68 FLRA No. 150

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 4052
(Union)

0-AR-4534

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DECISION

September 21, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

This matter is before the Authority on exceptions filed by the Agency to two awards of Arbitrator David M. Helfeld, the final merits award (Award III) and the fee award (Award IV). Because Case Nos. 0-AR-4534-001 and 0-AR-4534-FEE involve the same parties and arise from the same arbitration proceeding, we have consolidated them for decision.[1]

The grievant is the Union president. The Union filed a grievance alleging, in relevant part, that the Agency violated Title VII of the 1964 Civil Rights Act (Title VII),[2] the parties' agreement, and two prior arbitration awards of other arbitrators by denying the grievant's "right to fair and equitable treatment."[3] The grievance alleged that the Agency discriminated and retaliated against the grievant because of his Union activity.

In Award III, the Arbitrator found that, for more than a decade, the Agency had been violating the parties' agreement and the prior arbitration awards by refusing to comply with the Agency's anti-sexual-harassment policy. The Arbitrator awarded monetary remedies to the grievant, bargaining-unit employees, and the Union. In Award IV, the Arbitrator granted the Union's request for attorney fees. This case presents us with three substantive questions.

The first question is whether the Arbitrator's awards of monetary remedies in Award III and attorney fees in Award IV are contrary to the doctrine of sovereign immunity. Because there is no waiver of sovereign immunity in this case, we find that the answer is yes.

The second question is whether the Arbitrator exceeded his authority in Award III by: (1) resolving an issue that was not submitted to arbitration; or (2) awarding relief to parties not encompassed by the grievance. Because the award directly responds to the issues before the Arbitrator, we find that the answer is no.

The third question is whether Award III fails to draw its essence from the parties' agreement. As the Arbitrator's interpretation of the agreement is not irrational, unfounded, implausible, or in manifest disregard of the agreement, we find that the answer is no.

II. Background and Arbitrators' Awards

More than ten years ago, an arbitrator resolved a grievance regarding alleged sexual harassment occurring at the Agency's Metropolitan Detention Center (MDC) in Guaynabo, Puerto Rico. In his capacity as a Union representative, the grievant, an inmate systems officer, represented an employee who alleged that an Agency supervisor (the lieutenant) violated Title VII by committing acts of sexual harassment. The arbitrator in that case sustained the grievance (the Greenbaum Award) and ordered that the lieutenant "cease all unprofessional conduct, harassment[,] and intimidating behavior" and "attend appropriate training, including that covering sexual harassment, sensitivity[,] and 'bullying' behavior."[4]

The Union subsequently filed a grievance alleging that the Agency failed to comply with the Greenbaum Award and committed "reprisals against [the grievant]."[5] The arbitrator in that second case sustained the grievance (the La Penna Award) and ordered the lieutenant to "cease and desist any and all acts of discrimination including but not limited to sexual harassment, intimidation[,] and retaliation against

[1] *E.g., U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 19 n.1 (2012) (consolidating cases involving same parties and arising from same arbitration proceeding).
[2] 42 U.S.C. §§ 2000e to 2000e-17.
[3] Exceptions to Award III at 3 (quoting Exceptions, Ex. 3 at 1 (Union Grievance)) (internal quotation marks omitted).
[4] Award II at 9.
[5] Award I at 2.

employees and more particularly, female correction officers, Union officials[,] and Union members[] authorized to carry on Union business."[6] In the La Penna Award, the arbitrator also ordered that the lieutenant receive treatment and training courses similar to those ordered in the Greenbaum Award.

Sometime later, the grievant filed the grievance that gave rise to the awards before us in this case. That grievance alleged, in relevant part, that the Agency violated Title VII, the Greenbaum and La Penna Awards, and the parties' agreement's "right to fair and equitable treatment" provision by discriminating and retaliating against the grievant on the basis of his union activity.[7] Specifically, the grievance alleged that the Agency demonstrated animus toward the grievant by authorizing an official investigation of him for unprofessional conduct that allegedly occurred during a verbal exchange with the lieutenant. The grievance further claimed that the Agency continued to permit the lieutenant to supervise the grievant, "which allow[ed] the [lieutenant] to continu[al]ly taint the disciplinary process by reporting frivolous allegations of misconduct as a form of reprisal[]."[8] The grievance was unresolved, and the parties submitted it to arbitration.

