

67 FLRA No. 141

UNITED STATES
 DEPARTMENT OF DEFENSE
 DEFENSE LOGISTICS AGENCY
 DEFENSE DISTRIBUTION DEPOT
 RED RIVER
 TEXARKANA, TEXAS
 (Agency)

and

NATIONAL ASSOCIATION
 OF INDEPENDENT LABOR
 LOCAL 5
 (Union)

0-AR-4881

DECISION

August 29, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
 (Member Pizzella dissenting)

I. Statement of the Case

A grievance was filed alleging that the Agency's reassignment of an employee (the grievant) violated Article IV of the parties' collective-bargaining agreement (Article IV), which provides that "all employees will be treated in a fair and equitable manner."¹ The parties asked the Arbitrator to resolve whether "the grievant [was] treated in a fair and equitable manner when he was [reassigned]."² Arbitrator Archie E. Robbins sustained the grievance and directed the Agency to return the grievant to his previous position "with no loss of any benefits or seniority."³ This case presents the Authority with five substantive questions.

The first substantive question is whether the Arbitrator exceeded his authority by awarding a remedy without finding a violation of law or contract. Because the Arbitrator implicitly found a contractual violation, the answer is no.

The second substantive question is whether the Arbitrator exceeded his authority by directing the Agency to return the grievant to his previous position, despite the Agency's claim that he is medically unable to perform the duties of that position. Because the Agency provides no basis for finding that the Arbitrator was precluded from directing this remedy, the answer is no.

The third substantive question is whether the award is based on nonfacts. Because the Agency's nonfact arguments misinterpret the award, the answer is no.

The fourth substantive question is whether the award is contrary to § 7106(a) of the Federal Service Labor-Management Relations Statute (the Statute)⁴ and fails to draw its essence from a contract provision mirroring § 7106(a). Because the Agency has not properly raised a claim that the parties' agreement is unenforceable, the answer is no.

And the fifth, and final, substantive question is whether the Arbitrator's interpretation of Article IV fails to draw its essence from the parties' agreement. Because the Agency does not demonstrate that the Arbitrator's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

II. Background and Arbitrator's Award

This matter, which arose because the Agency reassigned the grievant (an employee of the Agency for over thirty-six years) from one division to another, involves the Agency's purported concerns with nepotism. In this connection, the Anti-Nepotism Act (the Act) prohibits a public official from, for example, appointing, employing, promoting, or advancing a relative.⁵ And the Agency has a personnel policy (the personnel policy) with similar prohibitions.⁶

After the grievant had worked for the Agency for many years, the Agency made the grievant's nephew the grievant's second-level supervisor. Three years later, the Agency promoted the nephew, and he became the grievant's third-level supervisor. About two years after promoting the nephew to third-level supervisor, the Agency reassigned the grievant from the division in which he had worked for over twelve years to a different division.

A grievance was filed alleging that the reassignment violated Article IV, which provides that "all

¹ Award at 2 (quoting collective-bargaining agreement).

² *Id.* at 5; *see also* Exceptions at 6; Opp'n at 3.

³ Award at 13.

⁴ 5 U.S.C. § 7106(a).

⁵ *Id.* § 3110.

⁶ Award at 7.

employees will be treated in a fair and equitable manner.”⁷ The grievance went to arbitration.

The parties asked the Arbitrator to resolve whether “the grievant [was] treated in a fair and equitable manner when he was [reassigned].”⁸ The Union argued to the Arbitrator, among other things, that it was unfair to reassign the grievant because, although he had done nothing wrong, the Agency was reassigning the grievant to a division in which the working conditions were significantly more physically demanding than the working conditions in the division where the grievant had worked for over twelve years. Specifically, the Union argued that the grievant’s new division differed from the grievant’s original division by requiring outside work and the manual handling of heavier loads – without the benefit of equipment, like hoists, and the assistance of two co-workers, that were available to the grievant in his original division.⁹

Because the Agency explained its decision to reassign the grievant by citing the Act and the personnel policy, the Arbitrator examined whether the prohibitions in these documents justified reassigning the grievant “without any other factors being involved.”¹⁰ In this regard, the Arbitrator found that both the Act and the policy prohibit an employee from, for example, “appoint[ing], employ[ing], [or] promot[ing] . . . a relative.”¹¹ The Arbitrator also found, however, that there was no allegation that the grievant or his nephew had engaged in any of these prohibited activities, as neither had been involved in any decisions regarding personnel actions concerning the other. In particular, the Arbitrator found that the nephew had “no i[n]put in the employment of” the grievant, and that the grievant was employed by the Agency, not by his nephew.¹²

The Arbitrator further found that neither the Act nor the personnel policy prohibits an employee from working within the chain of command of a relative. In particular, the Arbitrator noted that the personnel policy provides a procedure whereby employees may recuse themselves from participating in personnel actions that involve a relative, and that the grievant’s nephew testified to his willingness to follow this procedure “should a question regarding nepotism arise.”¹³

Next, the Arbitrator noted that the personnel policy requires employees to “avoid . . . engaging in

conduct that would cause a reasonable person with knowledge of the facts to question [their] impartiality.”¹⁴ However, the Arbitrator found that, out of the two hundred employees who worked in the same division as the grievant and his nephew, not one person – “not one . . . reasonable person[]” – complained during the five years that the grievant worked within his nephew’s chain of command.¹⁵ The Arbitrator concluded that neither the Act nor the policy justified the Agency’s decision to reassign the grievant to resolve its nepotism concerns stemming from its appointment of the grievant’s nephew as one of the grievant’s supervisors.

