fire ‘fail’ appraisal without having to wait for” the report); *id.* at 14 (Agency “was prepared to give [the grievant a pass for the year, notwithstanding” other issues, until it got the letter); *id.* at 15 (letter was “the most serious allegation by far involving [the grievant] for the appraisal year”); *id.* at 16 (letter was “the central, core issue of [the g]rievant’s performance for the year”). These findings – which are not challenged as nonfacts – support the Arbitrator’s conclusion that the Agency could not properly prepare the grievant’s rating of record at the end of the performance period because the investigation into the letter had not concluded. Thus, the Arbitrator correctly found that § 430.208(g) required the Agency to extend the performance period, and the Agency does not demonstrate that the award is contrary to law in this regard. Accordingly, we deny the exception.

5. Section 7106 of the Statute

The Agency argues that the Arbitrator’s remedies are contrary to management’s rights under § 7106 of the Statute. According to the Agency, the Arbitrator had no authority to direct the Agency to fully investigate the letter, identify all evidence related to the grievant’s allegedly poor performance, or allow the grievant an opportunity to respond to that evidence. *See* Exceptions at 13-14. Citing *BEP*, 53 FLRA 146, the Agency argues that if the Arbitrator was unable to “reconstruct” what the grievant’s appraisal or rating would have been had management acted properly, then “his authority [was] limited to simply remanding the case to management for reevaluation, without detailed instructions as to how the Agency is to complete the performance rating.” Exceptions at 14.

The Authority revised the analysis that it will apply when reviewing management-rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC*, *Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC*). As relevant here, under the revised analysis, the Authority assesses whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, then the Authority examines whether the award provides a remedy for a violation of either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision that was negotiated under § 7106(b). *See id.* at 115 & n.7. In addition, in setting forth the revised analysis, the Authority rejected the continued application of the requirement, set forth in *BEP*, that an arbitrator’s remedy must “reconstruct” what an agency would have done,

absent the legal or contractual violation. *See FDIC*, 65 FLRA at 106-07.

The Agency’s § 7106 exception is based on the “reconstruction” requirement in *BEP*, 53 FLRA at 154. As stated above, in assessing challenges to arbitral remedies on § 7106 grounds, the Authority no longer requires remedies to “reconstruct” what agencies would have done had they complied with the pertinent law or contract. *See FDIC*, 65 FLRA at 106-07. Thus, the Agency’s exception provides no basis for setting aside the Arbitrator’s remedy as contrary to § 7106, and we deny the exception.⁹

B. The Arbitrator did not exceed his authority.

The Agency argues that, for the same reasons set forth in its § 7106 exception, the Arbitrator exceeded his authority by directing the Agency to do the following when reevaluating the grievant’s performance: fully investigate the letter, identify all evidence related to the grievant’s allegedly poor performance, and allow the grievant an opportunity to respond to that evidence. *See* Exceptions at 13-14.

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. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

The Agency does not argue that the Arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, or awarded relief to those not encompassed within the grievance. To the extent that the Agency is claiming that the Arbitrator disregarded a specific limitation on his authority – in particular, § 7106 of the Statute – we reject that claim for the same reasons that we have rejected the Agency’s § 7106 exception.

For the foregoing reasons, the Agency has not demonstrated that the Arbitrator exceeded his authority. Accordingly, we deny the Agency’s exceeded-authority exception.

VI. Decision

The Agency’s exceptions are denied.

⁹ For the reasons set forth in her concurring opinion in *FDIC*, 65 FLRA at 112, Chairman Pope would assess whether the remedy is reasonably related to the violated provisions at issue and the harm being remedied. As she would find this standard satisfied here, she agrees with the denial of this exception.