The Arbitrator issued a number of awards, but the Agency only challenges the last two, Awards III and IV, in this proceeding. When the parties first began the arbitration process, they could not agree on a stipulated issue. Accordingly, in his preliminary merits award (Award I), as relevant here, the Arbitrator's framed issues focused on whether the Agency illegally retaliated against the grievant based upon his participation as a Union representative in prior arbitrations and whether the Agency complied with the Greenbaum and La Penna Awards "as they relate to the rights of the grievant."[9] The Arbitrator found that the grievant suffered from discrimination and reprisals prohibited by Title VII, that he was not treated fairly and equitably, and that the lieutenant engaged in retaliatory conduct. However, the Arbitrator further determined that "compensatory damages . . . should not be awarded in the present case," citing insufficient evidence of a "pattern" by the Agency.[10] The Arbitrator also ordered the parties to develop a "protocol" to avoid future interaction between the lieutenant and the grievant and to submit it to the Arbitrator "within thirty days of the receipt of [Award I]."[11] He retained jurisdiction over the dispute "to ensure that all instructions . . . are duly implemented."[12] The Arbitrator emphasized that Award I "is not a final award."[13]

In his second merits award (Award II), also not challenged in this proceeding, the Arbitrator addressed "institutional" issues, namely whether the Agency implemented the remedies ordered in the Greenbaum and La Penna Awards and "how [the Agency] has dealt with issues of sexual harassment."[14] He again rejected the Union's claim of a pattern of retaliatory action against the grievant for lack of probative evidence. In addition, the Arbitrator found that "[t]en years after [the] . . . grievance [in the Greenbaum Award], the problem of sexual harassment caused by [the lieutenant] has yet to be resolved," "severely diminish[ing] the efficacy of the [parties' agreement's] article on arbitration as a method" of dispute resolution.[15] Again, he ordered the Agency to comply with the Greenbaum and La Penna Awards' remedies. The Arbitrator repeated his direction from Award I to the parties to, within thirty days, draft the "protocol,"[16] and also a "compliance plan,"[17] to address enforcement of the Greenbaum and La Penna Awards. Although the protocol did not need to be submitted to him if the parties were able to reach an agreement, the Arbitrator stated that "final decision on the compliance plan will be determined by the Arbitrator" in a subsequent award.[18]

The parties did not agree on either a protocol or a compliance plan. Thereafter, in Award III, the Arbitrator once again addressed issues of "how Agency management has dealt with sexual harassment in light of the findings of Arbitrators Greenbaum, La[ ]Penna[,] and the present Arbitrator."[19] He found that the Agency "consistently followed a course of action to [en]sure that the [anti-sexual-harassment] policy . . . was not enforced" and that this noncompliance "caused harm to the Union and its members."[20] The Arbitrator also reaffirmed his rejection of the Union's claims of retaliation against the grievant.

In each of his awards, the Arbitrator rejected the Agency's argument that sexual harassment was not an issue before him. He found that although the grievance does not explicitly mention sexual harassment, it specifically alleges that the "Agency 'continues to violate the' . . . Greenbaum and La[ ]Penna [A]wards."[21] The

[6] Award II at 10 (quoting La Penna Award) (internal quotation marks omitted).
[7] Union Grievance.
[8] *Id.*
[9] Award I at 13 (emphasis omitted).
[10] *Id.* at 24.
[11] *Id.* at 27.
[12] *Id.*
[13] *Id.*
[14] Award II at 2.
[15] *Id.* at 27.
[16] *Id.* at 28.
[17] *Id.* at 29.
[18] *Id.*
[19] Award III at 2.
[20] *Id.* at 3.
[21] *Id.* at 3-4 (quoting Union Grievance at 1).