In addition, the Arbitrator addressed evidence regarding whether the grievant had medical problems that prevented him from performing the duties of his previous position, and whether that was a basis for the reassignment. The Arbitrator found that the medical reports were not the basis for the reassignment, and the Arbitrator relied on the testimony of the grievant’s immediate supervisor that the grievant “had no problem with . . . weigh[t] lifting.”¹⁶

Based on the foregoing, the Arbitrator found that it was improper for the Agency to reassign the grievant based upon only his nephew’s promotion. Accordingly, the Arbitrator sustained the grievance. As a remedy, he directed the Agency to return the grievant to his previous position “with no loss of any benefits or seniority.”¹⁷

The Agency filed exceptions to the Arbitrator’s award, and the Union filed an opposition to the Agency’s exceptions.

III. Preliminary Matters

In the context of challenging the Arbitrator’s “decision to reverse the [g]rievant’s reassignment,”¹⁸ the Agency argues that “the Arbitrator did not make a finding that the Agency violated any contract provision for appropriate arrangements that was negotiated pursuant to . . . § 7106(b) [of the Statute], because no such contract provision was negotiated.”¹⁹ As discussed further below, we find that the Arbitrator implicitly found a violation of Article IV of the parties’ agreement. There is no evidence that the Agency argued, before the Arbitrator, that Article IV was not negotiated under § 7106(b), or that interpreting Article IV to preclude reassignment in the circumstances of this case would render that contract provision unenforceable. And it should have known to

⁷ *Id.* at 2 (quoting collective-bargaining agreement).

⁸ *Id.* at 5; *see also* Exceptions at 6; Opp’n at 3.

⁹ Opp’n, Attach. 1, Union Closing Brief at 1-2, 7-10.

¹⁰ Award at 6.

¹¹ *Id.* at 7 (quoting personnel policy); *see also* 5 U.S.C. § 3110(b).

¹² Award at 10.

¹³ *Id.* at 9.

¹⁴ *Id.* at 11 (quoting personnel policy) (Arbitrator’s emphasis omitted).

¹⁵ *Id.* (Arbitrator’s emphasis omitted).

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 13.

¹⁸ Exceptions at 8.

¹⁹ *Id.* at 18.

do so. In this connection, the grievance alleged that the Agency “violat[ed] Article IV when [it] . . . provided [the grievant with] a [n]otice of [r]eassignment,” and, echoing the wording of Article IV, requested that the Agency treat the grievant “in a fair and equitable manner” and “[c]ancel” the notice of reassignment.²⁰ In other words, the Union argued that Article IV should be interpreted as precluding the grievant’s reassignment in the circumstances of this case. Consistent with §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, because there is no evidence that the Agency argued at arbitration that enforcing Article IV in this manner would render that contract provision unenforceable, the Agency may not make its § 7106(b) argument for the first time on exceptions.²¹ Accordingly, we dismiss the portions of the Agency’s exceptions that make that argument.

IV. Analysis and Conclusions

A. The Agency has not demonstrated that the Arbitrator exceeded his authority.

The Agency makes two arguments that the Arbitrator exceeded his 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.²² The Authority has held that an arbitrator who resolves the issue before him or her by finding no violation – but nevertheless awards a remedy – exceeds his or her authority by, essentially, deciding an issue not submitted to arbitration.²³

First, the Agency argues that the Arbitrator exceeded his authority by awarding a remedy without finding a violation of law or contract.²⁴ Specifically, although the Agency recognizes that the grievance alleged that “the Agency violated Article IV . . . by failing to treat [the grievant] in a fair and equitable manner,”²⁵ and acknowledges that the parties asked the Arbitrator “to decide whether the manner in which the [g]rievant was moved violated any provision of the parties’ agreement,”²⁶ the Agency asserts that the Arbitrator did not find a contract violation. The Union disputes this argument and claims that, “[b]y sustaining the grievance[,] which alleged a violation of Article IV,

[the Arbitrator] found that the [A]gency violated Article IV by treating [the grievant] in an unfair manner.”²⁷

When evaluating exceptions to an arbitration award, the Authority considers the award and record as a whole.²⁸ That is, the Authority interprets the language of an award in context.²⁹ For the following reasons, we conclude that the award, as a whole, demonstrates that the Arbitrator implicitly found a violation of Article IV.

