66 FLRA No. 88

NATIONAL LABOR RELATIONS BOARD
REGION 9
CINCINNATI, OHIO
(Agency)

and

NATIONAL LABOR RELATIONS BOARD UNION
(Union)

0-AR-4782

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DECISION

January 31, 2012

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Mollie H. Bowers 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]

During a snow and ice storm, an Agency Regional Director (Director) did not close the office at issue, but permitted employees to report for work two hours late. The Arbitrator found that the Director violated the parties' agreements by charging those employees who did not report for work at all that day with annual leave for all but the first two hours of the day. Consequently, the Arbitrator directed the Director to interview those employees who did not report for work to determine, on a case-by-case basis, whether each employee should be charged with annual leave. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

When a snow and ice storm affected the Cincinnati, Ohio area, the Director decided to keep the office at issue open, but with a two-hour delayed opening. Award at 3-4. Because the office typically opened at 8:30 a.m., the delayed opening meant that the Agency gave employees two hours of administrative leave, and expected them to report to work no later than 10:30 a.m. *Id.* at 4. At 10:00 a.m., the county sheriff's office issued a "level 3 snow emergency" (travel ban), which meant that all traffic, including public transportation, was prohibited and that violators would be subject to arrest. *Id.* at 5. Of the Agency's forty-three employees, only seven reported to work that day. *Id.* at 12-13. The Director charged those employees who did not report to work at all that day with annual leave from 10:30 a.m. until the end of the business day. *Id.* at 5.

The Union filed a grievance challenging the Director's actions. The grievance was unresolved and submitted to arbitration, where the parties stipulated to the following issues:

> Did the [Director] . . . violate the [parties'] applicable . . . agreements by: (a) refusing to close the office [on the day at issue]; and/or (b) failing to grant administrative or other leave to unit employees who were prevented from getting to work on [that day] . . . because of [the] severe weather emergency. If so, what is the remedy?

Id. at 1.

The parties' arguments to the Arbitrator relied on two different provisions of the parties' agreements.[2] The Union argued that the Director's actions violated Article 4, Section 7 (Article 4), which provides, in pertinent part, that "[e]mployees will not be subject to arbitrary or unreasonable acts by a management official or supervisor which would otherwise be grievable under" the parties' negotiated grievance procedure. *Id.* at 2; *see also id.* at 11. However, the Agency argued that the Director properly exercised his discretion under Article 14, Section 4 (Article 14), which states, in pertinent part, that "[w]hen severe weather emergencies, general transportation emergencies, or other emergencies . . . occur in the commuting area of a field office which prevent employees from getting to or from work, the [Director] . . . may exercise discretion to grant administrative or other leave to employees." *Id.* at 2; *see also id.* at 16-17. Article 14 further provides that the Director "will give consideration to local [Federal Executive Board (FEB)] guidance, if any, in exercising the discretion to grant administrative leave or other leave to employees," but that "[i]f no . . . FEB guidance is available, the [Director] . . . will exercise discretion to

[1] As discussed further below, the Authority issued an Order directing the Agency to show cause why its exceptions should not be dismissed as interlocutory, and the Agency and the Union each filed a response.

[2] Although two different agreements applied to the professional and clerical employees involved in this matter, the wording of the pertinent provisions is identical in both agreements. Award at 2.

grant administrative or other leave to employees." *Id.* at 2.

Before the Arbitrator, one employee testified that, on the day at issue, he did not report to work because he heard on the radio that there was a travel ban and that violators of the ban could be arrested. *Id.* at 6. Another employee testified that she did not report for work because weather conditions made it impossible for her to get to her bus stop. *Id.* at 7. A third employee (compliance officer) testified that, unaware of the travel ban, he left his house after the travel ban was in effect and arrived at work fifty minutes late. *Id.* at 8. The Arbitrator found that the compliance officer was not charged annual leave for those fifty minutes, *id.*, and that this constituted "disparate treatment" by the Director, *id.* at 22.