Arbitrator found that "in the early stages of this case[,] the allegation of retaliatory discrimination against the [grievant] appeared to be the primary issue[,] but . . . sexual harassment clearly became the more important issue."[22]

In Award III, the Arbitrator awarded several remedies. He awarded the grievant $40,000 in "compensatory damages"[23] for several reasons: (1) the Agency's "failure to submit the [p]rotocol ordered by the Arbitrator"[24] in Award I caused the grievant "considerable anxiety";[25] (2) "the harm [the grievant] suffered in his capacity as Union official and [p]resident" [26] caused him "stress and frustration";[27] (3) the Agency violated the parties' agreement by interfering with the grievant's "right to be 'treated fairly and equitably'";[28] and (4) the Agency failed to comply with the parties' agreement, which entitles an employee "to be free from discrimination based on their political affiliation, race, color, religion, national origin, sex, marital status, age, handicapping condition, Union membership, or Union activity."[29]

Citing the "broken arbitration system,"[30] the Arbitrator also awarded "$5,000 per [bargaining-]unit member who has been employed during the period 2002-2012 . . . and for those employed less than ten years, their pro rata share."[31] Additionally, he found that the Agency's treatment of the grievant "diminished profoundly the capacity of the Union to act effectively to implement the legal and contractual rights of its members," and he awarded the Union "$500,000 to underwrite an educational program to promote understanding of what went wrong for ten years and the reforms which have been put in place."[32]

The Arbitrator also ordered the Agency to write two letters of apology: (1) to an employee who testified at the arbitration hearing "for the false and vicious attack on her reputation" by an Agency supervisor who also testified; and (2) to all employees for failing to adhere to the parties' agreement's anti-sexual-harassment policy and for "protect[ing] a serial sexual harasser for ten years."[33]

The Arbitrator ordered additional remedies that the Agency does not challenge. For example, he ordered the parties to submit a copy of his award to and request an "investigation . . . to verify the accuracy of [his] findings" from "the Civil Rights and Civil Liberties Complaints Office of the Inspector General, U.S. Department of Justice"[34] and the Equal Employment Opportunity Commission. In addition, the Arbitrator directed the parties to send a copy of his award to "their respective national officers who are responsible for collective bargaining" so that the officers could "determine whether measures of reform can be negotiated."[35]

The Arbitrator also granted the Union's request for attorney fees provided that the Union submitted pertinent documentation supporting its request. Then, in Award IV, the Arbitrator granted the Union's attorney-fee request "on the ground that it prevailed substantially with respect to . . . issues . . . related to sexual harassment."[36]

The Agency filed exceptions to Awards III and IV. The Union filed an opposition to the Agency's exceptions to Award III, but did not file an opposition to the Agency's exceptions to Award IV.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's claim that Award III is contrary to the doctrine of sovereign immunity.

The Agency argues that the Arbitrator's monetary remedies in Award III are contrary to the doctrine of sovereign immunity.[37] Citing § 2425.4(c) of the Authority's Regulations,[38] the Union claims that the Authority should not consider this argument because it was not raised before the Arbitrator.[39] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the Arbitrator.[40] However, the Authority has held that "a claim of federal sovereign immunity can be raised by an agency at any time."[41] Accordingly, we find that the

[22] *Id.* at 4.
[23] *Id.* at 27.
[24] *Id.* at 30.
[25] *Id.* at 25.
[26] *Id.* at 26.
[27] *Id.* at 30.
[28] *Id.*
[29] Exceptions to Award III, Ex. 6 at 10 (Parties' Agreement).
[30] Exceptions to Award III at 27.
[31] *Id.* at 28.
[32] *Id.*
[33] *Id.* at 31.
[34] *Id.* at 30.
[35] *Id.* at 31.
[36] Award IV at 1.
[37] Exceptions to Award IV at 8-9.
[38] 5 C.F.R. § 2425.4(c).
[39] Opp'n at 1-2.
[40] 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g., Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011).
[41] *SSA, Office of Disability Adjudication & Review, Region 1*, 65 FLRA 334, 338 (2010) (quoting *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146, 151 (2005)) (internal quotation marks omitted) .

Agency has properly raised its sovereign-immunity exception, and address it below.