As stated previously, the grievance alleged that the reassignment violated Article IV,³⁰ which provides that “all employees will be treated in a fair and equitable manner.”³¹ The parties stipulated to the issue before the Arbitrator as whether the grievant was “treated in a fair and equitable manner” when he was reassigned.³² Further, the Arbitrator identified Article IV as a relevant provision,³³ and he sustained the grievance.³⁴

Read in context, the most reasonable reading of the Arbitrator’s award is that he implicitly found a violation of Article IV.³⁵ So we find that he did not exceed his authority by granting a remedy.

Further, in response to the dissent’s assertion that it is inconsistent to infer an arbitral finding from the context of an award when parties must use specific wording to sufficiently raise a ground for excepting to an award,³⁶ we note that both of these standards stem from

²⁷ Opp’n at 11.

²⁸ U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Terre Haute, Ind., 65 FLRA 460, 463 (2011) (*Terre Haute*) (citing U.S. Dep’t of Energy, Oak Ridge Operations Office, Oak Ridge, Tenn., 55 FLRA 1293, 1296 (2000)).

²⁹ U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla., 66 FLRA 1046, 1049 (2012) (*Miami*); *Terre Haute*, 65 FLRA at 463 (citing U.S. DOD, Def. Contract Audit Agency, Cent. Region, Irving, Tex., 60 FLRA 28, 29 (2004)); see, e.g., U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys., 67 FLRA 19, 23 (2012) (*Marshals Serv.*).

³⁰ Exceptions, Joint Exs. 2, 5.

³¹ Award at 2 (quoting collective-bargaining agreement).

³² *Id.* at 5.

³³ *Id.* at 2.

³⁴ *Id.* at 12.

³⁵ See *Marshals Serv.*, 67 FLRA at 23 (concluding that, “[r]ead in context, the most reasonable inference to draw” from award was that arbitrator made a particular finding); *Miami*, 66 FLRA at 1049 (reasoning that, “read in context,” the “only way to harmonize . . . key portions of [an] award” that sustained a grievance was to infer that the arbitrator made a particular finding); *Terre Haute*, 65 FLRA at 463 (rejecting excepting party’s interpretation of arbitration award “[b]ased on the award and the record as a whole”); cf. U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal., 66 FLRA 737, 739-40 (2012) (where arbitrator awards backpay, the Authority will, in certain circumstances, find that the arbitrator “implicitly” made certain findings).

³⁶ Dissent at 15.

²⁰ *Id.*, Joint Exs. 2, 5.

²¹ 5 C.F.R. §§ 2425.4(c), 2429.5; see AFGE, Local 1546, 65 FLRA 833, 833 (2011).

²² U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R., 67 FLRA 417, 418 (2014).

²³ Veterans Admin., 24 FLRA 447, 450-51 (1986).

²⁴ Exceptions at 16-18.

²⁵ *Id.* at 6; see also *id.* at 12.

²⁶ *Id.* at 12 (emphasis omitted).

the same, congressionally mandated policy consideration – the finality of arbitration awards. Because Congress intended that the arbitration process be final, the Authority is permitted to engage in only limited review of arbitration awards.³⁷ Consequently, it follows that the Authority would both: (1) use context to arrive at the most reasonable reading of an arbitration award in order to resolve exceptions – thereby avoiding the need to remand an award to the arbitrator for clarification – whenever possible; and (2) place the burden on the excepting party to establish an award’s deficiency by raising and supporting a recognized ground for review of the arbitrator’s award.

In addition, the Agency argues that the Arbitrator exceeded his authority by directing the Agency to return the grievant to his previous position because medical reports demonstrated that the grievant could not perform the functions of that position.³⁸ It is unclear how this argument raises an exceeded-authority exception. But even assuming that it does, the Arbitrator found that the medical reports were not the basis for the grievant’s reassignment,³⁹ and the Arbitrator relied on the testimony of the grievant’s immediate supervisor that the grievant “had no problem with weigh[t] lifting.”⁴⁰ The Agency does not allege that these findings are nonfacts or provide any other basis for finding that the Arbitrator was precluded from directing the Agency to return the grievant to his previous position. Accordingly, the Agency has not demonstrated that the Arbitrator exceeded his authority in this regard.

B. The Agency has not demonstrated that the award is based on nonfacts.

The Agency argues that the Arbitrator based his award on two nonfacts. 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.⁴¹

First, the Agency argues that it reassigned the grievant to avoid the *appearance* of impropriety, and that the Arbitrator based his award on a nonfact by finding that the Agency relied on *actual* impropriety.⁴² According to the Agency, the Arbitrator would have found “that the [g]rievant was treated in a fair and

equitable manner” if he had understood that the Agency reassigned the grievant to “avoid the *appearance* of impropriety” pursuant to its personnel policy.⁴³ In contrast, the Union argues that the absence of evidence of the appearance of impropriety is what led the Arbitrator to conclude that the reassignment of the grievant violated Article IV.⁴⁴

Before the Arbitrator, the Agency relied on the Act and the personnel policy to argue that the grievant’s reassignment did not violate Article IV. Consequently, the Arbitrator examined whether the Act or the personnel policy justified the Agency’s decision to reassign the grievant “without any other factors being involved,”⁴⁵ in order to determine whether the Agency’s treatment of the grievant was “fair and equitable.”⁴⁶ In particular, the Arbitrator reviewed the wording of the personnel policy that the Agency argues authorized the reassignment of the grievant, which requires employees to “avoid engaging in conduct that would cause a *reasonable person* with knowledge of the facts to question [their] impartiality.”⁴⁷ But the Arbitrator found that this wording did not justify the Agency’s action because, out of the two hundred employees who worked in the same division as the grievant and his nephew, “not one . . . *reasonable person*[] complained” during the five years that the grievant worked within his nephew’s chain of command.⁴⁸ We read this to mean that the Arbitrator found no appearance of impropriety.

