68 FLRA No. 155

INDEPENDENT UNION OF
PENSION EMPLOYEES
FOR DEMOCRACY AND JUSTICE
(Union)

and

PENSION BENEFIT
GUARANTY CORPORATION
(Agency)

0-AR-5075

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DECISION

September 29, 2015

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

I. Statement of the Case

Arbitrator James E. Conway issued an award finding that the Union violated § 7116(b)(1) of the Federal Service Labor-Management Relations Statute (the Statute)[1] and the parties' collective-bargaining agreement (CBA) when it published a newsletter containing an article that threatened an employee. The Union filed exceptions challenging not only the Arbitrator's findings on the merits, but also his findings that the CBA bound the parties and that he was properly appointed and selected for this arbitration.

First, the Union alleges that the award is contrary to law and fails to draw its essence from the CBA and that the Arbitrator exceeded his authority because the CBA, negotiated with a previous union, does not bind the Union. Because an agreement's grievance and arbitration procedures survive any expiration of that agreement, we deny these exceptions.

Second, the Union argues that the award is contrary to law and the Arbitrator exceeded his authority because the Arbitrator could not make a finding concerning his own long-term appointment. Because the Arbitrator did not make a finding regarding his own long-term appointment, we deny this exception.

Third, these exceptions also challenge the Arbitrator's selection to arbitrate this grievance. Because these exceptions challenge the Arbitrator's finding of procedural arbitrability, and such findings cannot be successfully challenged on essence or nonfact grounds, we deny these essence and nonfact exceptions. Additionally, because the Union bases its contrary-to-law and exceeds-authority exceptions in this regard on its essence claim or these exceptions otherwise fail to provide a basis for finding the award deficient, we likewise deny them.

Fourth, the Union challenges the Arbitrator's findings that the grievance was a proper grievance under the CBA and that the grievance was timely as contrary to law and failing to draw their essence from the agreement, and on the ground that the Arbitrator exceeded his authority. Because these findings are procedural-arbitrability determinations, we deny the exceptions that allege that these findings failed to draw their essence from the agreement. Furthermore, the Union either fails to cite to any law, fails to demonstrate that the Arbitrator exceeded his authority, or bases its argument on a faulty premise. Therefore, we deny these exceptions.

Fifth, the Union alleges that the Arbitrator denied it a fair hearing and that the Arbitrator was biased. Additionally, the Union argues that the award is contrary to law and fails to draw its essence from the agreement, and that the Arbitrator exceeded his authority because he had a conflict of interest. Because the Union fails to demonstrate the lack of a fair hearing, bias, or a conflict of interest on the part of the Arbitrator, we deny these exceptions.

Sixth, the Union argues that the award is based on a myriad of nonfacts. However, because the alleged nonfacts were disputed at arbitration or the Union fails to demonstrate how, but for the alleged nonfact, the Arbitrator would have reached a different result, we deny these exceptions.

Seventh, the Union contends that the award is contrary to 5 U.S.C. § 552a, 42 U.S.C. § 2000e-8(e), and 29 C.F.R. § 1614.101(b). Because the Union does not demonstrate how the award is contrary to these laws and these regulations, we deny these exceptions.

Eighth, the Union challenges the award as contrary to § 7116(a)(1) and (3) of the Statute. Because the Union does not allege any actions by the Agency that might violate the Statute, we deny this exception.

Ninth, the Union argues that the award is contrary to the First Amendment to the U.S. Constitution because the speech in the article was protected speech. Because the Union does not demonstrate that the speech

[1] 5 U.S.C. §§ 7101-7135.

in question is protected speech, we reject these exceptions.

Tenth, the Union alleges that the award is contrary to §§ 7102 and 7116(e) of the Statute because the article is protected speech. However, because neither of these sections provides protection for coercive activity, we deny these exceptions.

Eleventh, the Union contends that that the award is otherwise contrary to law and fails to draw its essence from the CBA because: (1) the Agency did not meet its burden of proof, because the portion of the CBA the Arbitrator found violated does not apply; (2) the statements in the article were true; and (3) the article is comparable to other articles found to be protected. However, the Union either bases these exceptions on arguments already denied or fails to demonstrate how these arguments have any bearing on the award. Consequently, we deny these exceptions.

Finally, the Union argues that the award is contrary to law and public policy because the arbitration was retaliatory. Because the Union fails to support this assertion, we deny this exception.

II. Background and Arbitrator's Award

Before the Union was certified as the exclusive representative, the Agency and the previous union negotiated and executed a CBA. Under the CBA, the parties, within thirty days of the implementation of the CBA, "will exchange lists of the names of ten . . . arbitrators they deem acceptable to serve as arbitrator[s] for disputes under this [a]greement."[2] Once the parties agreed to five names,[3] those individuals became the permanent pool of arbitrators (the pool), and "as arbitrations are invoked, arbitrators will be selected alphabetically by their last name[s]."[4] Prior to the current grievance at issue, but after the Agency and the previous union had reached agreement on both the CBA and the pool, the previous union lost an election and was decertified.

At a certain point after the certification of the Union, the Agency filed a grievance against the Union alleging that the Union had committed an unfair labor practice (ULP) by violating § 7116(b)(1), (3), and (8) of the Statute and violated Article 15 of the CBA (Article 15) when it published a newsletter containing an article that was coercive and intimidating to an employee who testified on behalf of the Agency during a separate arbitration.[5] Specifically, the newsletter gave the name of the employee as well as the location of her office, and called her a "traitor to [Agency] employees," warning other employees to "beware of" and "avoid" her.[6] Article 15 states, in relevant part, that "[e]mployees . . . who have relevant information concerning any matter for which remedial relief is available under this [a]greement will, in seeking resolution of such a matter, be assured freedom from restraint, interference, coercion, discrimination, intimidation[,] or reprisal."[7]

The grievance was unresolved, and the Agency contacted Arbitrator James E. Conway to hear and resolve the matter "pursuant to Article 2, [section] 3B(3)" of the CBA.[8] The Union protested that it had not bargained for or agreed to the selection process of the Arbitrator.[9] At the time of this grievance, the Agency and the Union had not completed negotiations on a new agreement.

The Union, "under protest,"[10] and the Agency held a phone conference with the Arbitrator to discuss the matter. The parties agreed that no hearing was necessary and that the Arbitrator could decide the matter based solely on written submissions.[11] The Agency submitted a brief, and the Union submitted a brief. The Agency also submitted a reply brief. After the Arbitrator closed the record, the Union submitted additional documents. The Arbitrator considered "all documents received and all arguments advanced by the parties."[12]

Concerning the Arbitrator's authority, the Union argued in its brief that Supreme Court precedent supported a conclusion that the arbitration procedure is unavailable.[13] The Union also argued that the Authority, not the Arbitrator, should determine whether the Arbitrator was properly chosen. The Arbitrator "reject[ed] th[e]se contentions hair, hoof[,] and horn."[14] The Arbitrator found that the CBA "provisions have post-expiration effect and survive change in union representation until new terms are negotiated"[15] and that "[n]o legitimate basis has been established in support of the Union's assertions that this Arbitrator is not the proper neutral to hear and resolve this grievance."[16] The

[2] Opp'n, Attach. A, Ex. 2 (CBA) at 5.
[3] *Id.* ("If there are not five . . . names common to both lists, the [p]arties will repeat the process until five . . . common names have been identified.").
[4] *Id.*
[5] Award at 2.
[6] *Id.* at 25 (internal quotation marks omitted).
[7] CBA at 33.
[8] Award at 2 (internal quotation marks omitted).
[9] *Id.*
[10] *Id.* (internal quotation marks omitted).
[11] *Id.*
[12] *Id.* at 3.
[13] *Id.* at 8-9 (citing *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190 (1991) (*Litton*)).
[14] *Id.* at 15.
[15] *Id.* at 16.
[16] *Id.* at 26.

Arbitrator also rejected the Union's claims that he was not an impartial arbitrator because of the Arbitrator's word choices and because the Arbitrator (1) "attempt[ed] to pile on unnecessary professional fees";[17] (2) breached ethics rules; and (3) failed to recuse himself.

As to the grievance itself, the Union argued that the Agency's grievance was procedurally deficient. As to the merits of the grievance, the Union argued, among other things, that the article in the newsletter was protected speech under the First Amendment as well as the Statute. Despite the phone conference, the Union also alleged that a hearing was necessary to address several factual issues.