IV. Analysis and Conclusions

A. The monetary remedies in Awards III and IV are contrary to the doctrine of sovereign immunity.

The Agency argues that the Arbitrator's monetary remedies in Awards III and IV are contrary to law because there is no waiver of sovereign immunity.[42]

When an exception challenges an award's consistency with law, the Authority reviews the question of law raised by the exception and the award de novo.[43] In applying this standard, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[44] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[45]

The United States, as sovereign, is immune from suit except as it consents to be sued.[46] As such, an award from an arbitrator that requires an agency to provide monetary damages to a union or employee must be supported by statutory authority to impose such a remedy.[47] Thus, there is no right to monetary damages in a suit against the United States without a waiver of sovereign immunity.[48]

1. The monetary remedies in Award III are contrary to the doctrine of sovereign immunity.

The Agency argues that Award III is contrary to law because there is no statutory waiver of sovereign immunity supporting his monetary awards of: (1) $40,000 to the grievant; (2) $5,000 to each bargaining-unit member "who has been employed during the period 2002-2012 . . . and for those employed less than ten years, their pro rata share"; and (3) $500,000 to the Union "to underwrite an educational program to promote understanding of what went wrong for ten years and the reforms which have been put in place."[49]

a. The monetary remedy awarded to the grievant is contrary to the doctrine of sovereign immunity.

The Agency contends that, although Title VII waives sovereign immunity, the Arbitrator's awards do not support a finding that the Agency discriminated or retaliated against the grievant in violation of Title VII.[50]

Title VII is a waiver of sovereign immunity.[51] Title VII provides for compensatory damage awards against defendants – including federal government agencies – for "intentional discrimination " in violation of Title VII.[52] Under Title VII, an employee must establish that an employer "discriminate[d] against [the] individual . . . because of such individual's race, color, religion, sex, or national origin."[53] There are several theories of discrimination under Title VII. For one, the anti-retaliation provision of Title VII prohibits employer acts that "discriminate against" an employee because that employee "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in [a Title VII] investigation, proceeding, or hearing."[54] For another, to find disparate treatment or disparate impact discrimination, Title VII requires an arbitrator to find that the grievants are members of a protected class.[55] However, when an employer has been found to have violated Title VII, it is "liable only for those damages directly or proximately caused by" the employer's unlawful act.[56]

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[42] Exceptions to Award III at 8; Exceptions to Award IV at 8.
[43] *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[44] *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[45] *See id*.
[46] *U.S. Dep't of Transp., FAA*, 52 FLRA 46, 49 (1996) (*FAA*) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)).
[47] *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 61 FLRA 366, 370 (2005) (citing *U.S. Dep't of HHS, Food & Drug Admin.*, 60 FLRA 250, 252 (2004)).
[48] *See FAA*, 52 FLRA at 49.
[49] Award III at 28.
[50] Exceptions to Award III at 8.
[51] *NTEU, Chapter 231*, 67 FLRA 247, 250 n.33 (2014) (citing *West v. Gibson*, 527 U.S. 212, 222 (1999) (finding that "statutory language, taken together with statutory purposes [and] history" of Title VII, "produce evidence of a waiver" of sovereign immunity)).
[52] 42 U.S.C. § 1981a(a)(1).
[53] *Id.* § 2000e-2(a)(1).
[54] *Id.* § 2000e-3(a).
[55] *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977) (disparate impact discrimination)); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 66 FLRA 81, 89 (2011) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (disparate treatment discrimination)).
[56] *Pension Benefit Guaranty Corp.*, 64 FLRA 692, 699 (2010) (*PBGC*) (quoting *Terrell v. Cisneros*, EEOC Doc. 01961030, 1996 WL 637242, at *13 (1996)) (internal quotation marks omitted).

