66 FLRA No. 37

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES
CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-4457

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DECISION

September 29, 2011

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Andrée Y. McKissick filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator found that the Agency engaged in bad faith bargaining and violated the parties' agreement and the Statute when it unilaterally implemented a new rough duty uniform (RDU). For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency informed the Union that it would begin requiring Border Patrol Agents (agents) to wear a new RDU while on duty, and that each agent would receive an initial issuance of three of the new RDUs. Award at 3. The Union sought to bargain with the Agency over increasing the agents' starting set of RDUs from three to six RDUs per agent. *Id.* After informal discussions failed to yield an agreement, the Union submitted to the Agency nine proposals concerning the new RDU. *Id.* The Agency adopted Proposals 1 and 2, but rejected Proposals 3 through 9.[2] *Id.* at 13. Further correspondence between the parties, as well as a bargaining session and a mediation session, failed to produce an agreement on the number of new RDUs that the Agency would provide agents in the initial uniform issuance. *Id.* at 13-14. Subsequently, the Agency stated to the Union that it had fulfilled its bargaining obligations, and the Agency implemented the new RDUs. *Id.* at 4.

In response to the Agency's implementation, the Union filed the instant grievance, which was unresolved and proceeded to arbitration. *Id.* The stipulated issues before the Arbitrator stated, in pertinent part: "Did the Agency violate Article 25 of the [parties' agreement] and/or [the Statute] by unilaterally implementing a new [RDU] without adequately and fairly compensating employees for the cost of such uniforms? If so, what is the remedy?"[3] *Id.*

The Arbitrator found that the grievance was "grounded upon" Articles 3A and 25 of the parties' agreement,[4] *id.* at 11-12, as well as a prior arbitration award (Jaffe Award) in which an arbitrator interpreted the parties' agreement to require the Agency to "adequately and fairly compensate[] employees for the cost of [their] uniforms," *id.* at 14 (quoting Jaffe Award) (internal quotation marks omitted). The Arbitrator also found that "[i]mplicit in Article 25 of the [a]greement as well as the Jaffe Award is the need for fluidity and adaptability," but that "based upon the bargaining history involv[ed] [in] this dispute, the record does not show a willingness of the Agency to compromise." *Id.* In this regard, the Arbitrator found that the Union explained that agents needed a starting set of six RDUs because of the "severe weather conditions" that agents work in, the inability of agents to launder their uniforms during the work week, and "a compelling need to change clothes daily for sanitary reasons." *Id.* As a result of the Agency's failure to seriously consider the need for more than three new RDUs in the initial issuance, and the Agency's inflexibility on this point, the Arbitrator found that the Agency "violated both Article 3A and Article 25 of the [a]greement when it unilaterally implemented the new [RDUs] without adequately and fairly compensating the employees for the cost of the uniforms, as the Jaffe Award required." *Id.* at 14-15. The Arbitrator also found that the Agency engaged in an "ongoing course of bad

[1] Member Beck's separate opinion, dissenting in part, is set forth at the end of this decision.

[2] As set forth in greater detail below, the Agency provided the Authority with only the wording of three of the six disputed proposals, and only two of these were labeled with the corresponding proposal number.

[3] The Arbitrator also resolved the stipulated issue of the timeliness of the grievance and found that it was arbitrable. Award at 4, 11. As no exceptions were filed regarding this finding, we do not discuss it further.

[4] The pertinent provisions of Articles 3A and 25 of the parties' agreement are provided in the appendix to this decision.

faith bargaining, where no genuine give and take exchange occurred." *Id.* at 17.

In addition, the Arbitrator addressed whether Proposals 3 through 9 were negotiable as appropriate arrangements under § 7106(b)(3) of the Statute.[5] *Id.* at 15-16. In this regard, the Arbitrator found that the proposals affected the Agency's right to determine the "method or means of performing work" under § 7106(b)(1).[6] *See id.* at 15. However, the Arbitrator found that the proposals addressed the adverse effect of management's exercise of this right because the Agency's failure "to have a full complement of daily, clean uniforms accessible without cost" caused agents to suffer a "monetary loss," and that this "financial hardship" harmed agents' ability to "fully function on the job." *See id.* at 15-16. In addition, the Arbitrator stated that the Agency had "admitted" through the testimony of its witness "that five . . . to seven . . . [RDUs] were needed for the job." *Id.* at 15. Based on the foregoing, the Arbitrator concluded that the proposals were appropriate arrangements, *id.* at 15, 16, and that the Agency violated the Statute by unilaterally implementing the new RDU while issuing each agent only three RDUs, *see id.* at 17.