Thus, the award demonstrates that the Arbitrator *did* understand the Agency’s argument that the alleged appearance of impropriety mandated the reassignment, but the Arbitrator found no appearance of impropriety and no such mandate.⁴⁹ Accordingly, the Agency’s contention that the Arbitrator would have upheld the reassignment if he had understood the Agency’s argument misinterprets the award. Because a contention that is based on a misunderstanding of an award does not provide a basis for finding an award deficient,⁵⁰ we deny the exception.

The Agency also contends that the Arbitrator’s direction to return the grievant to his previous position “with no loss of any benefits or seniority”⁵¹ is based on the nonfact that the grievant lost benefits or seniority due

³⁷ SSA, *Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597 (2014) (Member Pizzella dissenting) (SSA New Orleans).

³⁸ Exceptions at 18-19.

³⁹ Award at 5.

⁴⁰ *Id.*

⁴¹ E.g., NLRB, *Region 9, Cincinnati, Ohio*, 66 FLRA 456, 461 (2012) (citation omitted).

⁴² Exceptions at 13-14.

⁴³ *Id.* at 14-15.

⁴⁴ See Opp’n at 10.

⁴⁵ Award at 6.

⁴⁶ *Id.* at 1.

⁴⁷ Award at 11 (quoting personnel policy).

⁴⁸ *Id.*

⁴⁹ See *id.* at 11-12.

⁵⁰ AFGE, *Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010) (*Food Inspection*).

⁵¹ Award at 13.

to the reassignment.⁵² But this contention is also based on a misunderstanding of the award. The Arbitrator did not find that the grievant lost benefits or seniority because of the reassignment; he merely found that the grievant would be entitled to restoration of lost benefits or seniority if he had lost them due to the reassignment. Because, as stated previously, a contention that is based on a misunderstanding of an award does not provide a basis for finding an award deficient,⁵³ we deny the exception.

C. The Agency has not demonstrated that the award is contrary to law.

As stated previously, the Agency argues that the Arbitrator's "decision to reverse the [g]rievant's reassignment" violates management's right to assign employees under § 7106(a)(2)(A) of the Statute.⁵⁴ That section pertinently provides that "nothing . . . shall affect the authority of any management official of any agency . . . to . . . assign . . . employees."⁵⁵

In order to demonstrate that an arbitrator's award is contrary to § 7106(a) of the Statute, an excepting party must allege, as relevant here, that the award does not enforce a contract provision negotiated under § 7106(b).⁵⁶ In other words, the Authority places the burden on the party arguing that the award is contrary to management rights to demonstrate not only that the award affects a right under § 7106(a), but also that the agreement provision that the arbitrator has enforced is not the type of contract provision that falls within § 7106(b) of the Statute.⁵⁷ In this regard, the Authority has explained that "important policies underlying the Statute support placing this burden on the party that is arguing that the award is deficient," including Congress's intention that the Authority exercise only limited review of arbitration awards.⁵⁸

As discussed in Section III of this decision, the Agency has not properly raised a claim that Article IV of the parties' agreement was not negotiated under § 7106(b). As a result, the Agency's management-rights exception fails as a matter of law.⁵⁹ Accordingly, we deny this exception.

We note that, as part of its exception that the award conflicts with § 7106, which we deny above, the Agency also asserts that it "did not violate any applicable law."⁶⁰ In particular, the Agency states that "[t]he Agency did not violate [the Anti-Nepotism Act]."⁶¹ However, the Agency does not argue, as the dissent does, that the "award is contrary to the . . . Act, the standards of conduct, [or] 5 U.S.C. § 2302(b)(7)."⁶² Thus, the dissent's assertion that our decision "write[s] out of the . . . Act . . . an agency's ability to act proactively to prevent nepotism"⁶³ is perplexing because the exceptions before us do not permit us to *interpret* the Act, let alone *rewrite* it. In other words, because the exceptions do not ask us to evaluate the award's consistency with the Act, our decision does not involve any analysis or application of the Act's requirements. Moreover, as the Arbitrator found that the grievant's circumstances did not create *even the appearance* of impropriety, it is unclear how the Act could require the grievant's reassignment. And even if the grievant's circumstances *did* create an appearance of impropriety, neither the dissent nor the Agency provides a basis for finding that the Arbitrator's remedy here – returning the grievant to his previous position – would necessarily violate the Act or the personnel policy. In this connection, neither the dissent nor the Agency argues that it would violate the Act or the personnel policy to reassign the grievant's nephew, rather than the grievant, to avoid any appearance of impropriety.