Concerning the grievance, the Arbitrator found that the Agency had standing to submit the institutional grievance under the CBA and that the grievance was timely. Concerning summaries of potential witness testimony proffered in the Union's brief, the Arbitrator found that, "[b]ased upon the summarization of the testimony provided, no information supplied by these witnesses would add to our learning or assist the Arbitrator in expeditiously resolving the issues efficiently, economically[,] and without undue delay."[18]

As to the merits of the grievance, the Arbitrator found that the article "[b]y its unmistakable tone . . . threatens and bullies other employees, clearly seeking to dissuade [bargaining-unit employees] from agreeing with management in litigation over workplace issues" and "strays beyond the boundaries of the Union's constitutionally protected speech."[19]

The Arbitrator sustained the grievance. Specifically, he found that the Union had "dishonored its contractual and statutory obligations to respect the rights of free speech enjoyed by all employees."[20] As a remedy, the Arbitrator ordered the Union to "cease and desist from issuing communications to covered employees which in any way threaten reprisal or recrimination or otherwise seek to limit their freedom to speak freely, including[,] but not limited to, offering testimony adverse to the [Union]."[21]

The Union filed exceptions, and the Agency filed an opposition to those exceptions.

[17] *Id.* at 17.
[18] *Id.* at 24.
[19] *Id.* at 25.
[20] *Id.* at 27.
[21] *Id*.

III. Preliminary Matters

A. We will consider one of the Union's supplemental submissions.

After submitting its exceptions, the Union submitted two supplemental submissions. The Union's first submission corrects a typographical mistake. Because the Union submitted this correction within the time limit for submitting its exceptions, we consider it as part of the Union's timely filed exceptions.

In its second submission, the Union "moves for leave to submit,"[22] and submits, an email, purportedly from a management official, that was sent after the date of the Arbitrator's award and the filing of the Union's exceptions. The email states that management does not recognize a particular provision of the CBA – regarding employee attendance at Union meetings – because the Union "was not a party to" the CBA.[23] According to the Union, this email is an "admission and concession" that is "dispositive" of the issue regarding the Arbitrator's "jurisdiction and authority."[24]

In response, the Agency moved for leave to submit, and did submit, a motion to strike the Union's second submission. In its motion, the Agency asks that, in the event that the Authority considers the Union's submission, the Authority give the Agency an opportunity to respond to that submission.[25]

Under § 2429.26 of the Authority's Regulations, the Authority "may in [its] discretion grant leave to file" supplemental submissions.[26] We assume, without deciding, that the Union's second supplemental submission and the Agency's motion to strike it are properly before us.[27] But, as discussed in Section IV.A. below, the law supports the Arbitrator's conclusion that the grievance and arbitration procedures of the CBA negotiated by the previous union bind the parties until they negotiate new terms. One email from one management official, sent after the Arbitrator's award and the filing of the Union's exceptions – and concerning a different provision of the CBA – does not change that result. Accordingly, the Union's second supplemental submission and the Agency's motion to strike do not affect our conclusions in this case.

[22] Union's Mot. at 1.
[23] *Id.*, Attach. 1.
[24] Union's Mot. at 3.
[25] Agency's Mot. at 2.
[26] 5 C.F.R. § 2429.26.
[27] *See, e.g.*, *AFGE, Local 3911, AFL-CIO*, 68 FLRA 564, 567 (2015) (*Local 3911*) (assuming, without deciding, that supplemental submissions were properly before the Authority).

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar certain of the Union's arguments.

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.[28] First, the Union argues that the Arbitrator was biased because he "allowed the [A]gency to file documents with him electronically but required the [U]nion to mail documents in hard copy, and allowed the Agency to submit two briefs but only allowed the Union to file one."[29] Because the Union did not raise these allegations before the Arbitrator, but could have, we will not consider them now.[30]

Second, the Union argues that the award is "contrary to law and contrary to public policy because the remedy censors the Union, gives the [Agency] free rein and license to disparage and suppress the Union's free[-]speech rights, and imposes a prior restraint against the Union's free[-]speech rights."[31] However, the Union did not raise any of these arguments before the Arbitrator. This is despite the fact that the Agency requested as a remedy that the Union "cease and desist from retaliating against[,] . . . interfering with, restraining[,] and coercing employees."[32] This language has the same effect as the remedy in restricting the Union's speech. As such, the Union could have presented these arguments before the Arbitrator, but did not, and we will not consider them now.[33]

Third, the Union also alleges that the Arbitrator exceeded his authority and that the award is contrary to law, does not draw its essence from the CBA, and is contradictory so as to make implementation impossible because the Arbitrator "did not enforce his order that the Agency and [the Union] select a different, mutually agreeable arbitrator."[34] What the Union refers to as an "order" is an email that the Arbitrator sent prior to arbitration asking the parties to

> [p]lease communicate with each other and either, (i) agree upon a new panel of neutrals, or single neutral, to hear the matter at issue within the week, and advise [the Arbitrator] of the results . . . or if that is not possible, (ii) provide [the Arbitrator] with several dates . . . on which [the parties] can be available for arbitrating the dispute.[35]

The Union claims that it addressed this issue in its brief,[36] but nothing in the brief reflects the argument the Union now presents. The Union did argue that the Agency "never took [the Arbitrator's] message seriously, and refused to cooperate," but never argued that, if the Arbitrator did not enforce this alleged order, the Arbitrator could not issue an award.[37] Because the Union could have presented these arguments before the Arbitrator, but did not, we will not entertain them now.[38]

Fourth, the Union argues that the contents of the article concerned a matter of public concern.[39] However, despite arguing that the article contained speech protected by the First Amendment, the Union never argued before the Arbitrator that the article contained a matter of public concern. Additionally, the Agency raised the issue of public concern in its reply brief before the Arbitrator,[40] yet the Union failed to raise this argument in its supplemental submissions, which the Union submitted after the Agency's reply brief and which the Arbitrator considered.[41] As such, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union from raising the argument that the article contained a matter of public concern, and we will not consider this argument.[42]

Fifth, the Union alleges that award is contrary to law because it allows the former union to violate §§ 7114 and 7116(b)(1) of the Statute through its alleged "interference with [the Union]'s ability to fairly and properly represent employees."[43] However, the Union

[28] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014) (*DOL*); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012) (*Local 3448*).
[29] Exceptions at 82.
[30] 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288-89; *Local 3448*, 67 FLRA at 73-74.
[31] Exceptions at 144-45.
[32] Opp'n, Attach. A at 22.
[33] 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288-89; *Local 3448*, 67 FLRA at 73-74.
[34] Exceptions at 82.
[35] *Id.*, Attach. 7 at 4.
[36] Exceptions at 82.
[37] *Id.*, Attach. 3 (Union Hr'g Br.) at 57-58.
[38] 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288-89; *Local 3448*, 67 FLRA at 73-74.
[39] Exceptions at 111-17; *see also U.S. Dep't of the Army, U.S. Army Support Command, Fort Shafter, Haw.*, 48 FLRA 777, 781 (1993) (*Dep't of the Army*) (applying test from *Connick v. Myers*, 461 U.S. 138 (1983) (*Connick*)); *Pan. Canal Comm'n*, 33 FLRA 15, 22 (1988) (*Pan. Canal*) (same).
[40] Opp'n, Attach. B at 18-19.
[41] Award at 3 ("[A]ll documents received and all arguments advanced by the parties have been considered in the preparation of [the award].").
[42] 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288-89; *Local 3448*, 67 FLRA at 73-74.
[43] Exceptions at 76.

did not allege any such violation before the Arbitrator. Consequently, we will not consider this allegation now.[44]

Sixth, the Union argues that the arbitration pool should be found inherently unfair, unlawful, and unconscionable under *Murray v. United Food & Commercial Workers International*.[45] However, the Union did not argue this case before the Arbitrator, and we will not consider it now.[46]

Finally, the Union contends that the award unlawfully permits the Agency to "refuse to recognize [the Union] as the exclusive representative for purposes . . . of arbitrator selection . . . , bypass[] . . . [the Union], and deal[] with [the former union] instead of [the Union] for arbitration designation" in violation of §§ 7111 and 7114 of the Statute.[47] Because the Union did not argue this before the Arbitrator, even though this allegation concerns actions allegedly taken prior to arbitration, §§ 2425.4(c) and 2429.5 of the Regulations bar the Union from making this argument now, and we will not consider it.[48]