As a remedy, the Arbitrator directed the Agency to bargain with the Union over the implementation of the new RDU, "including[,] but not limited to[,] the Union's proposals 3 through 9 . . . ." *Id.* at 18. In addition, the Arbitrator directed the Agency to post her award "in all locations where notices to employees are normally posted," and to "cease and desist from engaging in bad faith bargaining." *Id.* Finally, the Arbitrator directed the Agency to provide "[a]n immediate, one-time increase in the uniform allotment for all bargaining unit employees equal to the cost of three . . . complete uniforms at the current rate." *Id.* at 17. The Arbitrator explained that this would allow agents who received three RDUs to buy three more, and would make whole agents who already had used their own money to purchase additional RDUs. *See id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the Arbitrator's award is contrary to law in four respects. First, the Agency argues that the award's requirement that the Agency negotiate with the Union over Proposals 3 through 9 is contrary to law because the proposals are non-negotiable. Exceptions at 11. In this regard, the Agency argues that the proposals are outside the scope of the Agency's change to conditions of employment, *id.* at 12-13, and that the proposals are not appropriate arrangements, *id.* at 14-19. Further, the Agency argues that its contractual duty to bargain does not apply to the Union's non-negotiable proposals because Article 3A of the parties' agreement "does not require the Agency to negotiate any matter that it is not required to negotiate under the law." *Id.* at 18.

Second, the Agency argues that the Arbitrator's finding that the Agency engaged in bad faith bargaining is contrary to law because the Agency made a good faith attempt to bargain with the Union. *Id.* at 22-24.

Third, the Agency argues that the monetary remedy awarded by the Arbitrator is contrary to the requirements of 5 U.S.C. § 5901 (uniform statute) and 5 C.F.R. §§ 591.103-591.104 (uniform regulations). *Id.* at 8-11. The uniform statute authorizes appropriations to fund either uniforms or uniform allowances for employees, *see* 5 U.S.C. § 5901,[7] and the uniform regulations provide a maximum uniform cost or allowance permissible unless an agency establishes a higher maximum uniform allowance rate.[8] *See* 5 C.F.R. §§ 591.103-591.104. The Agency argues that the maximum uniform allowance permissible under the uniform statute and regulations "may not exceed the average total uniform cost for the minimum basic uniform," Exceptions at 9 (quoting 5 C.F.R. § 591.104(b)) (internal quotation marks omitted), and that because the Agency's "standard initial issue" provides only three RDUs, "three is the only number of uniforms that can be considered to be the minimum basic uniform

[5] Section 7106(b)(3) of the Statute provides, in pertinent part, that "[n]othing . . . shall preclude any agency and any labor organization from negotiating . . . appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials." 5 U.S.C. § 7106(b)(3).

[6] Section 7106(b)(1) of the Statute provides, in pertinent part, that "[n]othing . . . shall preclude any agency and any labor organization from negotiating . . . at the election of the agency, on the . . . technology, methods, and means of performing work[.]" 5 U.S.C. § 7106(b)(1).

[7] As relevant here, the uniform statute authorizes agencies to either: "(1) furnish to each . . . employee[] a uniform . . . *or* (2) pay to each . . . employee[] an allowance for a uniform[,] . . . [which] may be paid only at the times and in the amounts authorized by the [uniform] regulations . . . ." 5 U.S.C. § 5901(a) (emphasis added).

[8] In this regard, the uniform regulations provide, in pertinent part that "[t]he head of an agency may establish one or more initial maximum uniform allowance rates greater than the [g]overnmentwide maximum uniform allowance rate . . . ." 5 C.F.R. § 591.104(a). The regulations also pertinently provide that an agency may establish a "higher initial maximum uniform allowance rate applicable to the initial year a new style or type of minimum basic uniform is required for a category of employees . . . ." *Id.* § 591.104(h).

mandated by" the uniform regulations, *id.* at 10. Thus, according to the Agency, the "immediate one-time increase in the uniform allotment" required by the award requires the Agency to exceed the maximum uniform allowance. *Id.* at 11 (quoting Award at 17) (internal quotation marks omitted).

Fourth, the Agency argues that the award's requirement that the Agency pay the increased uniform allotment to "all bargaining unit employees" is contrary to the Back Pay Act (BPA) because it requires the Agency to "pay money to employees who were not even arguably harmed by any alleged wrongful Agency action." *Id.* at 7. In this connection, the Agency asserts that the remedy is too broad because: (1) the bargaining unit includes employees who are not required to wear a uniform, *see id.* at 6, 7; and (2) the Agency's implementation of the new RDU did not "occasion a loss of pay, allowances, or differentials by *any* . . . bargaining unit employee," particularly those who were never issued the old RDU, *id.* at 8 (emphasis added). Similarly, the Agency argues that the Arbitrator exceeded her authority by granting relief to bargaining unit employees who were not encompassed within the grievance because they are not required to wear a uniform. *Id.* at 6-7.