For the foregoing reasons, the Agency has not demonstrated that the award is contrary to law.

D. The Agency has not demonstrated that the award fails to draw its essence from the parties' collective-bargaining agreement.

The Agency contends that the award fails to draw its essence from the parties' collective-bargaining agreement because it conflicts with Article III of that agreement, which sets forth the language of § 7106(a)(2)(A) of the Statute "verbatim."⁶⁴ The Authority applies statutory standards in assessing the application of contract provisions that "mirror" the Statute.⁶⁵ Because we have rejected the Agency's claim that the award is contrary to § 7106(a)(2)(A), we also deny the Agency's essence exception.⁶⁶

⁵² Exceptions at 15-16.

⁵³ *Food Inspection*, 64 FLRA at 1118.

⁵⁴ Exceptions at 8.

⁵⁵ 5 U.S.C. § 7106(a)(2)(A).

⁵⁶ *SSA New Orleans*, 67 FLRA at 602; *U.S. DHS, U.S. CBP*, 66 FLRA 634, 638 (2012) (CBP).

⁵⁷ *SSA New Orleans*, 67 FLRA at 602 (citing *CBP*, 66 FLRA at 638).

⁵⁸ *Id.*

⁵⁹ *Id.* at 603.

⁶⁰ Exceptions at 9.

⁶¹ *Id.* at 10 (emphasis added).

⁶² Dissent at 13 (emphasis added).

⁶³ *Id.* at 10.

⁶⁴ Exceptions at 11-13.

⁶⁵ *U.S. Dep't of VA, Reg'l Office, Winston-Salem, N.C.*, 66 FLRA 34, 39 (2011) (internal quotation marks omitted).

⁶⁶ *Id.*

In addition, although the Agency claims that the Arbitrator did not find a violation of Article IV,⁶⁷ the Agency also appears to assert that the award fails to draw its essence from the parties' agreement because the Agency complied with Article IV.⁶⁸ Specifically, the Agency stresses that it treated the grievant "in a fair and equitable manner" because: (1) the reassignment did not change the grievant's series, grade, pay, or tour of duty; (2) the Agency gave the grievant notice of the reassignment; and (3) the Agency verified that the grievant could "physically perform the new job duties" before reassigning him.⁶⁹

To the extent that the Agency raises an essence exception based on the Arbitrator's interpretation of Article IV,⁷⁰ the Authority reviews an arbitrator's interpretation of a collective-bargaining agreement by applying the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.⁷¹ 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 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.⁷²

Here, the Arbitrator found that it was improper for the Agency to reassign a longstanding employee – who had been working in his nephew's chain of command for five years without incident – based *only* upon his nephew's promotion.⁷³ Accordingly, the Arbitrator sustained the grievance,⁷⁴ thereby finding that the grievant's reassignment did not constitute "fair and equitable" treatment under Article IV.⁷⁵ Because the Agency has not established that this interpretation of Article IV is irrational, unfounded, implausible, or in

manifest disregard of the parties' agreement, we deny the Agency's essence exception.⁷⁶

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

⁶⁷ Exceptions at 6, 17.

⁶⁸ See *id.* at 12-13.

⁶⁹ *Id.* at 12.

⁷⁰ Compare *id.* at 12-13 (referring to Article IV in its essence exceptions and arguing that the Agency treated the grievant "in a fair and equitable manner"), with *id.* at 12-13 (arguing that the award fails to draw its essence from the parties' agreement "because it interferes with management's right to assign employees under Article III") (emphasis added).

⁷¹ 5 U.S.C. § 7122(a)(2); AFGE, *Council 220*, 54 FLRA 156, 159 (1998).

⁷² U.S. DOL (OSHA), 34 FLRA 573, 575 (1990); e.g., NTEU, *Chapter 32*, 67 FLRA 354, 355 (2014) (*Chapter 32*).

⁷³ See Award at 11-12.

⁷⁴ *Id.* at 12.

⁷⁵ Exceptions, Joint Exs. 2, 5; see also Award at 1, 2.

⁷⁶ E.g., *Chapter 32*, 67 FLRA at 355.

Member Pizzella, dissenting:

The premise that relatives should not sit in the supervisory hierarchy of other relatives is one of many mores that contributes to the American citizen's confidence in their Federal government. Prohibitions on nepotism date back to the inception of the Civil Service Reform Act of 1978 (CSRA)¹ but can also be traced back as far as the Pendleton Act of 1883. To that end, the CSRA includes a simple, but direct, prohibition that "a public official may not . . . employ . . . in or to a *civilian position* . . . over which he exercises jurisdiction or control any individual *who is a relative*."²

Since the passage of the CSRA, nepotism has been recognized not only as a prohibited personnel practice³ but the Standards of Ethical Conduct for Employees of the Executive Branch (standards of conduct)⁴ and agency policies require federal agencies and employees to avoid even the "appearance"⁵ of any form of favoritism, including nepotism. The very terms that are used to describe the responsibilities of federal agencies and employees in these provisions clearly indicate that they are designed to be applied proactively and in a manner that will prevent violations.⁶