IV. Analysis and Conclusions

The Union raises multiple exceptions alleging that the award is contrary to law or fails to draw its essence from the agreement or that the Arbitrator exceeded his authority or based his decision on a nonfact. In evaluating these exceptions we apply the following analyses.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[49] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[50] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[51]

When an exception alleges that an award fails to draw its essence from the agreement, the Authority reviews the arbitrator's interpretation of the agreement. 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.[52] 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.[53] 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."[54]

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.[55] In the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference.[56]

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.[57] However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[58] In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective-bargaining agreement does not constitute a fact that can be challenged as a nonfact.[59]

A. The grievance and arbitration procedures of the CBA bind the parties.

The Union argues that the award is contrary to law and fails to draw its essence from the agreement "because there is no CBA between the parties."[60]

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[44] 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288-89; *Local 3448*, 67 FLRA at 73-74.
[45] 289 F.3d 297 (4th Cir. 2002).
[46] 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288-89; *Local 3448*, 67 FLRA at 73-74.
[47] Exceptions at 76.
[48] 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288-89; *Local 3448*, 67 FLRA at 73-74.
[49] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).
[50] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[51] *Id.*
[52] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[53] *U.S. DOL* (*OSHA*), 34 FLRA 573, 575 (1990).
[54] *Id.* at 576.
[55] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[56] *U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).
[57] *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 172 (2015) (*VA*) (Member Pizzella dissenting); *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*Local 1984*).
[58] *VA*, 68 FLRA at 172-73; *Local 1984*, 56 FLRA at 41-42.
[59] *NLRB*, 50 FLRA 88, 92 (1995).
[60] Exceptions at 58.

Specifically, the Union argues that, under the U.S. Supreme Court's decision in *Litton Financial Printing Division, a Division of Litton Business Systems, Inc. v. NLRB* (*Litton*),[61] "the arbitration process is unavailable where a union collective[-]bargaining agreement . . . has expired even though an arbitration provision is otherwise a mandatory subject of bargaining."[62] In short, the Union argues that the parties have no agreement, "the present dispute is nonarbitrable[,] and no arbitrator has jurisdiction."[63]

We assume, without deciding, that the Union is correct that the CBA expired. However, balancing the Statute's various policies relating to exclusive recognition, and the need to "interpret[the Statute] in a manner consistent with the requirement of an effective and efficient [g]overnment,"[64] we reject the Union's claim. We begin our analysis with the understanding that labor organizations accorded exclusive recognition under § 7111 of the Statute have important rights and prerogatives. Section 7114(a)(1) expressly provides in this regard that "[a] labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective[-]bargaining agreements covering, all employees in the unit."[65] Moreover, the right to bargain collectively "includes the right to arbitrate . . . grievances pursuant to a collective[-]bargaining agreement."[66] Because "arbitration is an essential part of the collective[-]bargaining process,"[67] an exclusive representative, including a newly certified union such as we have in this case, has a legitimate interest in establishing with the employer agency a grievance-arbitration process to which it, as the exclusive representative, has agreed.

But other considerations based in the Statute's fundamental policies are also significant. It is well established that when a negotiated agreement expires, personnel policies, practices, and matters affecting working conditions continue to the maximum extent possible absent either an express agreement to the contrary or the modification of those conditions of employment in a manner consistent with the Statute.[68] These continuing policies, practices, and matters encompass negotiated grievance and arbitration procedures.[69] And negotiated grievance and arbitration procedures include the selection of an arbitrator.[70]

Furthermore, such provisions survive and remain in full effect not only following contract expiration, but even following the decertification of one exclusive representative and the installation of a new one.[71] As the Authority noted in *U.S. Nuclear Regulatory Commission*, these provisions continue because "[t]he stability of [a] new bargaining relationship is enhanced by a required maintenance of existing personnel policies and practices, and matters affecting working conditions pending the negotiation of a new agreement."[72] This continuation also ensures the purpose of the Statute and Congress's interest in resolving disputes between executive-branch agencies and unions representing executive-branch employees through the arbitration process with finality, speed, and economy.[73] Consequently, considering the pragmatic, tangible benefits that inure to the parties' collective-bargaining relationship and the federal workforce flowing from this precedent, we conclude that the grievance and arbitration procedures under the CBA negotiated by the previous exclusive representative bind the Union.

In arguing that it was not bound by the arbitration procedures of the CBA, the Union relies heavily on *Litton*.[74] In *Litton*, the U.S. Supreme Court considered a National Labor Relations Board (NLRB) ruling that, although mandatory subjects of bargaining continue after a bargaining agreement has expired, arbitration clauses do not continue while the parties are still negotiating a new agreement.[75] The Court ruled that "under the [National Labor Relations Act (NLRA),] arbitration is a matter of consent, and that it will not be imposed upon parties beyond the scope of their agreement."[76] The Court also noted the NLRB's position that the choice to arbitrate is a "voluntary surrender of the right of final decision which Congress . . . reserved to

[61] 501 U.S. 190 (1991).
[62] Exceptions at 58.
[63] *Id.* at 61.
[64] 5 U.S.C. § 7101(b).
[65] *Id.* § 7114(a)(1).
[66] *Children's Hosp. & Research Ctr. of Oakland, Inc. v. NLRB*, 793 F.3d 56, 57 (D.C. Cir. 2014) (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960)).
[67] *Fournelle v. NLRB*, 670 F.2d 331, 344 (D.C. Cir. 1982).
[68] *NTEU*, 64 FLRA 982, 985 n.4 (2010) (*NTEU I*).
[69] *Dep't of the Air Force, Combat Support Group (TAC), George Air Force Base, Cal.*, 4 FLRA 22, 23 (1980) (*Dep't of the Air Force*) ("existing personnel policies and practices and matters affecting working conditions – including negotiated grievance and arbitration procedures – must continue as established upon the expiration of a negotiated agreement").
[70] *U.S. Dep't of Transp., FAA, Wash., D.C.*, 65 FLRA 208, 211 (2010) (*FAA*) ("choosing an arbitrator to hear a grievance, pursuant to the procedures the parties agree to for choosing arbitrators, is a fundamental component of the binding arbitration process").
[71] *See U.S. Nuclear Regulatory Comm'n*, 6 FLRA 18, 19-20 (1981).
[72] *Id.* at 20.
[73] *See U.S. DHS, U.S. CBP, Scobey, Mont. v. FLRA*, 784 F.3d 821, 823 (D.C. Cir. 2015).
[74] 501 U.S. 190.
[75] *Id.* at 200-01.
[76] *Id.* at 201.

[the] parties" and that arbitration "is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize."[77] Unlike the NLRA, however, the Statute, by its very language, creates an obligation by law to arbitrate unresolved grievances.[78] Congress, rather than making the decision to participate in arbitration voluntary or consensual, explicitly bound parties under the Statute and required binding arbitration. As such, *Litton* does not apply here and does not contradict Authority precedent.[79]

For the reasons stated above, we find that the Union is bound by the arbitration procedures included in the CBA negotiated by the previous exclusive representative until the parties negotiate a new CBA with new procedures. Insofar as the Union bases its exceptions on a contrary position, we deny those exceptions, however articulated.[80]

B. The Arbitrator's appointment to the pool was valid.

The Union also alleges that the Arbitrator's award is contrary to law and the Arbitrator exceeded his authority because he lacked the authority to determine his own long-term appointment.[81] The Union argues that allowing the Arbitrator to determine his own long-term appointment is contrary to the Authority's decision in *EEOC*.[82]

In *EEOC*, the Authority affirmed that, where a "grievance directly concerns the arbitrator's own employment for what may be an extended period of time, impermissible self-interest requires [the arbitrator's] disqualification [from that case],"[83] and "allowing an arbitrator to rule on his or her own contested extended appointment 'create[s] a risk of unfairness so inconsistent with the basic principles of justice that the arbitration award must be automatically vacated.'"[84] The Authority also noted that "[b]oth the Authority and the [U.S. Court of Appeals for the Second Circuit in *Pitta v. Hotel Ass'n of New York City, Inc.* (*Pitta*)[85]] limited their holdings to cases where continued employment was at issue."[86] The Authority first adopted *Pitta* in *AFGE*.[87] In *AFGE*, the Authority emphasized that the issue of an arbitrator determining his own long-term appointment "is fundamentally different, in our view, from other issues involving an arbitrator's authority to hear and decide cases."[88]

Here, the Arbitrator concluded that "[n]o legitimate basis has been established in support of the Union's assertions that this Arbitrator is not the proper neutral to hear and resolve this grievance."[89] The Arbitrator only found that he was properly appointed to resolve this particular grievance. Thus, we find that the Arbitrator did not make a determination concerning his own long-term appointment and that *EEOC* does not apply. Consequently, we deny these exceptions.