Finally, the Agency claims that the Arbitrator's determination that agents "suffered financial harm" is based on a nonfact. *Id.* at 19. In this regard, the Agency argues that the Arbitrator erroneously determined that the Agency "admitted" through the testimony of its witness that five to seven RDUs "were needed for the job." *Id.* (quoting Award at 15) (internal quotation marks omitted). According to the Agency, this witness testified only that he owned approximately five to seven RDUs when he was employed as an agent, not that this number of RDUs were necessary to perform an agent's job. *Id.* at 20-21. The Agency asserts that the Arbitrator's erroneous factual finding about this testimony "was central to the Arbitrator's determination [that] the Agency failed to provide 'fair and adequate compensation' . . . by merely providing three RDUs." *Id.* at 19-20. *See also id.* at 21.

B. Union's Opposition

The Union argues that the award is not contrary to law because: (1) the Union's proposals were negotiable and within the scope of the Agency's change, *see* Opp'n at 21; (2) the Agency's conduct constituted bad faith bargaining, *id.* at 19; (3) the uniform statute and regulations provide the Agency with the discretion to determine the "minimum basic uniform," *id.* at 18 (quoting 5 C.F.R. § 591.104(b)) (internal quotation marks omitted); and (4) the Arbitrator's finding that agents were financially harmed by the Agency's violation of the parties' agreement meets the requirements of the BPA, *id.* at 16. The Union also argues that the Arbitrator did not exceed her authority because the only bargaining unit employees who would receive the increased uniform allotment are those who wear a uniform and receive a uniform allowance. *Id.* at 10. Finally, the Union asserts that the factual finding challenged by the Agency as a nonfact was disputed by the parties before the Arbitrator, *id.* at 12, and is not clearly erroneous, *id.* at 14.

IV. Analysis and Conclusions

A. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*Local 1437*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. The Arbitrator's remedy directing the Agency to bargain over the Union's proposals is not contrary to the Statute.

The Agency argues that the Arbitrator's direction that the Agency "negotiate with the Union over the implementation of a [new RDU], including[,] but not limited to[,] the Union's proposals 3 through 9," Award at 18, is contrary to law because the proposals are non-negotiable under the Statute, Exceptions at 11-19. The Authority's Regulations that were in effect when the Agency filed its exceptions provided that an exception must be a self-contained document and that a party filing an exception to an arbitration award has the burden of creating a record upon which the Authority can make a decision, including setting forth in full "[a]rguments in support of the stated grounds [for review], together with specific reference to the pertinent documents and citations of authorities; and . . . legible copies of other pertinent documents."[9] 5 C.F.R. § 2425.2. As noted previously, the Agency did not provide the Authority with the wording of Proposals 3 through 9 in their entirety. However, the Agency submitted the arbitration hearing transcript, which includes the complete, or substantially complete, wording of Proposals 3 and 5, as

[9] The Authority's Regulations concerning the review of arbitration awards, including § 2425.2, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency's exceptions were filed before that date, we apply the prior Regulations.

well as an unnumbered proposal.[10] Exceptions, Attach. 3, Tr. at 146, 265-67. Accordingly, we find that this exception is procedurally sufficient regarding the three proposals contained in the transcript.

However, the Agency has neither provided a legible copy of the remaining proposals, nor set forth the complete, or substantially complete, wording of those proposals, and the proposals are not set forth in the award, the Union's opposition, or elsewhere in the record. Thus, the Agency has not established an evidentiary record sufficient to prove its assertions regarding the remaining disputed proposals, and we deny the exceptions pertaining to these proposals. *See, e.g., U.S. Dep't of the Army, Corps of Eng'rs, Nw. Div., Portland Dist., Portland, Or.*, 59 FLRA 86, 88 (2003) (Member Armendariz dissenting).