We first address whether the Arbitrator's underlying factual findings support finding a Title VII violation. In Award I, the Arbitrator found that "the grievant has suffered from discrimination and reprisals . . . prohibited by Title VII"[57] and that "the retaliatory acts of [the lieutenant]"[58] violated Title VII. However, the Arbitrator found that "compensatory damages . . . should not be awarded in the present case."[59] Consistent with this statement, the Arbitrator based his monetary remedy to the grievant on other findings. Specifically, in Award III, the Arbitrator based this monetary award on the Agency's: (1) "failure to submit the [p]rotocol ordered by the Arbitrator"[60] in Award I, causing the grievant "considerable anxiety";[61] (2) failure to apply its anti-sexual-harassment policy, causing the grievant harm in his capacity as a Union official;[62] (3) failure to treat the grievant "fairly and equitably";[63] and (4) failure to comply with the parties' agreement.[64]

Neither the Arbitrator's various awards nor the record support a finding that the grievant's monetary remedy is based on a Title VII violation. With regard to retaliation, the Union did not show that the Agency "discriminate[d] against" the grievant because he "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in [a Title VII] investigation, proceeding, or hearing."[65] As for disparate treatment or disparate impact discrimination, although the Arbitrator concluded that the Agency failed to comply with the parties' agreement, which includes language similar to Title VII, the Arbitrator did not find, and the Union does not claim, that the grievant is a member of a protected group or that any alleged discrimination against the grievant was causally related to the grievant's membership in such a group.[66] Thus, even if the Agency violated the parties' agreement, there is no basis for concluding that the Arbitrator found a Title VII violation.

Accordingly, the Union fails to demonstrate that a Title VII violation was the basis for the Arbitrator's monetary remedy to the grievant.[67] For this reason, the Union has not established that Title VII waives sovereign immunity for the monetary remedy. Nor does the Union allege that there is any other applicable statutory waiver.

The Authority has held that where a monetary remedy fails to satisfy the requirements of a statutory waiver of sovereign immunity, and no other statutory waiver of sovereign immunity is present, the Authority will set aside the remedy.[68] Accordingly, we find that the $40,000 awarded to the grievant is contrary to law, and we set aside the portion of Award III that gives the grievant that monetary remedy.[69]

b. The monetary remedy awarded to bargaining-unit members is contrary to the doctrine of sovereign immunity.

The Agency also argues that the Arbitrator's awards do not support a finding that the Agency discriminated or retaliated against "any of the[] unnamed and unidentified [bargaining-]unit members" in violation of Title VII.[70]

The Union concedes that the Arbitrator did not cite any statutory basis for the monetary remedy awarded to bargaining-unit members, but suggests that Title VII may apply.[71] To the extent that the Union is citing Title VII as a waiver of sovereign immunity, we examine the Arbitrator's findings under the standards for assessing a Title VII claim set forth above.

The Arbitrator based the monetary remedy awarded to bargaining-unit members on the "diminished . . . capacity of the Union to act effectively to implement the legal and contractual rights of its members" because of the Agency's actions towards the grievant.[72] As another basis for this remedy, the Arbitrator found that the Union and its members were harmed by a "broken arbitration system" caused by the Agency's violations of the parties' agreement.[73] However, the Arbitrator does not state, and the record does not support the conclusion, that Title VII violations provide a waiver of sovereign immunity for the award of a monetary remedy to bargaining-unit members.

[57] Award I at 22.
[58] *Id.* at 24.
[59] *Id.*
[60] Award III at 30.
[61] *Id.* at 25.
[62] *Id.* at 26, 30.
[63] *Id.* at 24, 30.
[64] *Id.* at 30 (quoting Parties' Agreement at 10).
[65] 42 U.S.C. § 2000e-3(a).
[66] *AFGE, Local 376*, 62 FLRA 138, 140 (2007) (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)) (noting violation of Title VII where employee harassed due to status as member of protected class).
[67] *PBGC*, 64 FLRA at 699.
[68] *See U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 860 (2012) (*DOJ*); *U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 330 (2009) (*DOT*).
[69] *See DOJ*, 66 FLRA at 860; *DOT*, 64 FLRA at 329.
[70] Exceptions to Award III at 10.
[71] Opp'n 2-5.
[72] Award III at 27.
[73] *Id.*

As the Union does not cite any other waiver of sovereign immunity supporting this remedy, and no other basis for waiving sovereign immunity is apparent, we find that the monetary remedy awarded to bargaining-unit members is contrary to law.[74] Accordingly, we set aside that portion of Award III.

c. The Union's and bargaining-unit members' monetary remedies are not equitable in nature and are contrary to the doctrine of sovereign immunity.