A program specialist for the Greater Cincinnati FEB testified generally about the FEB's ability to make recommendations in emergency situations, but did not testify that the FEB provided any guidance to the Director on the day in question. *See id.* at 6. The Director testified that he took a walk at lunchtime that day and observed that many businesses, and most federal agencies, in downtown Cincinnati were open. *Id.* at 5. However, the Arbitrator found that this claim was "without evidentiary support." *Id.* at 18. In addition, although the Director testified that important deadlines might expire and affect the rights of the Agency's customers if the office were closed, the Arbitrator found that "[t]he important deadline that the Director was concerned about was the end of month report to the [Agency] headquarters on cases closed . . . [which] affects his pay and performance evaluation." *Id.* at 21.

Ultimately, the Arbitrator found that the Director's decision to keep the office open did not violate the parties' agreements. *Id.* at 18, 21-22. However, the Arbitrator found that "the Union succeeded in establishing a prima facie case that the [Director] erred in his decision to charge all employees, save [the] [c]ompliance [o]fficer . . . with annual leave." *Id.* at 19. "As a consequence," the Arbitrator found that "the burden of proof shift[ed] to the Agency to substantiate [the Director's] decision." *Id.*

Regarding that decision, the Arbitrator found that "[i]t was incumbent upon [the Director] to determine, among the employees who did not report for work, which [employees] simply did not come in because the weather was bad and which [employees] made every effort they could be reasonably expected to make and could not get to the office." *Id.* The Arbitrator determined that the Director "failed to engage in due diligence" because there was no evidence that the Director "ever talked to the employees who did not report for work to determine the reasons why." *Id.* In addition, the Arbitrator found that the travel ban served an important public-safety purpose, affected public transportation, and made violators subject to arrest, and, thus, that the Director "acted arbitrarily and capriciously when he decided that the [travel ban] was, in effect, of de minimis importance to an employee[']s 'choice' whether or not to report for work." *Id.* at 20.

Based on the foregoing, the Arbitrator found that the Director's determination "that all employees who did not report for work[] by 10:30 a.m. . . . should be charged with annual leave for the remainder of the day," *id.* at 22, "represented an arbitrary and capricious exercise of management rights," *id.* at 21. Accordingly, she sustained the grievance in part. *Id.*

As a remedy, the Arbitrator directed the Director to interview all employees who did not report to work by 10:30 a.m. that day "to determine whether or not each could have reported for work and just chose not to, or could not report for work because of the weather conditions; including the availability of public transportation before 10:00 a.m. [when the travel ban went into effect]." *Id.* at 22. The Arbitrator required the Director "to review this information and to determine, on a case[-]by[-]case basis, whether the employee involved should be charged with annual leave after 10:30 a.m. [that day]." *Id.* The Arbitrator retained jurisdiction "until the parties present, in writing, a mutually agreed to resolution." *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to § 7106 of the Statute because the Director's "decision to open or close the office" was based on management's exercise of its rights under the Statute. Exceptions at 12 (citing 5 U.S.C. § 7106(a)). Similarly, the Agency argues that the award is contrary to public policy because the Arbitrator required the Agency to justify its decision to keep the office open. *Id.* at 19. Specifically, the Agency asserts that the award is contrary to "Congressional public policy" requiring the Agency to be available to the public, especially given that a closure could preclude parties from filing timely charges. *Id.*

The Agency also argues that the Arbitrator exceeded her authority in two respects. First, the Agency asserts that the Arbitrator lacked the authority to review what she characterized as an "'arbitrary and capricious exercise of' management rights." *Id.* at 12 (quoting Award at 21). Second, the Agency argues that the Arbitrator exceeded her authority by requiring, in the remedy portion of her award, that the parties reach "'a mutually agreed to resolution.'" *Id.* at 21-22 (quoting Award at 22). Specifically, the Agency argues that "[t]he Arbitrator has no authority to recast her role into one of

overseeing the parties' negotiations over how to resolve the very matter the Arbitrator was retained to decide." *Id.* at 22.