With regard to the merits of the exception, where a grievance involves a dispute regarding a bargaining obligation established by the parties through an agreement, "the issue of whether the parties have complied with the agreement becomes a matter of contract interpretation for the arbitrator." *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010) (*Broad. Bd.*) (quoting *Soc. Sec. Admin., Balt., Md.*, 55 FLRA 1063, 1068 (1999) (*SSA Balt.*) (internal quotation marks omitted)). In addition, the Authority has recognized that when an arbitrator bases 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. *Soc. Sec. Admin., Office of Disability Adjudication & Review*, 64 FLRA 1000, 1002 (2010) (*SSA*) (citing *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000)). In those circumstances, if the excepting party does not demonstrate that the award is deficient on one of the grounds relied on by the Arbitrator, then it is unnecessary to address exceptions to the other grounds. *Id.*

The Arbitrator found that the Agency violated Articles 3A and 25 of the parties' agreement, the Jaffe Award, and the Statute when it unilaterally implemented the new RDUs without completing bargaining with the Union over the proposals. Award at 14-17. Article 25 obligates the Agency to "notify and discuss with the Union, all proposed uniform changes, additions and deletions, prior to circulation to the field." *Id.* at 5. The Arbitrator found that the Agency violated this article by demonstrating an unwillingness to compromise, failing to seriously consider the need for more than three new RDUs in the initial issuance, and unilaterally implementing the new RDU without completing bargaining. *See id.* at 14-15. The Agency has not alleged that the Arbitrator's interpretation of Article 25 fails to draw its essence from the parties' agreement. Thus, even assuming that the Arbitrator misinterpreted the Agency's *statutory* duty to bargain, the Arbitrator's finding that the Agency violated its *contractual* duty to bargain under Article 25 provides a separate and independent basis for directing the Agency to bargain with the Union over its proposals.[11] Accordingly, the Agency's argument that the award is contrary to the Statute because it requires the Agency to bargain over proposals concerning matters outside the scope of the Agency's change to conditions of employment – a principle that applies in cases involving *statutory* bargaining obligations, *see U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 870, 872-73 (2011) – does not provide a basis for setting aside the award.[12] *See SSA*, 64 FLRA at 1002.

[10] Although the record is unclear as to the exact, complete wording of Proposal 3, the record indicates that Proposal 3 effectively states that "as soon as [an agent] receives a full set of the nylon web gear, he or she will be authorized to wear it with either the old or the new style [RDU]." Exceptions, Attach. 3, Tr. at 265-66. Proposal 5 states: "Effective immediately, the use of the new style [RDU] is authorized for all [agents] in all circumstances where the wearing of the [RDU] is appropriate." *Id.* at 267. The record is unclear as to both the proposal number and the exact, complete wording of another of the disputed proposals. However, the record indicates that this proposal effectively states that:

> no employees [shall] be forced to purchase any portion of the full initial complement of six complete sets of new style [RDUs] with personal funds or their uniform allotment nor be required to cease wearing old style [RDUs] until such time as all phases of bargaining including the resolution of all intended third party proceedings have been completed.

Id. at 146.

[11] We note that the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently held that an excepting party was not required to file a separate exception in order to challenge the contractual basis for an award where the award did not make a sufficient distinction between the separate statutory and contractual grounds for the award. *Fed. Bureau of Prisons v. FLRA*, No. 10-1089, 2011 WL 2652437 at *6 (D.C. Cir. July 8, 2011), *granting pet. for review of U.S. Dep't of Justice, Fed. Bureau of Prisons, Wash., D.C.*, 64 FLRA 559 (2010). That decision is distinguishable because, unlike the award at issue there, the award at issue here includes clearly distinct sections containing separate analyses regarding the Arbitrator's findings concerning contractual and statutory violations. *See* Award at 14-16.

[12] The Authority has held that where a contract provision restates a provision of the Statute, the Authority "must exercise care" to ensure that an arbitral interpretation of the contract provision is consistent with Authority precedent interpreting the statutory provision. *Gen. Servs. Admin., Region 9, L.A., Cal.*, 56 FLRA 683, 685 (2000) (quoting *U.S. Dep't of Def., Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, 43 FLRA 147, 153 (1991)). Although the Agency correctly asserts that Article 3A places limitations on the Union by stating that Union proposals "must be responsive to either the [Agency's] proposed change or the impact of the proposed change," and restates statutory obligations by stating that "[n]othing in *this*

See also Broad. Bd., 64 FLRA at 891 (exception arguing no statutory duty to bargain did not establish that finding of contractual duty to bargain was contrary to law).

The Agency also argues that the disputed proposals are non-negotiable because they are not appropriate arrangements. Exceptions at 14-19. Although the Agency does not specify which management right the award conflicts with, the Arbitrator found, and there is no dispute, that matters concerning the RDU implicate the "method or means of performing work" under § 7106(b)(1). *See* Award at 15.