In limiting *EEOC* to long-term appointments, we acknowledge that the Authority suggested otherwise in *U.S. DHS, U.S. ICE* (*DHS*).[90] In *DHS*, the Authority applied *EEOC*, including a de novo review of the parties' agreement, where an arbitrator's decision only implicated his selection to a single arbitration, not a long-term position.[91] However, the Authority in *DHS* never addressed the first step in *EEOC* – determining whether there was a presumption of an impermissible self-interest – before vacating the award. *DHS* expanded *EEOC* without explanation and did not reconcile the expansion's tension with long-standing Authority precedent holding that procedural-arbitrability determinations may be found deficient only on grounds that do not challenge those

[77] *Id.* at 199-201 (alteration in original) (quoting *Hilton-Davis Chem. Co., Div. of Sterling Drug, Inc.*, 185 NLRB 241, 242 (1970)) (internal quotation marks omitted).
[78] 5 U.S.C. § 7121(a)(1) ("[A]ny collective[-]bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability."), (b)(1)(iii) ("[Any negotiated grievance procedure shall] provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration.").
[79] *See FAA*, 65 FLRA at 211; *NTEU I*, 64 FLRA at 985 n.4; *Dep't of the Air Force*, 4 FLRA at 23.
[80] Exceptions at 68 ("There is no contract or CBA with [the Union]."); *id.* at 74 ("[T]he continuation of the pool and . . . of the individual arbitrators . . . was contrary to law[,] and the [award] is contrary to law because there was no longer any contract . . . ."); *id.* at 77 (arguing that the award is contrary to law and the Arbitrator exceeded his authority "because there is no contract with [the Union]").
[81] *Id.* at 62.
[82] 53 FLRA 465 (1997).
[83] *Id.* at 474 (quoting *AFGE*, 29 FLRA 1568, 1578 (1987) (*AFGE*) (internal quotation marks omitted)).
[84] *Id.* (quoting *AFGE*, 29 FLRA at 1578).
[85] 806 F.2d 419, 424 (2d Cir. 1986).
[86] *EEOC*, 53 FLRA at 474 n.10.
[87] 29 FLRA at 1578-80.
[88] *Id.* at 1579.
[89] Award at 26.
[90] 61 FLRA 503 (2006).
[91] *DHS*, 61 FLRA at 503 ("[P]ursuant to a provision of the parties' [former agreement], the [Federal Mediation and Conciliation Service] designated the [a]rbitrator to resolve the grievance.").

determinations themselves.[92] As far as *DHS* conflicts with the approach taken here, we overrule *DHS* and its application of *EEOC*.

C. The Union's remaining exceptions challenging the Arbitrator's selection and the validity of the pool lack merit.

The Union raises several other exceptions challenging the validity of the Arbitrator's appointment to the pool, the validity of the pool itself, and the Arbitrator's selection to resolve this particular grievance. These exceptions, in challenging the process of arbitrator selection, challenge the Arbitrator's determination concerning procedural arbitrability.[93] An arbitrator's determination as to procedural arbitrability may be found deficient only on grounds that do not challenge the procedural-arbitrability determination itself.[94] Such grounds include arbitrator bias or the fact that the arbitrator exceeded his or her authority.[95] Exceptions challenging an arbitrator's procedural-arbitrability determination as based on a nonfact or alleging that the determination fails to draw its essence from the parties' agreement, however, provide no basis for finding an award deficient.[96]

Consequently, we deny the Union's nonfact[97] and essence exceptions[98] concerning the Arbitrator's selection and the validity of the pool.

Concerning the Arbitrator's selection, the Union also alleges that the award is contrary to law. In part, the Union argues that the Arbitrator's selection is contrary to law because the Union did not participate in the selection of the pool.[99] Beyond arguments already addressed,[100] the Union argues, citing 29 C.F.R. § 1404.4 (Federal Mediation and Conciliation Service (FMCS) ethics rules), that "it is not ethical for an arbitrator to serve unless he or she was mutually selected by the parties to the arbitration case."[101] However, as the Authority has noted, "the only consequence for an arbitrator of not following the FMCS's regulations or the Code of Professional Responsibility is possible removal from the FMCS roster. Therefore, the cited FMCS regulations do not constitute a general restriction on [an] arbitrator[']s authority and discretion with respect to arbitration proceedings."[102] Consequently, even had the Arbitrator violated FMCS ethics rules, a violation of FMCS ethics rules is not a basis for finding an award deficient.[103] We, therefore, deny these exceptions.

[92] *E.g.*, *AFGE, Local 2172*, 57 FLRA 625, 627 (2001) (*Local 2172*) ("An arbitrator's determination as to procedural arbitrability may be found deficient only on grounds that do not challenge the determination of procedural arbitrability itself."); *U.S. Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base*, 35 FLRA 700, 702 (1990) ("Questions concerning procedural arbitrability are appropriate for resolution by an arbitrator and are not generally subject to review or challenge before the Authority."); *Headquarters, Fort Sam Houston, Dep't of the Army*, 15 FLRA 974, 975 (1984) ("The [u]nion's exception, however, constitutes nothing more than disagreement with the Arbitrator's determination with respect to the procedural arbitrability of the grievance, and it is well established that such disagreement provides no basis for finding the award deficient.").

[93] *E.g.*, *Local 2172*, 57 FLRA at 627.

[94] *Local 3911*, 68 FLRA at 567; *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995) (*Local 2921*).

[95] *Local 2921*, 50 FLRA at 186.

[96] *U.S. DHS, ICE*, 67 FLRA 711, 713 (2014) (*ICE*) (nonfact); *AFGE, Local 2041*, 67 FLRA 651, 653 (2014) (*Local 2041*) (nonfact and essence).

[97] Exceptions at 90 (The Arbitrator "based his [d]ecision on a central nonfact that [the Union] participated in selecting him for a pool of arbitrators."); *id.* (The Arbitrator "based his decision on a central nonfact that there was a pool of five arbitrators.").

[98] *Id.* at 64 ("The [d]ecision by [the Arbitrator] to assert jurisdiction . . . does not draw its essence from a CBA because the Agency unilaterally selected him after it filed its institutional grievance in October 2013."); *id.* at 66 ("The [d]ecision by [the Arbitrator] to assert jurisdiction . . . does not draw its essence from a CBA because the Union did not participate in or agree to the selection of [the Arbitrator] or any of the individuals in the arbitration pool."); *id.* at 69 ("The [d]ecision by [the Arbitrator] to assert jurisdiction . . . does not draw its essence from a CBA because the individual arbitrators in the pool were selected and invited by the [Agency] unilaterally."); *id.* at 73-74 ("The [d]ecision by [the Arbitrator] . . . does not draw its essence from a CBA because even if a pool applied, the terms of appointment of the individual arbitrators, including [the Arbitrator], ended when [the former union] was decertified in November 2011."); *id.* at 75 ("The [d]ecision by [the Arbitrator] . . . does not draw its essence from a CBA because [the former union] is not and cannot be a 'party' to any arbitration after [the Union] was certified."); *id.* at 77-78 ("The [d]ecision by [the Arbitrator] . . . does not draw its essence from a CBA because . . . Article 2, Section 2.B requires that there must be five persons in the arbitration pool in order for any new arbitration to proceed."); *id.* at 79 ("The [d]ecision by [the Arbitrator] . . . does not draw its essence from a CBA because, under . . . Article 2, Section 2, . . . [the Arbitrator] is not the correct individual to arbitrate under the pool's rotation requirement.").

[99] *Id.* at 66.

[100] *Id.* at 68 ("There is no contract or CBA with [the Union].").

[101] *Id.* at 67; *see also id.* at 65, 75, 77, 80, 83.

[102] *U.S. DOT, FAA*, 65 FLRA 806, 807 (2011).

