66 FLRA No. 19

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
METROPOLITAN DETENTION
CENTER, GUAYNABO
SAN JUAN, PUERTO RICO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISONS LOCALS C-33
LOCAL 4052
(Union)

0-AR-4228

_____

DECISION

August 31, 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 four awards of Arbitrator David M. Helfeld 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 determined that the Agency: (1) discriminated against Puerto Rican bargaining unit employees recruited[2] from Puerto Rico in favor of Puerto Rican bargaining unit employees recruited from the continental United States and (2) breached those employees' contractual, statutory, and constitutional rights when it denied them rights to home leave, access to post exchanges (PX), and access to a Department of Defense (DoD) school.[3] For the reasons that follow, we deny the exceptions in part, grant the exceptions in part, set aside the awards in part, and remand the awards in part.

II. Background and Arbitrator's Awards

A. Arbitrator's Initial Opinion and Award

The Arbitrator's initial opinion and award (initial award) concerned the alleged violations of rights to home leave, PX privileges, and access to the DoD school (liability)[4] and was based on the parties' submissions of written briefs. Initial Award at 2. He framed the issues as follows:

> 1. Did the Agency violate the right to home leave?
>
> 2. Were PX privileges denied to bargaining unit employees in violation of their contractual and legal rights?; and
>
> 3. Were bargaining unit employees' children denied access to the DoD school in violation of [the employees'] contractual and legal rights?

Id. at 8, 11, 19.

The Arbitrator noted that the Agency's policy on home leave denies home leave to Puerto Rican employees hired or recruited in Puerto Rico. *Id.* at 9. The Arbitrator determined that the Agency's policy modified the statutory right to home leave, at 5 U.S.C. § 6305,[5] by permitting home leave to be taken only in the United States, not in Puerto Rico. *Id.* at 8-9. The Arbitrator found that this policy violates the requirement in Article 6, Section b-2 (Article 6b-2) of the parties' agreement that all employees "be treated fairly and equitabl[y] in all aspects of personnel management." *Id.* at 10. Also, the

[1] Further, as addressed below, an individual grievant filed a letter with the Authority.

[2] For purposes of this decision, we note that the place from which an employee was recruited is the same place as the employee's permanent residence.

[3] These terms are discussed in greater detail later in this decision.

[4] Before addressing liability, the Arbitrator reached the following conclusions on several threshold issues: (1) the grievance was presented in a timely manner under the parties' agreement; (2) the issue of denial of PX privileges was arbitrable because the Union had withdrawn a previously filed an unfair labor practice charge regarding that issue; (3) the DoD school issue was not moot because, even though Agency employees no longer matriculated at the school, compensatory damages might be available to employees who incurred out-of-pocket expenses; and (4) the scope of the Arbitrator's jurisdiction covered the home leave, PX, and DoD school issue. Initial Award at 2-6. No exceptions were raised concerning the Arbitrator's findings with regard to these issues; thus, we will not address them further.

[5] The text of the relevant statutory, regulatory, and contractual provisions is set forth in the appendix to this decision.

Arbitrator determined that the Agency's policy violates Article 6, Section b-3's (Article 6b-3's) guarantee "that all employees have the right 'to be free from discrimination based on their . . . national origin.'" *Id.* at 11; *see also id.* at 10. In addition, the Arbitrator found that the policy violates Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e,[6] by discriminating against employees recruited in Puerto Rico, almost all of whom were born and raised in Puerto Rico, based on their national origin. *Id.* at 11. Further, the Arbitrator determined that the Agency's policy and actions were "completely incompatible with" the guarantee of equal protection in the Due Process Clause of the Fifth Amendment of the Constitution (Fifth Amendment). *Id.* In this regard, the Arbitrator suggested that, if the home leave statute, 5 U.S.C. § 6305, contained the same terms as the Agency's policy and practices, then it undoubtedly would be declared unconstitutional. *Id.*

Regarding PX privileges, the Arbitrator found that the Agency had a policy of granting these privileges only to management and supervisory staff and to "bargaining unit employees who . . . [had] transportation or mobility agreements," *id.* at 15, and that only those unit employees whose "position descriptions included a transferability or mobility statement" had such agreements, *id.* at 18.[7] Also, the Arbitrator determined that "access to the [PX constituted] a fringe benefit" and that, "[b]y obtaining PX privileges for some of its employees, the Agency . . . effectively made the matter a condition of employment . . . ," *id.* at 15. The Arbitrator acknowledged that DoD controlled which Agency employees would have PX privileges and that the Agency made several attempts to persuade DoD to grant PX privileges to all Agency employees. *Id.* at 12-13. However, the Arbitrator determined that, once the Agency accepted DoD's partial grant of PX privileges to managerial and supervisory staff and to bargaining unit members who had transportation or mobility agreements, it also made the "offending conditions" of the grant its own and, in doing so, violated its contractual and legal obligations. *Id.* at 15-16.