In addition, the Agency argues that the remedy is "ambiguous and impossible to implement." *Id.* at 21. In particular, the Agency asserts that the award's requirement that the Director personally interview affected employees to assess their individual circumstances to determine whether they were prevented from coming to work by "'weather conditions'" or "'the availability of public transportation before 10:00 a.m.,'" *id.* at 21-22 (quoting Award at 22), "provides no other relevant factors to review," *id.* at 22.

The Agency also argues that the award fails to draw its essence from the parties' agreements in four respects. First, the Agency argues that the award's requirement that the Director assess the individual circumstances of the affected employees is inconsistent with the Director's broad discretion under Article 14. *Id.* at 13-14. In support of this argument, the Agency states that the parties' agreements "do not provide (or allow) for the granting of excused absence based on the commuting circumstances of individual employees[.]"[3] *Id.* at 15.

Second, the Agency contends that the "[a]ward's shifting [of] the onus of proof to the Agency to provide specific justification of the liberal leave policy came out of whole cloth and was completely unsupported by the parties' . . . agreement[s]." *Id.* at 18.

Third, the Agency asserts that the Arbitrator erroneously "concluded that the Union presented a prima facie case of error in the [Director]'s policy of unscheduled (annual) leave . . . simply because [the compliance officer] who came to work beyond the delayed opening time may not have been charged annual leave for his 'late' arrival." *Id.* at 17. In support of this assertion, the Agency claims that both the compliance officer's leave status, and the meaning of the Arbitrator's statement that the compliance officer benefitted from "'disparate treatment,'" are unclear and irrelevant. *Id.* at 17-18 (quoting Award at 22).

Fourth, the Agency argues that the award fails to draw its essence from Article 14's requirement that the Director "'give consideration'" to "'local FEB guidance,'" *id.* (quoting Article 14), because the Director followed the FEB's "'default'" position of "liberal or unscheduled leave on days of adverse weather conditions," *id.* at 6-7 (quoting testimony of FEB program specialist).

Finally, the Agency argues that the award is based on two nonfacts. First, the Agency argues that the Arbitrator erred in finding that there was "'no evidentiary support'" for the Agency's assertion that most federal agencies in Cincinnati were open on the day at issue. *Id.* at 21 (quoting Award at 18). Second, the Agency argues that the Arbitrator's finding that the Director was concerned about the "'end of the month report to the [Agency] headquarters on cases closed,' because it affected his pay and performance evaluation" is a "nonfact wholly unsupported by the record." *Id.* at 20 (quoting Award at 21).

B. Union's Opposition

The Union argues that award does not conflict with § 7106 of the Statute, or public policy, because the Arbitrator found that the Director had the right to keep the office open on the day at issue. *See* Opp'n at 4, 9-10. The Union also argues that the Agency fails to demonstrate that the Arbitrator exceeded her authority, *id.* at 3, or that the remedy is impossible to implement, *see id.* at 13-14. In addition, the Union contends that the Arbitrator correctly interpreted Articles 4 and 14, *see id.* at 4-9, and that the Agency's argument that the Director was following FEB guidance conflicts with the evidence in the record that the "FEB gave no guidance at all" to the Director on the day at issue, *id.* at 8. Finally, the Union asserts that the Agency has failed to establish that the alleged nonfacts are "clearly erroneous." *Id.* at 11, 12.