Section 7106(b)(1) of the Statute makes clear that matters concerning the "technology, methods, and means of performing work" are negotiable "at the election of the agency[.]" 5 U.S.C. § 7106(b)(1). Consistent with this section, an agency may elect to bargain over these matters, and a contractual agreement to bargain over § 7106(b)(1) matters is enforceable through grievance arbitration. *SSA Balt.*, 55 FLRA at 1068-69. By finding that the Agency was bound by – and had violated – Article 25's requirements concerning the Agency's obligation to bargain over the RDU, the Arbitrator effectively found that the Agency had made a contractual election to bargain over certain § 7106(b)(1) matters. *See* Award at 14-15. As a result, the Agency had a contractual obligation to bargain over these proposals without regard to whether the proposals are appropriate arrangements under § 7106(b)(3) of the Statute. Accordingly, the Agency's argument that the Union's proposals are not appropriate arrangements does not provide a basis for setting aside the award. *See SSA Balt.*, 55 FLRA at 1068-69.

For the foregoing reasons, we deny the Agency's exception arguing that the Arbitrator's remedy directing the Agency to bargain over the Union's proposals is contrary to law.

2. The Arbitrator's finding that the Agency engaged in bad faith bargaining is not contrary to the Statute.

In the section of her award in which the Arbitrator found that the Agency violated Articles 3A and 25 and the Jaffe Award, the Arbitrator discussed the parties' conduct during bargaining. Award at 14. Specifically, the Arbitrator found that "[i]mplicit in Article 25 . . . [and] the Jaffe Award is the need for fluidity and adaptability," and that, "based upon the bargaining history involv[ed] [in] this dispute, the record does not show a willingness of the Agency to compromise." *Id.* As a result of the Agency's failure to seriously consider the need for more than three new RDUs in the initial issuance, and the Agency's inflexibility on this point, the Arbitrator found that the Agency violated the Articles 3A and 25 and the Jaffe Award. *Id.* at 14-15. In a later section of her award, in which she did not discuss the Statute, the Arbitrator reiterated that the Agency demonstrated "rigidity" regarding the number of RDUs necessary for the initial issuance, and engaged in an "ongoing course of bad faith bargaining, where no genuine give and take exchange occurred." *Id.* at 17. At no point did the Arbitrator expressly find that the Agency violated the *statutory* duty to bargain in good faith. Moreover, a review of the pertinent provisions of the award in context supports a conclusion that the Arbitrator found that the Agency's bargaining conduct violated the parties' agreement. *See id.* at 14-15, 17.

The Agency argues that the Arbitrator's finding that the Agency engaged in bad faith bargaining is contrary to the Statute. Exceptions at 22-24. However, statutory principles are inapplicable to an arbitrator's interpretation of a contractual bargaining obligation, *see Broad. Bd.*, 64 FLRA at 891, and the Agency does not argue that the Arbitrator's finding that the Agency engaged in bad faith bargaining fails to draw its essence from the parties' agreement. Because the Arbitrator's finding of bad faith bargaining was based on her interpretation of the parties' agreement, not the Statute, the Agency's statutory arguments are inapposite and provide no basis for finding the award contrary to law. Accordingly, we deny the Agency's exception arguing that the Arbitrator's finding that the Agency engaged in bad faith bargaining is contrary to law.

3. The monetary remedy awarded by the Arbitrator is not contrary to the uniform statute and regulations.

The Agency argues that the monetary remedy awarded by the Arbitrator is contrary to the requirements of the uniform statute and regulations. Exceptions at 8-11. As set forth above, the uniform statute authorizes appropriations to fund either uniforms or uniform allowances for employees. *See* 5 U.S.C. § 5901. The uniform statute and regulations provide a maximum uniform cost or allowance permissible unless an agency establishes a higher maximum uniform allowance rate. *See* 5 U.S.C. § 5901; 5 C.F.R. §§ 591.103-591.104. If an agency establishes such a higher uniform allowance rate, then this rate "may not exceed the average total uniform cost for the minimum basic uniform for the affected employees . . . ." 5 C.F.R. § 591.104(b). In this regard, the Agency argues that because the Agency's "standard

article shall require either party to negotiate on any matter it is not obligated to negotiate under applicable law," Award at 6 (emphasis added), the Agency does not allege, and there is no basis for concluding, that Article 25 similarly limits the parties' bargaining obligations or restates statutory bargaining obligations.

initial issue" provides only three RDUs, "three is the only number of uniforms that can be considered to be the minimum basic uniform mandated by" the uniform regulations. Exceptions at 10. Thus, according to the Agency, the award's requirement of an "immediate one-time increase in the uniform allotment . . . equal to the cost of three . . . complete uniforms," Award at 17, so that employees are compensated for a total of six RDUs, forces the Agency to exceed the maximum uniform allowance permitted under the uniform statute and regulations, Exceptions at 11.[13]