[103] *Id.*

Additionally, the Union argues that the award is contrary to law and the Arbitrator exceeded his authority because: (1) the section of the CBA concerning arbitration procedure "requires that there must be five persons in the . . . pool in order for any new arbitration to proceed";[104] and (2) the Arbitrator "is not the correct individual to arbitrate under the pool's rotation requirement."[105] As an initial matter, the Union cites no law to support these contrary-to-law exceptions; we therefore deny those exceptions.[106] Furthermore, whether the arbitration procedures require a full pool and whether the Arbitrator is the next in the pool's rotation are matters of contract interpretation and fact, respectively. As noted above, the Union cannot challenge the Arbitrator's procedural-arbitrability determination on essence and nonfact grounds.[107] Because the Union bases these exceeds-authority exceptions on essence and nonfact grounds challenging the Arbitrator's procedural-arbitrability determination, we deny them.

Beyond the above contentions, the Union also argues that the Arbitrator's selection is contrary to law because the parties had a past practice of selecting arbitrators not from the pool, but from a random list of arbitrators supplied by the FMCS.[108] In reviewing an arbitrator's award concerning whether a past practice has altered a contract term, the Authority considers the issue as a challenge to an arbitrator's interpretation and application of the parties' agreement.[109] An allegation that an arbitrator erred in this regard does not provide a basis for finding an award contrary to law.[110] Consequently, we deny this exception.

Additionally, the Union argues that by not relying on a past practice, the Arbitrator exceeded his authority.[111] However, as noted above, the Authority analyzes this issue as challenging the Arbitrator's interpretation and application of the parties' agreement.[112] As the Union cannot challenge this procedural-arbitrability issue through challenging the Arbitrator's interpretation and application of the CBA[113] – an essence challenge – we deny this exception.

The Union also alleges that the award is contrary to law and the Arbitrator exceeded his authority because the Agency unilaterally selected him.[114] Specifically, the Union argues that, in selecting the arbitration pool, an official of the former union "was acting on behalf of the [Agency] and herself individually."[115] However, this argument presents a factual, not a legal question. The Union does not – and indeed cannot[116]– challenge this finding as a nonfact. We therefore deny these contrary-to-law and exceeds-authority exceptions.

The Union raises several other related exceptions alleging that, concerning the Arbitrator's selection, the award is contrary to law and the Arbitrator exceeded his authority.[117] However, the Union bases these exceptions on grounds already denied above.[118] As such, we deny these exceptions as well.

The Union also argues that the Arbitrator's appointment is contrary to public policy. Specifically, the Union contends that the appointment "is fundamentally undemocratic and inherently unfair because it rests on the [long-term] appointment of an

[104] Exceptions at 77-78.
[105] *Id.* at 79.
[106] *See* 5 C.F.R. § 2425.6(e) ("An exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground.").
[107] *ICE*, 67 FLRA at 713 (cannot challenge procedural-arbitrability determination on nonfact grounds); *Local 2041*, 67 FLRA at 653 (cannot challenge procedural-arbitrability determination on nonfact or essence grounds).
[108] Exceptions at 63.
[109] *U.S. DHS, U.S. CBP, Savannah, Ga.*, 68 FLRA 324, 326 (2015) (*CBP*); *U.S. DOJ, Fed. BOP, Mgmt. & Specialty Training Ctr., Aurora, Colo.*, 56 FLRA 943, 944 (2000) (*BOP*).
[110] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 691 (2014) (Member Pizzella concurring).
[111] Exceptions at 63.
[112] *CBP*, 68 FLRA at 326; *BOP*, 56 FLRA at 944.
[113] *See Local 2041*, 67 FLRA at 653.
[114] Exceptions at 69.
[115] *Id.* at 70.
[116] *See ICE*, 67 FLRA at 713; *Local 2041*, 67 FLRA at 653.
[117] Exceptions at 64 ("The [d]ecision by [the Arbitrator] to assert jurisdiction is contrary to law and exceeded his authority . . . because the Agency unilaterally selected him after it filed its institutional grievance in October 2013."); *id.* at 66 ("The [d]ecision by [the Arbitrator] to assert jurisdiction is contrary to law and exceeded his authority . . . because the Union did not participate in or agree to the selection of [the Arbitrator] or any of the individuals in the arbitration pool."); *id.* at 69 ("The [d]ecision by [the Arbitrator] to assert jurisdiction is contrary to law and exceeded his authority . . . because the individual arbitrators in the pool were selected and invited by the [Agency] unilaterally."); *id.* at 73-74 ("The [d]ecision by [the Arbitrator] is contrary to law and exceeded his authority . . . because even if a pool applied, the terms of appointment of the individual arbitrators, including [the Arbitrator], ended when [the former union] was decertified in November 2011."); *id.* at 75 ("The [d]ecision by [the Arbitrator] is contrary to law and exceeded his authority . . . because [the former union] is not and cannot be a 'party' to any arbitration after [the Union] was certified."); *id.* at 77-78 ("The [d]ecision by [the Arbitrator] is contrary to law and exceeded his authority . . . because . . . Article 2, Section 2.B requires that there must be five persons in the arbitration pool in order for any new arbitration to proceed."); *id.* at 79 ("The [d]ecision by [the Arbitrator] is contrary to law and exceeded his authority . . . because, under . . . Article 2, Section 2, . . . [the Arbitrator] is not the correct individual to arbitrate under the pool's rotation requirement.").
[118] *Id.* at 64 (based on lack of CBA and FMCS ethics rules); *id.* at 66 (same); *id.* at 73-74 (same); *id.* at 75 (same).

arbitration pool after a prior union [had] lost a representational election"[119] and "it is unconscionable to have an inherently unfair arbitration process where one party to the particular arbitration has no role and only its opponents have a say in the selection of the [A]rbitrator."[120] Under the Authority's public-policy analysis, the asserted public policy must be "explicit," "well[-]defined," and "dominant,"[121] and a violation of the policy "must be clearly shown."[122] 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.'"[123] However, the Union does not identify any policy "by reference to the laws [or] legal precedents."[124] Consequently, we deny this exception.

D. The grievance was not otherwise procedurally deficient.

In addition to arguments already addressed above,[125] the Union argues that the award is contrary to law and fails to draw its essence from the agreement and that the Arbitrator exceeded his authority because the grievance was untimely.[126] The Arbitrator's finding concerning the timeliness of the grievance is a procedural-arbitrability finding.[127] As noted above, an arbitrator's determination as to procedural arbitrability may be found deficient only on grounds that do not challenge the procedural-arbitrability determination itself.[128] Such grounds include arbitrator bias or the fact that the arbitrator exceeded his or her authority.[129] Exceptions challenging an arbitrator's procedural-arbitrability determination as based on a nonfact or alleging that the determination fails to draw its essence from the parties' agreement, however, provide no basis for finding an award deficient.[130]

Insofar as the Union challenges this procedural-arbitrability finding as failing to draw its essence from the CBA,[131] we deny this exception.[132] Furthermore, the Union does not cite to any law to support its claim that this determination is contrary to law.[133] Consequently, we deny this contrary-to-law exception as unsupported.[134] Finally, the Union does not explain how the Arbitrator's procedural-arbitrability decision exceeded his authority. As a result, we deny this exception as unsupported as well.[135]

The Union also argues that the Arbitrator's decision that the grievance qualified as an institutional grievance under the CBA is contrary to law and does not draw its essence from the agreement and that the Arbitrator exceeded his authority in making that decision.[136] Specifically, the Union argues that the grievance is actually on behalf of either an individual or the former union and "only an individual employee can file a grievance that seeks particular relief for that employee."[137] As such, the Union concludes, the matter is not grievable by the Agency as an institutional grievance. However, the premise of this argument is faulty. The Arbitrator found – and the Union does not challenge as a nonfact or on other grounds – that the grievance was not

> seeking specific benefit, remuneration[,] or any other relief for [an] individual employee . . . . It seeks instead only express vindication of [the Agency's] and its employees' rights in general to be treated with respect and to enjoy an open and honest dispute[-]resolution mechanism. The record is devoid of any evidence establishing that the grievance was designed in aid of [the former union].[138]

[119] *Id.* at 71.
[120] *Id.* at 84.
[121] *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983) (*Rubber Workers*).
[122] *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43 (1987).
[123] *NTEU*, 63 FLRA 198, 201 (2009) (*NTEU II*) (quoting *Rubber Workers*, 461 U.S. at 766).
[124] *Id.* (quoting *Rubber Workers*, 461 U.S. at 766) (internal quotation marks omitted).
[125] Exceptions at 85-86 ("[T]he refusal of [the Arbitrator] to hold a hearing on the issue of timeliness is unlawful in itself and exhibits partiality and bias.").
[126] *Id.* at 85-86.
[127] *Local 3911*, 68 FLRA at 567.
[128] *Local 2921*, 50 FLRA at 185-86.
[129] *Id.* at 186.
[130] *ICE*, 67 FLRA at 713 (nonfact); *Local 2041*, 67 FLRA at 653 (nonfact and essence).
[131] Exceptions at 85-86 (The award "does not draw its essence from the CBA because the 'institutional grievance' filed by the [Agency] was untimely."); *id.* at 86 (The award "does not draw its essence from the CBA because the 'grievance' did not qualify as an 'institutional grievance.'").
[132] *Local 2041*, 67 FLRA at 653.
[133] Exceptions at 85-86 ("[T]he refusal of [the Arbitrator] to hold a hearing on the issue of timeliness is unlawful . . . .").
[134] *See* 5 C.F.R. § 2425.6(e) ("An exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground.").
[135] *See id.*
[136] Exceptions at 86.
[137] *Id.* at 87 (citing CBA Art. 19, Sec. 6.A).
[138] Award at 12.