Nonetheless, my colleagues attempt to effectively write out of the Anti-Nepotism Act and the standards of conduct – provisions which have remained essentially unchanged since their inception in 1978 – an agency's ability to act *proactively* in order to prevent nepotism *before a charge* of nepotism is *actually* raised as a formal complaint. That reading of the Anti-Nepotism Act and the standards of conduct is not supported by precedent⁷ and most certainly "does not

contribute to the 'effective conduct of public business' or to those 'progressive work practices [that] facilitate and improve employee performance.'"⁸

The Agency in this case is a subordinate activity of the Defense Logistics Agency, Defense Distribution Center Command (DDC).⁹ In January 2009, after a number of allegations of favoritism and nepotism surfaced throughout the DDC, the commanding general issued a "personnel practice policy" that required all DDC activities to "compl[y] with the Anti-Nepotism Act and [the standards of conduct]."¹⁰ After the policy was issued, an "altercation" occurred at the Agency when one employee accused a coworker of receiving favorable treatment because he worked in the same division where a relative worked as the division chief.¹¹ Following that altercation, the Agency reassigned the coworker out of the division that was supervised by his relative.¹²

Prior to these events, the grievant's nephew had been promoted to the position of division chief in the grievant's work division. That promotion placed the nephew squarely in the grievant's supervisory chain of command.¹³ Therefore, after the earlier altercation in the other division,¹⁴ the new deputy commander notified the grievant that he would be "reassigned" to a different division in order to avoid any appearance of "improper preferences."¹⁵ The move was delayed, however, when the grievant (at the time seventy-four years old)¹⁶ indicated that he was contemplating retirement.¹⁷ When the grievant did not retire after thirteen months¹⁸ (and an undefined period of medical leave),¹⁹ the grievant was again notified that he was being "reassigned" but was assured that there would be "no change to [his] title, series and grade, [or] tour of duty."²⁰

In light of these innocuous circumstances, I am surprised that the Union was convinced that a grievance

¹ *Special Counsel v. Ponce*, 29 M.S.P.R. 385, 386 (1985) (uncle in the chain of command of nephew constitutes a prohibited personnel practice under 5 U.S.C. § 2302(b)(7)); (emphasis added); *U.S. v. Fausto*, 484 U.S. 439, 446 (1988); *U.S. Dep't of HHS v. FLRA*, 858 F.2d 1278, 1280 (CA 7 1988); *Elgin v. United States*, 697 F. Supp 2d 187, 191 (D.Mass. 2010); *Burch v. U.S.*, 99 Fed. Cl. 377, 382 (Fed. Cl. 2011); *Dachman v. United States*, 73 Fed. Cl. 508, 517 (Fed.Cl. 2006); *Graf v. DOL*, 111 M.S.P.R. 444, 448 (2009).

² 5 U.S.C. § 3110(b) (in pertinent part) (Anti-Nepotism Act) (emphases added).

³ *Thoms v. OPM*, 103 M.S.P.R. 652, 655 (2006).

⁴ 5 C.F.R. §§ 2635.101- 2635.902.

⁵ *Id.* § 2635.101(b)(14); *see also id.* § 2635.702(b).

⁶ *Id.* § 2635.101(b)(14) ("to avoid any actions creating the appearance"); *id.* § 2635.101(a) ("to ensure that every citizen can have complete confidence in the integrity of the [f]ederal government"); *id.* § 2635.102(e) ("corrective action includes any action necessary to . . . prevent a continuing violation"); *id.* § 2635.702 (b) ("shall not use . . . Government position . . . in a manner that could reasonably be construed . . .")

⁷ *See supra* n.1.

⁸ *AFGE, Local 3571*, 67 FLRA 218, 220 (2014) (Concurring Opinion of Member Pizzella) (quoting 5 U.S.C. §§ 7101(a)(1)(B), 7101(a)(2)).

⁹ Joint Ex. 12 at 1.

¹⁰ *Id.*

¹¹ *See Exceptions at 4; see also Award at 6.*

¹² *See Exceptions at 4; see also Award at 6.*

¹³ Joint Ex. 3.

¹⁴ The altercation occurred in July 2010 (Exceptions at 4 (citing Award at 6)); grievant was initially notified of his reassignment in October 2010 (Joint Ex. 2)).

¹⁵ Joint Exs. 4, 9.

¹⁶ Award at 4.

¹⁷ Joint Ex. 3.

¹⁸ *Compare Joint Ex. 2 (dated Oct. 7, 2010), with Joint Ex. 3 (dated Nov. 8, 2011).*

¹⁹ Exceptions at 4; *see also* Award at 5.

²⁰ Joint Exs. 4, 9.

would do anything to “encourage[] the amicable settlement[] of disputes between” the grievant and the Agency.²¹ However, Arbitrator Archie Robbins determined that the grievant “must . . . be returned immediately to his former job”²² and did so without pointing to so much as one provision of the parties’ agreement, or any law, that the Agency supposedly violated.