The Arbitrator found that, as the Agency's policy worked in practice, thirteen of the fourteen Puerto Rican bargaining unit employees who were recruited from the continental United States had transportation or mobility agreements while none of the 201 Puerto Rican bargaining unit employees recruited from Puerto Rico had such agreements. *Id.* The Arbitrator found that this policy violated the requirement of fair and equitable treatment in Article 6b-2 of the parties' agreement. *Id.* The Arbitrator also found that the Agency's policy violated Article 6b-3, which prohibits national origin discrimination and Article 22, which contains the Agency's commitment "to promote full realization of equal opportunity through a positive and continuing effort." *Id.* at 17 (quoting Article 22) (internal quotation marks omitted). In addition, the Arbitrator found that the policy violated Title VII by favoring Puerto Rican employees and other Hispanic employees who were recruited from the mainland over Puerto Rican employees who were recruited in Puerto Rico and that "in a sociological sense," Puerto Ricans consist of two national origin groups – one residing in Puerto Rico and the other residing on the mainland. *Id.* at 17 & n.9, 18. Further, the Arbitrator found that the policy conflicted with the Fifth Amendment. *Id.* at 18. According to the Arbitrator, the Agency failed to demonstrate a "compelling interest" or offer any justification for the prerequisite of a transportation or mobility agreement. *Id.*

As for DoD school access, the Arbitrator found that the Agency made it a condition of employment by taking the initiative in seeking and obtaining it for its managerial and supervisory staff and for "a select group" of bargaining unit employees. *Id.* at 21. The Arbitrator noted that DoD's enrollment instructions contained the following requirement for employees claiming eligibility: "The employee is employed in a grade, position, or classification subject by policy and practice of this agency to transfer from Puerto Rico to areas where English is the language of instruction in schools normally attended by the children of Federal employees." *Id.* (citation omitted). Then, the Arbitrator noted that, for an employee's children to gain DoD school access, the Agency's policy required: (1) a mobility statement in the position description; (2) a signed mobility agreement; or (3) a specific legal requirement that the Agency transfer "a specific employee from Puerto Rico to an area where English is the language of instruction in schools normally attended by the children." *Id.* at 22. The Arbitrator found that this policy was more demanding than DoD's enrollment instructions. *Id.* at 22-23. He based this finding, in part, on written clarification from DoD that a transportation agreement was not a requirement for eligibility to attend its school. *Id.* at 22. The Arbitrator

[6] The Arbitrator found the following provision of section 703 of Title VII to be most relevant to the grievance:

> It shall be an unlawful practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of the individual's race, color, religion, sex, or national origin.

Initial Award at 6-7 (quoting 42 U.S.C. § 2000e-2(a)). However, this section of Title VII pertains to private sector employees. The section of Title VII that would be relevant here is section 717, which provides, in pertinent part, that "[A]ll personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16.

[7] In his award, the Arbitrator does not define "transportation or mobility agreements" or "transferability or mobility statement."

found that, in practice, the Agency's policy resulted in access to DoD schooling for the children of ten bargaining unit employees, nine of whom clearly were recruited from the continental United States. *Id.* at 24. As for the tenth employee, referred to here as JM, the Arbitrator found it unclear whether he was recruited from the continental United States or Puerto Rico and ordered the parties to clarify this matter during the next phase of the arbitration. *Id.* at 24-25. The Arbitrator found that the Agency's policy on DoD school access violated Article 6, Sections b-2 and b-3 of the parties' agreement, Title VII, and the Fifth Amendment. *Id.* at 26-27. Regarding the Fifth Amendment, the Arbitrator found it "entirely inconceivable that a reviewing court would accept that the Agency had a compelling interest which could only be satisfied by the policy which it adopted . . ." *Id.*

Finally, with regard to PX privileges and to DoD school access, the Arbitrator ordered the parties to address: (1) the accuracy of the Union's claim that the position descriptions for 200 bargaining unit employees had transferability or mobility statements that were removed, and (2) the effect this would have on the Agency's liability and the fashioning of appropriate relief. *Id.* at 19.

B. Arbitrator's Second Opinion and Award

The Arbitrator's second opinion and award (second award) contains instructions and inquiries to the parties. Second Award at 28-32.[8]

C. Arbitrator's Third Opinion and Award

The Arbitrator based this award on a hearing and documents pertaining to damages and remedies. Third Opinion and Award (Third Award) at 34.

Based on hearing testimony, the Arbitrator found that the Agency's actions, denying home leave without explanation, violated the Fifth Amendment. *Id.* at 37-38. He also found that JM initially was granted home leave, PX access, and DoD school access because he is Caucasian, but that these privileges were withdrawn when JM had a run-in with his supervisor after his wife was denied an identity card to enter Fort Buchanan because of her race. *Id.* at 38 & n.33.

The Arbitrator ordered the Union to calculate the years of home leave benefits owed to sixty current affected bargaining unit members as well as former members employed during the relevant time period. *Id.* at 40-41. He denied the Agency's objection that 5 U.S.C. § 6305(a)(3) prohibits paying for home leave in a lump sum, explaining that the prohibition applies only to employees who failed to act on their home leave rights with due diligence. *Id.* at 41.