As the premise of these exceptions is faulty, we deny them.[139]

E. The Arbitrator did not deny the Union a fair hearing, and the Union fails to demonstrate bias or a conflict of interest on the part of the Arbitrator.

The Union contends that, by not holding a hearing, the Arbitrator denied the Union a fair hearing.[140] An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.[141] The Union argues that, because the Arbitrator did not hold a hearing, the award "is invalid as a matter of law."[142] In its hearing brief, the Union proffered summaries of potential witness testimony, and the Union argued, as it does here, that there were facts in dispute requiring a hearing.[143]

However, beyond the fact that the Union had previously agreed that a hearing was not necessary,[144] the Union does not demonstrate that the evidence it would have presented at a hearing was pertinent or material. Specifically, the Union does not address the Arbitrator's findings that "[b]ased on the summarization of the testimony provided, no information supplied by these witnesses would add to [the Arbitrator's] learning or assist the Arbitrator in expeditiously resolving the issues efficiently, economically[,] and without delay"[145] and that "[n]o showing of need for further continuance to take testimony has been shown."[146] The Union does not identify any further evidence it would have presented at a hearing. Consequently, because the only evidence the Union would have presented at the hearing was not pertinent or material, the Union has failed to demonstrate that it was denied a fair hearing.[147]

The Union also argues that the Arbitrator based the award on the nonfact that the Union "did not seek a hearing and that [the Union] waived its right to a hearing."[148] However, in light of the above discussion, the Union does not demonstrate that, but for this alleged nonfact, the Arbitrator would have reached a different result.[149] Consequently, we deny this nonfact exception.

Additionally, the Union alleges that the Arbitrator was biased.[150] To establish that an arbitrator was biased, the moving party must demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party.[151] The Union alleges that the Arbitrator demonstrated hostility and animosity towards the Union in the language he used in his emails with the Union as well as in his decision. Specifically, the Union notes that the Arbitrator "called the Union and its representative 'crazy'"[152] and called the Union a "little union."[153] Concerning the language and the tone used by an arbitrator, the Authority has found that language sharply critical of a party[154] or its conduct,[155] or even intemperate language by an arbitrator[156] is not sufficient to demonstrate that an award was procured by proper means or that there was partiality or corruption on the part of an arbitrator.[157] As such, the Union has not shown that the language used by the Arbitrator demonstrated his bias and we deny this exception.

The Union also alleges that the Arbitrator was biased because he failed to conduct a fair hearing.[158] However, as noted above, the Union does not demonstrate that the Arbitrator failed to conduct a fair hearing. Consequently, we deny this exception.

Finally, the Union argues that the award is contrary to law and does not draw its essence from the agreement and that the Arbitrator exceeded his authority

[139] *See e.g., U.S. Dep't of Transp., FAA, Wash., D.C.*, 65 FLRA 950, 955 n.2 (2011).
[140] Exceptions at 85; *see also id*. at 71, 80.
[141] *AFGE, Local 1668*, 50 FLRA 124, 126 (1995) (*Local 1668*).
[142] Exceptions at 85.
[143] *Id.* (citing Union Hr'g Br. at 42-44).
[144] Award at 2 (During a conference call, "all involved appeared to agree that a de novo hearing would not be required and written submissions were scheduled for exchange."); *id.* at 14 n.9 ("We had understood that all parties concurred in the decision reached in conference call . . . that the matter was entirely susceptible to a 'paper submission.'").
[145] *Id.* at 24.
[146] *Id.* at 25.
[147] *See e.g.*, *Local 1668*, 50 FLRA at 126.
[148] Exceptions at 88.
[149] *Local 1984*, 56 FLRA at 41 ("To establish that an award is based on nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which a different result would have been reached by the arbitrator.").
[150] Exceptions at 80-82, 85-86.
[151] *AFGE, Local 3438*, 65 FLRA 2, 3 (2010).
[152] Exceptions at 81 (quoting Award at 18).
[153] *Id.* (quoting Award at 24 n.23) (internal quotation marks omitted).
[154] *AFGE, Local 4042*, 51 FLRA 1709, 1714 (1996).
[155] *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 56 FLRA 848, 851 (2000).
[156] *AFGE, Local 4044, Council of Prisons Local 33*, 57 FLRA 98, 100 (2001).
[157] *Id.*
[158] Exceptions at 85.

because the Arbitrator had a conflict of interest.[159] Specifically, the Union alleges that the Arbitrator had a conflict of interest because the Agency and the former union appointed him, and the grievance concerns an official of the former union. However, outside of arguments already discussed,[160] the Union cites no law or portion of the CBA to support this claim. Furthermore, the Union's argument does not explain how the Arbitrator, chosen under the terms of the CBA, exceeded his authority. Consequently, we deny these exceptions.

F. The award is neither based on a nonfact nor contrary to law as premised on those alleged nonfacts.

The Union argues that the award is deficient as based on nonfacts. Beyond the nonfact allegations already addressed, the Union argues that the Arbitrator based the award on the following nonfacts: (1) that the Union distributed the newsletter;[161] (2) that any bargaining-unit employee, witness, or future witness read the article or was affected, influenced, coerced, concerned, or chilled by it;[162] (3) that statements in the article were untrue;[163] (4) that a certain employee told the truth in a separate hearing;[164] (5) that a certain employee was solely an individual employee or an agent of the Agency and was not acting as an official of the former union;[165] (6) that the article contained a threat or threatened any potential future witness or affected any future witness;[166] (7) that the Agency did not have a policy and longstanding practice that recognized statements such as those in the article as protected;[167] (8) that the article applied to anyone other than a certain employee;[168] (9) that any potential witness would have read or had any concerns about the article and would not have appeared and testified truthfully;[169] (10) that a certain employee did not disclose confidential, privileged, and private information;[170] and (11) that the "article is different from other flyers that were protected."[171]

As noted above, 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.[172] However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[173] Each of the above alleged nonfacts was disputed before the Arbitrator.[174] As a result, we deny these nonfact exceptions.

The Union also argues that the Arbitrator based his decision on the nonfact that a CBA existed.[175] However, the Arbitrator did not base his decision on the existence of a CBA, but the continuation of the arbitration procedures.[176] Additionally, the Union argues that the Arbitrator based his decision on the nonfacts that a certain employee read the article and that the article affected that employee's testimony.[177] However, the Arbitrator did not base his award on the effects of the article on any individual employee, but the effect of the article on all employees.[178] In light of this, the Union does not explain how, but for these alleged nonfact, the Arbitrator would have reached a different result. Consequently, we deny these nonfact exceptions.[179]

Relatedly, the Union argues that the award is contrary to law because the ULP provision – § 7116(b) of the Statute – does not protect the employee mentioned in the article because she was not an employee, but a representative of a rival union and of the Agency.[180] Because this contrary-to-law exception is entirely premised on an alleged nonfact – that a certain employee was not an employee but a representative of a rival union and of the Agency – denied above, we also deny this contrary-to-law exception.