Unfortunately, Arbitrator Robbins demonstrates a fundamental misunderstanding of what is prohibited, and also what is required, by the Anti-Nepotism Act and the standards of conduct. Throughout his decision, he repeatedly notes that the Agency never received any “complaints” about the grievant working in the same division as his nephew,²³ as if the Agency could act only if it had received an actual complaint about those circumstances.

But the Agency never asserted, and the parties never disputed, whether any complaints were received by the Agency because that was never an issue in this case.²⁴ To the contrary, the record contains at least three *joint exhibits* that clearly demonstrate the only reason the Agency “reassigned” the grievant was to “avoid” a situation where other persons “would . . . question our impartiality”²⁵ and “to ensure there is no granting of improper preferences . . . to you by your relative.”²⁶ (In fact, it is quite apparent that, if the Agency had not moved the grievant to another division, any employee in the nephew’s division could have just as easily filed a grievance against the Agency because it *failed to act* to reassign the grievant.) Contrary to the Arbitrator’s reasoning, the Anti-Nepotism Act and the standards of conduct are preventative in nature and require federal agencies to act proactively to “avoid”²⁷ situations that create even the “appearance”²⁸ of favoritism. Any form

of nepotism is prohibited²⁹ and constitutes a prohibited personnel practice.³⁰

Under these circumstances, it is obvious to me that the Agency acted reasonably and in compliance with the explicit mandates of the Anti-Nepotism Act, the standards of conduct, as well as DDC’s policy. In that respect, the Arbitrator’s award is contrary to the Anti-Nepotism Act, the standards of conduct, and 5 U.S.C. § 2302(b)(7).

My colleagues also deny the Agency’s nonfact exception because they are willing to infer that, when the Arbitrator said that “not one . . . reasonable person[] complained,” the Arbitrator really meant to say that there was “no appearance of impropriety.” But that is *not what the Arbitrator found*, and the majority’s inference is simply not supported by the undisputed facts.

It was never disputed by the parties that the Agency moved the grievant because of the *appearance of impropriety*. The joint exhibits submitted by the parties clearly demonstrate that the *only reason* the Agency ever gave for moving the grievant was “to avoid . . . conduct that would cause [persons] to question our impartiality”³¹ and “to ensure there is no granting of improper preferences, assistance, or advancement to [the grievant] by [his] relative.”³² Whether or not anyone complained was not a factor that the Agency, or the Union, even considered. To the contrary, the documents clearly demonstrate that the Agency acted entirely on the *appearance* that was created by the grievant remaining in the division supervised by his nephew. Even the Arbitrator acknowledged that the promotion of the grievant’s nephew into the grievant’s chain of command was “the crux of,”³³ and “*the only factor*” behind, the Agency’s decision to “move” the grievant.³⁴ Therefore, insofar as the Arbitrator concluded that the Agency’s action was improper because there was “*no record of*

²¹ AFGE, Council 215, 67 FLRA 164, 167 (2014) (Concurring Opinion of Member Pizzella).

²² Award at 12-13.

²³ *Id.* at 10-11.

²⁴ *Id.* at 11-12.

²⁵ Joint Exs. 3, 4, 9.

²⁶ Joint Exs. 4, 9.

²⁷ 5 C.F.R. § 2635.101(b)(14).

²⁸ *Id.* (“Employees shall endeavor to *avoid* any actions creating the *appearance* that they are violating the law or the ethical standards set forth in this part.”) (emphases added); *see also id.* § 2635.702(b) (“an employee shall not use . . . his Government position . . . or *any authority associated with his public office* in a manner that *could reasonably be construed* to imply that his agency . . . sanctions or endorses his personal activities or those of another.”) (emphases added)).

²⁹ 5 U.S.C. § 3110(b).

³⁰ *Id.* § 2302(b)(7) (“Any employee who has authority to take . . . recommend, or approve any personnel action, shall not, with respect to such authority . . . employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position *any individual who is a relative . . . or over which such employee exercises jurisdiction or control . . .*”) (emphasis added)).

³¹ Joint Ex. 3.

³² Joint Exs. 4, 9 (emphases added).

³³ Award at 6.

³⁴ *Id.* at 12.

complaints, or allegations regarding nepotism,”³⁵ his award is based on a nonfact.³⁶

Unlike my colleagues, I also would conclude that the Arbitrator exceeded his authority when he awarded a remedy that directed the Agency to “return[]” the grievant to the division that is supervised by his nephew.³⁷ The Arbitrator never addressed the *only issue* that was sent to him by the parties – “was the grievant treated in a fair and equitable manner when he was moved”³⁸ – and never determined whether the Agency violated *any provision* of the parties’ contract.³⁹

The majority, however, rejects the Agency’s exception and concludes, without any relevant support, that when “[r]ead in context . . . the most reasonable reading . . . of the Arbitrator’s award . . . is that [he] implicitly found a violation of Article IV” of the parties’ agreement.⁴⁰ Contrary to the majority’s reliance on *U.S. Department of Justice, U.S. Marshals Service, Justice Prisoner & Alien Transportation System (Marshals Serv.)*,⁴¹ our precedent simply does not permit the Authority to correct a deficient arbitral award to find a contractual violation “implicitly” when no contract violation was found by the arbitrator.