As he did regarding home leave in the initial award, the Arbitrator found in the third award that the Agency's denial of PX privileges to the grievants violated their rights under the Fifth Amendment. *Id.* at 42. Based on a study that the Union submitted, and the Arbitrator's adjustments thereto to reach a "conservative judgment," the Arbitrator found that the grievants were entitled to their pro rata share (based on the number of years worked during the relevant period) of $13,275. *Id.* at 43-44.

Regarding access to the DoD school, the Arbitrator rejected the Agency's argument that granting DoD school access to the grievants would be in violation of the statutes and regulation governing schooling at established military bases. *Id.* at 44. In this regard, the Arbitrator found that the Agency had not applied the statutory and regulatory restrictions in a consistent manner and, therefore, violated the Fifth Amendment. *Id.* at 44-45. In addition, the Arbitrator rejected several of the Union's proposed remedial measures. *Id.* at 45-46. Among other things, he denied damage claims arising after the Agency's decision in 2004 to discontinue DoD school enrollment for dependents of all employees. *Id.* Also, he disallowed claims for tuition costs that were not incurred as a result of the Agency's decision to deny the grievants' children DoD school access. *Id.* at 46. Instead, he restricted damages to reimbursement for out-of-pocket costs incurred from 2001 to 2004 when employees enrolled their dependents in other schools. *Id.* at 46-47.

Next, the Arbitrator addressed the Union's claims for non-pecuniary damages for emotional distress suffered by the grievants as a result of the Agency's violations of Title VII. *Id.* at 47-62. The Arbitrator rejected the Agency's argument that the grievants were not entitled to awards for mental suffering for a disparate impact claim and that the Union demonstrated no actual harm to individual grievants. *Id.* at 49. Instead, he found that the grievants were entitled to compensation for non-pecuniary damages under 42 U.S.C. §§ 1981a and 1983. *Id.* at 49-50, 51, 53. The Arbitrator summed up the evidence of emotional distress as follows: "a deeply felt sense of injustice at not receiving fair and equal treatment for the better part of a decade, a sense of injustice which endures up to the present." *Id.* at 56. Although the Arbitrator discredited some of the grievants' testimony, he found, on the whole, that the Agency engaged in "invidious discrimination" and "arbitrary decisions" causing "deep and long term suffering to most of their employees." *Id.* at 59. Based

[8] The pagination in the second, third, and final opinions and awards are a continuation of the pagination in the initial award.

on a "balancing of all the relevant considerations," including the Agency's budgetary resources, the Arbitrator awarded non-pecuniary damages per grievant of $10,000 per year of employment during the relevant five-year period, with a maximum of $50,000. *Id.* at 61-62. In addition, the Arbitrator ordered additional remedies, including a cease and desist order and the posting of a notice that the Agency violated the parties' agreement and has taken measures to prevent future violations. *Id.* at 62. Finally, the Arbitrator invited the Union to file a petition for attorney fees and costs. *Id.* at 63.

D. Arbitrator's Final Opinion and Award

In his final opinion and award (final award), the Arbitrator, once more, rejected the Agency's argument that the grievants were not entitled to an award of non-pecuniary damages for a disparate impact claim, finding "that invidious discrimination was intended." Final Award at 67. The Arbitrator also rejected the Agency's argument that the Union had not substantiated any of the claims for pecuniary and non-pecuniary damages. *Id.* at 69-72. In this regard, the Arbitrator noted that the Agency had a reasonable opportunity to question the tables of data that the Union submitted in support of the claims of each grievant, but failed to do so. *Id.* at 70-72. Therefore, the Arbitrator ordered the Agency to pay the claims of each grievant as set out in the Union's chart for each type of claim. *Id.* at 72. In addition, the Arbitrator awarded $14,875 in attorney fees to the attorney representing the Union. *Id.* at 74.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator erred in finding that the employees who both work and permanently reside in Puerto Rico have a right to home leave under 5 U.S.C. § 6305(a). Exceptions at 4. In this regard, the Agency argues that home leave is available only to an employee serving outside of the United States and away from his or her home, not to an employee both working and residing in Puerto Rico. *Id.* at 5. In support of this contention, the Agency cites the legislative history of § 6305, the definition of "service abroad" in 5 C.F.R. § 630.601(a),[9] and Comptroller General decisions holding that employees who serve and reside in Puerto Rico are not entitled to home leave. *Id.*

Also, the Agency asserts that the Arbitrator's finding that the Agency improperly denied PX privileges and DoD school access is contrary to law because these benefits are not conditions of employment within the scope of collective bargaining. *Id.* at 6-8. Further, the Agency argues that, even if the PX privileges constitute a condition of employment, then the award of damages is contrary to law because DoD, as opposed to the Agency, has the discretion to allow access to the privileges, and the Agency should not be bound by the exercise of that discretion. *Id.* at 9-10.