IV. Preliminary Matter: The exceptions are not interlocutory.

The award states that the Arbitrator would retain jurisdiction "until the parties present, in writing, a mutually agreed to resolution." Award at 22. The Authority issued an Order directing the Agency to show cause why its exceptions should not be dismissed as interlocutory because it appeared that the Arbitrator "directed the parties to formulate a remedy." Order to Show Cause at 2. In its response, the Agency asserts that the award is final because "[t]he Arbitrator's directive that the parties present to her a 'mutually agreed to resolution,' . . . is most logically interpreted to mean that they should seek agreement on *compliance with the remedy that the Arbitrator ordered*, rather than that the parties need to *develop* a remedy." Response at 1 (quoting Award at 22). The Union filed a motion agreeing with the Agency that the Arbitrator retained jurisdiction only "to assist with the implementation of her

[3] We note that, as part of this exception, the Agency also argues that the Arbitrator "may have been influenced" by two distinguishable decisions cited by the Union, "although the analysis in the [a]ward did not refer to them." Exceptions at 14-15 (citing *U.S. Dep't of Veterans Affairs, Denver Reg'l Office, Denver, Colo.*, 60 FLRA 235 (2004) (Chairman Cabaniss dissenting); *U.S. Dep't of Justice, Immigration & Naturalization Serv., Wash., D.C.*, 48 FLRA 1269 (1993)). However, there is no evidence that the Arbitrator relied on the cited decisions. Accordingly, we do not address this argument further.

clearly defined remedy and to assure compliance with[,] and implementation of[,] her instructions." Motion at 3.

Section 2429.11 of the Authority's Regulations pertinently provides that "the Authority . . . ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11. Thus, the Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration. *See, e.g.*, *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 60 FLRA 247, 248 (2004); *U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs.*, 57 FLRA 924, 926 (2002). However, if an arbitrator determines a remedy and retains jurisdiction in order to oversee compliance and assist the parties with the details of implementation, then the award is final for purposes of filing exceptions. *See Cong. Research Emps. Ass'n, IFPTE, Local 75*, 64 FLRA 486, 489-90 (2010) (*Local 75*).

The stipulated issues before the Arbitrator concerned whether the Agency violated the parties' agreements and, if so, what the remedy should be. Award at 1. In the award, the Arbitrator resolved the question of whether the Agency violated the parties' agreements, *id.* at 21, and set out a remedy, *id.* at 22. Specifically, as a remedy, the Arbitrator directed the Director to interview all employees who did not report to work by 10:30 a.m. on the day at issue "to determine whether or not each could have reported for work and just chose not to, or could not report for work because of the weather conditions; including the availability of public transportation before 10:00 a.m. [when the travel ban went into effect]." *Id.* Next, the Arbitrator required the Director "to review this information and to determine, on a case[-]by[-]case basis, whether [each] employee involved should be charged with annual leave after 10:30 a.m. [that day]." *Id.* Although the Arbitrator retained jurisdiction "until the parties present, in writing, a mutually agreed to resolution," *id.*, in context, the most reasonable reading of the award is that it set forth a complete remedy – not that it directed the parties to formulate a remedy – and that the Arbitrator retained jurisdiction only to oversee compliance and assist with implementation of the directed remedy, *see id.* Accordingly, we find that the award is final and that the Agency's exceptions are not interlocutory. *See Local 75*, 64 FLRA at 489-90. Consequently, we consider the exceptions on the merits.

V. 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).

The Agency argues that the award is contrary to § 7106 of the Statute because the Director's "decision to open or close the office" was based on management's exercise of its rights under the Statute. Exceptions at 12. However, the Arbitrator expressly found that the Agency's decision to open the office was not improper. Award at 21. Therefore, the award does not affect the Agency's ability to decide when to open or close its office. As such, the Agency's argument provides no basis for finding that the award is contrary to § 7106 of the Statute, and we deny this exception.

B. The award is not contrary to public policy.

The Authority construes public-policy exceptions "extremely narrow[ly]." *NTEU*, 63 FLRA 198, 201 (2009) (citing *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 810 F.2d 1239, 1241 (D.C. Cir. 1987)). For an award to be found deficient on this basis, the asserted public policy must be "explicit," "well defined," and "dominant," *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers of Am.*, 461 U.S. 757, 766 (1983) (*Rubber Workers*), and a violation of the policy "must be clearly shown." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (*Paperworkers*). In addition, the appealing party must identify the policy "'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *NTEU*, 63 FLRA at 201 (quoting *Rubber Workers*, 461 U.S. at 766).