The facts in this case differ in one critical respect from those in *Marshals Service*. In that case (a two-Member decision issued by my colleagues), the arbitrator found that the agency violated the Fair Labor Standards Act (FLSA) and “Article 2 of the [parties’] agreement.”⁴² In other words, the arbitrator answered the central question that was raised by the union and *specifically* found that the Agency violated both the FLSA and the pertinent contract provision that was at the heart of the union’s grievance. But, because the arbitrator failed to determine whether the agency had acted in good faith in awarding liquidated damages as a

remedy for the contractual violation,⁴³ my colleagues “infer[red]” that the arbitrator made an “implicit[finding]” that the agency had not acted in good faith.⁴⁴ Even though I would not have agreed (in that case) that we have the authority to make such an inference, the inference was limited to a remedial matter that was peripheral to the explicit contract violation already found by the arbitrator and did not determine the central issue in that case. In this case, however, the Arbitrator found no contract violation on the only issue that was submitted to him. It is one thing to infer a finding on a peripheral matter, but it is quite another to infer a violation that goes to the very heart of the case.

Whereas my colleagues frequently and summarily dismiss meritorious arguments that are raised by *union stewards and agency representatives* who fail to use precise language or “particular” words in their submissions,⁴⁵ I am perplexed why, in this case, my colleagues are so eager to fill in the gaping holes left by a *professional arbitrator* in an award that is clearly deficient.

I also do not agree with my colleagues insofar as they dismiss the Agency’s management right exception because the Agency did not argue “that Article IV was not negotiated under § 7106(b).”⁴⁶ For the reasons that I explained in *SSA Office of Disability Adjudication & Review, Region VI, New Orleans, Louisiana (SSA ODAR)*,⁴⁷ I do not agree that the Authority’s precedent in *FDIC, Division of Supervision & Consumer Protection, San Francisco Region (FDIC)*⁴⁸ and *U.S. EPA (EPA)*⁴⁹ “requires an agency, in all circumstances, to ‘allege’ that a contract provision applied by an arbitrator ‘is not the type of contract provision that falls within § 7106(b) of the Statute’⁵⁰ in order to argue that an award is contrary to law.”⁵¹ But I most certainly would not impose that requirement here where the Arbitrator never found that the Agency violated Article IV, nor any other provision of the parties’ agreement. The one point on which my colleagues and Member Beck agreed in the multi-fissured-EPA decision is that, *before* the Authority may determine whether an award enforces “a contract provision [that was] negotiated under § 7106(b),” the

³⁵ *Id.*

³⁶ *U.S. Dep’t of HHS, Fed. Drug Admin., San Diego, Cal.*, 67 FLRA 255, 255 (2014) (citing *U.S. Dep’t of Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (to establish that an award is based on a **nonfact**, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result)).

³⁷ Award at 13.

³⁸ *Id.* at 1.

³⁹ Exceptions at 16 (citing *NAGE*, 64 FLRA 350, 351 (2009) (because the agency did not violate any law or provision of the parties’ agreement, the [a]rbitrator . . . was without the authority to grant [a remedy])).

⁴⁰ Majority at 6 (emphases added).

⁴¹ *Id.* at 6 n.35 (citing *Marshals Serv.*, 67 FLRA 19, 23 (2012)).

⁴² *Marshals Serv.* 67 FLRA at 20 (“the [a]gency’s actions were . . . in violation of Article 2 of the [parties’] agreement”) (internal quotation marks omitted).

⁴³ *Id.*

⁴⁴ *Id.* at 23.

⁴⁵ See *Local 1897* at 243 (Concurring Opinion of Member Pizzella) (internal citations omitted).

⁴⁶ Majority at 4.

⁴⁷ 67 FLRA 597, 605-06 (2014) (Dissenting Opinion of Member Pizzella).

⁴⁸ 65 FLRA 102 (2010) (Chairman Pope concurring).

⁴⁹ 65 FLRA 113 (2010) (Member Beck concurring).

⁵⁰ *SSA ODAR*, 67 FLRA at 606 (Dissenting Opinion of Member Pizzella) (citing 67 FLRA at 601).

⁵¹ *Id.*

arbitrator must first determine that a contract provision was *actually* violated.⁵² In this case, however, the Arbitrator never made that determination. The closest we get here is when my colleagues “implicitly”⁵³ fill in the gaping hole left by Arbitrator Robbins.

Therefore, I would consider the Agency’s argument that the award violates its management right to assign employees under § 7106(a)(2)(A).

Thank you.

⁵² See EPA, 65 FLRA at 115 (an award is contrary to law *unless it enforces a contract provision*) (emphasis added); see also *id.*, 65 FLRA at 120 (Concurring Opinion of Member Beck) (when an arbitral remedy affecting management rights is not properly derived from the contract provision that is being enforced, it “imposes a constraint on management rights that was not agreed to by the parties” and will be set aside) (internal citations omitted) (emphasis added).

⁵³ Majority at 5.