The Agency contends that the Arbitrator erred when he found that the Agency engaged in disparate treatment discrimination. *Id.* at 10-17. The Agency maintains that the grievants did not make a prima facie showing of disparate treatment discrimination. *Id.* at 12-14. It notes that the grievance claims discrimination against "local-hired Hispanic [e]mployees and Hispanic employees [who] transferred and relocated to [the Agency]." *Id.* at 13 (quoting grievance) (internal quotation marks omitted). Similarly, the Agency claims that the Arbitrator referred to the allegedly discriminated group as "Puerto Ricans recruited in . . . Puerto Rico as compared with Puerto Ricans and other Hispanics recruited from the continental United States." *Id.* (quoting Initial Award at 17) (internal quotation marks omitted). The Agency contends that this allegedly discriminated group is not a protected class under Title VII because "Title VII does not confer protected class status based on residency or place of hire, and neither residency nor place of hire are synonymous with [n]ational [o]rigin." *Id.* Also, the Agency argues that there is no evidence that the Agency discriminated against employees of Hispanic national origin. *Id.* According to the Agency, the statistics in the record for bargaining unit employees reflect that most of the employees enjoying the benefits in question were Puerto Rican. *Id.* at 13-14.

Even if there had been a class of employees protected by Title VII, the Agency contends that it articulated legitimate, nondiscriminatory reasons for its actions. *Id.* at 14-17. The Agency asserts that it acted in accordance with 5 U.S.C. § 6305 and 5 C.F.R. §§ 630.601, 630.605(a) when it denied home leave to the grievants. *Id.* at 16-17. As for PX privileges and DoD school access, the Agency claims that it acted in accordance with DoD policy. *Id.* at 14-16.

The Agency contends that the Arbitrator also erred when he found that the Agency engaged in disparate impact discrimination. *Id.* at 17-22. The Agency claims that the grievants did not make a prima facie showing of disparate impact discrimination. *Id.* at 19-20. According to the Agency, the grievants do not comprise a Title VII protected class, and the Union has

[9] The Office of Personnel Management defines "[s]ervice abroad" as "service . . . by an employee at a post of duty outside the United States and outside the employee's place of residence if his place of residence is in the Commonwealth of Puerto Rico or a territory or possession of the United States." 5 C.F.R. § 630.601.

not demonstrated adverse impact on the actual protected class, all Puerto Rican employees. *Id.* at 19-20. In this regard, the Agency notes that, based on the Union's evidence, the percentages of recipients of home leave, PX privileges, and DoD school access who were of Puerto Rican and Hispanic national origin were 81, 84, and 86, respectively. *Id.* In addition, the Agency argues that its actions were based on business necessity because they were in accordance with the regulations of another agency. *Id.* at 20-21.

Finally, the Agency contends that the award of non-pecuniary damages is contrary to Title VII because it is based on an erroneous finding of disparate treatment discrimination, it is excessive, and such damages cannot be awarded for disparate impact discrimination. *Id.* at 21-22.

B. Union's Opposition

The Union contends that the Authority need not consider the Agency's exceptions because they address only the Arbitrator's findings that the Agency's actions violated Title VII and fail to address the Arbitrator's alternative holdings of contractual and constitutional violations. Opp'n at 8. Moreover, the Union argues that the Arbitrator properly applied the standards of Title VII in finding disparate treatment, not disparate impact, discrimination. *Id.* at 9-11.

The Union contends that the Arbitrator's award of home leave is not contrary to law. *Id.* at 11-17. The Union maintains that it "did not request home leave for employees [who] were residing and recruited in Puerto Rico to work at [the Agency]." *Id.* at 12. Also, the Union claims that the Agency's home leave policy is contrary to 5 U.S.C. § 6305 and Department of Justice policy 1630.1B because it disallows employees from using home leave in Puerto Rico and requires that employees take home leave in the United States. *Id.* at 12-13. Moreover, the Union cites *Delcio Rivera-Rosario v. Department of Agriculture*, 151 F.3d 34 (1st Cir. 1998) (*Rivera-Rosario*), a case in which the court held that an agency engaged in unlawful discrimination when it denied home leave to a Puerto Rican native stationed in Puerto Rico. *Id.* at 16.

As for PX privileges and DoD school access, the Union contends that the Agency's assertion that these benefits are not conditions of employment is belied by the fact that, "[b]y obtaining PX privileges for some of its employees, the Agency . . . effectively made the matter a condition of employment which those who are still without the benefit are legally entitled to seek to achieve for themselves." *Id.* at 18-19 (quoting Initial Award at 15) (internal quotation marks omitted). Further, regarding PX privileges, the Union disagrees with the Agency's claim that the award is contrary to law because it holds the Agency responsible for restrictions imposed by DoD. *Id.* at 19-20. Instead, the Union argues that, once the Agency accepted DoD's conditions on the PX privileges, it violated the anti-discrimination provisions of the parties' agreement. *Id.* at 20-21. The Union cites the Authority's decision in *Overseas Education Ass'n*, 29 FLRA 485, 492 (1987), to support the theory that the Agency must be held responsible for DoD's restrictions. *Id.* at 21.

Next, the Union contends that the award is consistent with both the disparate treatment and disparate impact theories under Title VII. *Id.* at 23. The Union disagrees with the Agency's assertion that employees working and residing in Puerto Rico are not a protected class. *Id.* at 25. Thus, it argues that the grievants are entitled to compensatory damages for both pecuniary and non-pecuniary losses. *Id.* at 25-29. It argues further that the sums awarded for non-pecuniary losses were not "monstrously excessive" or inconsistent with awards made in similar cases. *Id.* at 29-30.