The Agency asserts that the award is contrary to public policy because the Arbitrator required the Agency to justify its decision to keep the office open. Exceptions at 19. However, as discussed above, the award does not affect the Agency's ability to decide when to open or close its office. *See* Award at 21. Therefore, even assuming that the asserted public policy is sufficiently "explicit," "well-defined," and "dominant," *Rubber Workers*, 461 U.S. at 766, the Agency has not "clearly shown" that the award violates that policy, *Paperworkers*, 484 U.S. at 43. Accordingly, we deny this exception.

C. 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 those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). Where a party fails to cite any specific limitations on an arbitrator's authority, the Authority will not find that the arbitrator disregarded specific limitations on his or her authority. *See, e.g.*, *AFGE, Local 3627*, 64 FLRA 547, 550 (2010) (*Local 3627*).

The Agency's first exceeded-authority argument is that the Arbitrator lacked the authority to review what she characterized as an "'arbitrary and capricious exercise of' management rights." Exceptions at 12 (quoting Award at 21). In making this argument, the Agency does not claim that the Arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, or awarded relief to those not encompassed within the grievance. To the extent that the Agency is claiming that the Arbitrator disregarded specific limitations on her authority, the Agency has not cited any such express limitations and, as a result, has not established that the Arbitrator disregarded such limitations. *See Local 3627*, 64 FLRA at 550. Accordingly, we deny this exception.

The Agency's second exceeded-authority argument challenges the Arbitrator's direction, in the remedy portion of her award, that the parties reach "'a mutually agreed to resolution.'" Exceptions at 21-22 (quoting Award at 22). In making this argument, the Agency does not claim that the Arbitrator resolved an issue not submitted to arbitration, disregarded specific limitations on her authority, or awarded relief to those not encompassed within the grievance. To the extent that the Agency is claiming that the Arbitrator failed to resolve an issue submitted to arbitration by failing to provide a remedy, as discussed above, the Arbitrator resolved the stipulated issues, including what would be an appropriate remedy. Accordingly, the Agency provides no basis for finding that the Arbitrator exceeded her authority, and we deny this exception.

D. The award is not so ambiguous as to make implementation impossible.

The Authority will find an award deficient when it is incomplete, ambiguous, or so contradictory as to make implementation of the award impossible. *U.S. Dep't of Labor, Mine Safety & Health Admin., Se. Dist.*, 40 FLRA 937, 943 (1991). For an award to be found deficient on this ground, the appealing party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1074 (2001).

The Agency does not explain why it is impossible to implement the award's requirement that the Director personally interview affected employees to assess their individual circumstances and determine whether they should be charged with annual leave. *See* Award at 22. As the Agency does not provide a basis for finding that the award is impossible to implement, we deny this exception.

E. The award does not fail to draw its essence from the parties' agreements.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context because it is the arbitrator's construction of the agreement for which the parties have bargained. *Id.* at 576. Exceptions based on a misunderstanding of an arbitrator's award do not provide a basis for finding that an award fails to draw its essence from the parties' agreement. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 66 FLRA 335, 339 (2011) (*Homeland*) (citing *NAGE, Local R4-45*, 55 FLRA 789, 793-94 (1999)).

The Agency's first essence argument claims that the Arbitrator's direction that the Director assess the individual circumstances of the affected employees is inconsistent with the Director's broad discretion under Article 14. Exceptions at 14. Although Article 14 provides the Director with "discretion to grant administrative leave or other leave to employees" during weather emergencies, Article 4 protects employees from "arbitrary or unreasonable acts by a management official." Award at 2. The Arbitrator interpreted Article 4 and found that the Director "acted arbitrarily and capriciously" by charging all employees who did not report to work with annual leave without regard for their individual circumstances. *Id.* at 20, 22; *see also id.* at 21. The Agency provides no basis for concluding that the Arbitrator's interpretation of Article 4 is irrational, unfounded, implausible, or in manifest disregard of the agreements. Further, the Agency does not cite any

contractual language in support of its argument that the parties' agreements "do not provide (or allow) for the granting of excused absence based on the commuting circumstances of individual employees." Exceptions at 15. Thus, we deny this exception.