The Union asserts that the doctrine of sovereign immunity does not bar the Agency from compensating the Union and its bargaining-unit members because the monetary awards are equitable in nature.[75]

Sovereign immunity does not apply where a monetary award is equitable in nature.[76] In *Fort Benjamin Harrison, Indianapolis, Indiana v. FLRA* (*Fort Benjamin Harrison*), the U.S. Circuit Court of Appeals for the District of Columbia Circuit found that, absent a waiver, monetary awards that are "legal" in nature are barred by sovereign immunity, but monetary awards that are "equitable" in nature are not.[77] The court determined that a monetary award is legal in nature when it is a substitute for the plaintiff's loss in consequence of the defendant's action.[78] In contrast, a monetary award is equitable in nature when it "does not attempt to provide the injured party with a substitute for a consequential loss, but rather 'attempt[s] to give the plaintiff the very thing to which he was entitled.'"[79]

Applying the definition of monetary awards that are legal in nature from *Fort Benjamin Harrison*, the remedies awarded to the Union and bargaining-unit members in this case are legal, rather than equitable. As compensation for a "broken arbitration system," the Union received $500,000 to be used for an "educational program."[80] Similarly, bargaining-unit members were awarded up to $5,000 each because the "broken arbitration system" deprived them of "a fair and effective arbitration process."[81] Accordingly, the Arbitrator awarded compensation to the Union and bargaining-unit members for a suffered loss, rather than the very thing to which they were arguably entitled.[82]

Although the Union cites *U.S. Department of Transportation, FAA, Northwest Mountain Region, Renton, Washington* (*FAA Renton*),[83] that decision is distinguishable. In *FAA Renton*, the Authority found that sovereign immunity did not apply to a remedy that required the agency to obtain parking for employees at a location other than the location the agency made available at no cost to employees.[84] In upholding the administrative law judge's finding that the agency had failed to comply with an arbitration award, the Authority determined that the remedy was equitable in nature because it was the very thing to which the employees were entitled under the award.[85] By contrast, here, the Arbitrator awarded monetary remedies as compensation for a "broken arbitration system,"[86] rather than the very thing to which the Union and its bargaining-unit members were entitled.[87]

Accordingly, because Award III provides monetary awards that are legal in nature, and as the Union does not identify any waiver of sovereign immunity supporting these remedies, we find that the money awarded to the Union and bargaining-unit members is contrary to law, and we set aside the portion of Award III that directs these monetary remedies.[88]

The Union requests that the Authority remand the award to the Arbitrator so that he can clarify the bases for these remedies.[89] The Authority generally will remand an award to the parties for resubmission to the arbitrator for clarification when the Authority is unable to determine if the award is deficient.[90] But, as discussed above, even applying Title VII – the only legal authority that the Union raises – neither the Arbitrator's awards nor the record support a finding that the Arbitrator's monetary remedies are based on a Title VII violation. And the Union does not allege that there is any other applicable waiver of sovereign immunity supporting these monetary remedies. Consequently, for the reasons

[74] *See DOJ*, 66 FLRA at 860; *DOT*, 64 FLRA at 330.
[75] Opp'n at 7-8.
[76] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Tucson, Ariz.*, 66 FLRA 517, 519 (2012) (*BOP*) (citing *Dep't of the Army, U.S. Army Commissary, Fort Benjamin Harrison, Indianapolis, Ind. v. FLRA*, 56 F.3d 273, 276 (D.C. Cir. 1995).
[77] 56 F.3d at 276.
[78] *Id*.
[79] *Id.* (alteration in original) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988); *Hubbard v. Adm'r, EPA*, 982 F.2d 531, 533 (D.C. Cir. 1992)).
[80] Award III at 27.
[81] *Id.*
[82] *See BOP*, 66 FLRA at 519.
[83] 55 FLRA 293 (1999).
[84] *Id.* at 298-99.
[85] *Id.*
[86] Award III at 27.
[87] *See BOP*, 66 FLRA at 519.
[88] *See DOJ*, 66 FLRA at 860; *DOT*, 64 FLRA at 330.
[89] Opp'n at 2, 6.
[90] *E.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 65 FLRA 157, 159 (2010) (remanding award to parties for resubmission to arbitrator for clarification, absent settlement, when unable to determine if award is deficient).

discussed above, we find that there is a clear basis for finding that the Arbitrator's monetary remedies are contrary to law. Accordingly, we deny the Union's request for a remand.