The Union requests that the Authority modify the award of damages by resetting the beginning of the compensation period to two years before the filing of the grievance. *Id.* at 31. The Union also asks that the award concerning PX privileges be extended to the present to reflect that the Agency continues to apply the DoD restrictions. *Id.* at 32.

IV. Preliminary Issues

A. The Authority will not consider the letter of an individual grievant.

One of the individual grievants, JM, wrote a letter to the Authority claiming that the "Union failed to list [his] name in the Table of Award correctly." Letter from JM to the Chief Administrative Law Judge. Under the Authority's Regulations, only a "party" to an arbitration may file an exception. 5 C.F.R. § 2425.1(a) (stating that "[e]ither party to an arbitration . . . may file an exception to an arbitrator's award rendered pursuant to the arbitration").[10] A "party" to an arbitration is defined in the Authority's Regulations as "(b) Any labor organization or agency or activity . . . (3) Who participated as a party . . . (ii) In a matter where the award of an arbitrator was issued." 5 C.F.R. § 2421.11(b)(3)(ii). In this case, the parties who participated in the arbitration were the Union and the Agency. The grievant, who did not participate in the arbitration, may not file an exception. *See AFGE, Local 2904*, 20 FLRA 3, 3-4

[10] We note that the exceptions were filed prior to the October 1, 2010 effective date of the Authority's revised arbitration Regulations.

(1985) (finding that an individual who was not a party to the arbitration lacked standing to file an exception). Accordingly, we will not consider JM's letter.

B. The exceptions do not address all of the grounds for the award.

The Union contends that the Agency's exceptions should be dismissed as deficient because they address only the statutory bases for the award and not the contractual or constitutional bases. Opp'n at 8-9. An award is based on separate and independent grounds when more than one ground independently would support the remedies that the arbitrator awards. *See U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123-24 (2007) (then-Member Pope dissenting in part on other grounds) (*Kirtland Air Force Base*) (concluding that the agency did not demonstrate that the award was deficient because it did not except to the finding of a contract violation which served as a separate and independent ground for the remedies granted by the arbitrator). The Authority has recognized 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 have the award found deficient. *E.g.*, *U.S. Dep't of the Treasury, Internal Revenue Serv., Oxon Hill, Md.*, 56 FLRA 292, 299 (2000). In those circumstances, if the excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the Arbitrator, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other ground. *See U.S. Dep't of Veterans Affairs Med. Ctr., Hampton, Va.*, 65 FLRA 125, 129 (2010); *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 892 (2010). Moreover, if a party fails to except to a separate and independent ground relied on by the Arbitrator, then the Authority will assume that the party is liable on that ground. *See U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 (2010) (denying the agency's essence exception because the agency did not challenge the arbitrator's interpretation of the parties' command labor agreement, and the finding of a command labor agreement violation provided a separate and independent basis for the award); *Kirtland Air Force Base*, 62 FLRA at 123-24 (concluding that the agency failed to demonstrate that the award was deficient when it did not except to the arbitrator's finding that that it violated the parties' agreement, and the finding constituted a separate and independent ground for the remedies granted by the arbitrator).

As noted above, the Arbitrator awarded the grievants pecuniary damages because he found that the Agency improperly denied the grievants home leave, PX privileges, and DoD school access. *See, e.g.*, Initial Award at 8-11, 12-18; Third Award at 36-47. The Arbitrator relied on four bases in concluding that the Agency was liable for pecuniary damages. *See, e.g.*, Initial Award at 10-11, 16-18, 26-27. Specifically, he determined that the Agency was liable because it: (1) discriminated against the grievants in violation of Title VII, (2) violated Articles 6b-3 and 22 of the parties' agreement which, among other things, prohibit discrimination based on national origin, (3) failed to abide by Article 6b-2 of the parties' agreement, which requires the Agency to treat employees fairly and equitably, and (4) violated the Fifth Amendment. *See, e.g.*, *id.* These four bases constitute separate and independent grounds for the Arbitrator's liability determination because liability on one of the Arbitrator's grounds would not depend upon, or necessarily result in, liability on the other grounds. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Wash., D.C.*, 64 FLRA 559, 561 (2010) (concluding that the arbitrator's finding that the agency violated Article 3(d) of the parties' agreement constituted a separate and independent ground because that provision did not reference any statutory bargaining obligation and created an independent contractual bargaining obligation).[11]

Although the Arbitrator relied on four separate and independent grounds in finding the Agency liable for pecuniary damages, the Agency does not except to all of the separate and independent grounds relied on by the Arbitrator. In particular, the Agency fails to address whether the Arbitrator erred in finding that the Agency's actions violated the "fair treatment" requirement of Article 6b-2 and whether the Arbitrator improperly found that its actions violated the Fifth Amendment. Consequently, because the Agency does not dispute these determinations, the Authority adopts the Arbitrator's determinations that the Agency violated Article 6b-2 and the Fifth Amendment. *See Kirtland Air Force Base*, 62 FLRA at 123-24.