The Agency has the discretion to determine what constitutes the "minimum basic uniform" within the meaning of the uniform regulations. 5 C.F.R. § 591.104(b). Although the Agency asserts that it currently issues three RDUs to new agents, neither this fact, nor the uniform statute and regulations, establishes that the Agency could not determine that six RDUs constitute the "minimum basic uniform." *Id.* By finding that the Agency was obligated to "adequately and fairly compensate[] employees for the cost of . . . uniforms," Award at 14 (quoting Jaffe Award) (internal quotation marks omitted), and that the Agency was therefore required by the Jaffe Award and the parties' agreement to compensate employees for the cost of six RDUs, *id.* at 14-15, 17, the Arbitrator effectively found that the Agency obligated itself to exercise its discretion to make six RDUs the "minimum basic uniform" for purposes of the uniform regulations, 5 C.F.R. § 591.104(b).[14] Accordingly, the Agency has not established that the award is contrary to the uniform statute and regulations, and we deny the Agency's exception arguing that the award is contrary to law in this regard.

4. The monetary remedy awarded by the Arbitrator is not contrary to the BPA.

Under the BPA, an award of backpay is authorized only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action has resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *See, e.g.*, *U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1218-19 (1998) (*HHS*). A violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action under the BPA. *See id.* at 1220. With regard to the second requirement, the Authority has held that "'it will not look behind an arbitrator's award in cases where the requisite 'but for' finding is made' and is supported by other factual findings." *U.S. Dep't of Transp., Fed. Aviation Admin.*, 64 FLRA 922, 923 (2010) (*FAA*) (quoting *HHS*, 54 FLRA at 1219 n.9).

First, the Agency argues that the award is contrary to the BPA because it grants a monetary remedy to all bargaining unit employees, despite the fact that not all of these employees were harmed because some employees do not wear a uniform. *See* Exceptions at 6, 7. However, the award directs the Agency to pay an "immediate, one-time *increase* in the uniform allotment for all bargaining unit employees," Award at 17 (emphasis added), and, as the Union concedes, "[t]he *only* employees who receive a uniform [allotment] are those who wear the uniform," Opp'n at 10. Because employees who do not wear the uniform are not entitled to the one-time increased uniform allotment under the award, we find that the Agency's argument does not provide a basis for setting aside the award as contrary to law.

[13] The Agency does not assert that the awarded remedy would force the Agency to exceed the dollar limit imposed by the uniform statute and regulations.

[14] We note that in a recent D.C. Circuit decision involving a different uniform statute, 10 U.S.C. § 1593, the Court stated that the Authority must defer to an agency's reasonable interpretation of a uniform statute administered by that agency. *U.S. Dep't of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base v. FLRA*, No. 10-1299, 2011 WL 2135732 at *6 (D.C. Cir. May 27, 2011) (*Seymour Johnson*), *granting pet. for review of NAIL, Local 7*, 64 FLRA 1194 (2010). However, the uniform statute here authorizes the Office of Personnel Management (OPM) – not the Agency – to prescribe regulations necessary for the administration of the uniform statute. *See* 5 U.S.C. § 5901(a) ("The [uniform] allowance may be paid only at the times and in the amounts authorized by the regulations prescribed under section 5903 of this title"); *id.* § 5903 ("[OPM] may prescribe such regulations as it considers necessary for the administration of this subchapter."). Thus, OPM – not the Agency – promulgated the uniform regulations. 5 C.F.R. § 591.101 ("This subpart prescribes the regulations authorized by section 5903 of title 5, United States Code, for the payment of uniform allowances."). As such, this case is distinguishable from *Seymour Johnson* because there is no basis for concluding that the Agency's interpretation of the uniform regulations is entitled to any deference. In addition, *Seymour Johnson* involved an Authority negotiability decision finding that an agency was required to exercise its discretion to bargain over certain proposals. By contrast, here, as discussed above, the Arbitrator effectively found that the Agency had *already* exercised its discretion, as authorized by the uniform regulations, to increase the "minimum basic uniform" to meet the needs of its employees via its agreement with the Union. 5 C.F.R. § 591.104(b); *see also id.* § 591.104(a) & (g); Award at 14-15. In this regard, the Arbitrator found that the Agency's contractual obligation to furnish uniforms to its employees was interpreted by the Jaffe Award to require the Agency to "adequately and fairly compensate[] employees for the cost of [their] uniforms," and that the Agency violated this contractual obligation by failing to issue six RDUs. *See* Award at 12, 14-15 (quoting Jaffe Award) (internal quotation marks omitted). Thus, *Seymour Johnson* is distinguishable on this basis as well.