In view of these determinations, we find it unnecessary to resolve the Agency's exceeded-authority argument that the Arbitrator awarded relief to those not encompassed by the grievance – that is, the Union and its bargaining-unit members.[91] This argument challenges the same portions of the remedy that we have set aside. Therefore, it is unnecessary to separately address these exceptions.[92]

2. The award of attorney fees in Award IV is contrary to the doctrine of sovereign immunity.

The Agency contends that, although certain statutes, such as the Back Pay Act,[93] waive sovereign immunity for awards of attorney fees, there is no applicable waiver of sovereign immunity for Award IV's award of such fees.[94]

In Award IV, the Arbitrator granted the Union's attorney-fee request "on the ground that [the Union] prevailed substantially with respect to . . . issues . . . related to sexual harassment."[95] The Arbitrator did not cite any statutory authority for the award. To the extent that the Authority recognizes that Title VII provides an independent statutory basis to award attorney fees, we note our findings, above, that there is no basis for concluding that the Agency violated Title VII "with respect to . . . issues . . . related to sexual harassment."[96] And as the Union does not claim entitlement to attorney fees under other statutes, and as the United States has not otherwise waived its sovereign immunity with respect to attorney fee awards, we find that the award of attorney fees is contrary to law and set aside that portion of Award IV.

B. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority in Award III by: (1) resolving an issue not submitted to arbitration by addressing whether the Agency had appropriately handled sexual harassment; and (2) awarding relief to those not encompassed by the grievance by requiring the Agency to write two letters of apology – one to a former employee, and the other to all Agency employees.[97]

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.[98] Where the parties fail to stipulate the issue, the arbitrator may formulate the issue on the basis of the subject matter before him or her, and this formulation is accorded substantial deference.[99] In those circumstances, the Authority examines whether the award is directly responsive to the issue the arbitrator framed.[100] The law is clear in this regard that, in formulating and resolving the issues before them, arbitrators may rely on the arguments that the parties raise in the proceeding.[101]

Award III is directly responsive to the issues framed by the Arbitrator.[102] One of the framed issues was "how [the Agency] has dealt with issues of sexual harassment."[103] The grievance itself specifically alleged that the "Agency 'continues to violate'" the Greenbaum and La Penna Awards, whose remedies included ceasing sexual harassment at the Agency.[104] Based on Agency-witness testimony regarding the lieutenant's alleged sexual harassment, the Arbitrator concluded that "the ten[-]year record of the Agency related to sexual harassment [was] a fundamental issue,"[105] particularly when considering whether the Agency complied with the Greenbaum and La Penna Awards' remedies.[106] Specifically, he

[91] Exceptions to Award III at 13-15.
[92] *See, e.g.*, *U.S. Dep't of Transp., FAA, Nashua, N.H.*, 65 FLRA 447, 450 n.3 (2011) (finding it unnecessary to address party's remaining exceptions after setting aside award as contrary to law).
[93] 5 U.S.C. § 5596.
[94] Exceptions to Award IV at 8.
[95] Award IV at 1.
[96] *Id.*
[97] Exceptions to Award III at 11-15.
[98] *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996) (citation omitted).
[99] *E.g.*, *AFGE, Local 522*, 66 FLRA 560, 562 (2012) (*Local 522*); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 887, 891 (2000) (citations omitted); *U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997) (citation omitted).
[100] *Local 522*, 66 FLRA at 562.
[101] *See, e.g.*, *U.S. Dep't of HHS, SSA, Office of Hearings & Appeals*, 48 FLRA 833, 838 (1993).
[102] Exceptions at 2 (citing Union Grievance at 1).
[103] Award II at 2.
[104] Award III at 3-4 (quoting Union Grievance at 1); *see also id.* at 23.
[105] *Id.* at 23.
[106] Award II at 1-2.

addressed whether the lieutenant continued to engage in acts of sexual harassment despite previous remedies prohibiting those acts. The Arbitrator found that the Agency had not complied with those remedies in this regard, and he resolved the issue that he expressly framed.