A party's failure to establish that all of the separate and independent grounds underlying an arbitrator's liability determination are deficient does not prohibit the party from challenging the legality of a

[11] In *Federal Bureau of Prisons v. FLRA*, 2011 WL 2652437, at *6 (D.C. Cir. July 8, 2011) (*Federal Bureau of Prisons*), the court rejected the Authority's contention that the award was based on separate and independent grounds because the "award [made] no distinction between the purportedly 'separate' statutory and contractual grounds for the award." However, this case is distinguishable from *Federal Bureau of Prisons* because, here, the Arbitrator clearly distinguished between the four separate grounds he relied on in the award. *See, e.g.*, Initial Award at 18 (finding that, "[i]ndependently of the Agency's violation of Title VII, it . . . also failed to comply with the . . . Fifth Amendment").

remedy awarded by an arbitrator. *See id.* at 124 (addressing whether the award of attorney fees was contrary to the Back Pay Act despite finding that the agency did not except to all the separate and independent grounds underlying the award). Because the Agency's exception regarding home leave challenges the legality of the remedy awarded by the Arbitrator, we will consider whether the award of home leave is contrary to law.[12] Exceptions at 5, 6 & n.4.

Also, based solely on his finding that the Agency violated Title VII, the Arbitrator awarded the grievants non-pecuniary damages because he found that the Agency improperly denied them home leave, PX privileges, and DoD school access. *See, e.g.*, Third Award at 49, 61. Moreover, contrary to the Union's contention, Title VII is the only available basis for the award of non-pecuniary damages.

In this regard, contrary to the Union's contention, the grievants would not be entitled to non-pecuniary damages under the Back Pay Act based on the Agency's various contractual violations. *See* Opp'n at 29. This is because the Back Pay Act covers only a withdrawal or reduction of an employee's pay, allowances, or differentials, *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Beaumont, Tex.*, 59 FLRA 466, 467 (2003), and damages for emotional distress are not pay, allowances, or differentials under the Back Pay Act. *See Soc. Sec. Admin., Balt., Md., v. FLRA*, 201 F.3d 465, 469 (D.C. Cir. 2000) (citing *Hurley v. United States*, 624 F.2d 93, 94-95 (10th Cir. 1980); *Morris v. United States*, 595 F.2d 591, 594 (Ct.Cl. 1979)) (indicating that the term "pay, allowances, or differentials" includes "only those amounts and benefits that the employee normally would have earned as part of his regular compensation during the period in question if the adverse personnel action had not occurred"). In addition, the Arbitrator's determination that the Agency violated the Fifth Amendment would not support the award of non-pecuniary damages. This is because the grievants could not receive an award of damages against the Agency for a violation of constitutional rights. *See U.S. Dep't of Health & Human Servs., Gallup Indian Med. Ctr., Navajo Area Indian Health Serv.*, 60 FLRA 202, 211 (2004) (holding that federal employees cannot obtain money damages for constitutional violations).

Therefore, because only one ground, Title VII, could support the Arbitrator's award of non-pecuniary damages, the award of non-pecuniary damages is not supported by separate and independent grounds, and we find it necessary to consider the Agency's exceptions relevant to the Arbitrator's award of non-pecuniary damages. *See Office of Pers. Mgmt.*, 61 FLRA 358, 363-64 (2005) (then-Member Pope dissenting in part on other grounds) (finding it necessary to consider whether the arbitrator's compensatory damages and attorney fees remedies were contrary to law because only one ground relied on by the arbitrator supported the award of those remedies); *cf. NTEU, Local 233*, 65 FLRA 802, 805 (2011) (finding it unnecessary to determine whether an award was based on an erroneous ground because another separate and independent ground was sufficient to support the award).

In sum, we will consider whether the award of home leave and the award of non-pecuniary damages are contrary to law.

V. Analysis and Conclusions

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. *See id.*

A. The award of home leave is contrary to law.

The Agency contends that the award of home leave is contrary to law. Exceptions at 4-5, 6 & n.4. In this regard, the Agency asserts that the Arbitrator erred in finding that the employees who both work and permanently reside in Puerto Rico have a right to home leave under 5 U.S.C. § 6305(a). *Id.* at 4. Instead, the Agency claims that home leave is available only to an employee serving outside of the United States and away

[12] The Agency claims that its exceptions regarding PX privileges and DoD school access challenge the remedies awarded by the Arbitrator. *See, e.g.*, Exceptions at 6. However, the Agency's exceptions do not challenge the legality of the Arbitrator's award of monetary damages for the denial of PX privileges and DoD school access. *See U.S. Dep't of Health & Human Servs., Food & Drug Admin., Pac. Region*, 55 FLRA 331, 336 (1999) (noting that the agency only argued that, because it had no duty to bargain over the substance of its decision to restructure its offices, the arbitrator's status quo ante remedy was inappropriate). Therefore, it is unnecessary to address these remedies further. *See id.* at 336-37 (denying the agency's exception because it failed to challenge a separate and independent ground supporting the arbitrator's award of the status quo ante remedy, and the agency's exceptions provided no basis for finding the status quo ante remedy deficient).

from his or her home, not to an employee both working and residing in Puerto Rico. *Id.* at 5.