Second, the Agency argues that the award is contrary to the BPA because the Agency's implementation of the new RDU did not "occasion a loss of pay, allowances, or differentials by *any* . . . bargaining unit employee," particularly those agents who were never issued the old RDU. Exceptions at 8 (emphasis added). To the extent that the Agency argues that the award does not satisfy the first requirement of the BPA, as discussed previously, the Arbitrator found that the Agency violated the parties' agreement when it unilaterally implemented the new RDUs without adequately and fairly compensating the employees for the cost of six RDUs. *See* Award at 14-15. Because a violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action, *HHS*, 54 FLRA at 1220, we find that the award satisfies the first requirement under the BPA.

With regard to the second requirement, the Arbitrator found that the Agency's issuance of only three RDUs caused a "monetary loss" and that "[a]gents were financially disadvantaged by not having a full complement of daily uniforms." *See* Award at 15. The Arbitrator's factual findings support the conclusion that all agents who are required to wear a uniform suffered a reduction in allowance by not receiving the necessary six RDUs (or the equivalent uniform allowance) when the Agency implemented the new RDU. With one exception, which we reject below, the Agency does not argue that these factual findings are based on a nonfact, and the Authority defers to an arbitrator's factual findings in conducting a de novo review of the Arbitrator's legal conclusions. *See Local 1437*, 53 FLRA at 1710. *See also FAA*, 64 FLRA at 923. Accordingly, we find that the award satisfies the second requirement under the BPA.

For the foregoing reasons, we deny the Agency's exceptions arguing that the award is contrary to the BPA.

B. The Arbitrator did not exceed her authority.

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 persons who are not encompassed within the grievance. *U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995).

The Agency argues that the Arbitrator exceeded her authority by granting relief to bargaining unit employees who were not encompassed within the grievance because they are not required to wear a uniform. Exceptions at 6-7. However, as conceded by the Union and discussed above, the award does not apply to employees who do not wear the uniform. *See* Award at 17; Opp'n at 10. Therefore, we find that the Agency's argument does not provide a basis for setting aside the award, and we deny the Agency's exceeded authority exception.

C. The award is not based on a nonfact.

The Agency asserts that the Arbitrator's erroneous finding that the Agency "'admitted'" that five to seven RDUs "'were needed for the job'" is a nonfact that "was central to the Arbitrator's determination [that] the Agency failed to provide 'fair and adequate compensation' . . . by merely providing three RDUs." Exceptions at 19-20 (quoting Award at 15). *See also id.* at 21.

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) (*NFFE*). *See, e.g.*, *U.S. Dep't of Veterans Affairs, VA Med. Ctr., Dayton, Ohio*, 65 FLRA 988, 992-93 (2011) (*VA Dayton*) (denying nonfact exception alleging that arbitrator mischaracterized testimony because the excepting party did not demonstrate that, but for this finding, the arbitrator would have reached a different result). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See, e.g.*, *VA Dayton*, 65 FLRA at 993; *NFFE*, 56 FLRA at 41-42.

In finding that agents needed more than three RDUs, the Arbitrator relied not only on the allegedly mischaracterized testimony, but also on the "changed circumstances" since the Jaffe Award, such as "severe weather conditions, the inability of the employees to wash mid-week and a compelling need to change clothes daily for sanitary reasons." Award at 14. These additional findings support the Arbitrator's conclusion that the Agency's issuance of only three RDUs was insufficient.[15] *See id.* at 14-15. Thus, the Agency has not established that the Arbitrator's alleged mischaracterization of testimony was a central fact, but for which the Arbitrator would have reached a different result. *See VA Dayton*, 65 FLRA at 992-93. Accordingly, we find that the Agency has not established that the award is based on a nonfact, and we deny the exception.

[15] To the extent that the Agency's exception could be construed as challenging as a nonfact the Arbitrator's ultimate finding that agents were financially harmed by the Agency's issuance of only three RDUs, we reject this argument because this issue was disputed at arbitration. *See* Award at 10, 16; *see, e.g.*, *VA Dayton*, 65 FLRA at 993; *NFFE*, 56 FLRA at 41-42.

V. Decision

The Agency's exceptions are denied.

APPENDIX

Article 3A of the parties' agreement provides, in pertinent part, that, when the need arises for the Agency to change "existing . . . regulations covering personnel policies, practices, and/or working conditions not covered by this agreement[,]" then the Agency:

> shall present the changes it wishes to make to the existing rules, regulations and existing practices to the Union. The Union will present its views and concerns (which must be responsive to either the proposed change or the impact of the proposed change) within a set time after receiving notice from [m]anagement of the proposed change. . . . Nothing in this article shall require either party to negotiate on any matter it is not obligated to negotiate under applicable law.

Award at 6.