Finally, the Union alleges on two occasions that the Arbitrator based his award on nonfacts, but the Union fails to identify what those nonfacts are.[181] As such, the Union has failed to support these nonfact exceptions and we deny them.[182]

[159] *Id.* at 83.
[160] *Id.* (citing FMCS regulations and FMCS ethics rules).
[161] *Id.* at 90.
[162] *Id.* at 91-92, 102.
[163] *Id.* at 93, 144.
[164] *Id.* at 94-95.
[165] *Id.* at 96, 99, 141.
[166] *Id.* at 97-98, 102-04, 131.
[167] *Id.* at 101.
[168] *Id.* at 98-99.
[169] *Id.* at 104-05.
[170] *Id.* at 105-06.
[171] *Id.* at 125.
[172] *VA*, 68 FLRA at 172; *Local 1984*, 56 FLRA at 41.
[173] *VA*, 68 FLRA at 172-73; *Local 1984*, 56 FLRA at 41.
[174] Union Hr'g Br. at 4, 9, 32, 42, 73, 74, 77; Exceptions at 99 (citing Union Hr'g Br. at 34).
[175] Exceptions at 89.
[176] Award at 16 ("[F]or the ultimate benefit of both sides, the arbitration provisions have post-expiration effect and survive a change in union representation until new terms are negotiated.").
[177] Exceptions at 92, 102.
[178] Award at 26-27.
[179] *E.g.*, *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 461 (2012).
[180] Exceptions at 139-41.
[181] *Id.* at 132, 135.
[182] *See* 5 C.F.R. § 2425.6(e) ("An exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground.").

G. The award is not contrary to law as violating 5 U.S.C. § 552a, 42 U.S.C. § 2000e-8(e), or 29 C.F.R. § 1614.101(b).

The Union alleges that the award is contrary to law because the Arbitrator "considered a confidential document protected by the [c]ivil[-]rights laws and the Privacy Act."[183] The Union argues that the Agency, by "taking an [Equal Employment Opportunity (EEO)] document,"[184] violated EEO laws and the Privacy Act – specifically 5 U.S.C. § 552a and 42 U.S.C. § 2000e-8(e). In turn, the Union continues, the award is contrary to law because the Arbitrator considered that document.

As an initial matter, the Union cites to 5 U.S.C. § 552a but does not provide any argument concerning this statute outside of the citation. As such, we deny this portion of these exceptions as unsupported.[185] The portion of 42 U.S.C. § 2000e-3 cited by the Union concerns "[d]iscrimination for making charges, testifying, assisting, or participating in [Equal Employment Opportunity Commission (EEOC)] enforcement proceedings." Although the Union alleges that the Agency violated the law by disclosing information, the Union fails to explain how the Arbitrator, by considering the information, issued an award that was contrary to law. Beyond the fact that the liberal admission of evidence during arbitration is a permissible practice,[186] the cited law does not restrict the use of such information as evidence and only pertains to those who improperly disclose information, not those who consider it in arbitration.[187] Because the Union does not demonstrate how the Arbitrator's consideration of certain evidence is contrary to law, we deny this exception.

The Union also alleges that the award is contrary to 29 C.F.R. § 1614.101(b).[188] Under 29 C.F.R. § 1614.101(b) "[n]o person shall be subject to retaliation for opposing any practice made unlawful by," among other statutes, 42 U.S.C. § 2000e-3. The Union claims that the article was an expression against an employee who testified in a separate arbitration that concerned a charge of EEO retaliation. However, neither this matter nor the matter the Union claims it was addressing in the article was an EEOC proceeding. Because this arbitration does not concern an EEOC proceeding, the award cannot be contrary to 42 U.S.C. § 2000e-3 or 29 C.F.R. § 1614.101(b), both of which ensure protection for those pursuing claims before the EEOC. Consequently, we deny these exceptions.

H. The award is not contrary to § 7116(a)(1) or (3) of the Statute.

The Union argues that the award is contrary to law and the Arbitrator exceeded his authority because "it is unlawful for [the former union] to have any say in what individual may arbitrate [Union] cases."[189] The Union claims that the award is contrary to § 7116(a)(1) and (3) of the Statute because "to allow [the former union] to essentially choose or dictate the individual arbitrators via the . . . pool[,] . . . interfere[s] with [the Union]"[190] and "allows [the former union] to interfere in [Union] arbitrations."[191] Under the Statute, § 7116(a) delineates what actions "shall be a[ULP] for an agency" to perform. However, outside of arguments not raised before the Arbitrator – that the Agency bypassed the Union by dealing with the former union for arbitration designation – and therefore not considered here,[192] the Union does not allege any actions by the Agency that might violate the Statute. Because the Union's exception does not demonstrate how the award violates § 7116(a) of the Statute, we deny this exception.

I. The award is not contrary to the First Amendment.[193]

Turning to the Arbitrator's findings on the merits of the underlying grievance, the Union argues that the award – finding that the Union newsletter violated the Statute and the CBA – is contrary to law because the article was speech protected under the First Amendment.[194] In determining whether an employee's First Amendment rights have been violated, we apply[195] the test set out in *Connick v. Myers* (*Connick*).[196] The Supreme Court held in *Connick* that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide

[183] Exceptions at 107.
[184] *Id.*
[185] *See, e.g., U.S. DHS, U.S. CBP*, 66 FLRA 904, 907-08 (2012) ("'mere citation' to legal authority, 'without explanation or analysis, is nothing more than a bare assertion and does not demonstrate that an arbitrator's award is contrary to law'" (citations omitted)).
[186] *AFGE, Local 22*, 51 FLRA 1496, 1498 (1996).
[187] 42 U.S.C. § 2000e-8(e) ("Any officer or employee of the [EEOC] who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.").
[188] Exceptions at 123.
[189] *Id.* at 75.
[190] *Id.* at 76.
[191] *Id.* at 77 (emphasis omitted).
[192] 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288-89; *Local 3448*, 67 FLRA at 73-74.
[193] U.S. Const. amend. I.
[194] Exceptions at 107 (citing U.S. Const. amend. I).
[195] *Dep't of the Army*, 48 FLRA at 781; *Pan. Canal*, 33 FLRA at 22.
[196] 461 U.S. 138 (1983).

latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[197] This logic applies equally to public unions as it does to public employees.[198] Therefore, we will apply *Connick* in the current case concerning the Union's First Amendment rights as the Union.

The threshold question under *Connick* is whether the speech in question involves a matter of public concern.[199] Only if the speech involves a matter of public concern and, thus, is constitutionally protected, does *Connick* require the application of a balancing test.[200] The Union argues that we do not need to determine whether or not the speech in the newsletter involved a matter of public concern because "the First Amendment strictly protects an employee's right to associate with a union."[201] However, the threats at issue do not concern any employee's right to associate with a union. Although the Union argues that the article concerned a rival union, the Arbitrator did not make a finding that anything in the article in question identified the employee as a member of the other union or advocated joining one union over the other. In fact, the Arbitrator found that the article "had the very obvious purpose of chilling the exercise of [employee rights of freedom of speech]."[202] Consequently, the article does not concern an employee's right to associate with a union, and we will apply *Connick* to determine whether the award violates the Union's First Amendment speech rights.

The Union addresses *Connick*, arguing that "the newsletter as a whole and the news article do concern matters of public concern."[203] However, as noted above, the Union did not argue before the Arbitrator that the speech in question concerned a matter of public concern. As a result, §§ 2425.4(c) and 2429.5 of the Regulations bar the Union from raising this argument for our consideration. Consequently, the Union has failed to demonstrate that the speech in question involved a matter of public concern. As such, we have no basis on which to conclude that the newsletter was protected under the First Amendment, and it is not necessary to apply the balancing test.[204] Therefore, we conclude that Union has not demonstrated that the award violates its First Amendment rights.

J. The award is not contrary to §§ 7102 or 7116(e) of the Statute.

The Union also contends that the award is contrary to § 7102 of the Statute.[205] The Union argues that § 7102 "guarantees employees and unions the right to communicate about working conditions and union matters 'freely and without fear of penalty or reprisal.'"[206] Section 7102 guarantees, "[e]xcept as otherwise provided under this chapter," certain employee rights, including: the right "to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization"; and the right "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter." However, as noted above, the rights enumerated under § 7102 are subject to the remainder of the Statute, including § 7116(b)(1) – which the Arbitrator found that the Union had violated with its newsletter. In short, § 7116(b)(1) limits the rights under § 7102, and § 7102 cannot operate as a shield to protect the Union from its violation of § 7116(b)(1). Because the Union violated § 7116(b)(1), the award is not contrary to § 7102 of the Statute, and we deny this exception.

The Union similarly argues that the award is contrary to law because the Statute protects "the rights of union members to receive information."[207] However, the Union cites no support for the contention that any alleged right that union members may have to receive information permits a union to violate § 7116(b)(1) of the Statute.