Under § 6305(a)(1), home leave is available "for use in the United States, or[,] if the employee's place of residence is outside the area of employment, in its territories or possessions including the Commonwealth of Puerto Rico." 5 U.S.C. § 6305(a)(1). Home leave was applied to all federal agencies by Pub. L. 86-707, § 401(f), 74 Stat. 799 (Sept. 6, 1960). *See* 5 U.S.C. § 6305 note; S. Rep. 86-1647, 86th Cong. (2d Sess. 1960), *reprinted in* 1960 USCCAN 3338, 3349. Congress explained that, under then-existing law, U.S. employees working abroad for non-foreign affairs agencies accrued annual leave at the same rate as U.S. employees employed in the States. Congress noted that the employees working abroad used much of their existing leave "locally for personal business and recreation, so that frequently insufficient leave is available to permit trips home" and that "[p]eriodic vacations in the States are seen as desirable for all U.S. citizen employees." 1960 USCCAN at 3349. It found that the home-leave provision provides for additional leave to ensure that employees working abroad can return "home" to the United States. *Id.*

The Office of Personnel Management promulgated regulations under § 6305 defining "service abroad" as service "by an employee at a post of duty outside the United States and outside the employee's place of residence if his [or her] place of residence is in the Commonwealth of Puerto Rico or a territory or possession of the United States." 5 C.F.R. § 630.601. Under these regulations, home leave is earned by service abroad. 5 C.F.R. § 630.605(a). Consistent with these regulations, the Comptroller General has stated that employees serving in Puerto Rico whose permanent residences are in Puerto Rico are not entitled to home leave.[13] *See Matter of: Miquel Caban*, 63 Comp. Gen. 563, 568 (Sept. 5, 1984); *Matter of: Leon H. Liegel*, B-212697, 1983 WL 27772, at *3-4 (Dec. 23, 1983); *To Mrs. Carmen P. Casas*, B-176933, 1972 WL 6222, at *1-2 (Oct. 18, 1972).

Because the grievants work and permanently reside in Puerto Rico, they do not perform "service abroad" and, thus, cannot earn home leave. *See* 5 C.F.R. §§ 630.601, 630.605(a). Moreover, although the Union cites *Rivera-Rosario*, that case is distinguishable. Opp'n at 16. In *Rivera-Rosario*, the court found unlawful discrimination when the agency denied home leave to all employees of Puerto Rican origin. *Rivera-Rosario*, 151 F.3d at 35. However, the Agency here denied home leave to Puerto Rican employees permanently residing in Puerto Rico and granted home leave to Puerto Rican employees who permanently reside in the United States. Initial Award at 10-11 (noting that the Agency's policy distinguished between Puerto Rican employees recruited from Puerto Rico and Puerto Rican employees recruited from the continental United States).

Because the grievants do not perform "service abroad," they do not qualify for home leave under 5 C.F.R. §§ 630.601, 630.605(a). Further, because there is no basis for finding that the Agency can provide home leave to employees who do not qualify for it under 5 C.F.R. §§ 630.601, 630.605(a), the parties' agreement cannot provide a basis for the Arbitrator's award of home leave. *Cf. U.S. Dep't of the Air Force, Air Force Materiel Command, Eglin Air Force Base, Fla.*, 65 FLRA 908, 910 (2011) (finding that, because the terms of the agreement were inconsistent with the requirements of 5 C.F.R. § 551.431, the agreement could not provide a basis for the arbitrator's award of standby pay); *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Dallas, Tex.*, 64 FLRA 603, 605 (2010) (determining that parties may not negotiate over proposals that would entitled employees to standby pay unless such pay would be consistent with the requirements of § 551.431); *NFFE, Forest Serv. Council*, 45 FLRA 1204, 1211 (1992) (concluding that the disputed sections of the proposal were nonnegotiable because they were inconsistent with § 551.431, a government-wide regulation). Accordingly, we set aside the award of home leave as contrary to law.

In cases where the Authority sets aside an entire remedy, but an arbitrator's finding of an underlying violation is left undisturbed, the Authority remands the award for determination of an alternative remedy. *E.g.*, *U.S. Dep't of Transp., Fed. Aviation Admin., Salt Lake City, Utah*, 63 FLRA 673, 676 (2009). As we have left undisturbed the Arbitrator's finding of liability regarding home leave but have set aside the entire remedy with respect to that violation, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy. *See U.S. Dep't of Housing & Urban Dev.*, 65 FLRA 433, 436 (2011) (concluding that, because the entire remedy for the merits award was set aside, the award should be remanded to the parties for resubmission to the arbitrator, absent settlement, to formulate an alternative remedy); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Beckley, W. Va.*, 64 FLRA 775, 776 (2010) (finding that, because the entire remedy was set aside, but the arbitrator's finding of a contract violation was left undisturbed, the award should be remanded to the parties

[13] The Arbitrator quotes a Union brief to illustrate that the Agency acted contrary to the statute and regulation by denying home leave to St. Thomas to an employee who was recruited from there in 1993 to work in Puerto Rico. Initial Award at 9-10; *see also id.* at 11 n.5. However, the employee had moved his permanent residence to Puerto Rico before making the request for home leave in 2000. Tr., 1st Sess. 35-37, 86.

for resubmission to the arbitrator, absent settlement, to formulate an alternative remedy).