Article 25 of the parties agreement provides, in pertinent part:

> A. The employer has determined that the maintenance of a uniformed force of employees will promote the law enforcement mission of the [Agency]. Accordingly, determinations regarding which employees will wear a uniform and when, where, and under what circumstances the uniform or uniforms determined to be appropriate will be worn are rights reserved to management.
> B. . . . . The employer . . . shall maintain a uniform program under which agents may obtain uniform items either through payment of a uniform allowance or . . . through a voucher system.
> C. The [A]gency will notify and discuss with the Union, all proposed uniform changes, additions and deletions, prior to circulation to the field.
> . . . .
> G. (1) The basic uniform allowance received in the first year of employment shall be sufficient to purchase the required minimum number of uniform items required by [Agency] policy. Its use may be restricted by the [Agency] as follows: The initial uniform purchase shall consist of only those items required for training at the Border Patrol Academy. The balance of the basic allowance may be used to purchase those items needed for graduation from the Border Patrol Academy and all other items required by [Agency] policy during the first year of employment.
> (2) The replacement uniform allowance received in the second and subsequent years of employment shall be the maximum amount allowable under law.
> H. In the event the [e]mployer is not legally able to pay the uniform allowance in Section G, the [e]mployer will furnish the employees any and all uniform items the employees may be required to wear.
> . . . .

Id. at 5.

Member Beck, Dissenting:

I agree with the Majority's conclusion that the Agency failed to engage in bargaining as required by the parties' collective bargaining agreement.

Contrary to my colleagues, I would conclude that the Arbitrator's Award is contrary to law insofar as it requires the Agency to increase the allotment for rough duty uniforms (RDUs) from the equivalent of three to six uniforms for an "immediate one-time increase." Award at 17.

The Agency is authorized to determine both a "minimum basic uniform allowance" and an "initial maximum uniform allowance" that "does not exceed" the minimum allowance. 5 C.F.R. § 591.104(a) and (b). In either event, the uniform allowance or cost of the uniforms may not exceed $800 in a given year. 5 U.S.C. § 5901(a) ("Uniform Statute"); 5 C.F.R. § 591.103.

The Agency determined that Border Patrol Agents require three rough duty uniforms to perform their duties. Award at 3. The United States Court of Appeals for the District of Columbia Circuit recently determined that we "owe deference" to an Agency's "reasonable interpretation" of the Uniform Statute.[1] *U.S. Dep't of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base v. FLRA*, No. 10-1299, 2011 WL 2135732 at *6 (D.C. Cir. May 27, 2011) (*Seymour Johnson*) *granting pet. for review of NAIL, Local 7*, 64 FLRA 1194, 1200 (2010). The Court specifically rejected our analysis that the agency was required to bargain over a proposal that would have provided an allowance for the cleaning of uniforms simply because the proposal "did not require" an expenditure in "excess of the minimum." *Id*. at *5.

The Majority's conclusion here is based on the same flawed analysis – that, because the Agency "has the discretion" to determine what constitutes the "minimum basic uniform" requirement, the Agency is "obligated . . . to exercise its discretion to make six RDUs the 'minimum basic uniform' for purposes of the uniform regulation."[2] Majority at 9.

Accordingly, I would conclude that the Arbitrator's remedy that requires the Agency to provide six uniforms is contrary to law.

[1] The Majority's footnote 14 is based on several non sequiturs. The Court in *Seymour Johnson* makes no distinction between 10 U.S.C. § 1593 (specific to the Armed Forces) and 5 U.S.C. § 5901 (specific to non-military government organizations) as does the Majority. To the contrary, the Court clearly equates the two uniform statutes (and their corresponding regulations) and cites to the legislative history of § 5901 to support its conclusion that the Authority must defer to the Air Force's interpretation of § 1593 (even though the Department of Defense, not the Air Force, administers that Statute). *See Seymour Johnson* at *6 (the Air Force's interpretation of 10 U.S.C. § 1593 is the same as the interpretation of the Department of Defense). In similar fashion, 5 C.F.R. § 591.103-591.104 grants "the head of each agency concerned" specific authority to pay an allowance, to furnish uniforms, or to establish an initial maximum allowance. The Court determined that we must defer to the Agency's interpretation of that authority. *Seymour Johnson* at *6.

[2] On at least two occasions the Authority has implied that a proposal that "prescribe[s] a particular amount to be expended" by an agency would interfere with the agency's discretion under the Uniform Statute. *See NAIL, Local 7*, 64 FLRA 1194, 1200 (2010) (the Authority has held that where, as here, the proposal does not prescribe *a particular amount* to be expended the Uniform Statute permits the agency to explore possibilities for agreement) (emphasis added) (citing *AFGE Council 214*, 30 FLRA 1025, 1034 (1988)).