The Agency's second essence argument claims that the Arbitrator erroneously "shift[ed] the onus of proof to the Agency" to justify the Director's decision to charge employees with annual leave. *Id.* at 18. The Authority has stated that "[i]n the absence of any established burden of proof, [an] [a]rbitrator [is] free to determine which party [is] required to bear the burden of proof." *NFFE, Local 1437*, 55 FLRA 1166, 1171 (1999) (citing *AFGE, Local 2250*, 52 FLRA 320, 324 (1996)). The Agency does not cite any provision of the parties' agreements that prohibited the Arbitrator from shifting the burden of proof to the Agency once she found that the Union had established a prima facie case that the Director erred in his decision to charge employees with annual leave. Thus, the Agency's exception does not establish that the Arbitrator's allocation of the burden of proof is irrational, unfounded, implausible, or in manifest disregard of the parties' agreements. *See id.* Accordingly, we deny this exception.

The Agency's third essence exception asserts that the Arbitrator improperly "concluded that the Union presented a prima facie case . . . simply because [the compliance officer] who came to work beyond the delayed opening time may not have been charged annual leave for his 'late' arrival." Exceptions at 17. However, the Arbitrator did not rely upon the compliance officer's situation in concluding that the Union established a prima facie case. *See* Award at 19-21. Thus, the Agency's arguments concerning the compliance officer are based on a misunderstanding of the award. As such, they do not provide a basis for finding that the award fails to draw its essence from the parties' agreements. *See Homeland*, 66 FLRA at 339. Accordingly, we deny this exception.

The Agency's final essence argument is that the award conflicts with Article 14's requirement that the Director "'give consideration'" to "'local FEB guidance,'" Exceptions at 17 (quoting Article 14), because the Director followed the FEB's "'default'" position of "liberal or unscheduled leave on days of adverse weather conditions," *id.* at 6-7 (quoting testimony of FEB program specialist). It is undisputed that the FEB gave no express guidance to the Director about how to address the weather emergency on the day at issue. As such, there is no basis for finding that the award conflicts with contractual wording directing the Director to "give consideration" to any FEB guidance. Accordingly, we deny this exception.

F. The award is not based on nonfacts.

To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See U.S. Dep't of the Air Force, Lowry AFB, Denver, Colo.*, 48 FLRA 589, 593 (1993). However, "disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, provides no basis for finding" that an award is based on a nonfact. *AFGE, Local 1102*, 65 FLRA 40, 43 (2010) (*Local 1102*).

The Agency's first nonfact argument challenges the Arbitrator's finding that there was no "evidentiary support" for the Agency's assertion that most federal agencies in Cincinnati were open on the day at issue. Award at 18. Because this exception "disagree[s] with [the A]rbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence," it provides no basis for finding that the award is based on a nonfact, and we deny this exception. *Local 1102*, 65 FLRA at 43.

The Agency's second nonfact exception disputes the Arbitrator's finding that the Director kept the office open because he was concerned about the "'end of the month report to the [Agency] headquarters on cases closed,'" which "affect[ed] his pay and performance evaluation." Exceptions at 20 (quoting Award at 21). Even assuming that the Arbitrator erred in this factual finding, it is immaterial because this finding concerns the Director's asserted justification for keeping the office open, which the Arbitrator did not find improper. *See* Award at 21. Thus, the challenged finding is not a central fact underlying the award, but for which the Arbitrator would have reached a different result. Accordingly, we find that the Agency has not shown that the award is based on a nonfact, and we deny this exception.

VI. Decision

The Agency's exceptions are denied.