The case the Agency relies on,[107] *U.S. Department of HHS, Food & Drug Administration, New Jersey District* (*HHS*),[108] is distinguishable. In that case, the Authority found an award deficient because the arbitrator resolved an issue that was not included in the issues he framed.[109] Here, in Award II, the Arbitrator framed an issue of "how [the Agency] has dealt with the issue of sexual harassment"[110] as one of the issues to be resolved. To the extent that the Agency suggests that the Arbitrator was required to set forth all issues to be resolved in Award I, it has provided no legal support for such a requirement. Granting the substantial deference that is due to the Arbitrator's formulation of the issues, we find that he did not exceed his authority by resolving the issue of the Agency's handling of sexual-harassment matters, and we deny this exception.

With regard to the Agency's second exceeded-authority claim, the Agency argues that in Award III the Arbitrator erroneously awarded remedies to a person other than the grievant.[111]

The Arbitrator also did not exceed his authority in Award III by directing the Agency to write the two letters of apology. One of the letters was to all Agency employees for the Agency's failure to adhere to the parties' agreement's anti-sexual-harassment policy and for "protect[ing] a serial harasser for ten years."[112] The other letter was to an employee who testified at the arbitration hearing on the issue of sexual harassment at the Agency, "for the false and vicious attack on her reputation" by an Agency supervisor who also testified on that issue.[113] The Authority has held that arbitrators have broad discretion to fashion remedies that they consider to be appropriate.[114] The letters of apology are responsive to the issues he framed, as discussed above – that is, the remedies address the harm caused by the Agency's non-compliance with remedies ordered by the Greenbaum and La Penna Awards designed to curtail sexual harassment at the Agency.[115] Therefore, we deny this exception.

C. Award III draws its essence from the parties' agreement.

The Agency argues that Award III fails to draw its essence from the parties' agreement, which provides that "the written grievance may be modified only by mutual agreement."[116]

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.[117] 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.[118]

The Agency claims that the Arbitrator ignored the plain language of the parties' agreement.[119] However, the Agency's assertions provide no basis for finding the award deficient. The parties' agreement provides, in pertinent part, that "[i]f the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission[,] and the arbitrator shall determine the issue or issues to be heard. However, the issues . . . in the written grievance may be modified only by mutual agreement."[120]

Here, neither the Union nor the Arbitrator unilaterally modified the issues submitted to the Arbitrator in the written grievance. Rather, as the parties did not stipulate to the issues, the Arbitrator framed the issues before him after considering Union and Agency arguments and witness testimony. This is a plausible interpretation of the parties' agreement, which, as stated above, provides that "the arbitrator shall determine the issue or issues to be heard."[121] Thus, we find that the Agency fails to demonstrate that the Arbitrator's

[107] Exceptions to Award III at 11.
[108] *HHS*, 61 FLRA 533 (2006).
[109] *Id.* at 535.
[110] Award II at 2.
[111] Exceptions to Award III at 15.
[112] Award III at 31.
[113] *Id.*
[114] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 66 FLRA 388, 391 (2011) (*Sheridan*) (no basis for setting remedy aside where it is responsive to issue framed by arbitrator) (citation omitted); *see DOJ*, 66 FLRA at 861.
[115] *See Sheridan*, 66 FLRA at 391; *DOJ*, 66 FLRA at 861.
[116] Exceptions to Award III at 12 n.7 (quoting Parties' Agreement at 68).
[117] *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[118] *See U.S. DOL*, 34 FLRA 573, 575 (1990).
[119] Exceptions to Award III at 12 n.7.
[120] Parties' Agreement at 68.
[121] *See* Parties' Agreement at 68.

interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement, and we deny this exception.[122]

V. Decision

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

[122] *See AFGE, Local 2128*, 66 FLRA 801, 803-04 (2012); *AFGE, Local 2198*, 49 FLRA 575, 579-80 (1994).