B. The award of non-pecuniary damages is contrary to law.

The Agency asserts that the Arbitrator erred when he found that the Agency engaged in disparate treatment and disparate impact discrimination because the grievants did not make a prima facie showing of either type of discrimination. Exceptions at 12-14, 19-20. In order to find disparate treatment or disparate impact discrimination, the Arbitrator was required to find that the grievants are members of a protected class. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (disparate treatment discrimination); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977) (disparate impact discrimination).

The Arbitrator found that the Agency discriminated against the grievants because they were recruited from Puerto Rico, rather than the continental United States, to work in Puerto Rico. Initial Award at 10-11, 17, 24. He justified his characterization of this group as within the protected class of national origin based on his "arbitral notice" that "in a sociological sense" Puerto Ricans consist of two national origin groups – one residing in Puerto Rico and the other residing on the mainland. *Id.* at 17 n.9. This reasoning is contrary to how the Equal Employment Opportunity Commission (EEOC) and the Supreme Court define "national origin."

In interpreting Title VII, the EEOC defines "national origin" "as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, *place of origin*; or because an individual has the physical, cultural[,] or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (emphasis added). Place of residency is not included in the EEOC's definition. Likewise, the Supreme Court, in interpreting Title VII, defines "national origin" as "the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) (emphasis added). Place of residence is not in the Supreme Court's definition of "national origin." Thus, the Arbitrator's view that the grievants make up a protected "national origin" class is unsupported.

It is well established that Puerto Ricans comprise one protected class based on national origin. *See, e.g., De la Cruz v. N.Y.C. Human Res. Admin. Dep't of Soc. Servs.*, 82 F.3d 16, 20 (2d Cir. 1996) (finding that, as a Puerto Rican, plaintiff was a member of a protected class); *Cruz v. Frank*, EEOC Appeal No. 01891512, 1989 WL 1005776, at *4 (1989); *Bass v. U.S. Postal Serv.*, EEOC Appeal No. 01830151, 1983 WL 412697, at *2 (1983). However, according to the Union's own evidence, the Agency did not discriminate against this class. Indeed, the class was treated favorably as the percentages of recipients of home leave, PX privileges, and DoD school access who were of Puerto Rican and Hispanic national origin were 81, 84, and 86, respectively. Exceptions at 19-20. Consequently, because the Agency did not violate the grievants' rights under Title VII, the Arbitrator's award of non-pecuniary damages is contrary to law.[14]

Accordingly, we set aside the award of non-pecuniary damages.[15]

VI. Decision

The Agency's exceptions regarding PX privileges and DoD school access are denied. The award of home leave is set aside and remanded to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy. The award of non-pecuniary damages is set aside.

[14] Because we have found that the Agency is not liable for non-pecuniary damages and that, as a result, the award of non-pecuniary damages is contrary to law, we find it unnecessary to address the Agency's remaining contentions regarding the award of non-pecuniary damages. *See U.S. Dep't of the Interior, Nat'l Park Serv., Pictured Rocks Nat'l Lakeshore, Munising, Mich.*, 61 FLRA 404, 407 & n.10 (2005) (finding that, because the arbitrator's award was contrary to law, it was unnecessary to address the agency's remaining contrary to law arguments).

[15] Whereas we left undisturbed the Arbitrator's finding of a violation with respect to home leave, here we determined that the Agency did not violate Title VII. Therefore, because, as to Title VII, there is no violation without a remedy, it is unnecessary to remand that aspect of the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

APPENDIX

5 U.S.C. § 6305(a)(1) provides:

> (a) After 24 months of continuous service outside the United States (or after a shorter period of such service if the employee's assignment is terminated for the convenience of the Government), an employee may be granted leave of absence, under regulations of the President, at a rate not to exceed [one] week for each [four] months of that service without regard to other leave provided by this subchapter. Leave so granted–
>
> (1) is for use in the United States, or if the employee's place of residence is outside the area of employment, in its territories or possessions including the Commonwealth of Puerto Rico. . . .

42 U.S.C. § 1981a(1) provides:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

5 C.F.R. § 630.601 provides, in pertinent part:

> Service abroad means service on and after September 6, 1960, by an employee at a post of duty outside the United States and outside the employee's place of residence if his [or her] place of residence is in the Commonwealth of Puerto Rico or a territory or possession of the United States.

Article 6b-2 provides:

> Employees have the right 'to be treated fairly in all aspects of personnel management.'

Initial Award at 6.

Article 6b-3 provides:

> Employees have the right 'to be free from discrimination based on their political affiliation, race, color, religion, national origin, sex, marital status, age, handicapping condition, Union membership or Union activity.'

Id.

Article 22 provides, in pertinent part:

> The Employer and the Union agree to cooperate in providing equal opportunity for all qualified persons; to prohibit unlawful discrimination because of age, sex, religion, color, national origin or physical handicap; and to promote full realization of full equality through a positive and continuing effort. . . .

Id. (internal quotation mark omitted).