Finally, the Union contends that § 7116(e) of the Statute protects the newsletter.[208] Section 7116(e) of the Statute states, in part, that "[t]he expression of any personal view, argument, [or] opinion . . . shall not, if the expression contains no threat or reprisal or force or promise of benefit or was not made under coercive conditions, . . . constitute a[ULP]." Additionally, well-settled labor precedent establishes that neither the First Amendment nor the speech guarantees found in federal labor laws protect threatening or coercive

[197] *Id.* at 146.
[198] *See, e.g., Booth v. Pasco Cnty., Fla.*, 757 F.3d 1198, 1214 (11th Cir. 2014).
[199] *See Connick*, 461 U.S. at 146.
[200] *Dep't of the Army*, 48 FLRA at 781; *AFGE, Local 3197*, 48 FLRA 350, 354-55 (1993).
[201] Exceptions at 114 (citing *Boddie v. City of Columbus, Miss.*, 989 F.2d 745, 748-49 (5th Cir. 1993); *Donovan v. Inc. Village of Malverne*, 547 F. Supp. 2d 210, 218 (E.D.N.Y. 2008)).
[202] Award at 26.
[203] Exceptions at 115.
[204] *See Dep't of the Army*, 48 FLRA at 781.
[205] Exceptions at 118.
[206] *Id.* (quoting 5 U.S.C. § 7102).
[207] *Id.*
[208] *Id.* at 119, 131.

statements.[209] In the current case, the Arbitrator found that the article in question contained a threat – a finding the Union does not successfully challenge – and so, the article loses its protection under § 7116(e) and the expression therein constituted a ULP.[210]

Furthermore, as to the Union's claims concerning both §§ 7116(e) and 7102, the right to free speech in labor disputes does not permit a union to coerce employees in the exercise of those employees' rights.[211] To allow the use of the Statute as a shield to protect the Union's coercive activity would undermine the valid interests of Congress in enacting the Statute. In the instant case, such a misapplication of the Statute would result in the Union being able to, with impunity: (1) retaliate against an employee for testifying on behalf of the Agency; (2) chill other employees from exercising their right to provide similar testimony at Authority and arbitral proceedings in the future; and (3) potentially obstruct the ability of both arbitrators and the Authority to receive relevant evidence in proceedings under the Statute. Such a result directly contradicts the protections given to employees by Congress under the Statute.[212] Therefore, the Union's argument fails.

Citing *Department of the Air Force, 315th Airlift Wing v. FLRA* (*Air Force*),[213] the Union claims that "speech must constitute a threat of force or actual reprisal in order to possibly lose protection" under § 7116(e) of the Statute.[214] However, *Air Force* only concerns the Authority's flagrant-misconduct standard under § 7102 of the Statute, which is not at issue here because no union official was disciplined or threatened with any discipline.[215] Because this case does not address § 7116(e), *Air Force* does not have any applicability here. Furthermore, § 7116(e) removes protection from a "threat of reprisal or force"[216] not, as the Union alleges, from "a threat of force or actual reprisal."[217] In short, the Union's misreading overlooks the fact that a threat does not need to be a threat of force to lose protection. The Union's misreading of the Statute cannot support its argument.

Additionally, the Union cites several other cases to support these exceptions.[218] However, because none of these cases deal with coercive activities against employees, each of these cases is inapposite to the current case and provides no support for the Union's contentions.[219]

Consequently, the Union has failed to demonstrate that the award is contrary to §§ 7102 or 7116(e) of the Statute, and we deny these exceptions.

K. The award is not otherwise deficient as being contrary to law or failing to draw its essence from the CBA.

The Union contends that the award is contrary to law and fails to draw its essence from the CBA because the Agency "failed to present any proof of any unlawful interference and threat and did not meet its burden of proof."[220] However, outside of arguments already addressed, the Union fails to cite to any law or any portion of the CBA, and fails to explain how the award

[209] *Cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-20 (1969) (ruling that threats against employees do not receive protection from the NLRA's counterpart to § 7116(e) of the Statute); *NLRB v. U.S. Postal Serv.*, 526 F.3d 729, 732 (11th Cir. 2008) (ruling that the NLRA's counterpart to § 7116(e) of the Statute incorporates the First Amendment, but a "threat of retaliation against an employee for engaging in protected conduct" does "not enjoy Speech Clause immunity").

[210] *Cf. AFGE Local 987, Warner Robins, Ga*, 35 FLRA 720, 724 (1990) (standard for determining whether a union's statement violates § 7116(b)(1) is an objective one); *Overseas Educ. Ass'n*, 15 FLRA 488, 490 (1984) (remarks in the publication at issue, which were of sufficient particularity that the identity of the unit employee could be ascertained, violated § 7116(b)(1) as they reasonably could have a coercive effect on the exercise by employees of their protected rights under the Statute); *Okla. City Air Logistics Ctr.(AFLC), Tinker Air Force Base, Okla*, 6 FLRA 159, 160-61 (1981) (discussing the purpose and intent of § 7116(e)); *Norfolk Naval Shipyard, Portsmouth, Va.*, 5 FLRA 788, 791, 810 (1981) (adopting judge's finding that agency's speech was protected by § 7116(e) of the Statute and the First Amendment where it "contained no explicit threat" against employees and "was not attended by coercive conditions.").

[211] Although we denied Union's First Amendment argument in Section IV.I. above without reaching the merits of that argument, were the Authority to reach the merits of that argument, this same reasoning would lead us to reject that argument as well.

[212] 5 U.S.C. § 7116(a)(1), (b)(1).

[213] 294 F.3d 192, 196 (D.C. Cir. 2002) (ruling that Authority's application of the flagrant misconduct standard – holding that § 7102 of the Statute protects conduct that is "tortious if not criminal" – is arbitrary and capricious).

[214] Exceptions at 119, 131.

[215] *See generally AFGE, Local 2595*, 68 FLRA 293, 295-97 (2015) (Member Pizzella dissenting) (finding union official engaged in protected activity and so could not be disciplined).

[216] 5 U.S.C. § 7116(e).

[217] Exceptions at 119.

[218] *Id.* at 107 (citing *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264 (1974) (*Old Dominion*)); *id.* at 109 (citing *U.S. Dep't of Transp., FAA, Wash., D.C.*, 64 FLRA 410 (2010) (*DOT*) (Member Beck dissenting)); *id.* at 114 (citing *U.S. Dep't of HHS, Gallup Indian Med. Ctr., Navajo Area Indian Health Serv.*, 60 FLRA 202 (2004) (*HHS*) (Chairman Cabaniss dissenting in part)).

[219] *Old Dominion*, 418 U.S. 264 (applying state libel laws); *DOT*, 64 FLRA 410 (concerning intemperate speech during heated labor-management interactions); *HHS*, 60 FLRA 202 (concerning retaliation against employees for ostensibly public speech).

[220] Exceptions at 132.

fails to draw its essence from the CBA based on this argument. As such, we deny these exceptions.

The Union argues that the award is contrary to law and does not draw its essence from the CBA because Article 15 does not apply to the employee mentioned in the article.[221] Outside of arguments already addressed and denied,[222] the Union does not cite any laws to support this argument. As such, we deny this contrary-to-law exception. The Union argues that Article 15 does not apply to the employee in the article "because she was not a grievant seeking remedial relief[,] and she participated in a hearing to testify . . . not as a grievant."[223] Article 15 protects employees, stating, as pertinent here, that "[e]mployees . . . who have relevant information concerning any matter for which remedial relief is available under this [a]greement will, in seeking resolution of such matter, be assured freedom from restraint, interference, coercion, discrimination, intimidation[,] or reprisal."[224] As part of the grievance and arbitration procedures, this article continues to bind the parties.[225] However, the Union does not explain how the Arbitrator's interpretation that Article 15 protects the employee mentioned in the article is irrational, unfounded, implausible, or manifests a disregard for the CBA.[226] As such, the Union has failed to demonstrate that the Arbitrator's interpretation of the CBA fails to draw its essence from the agreement, and we deny this exception.

The Union next contends that the award is contrary to law "because the statements in the news article are true . . . and because [the Arbitrator] failed to find that the statements are true."[227] However, besides arguments already addressed,[228] the Union does not explain, or cite any analysis or caselaw concerning, how the veracity of the statements in the article had any bearing on the Arbitrator's findings or how the award is contrary to law because the Arbitrator did not address whether the article was "true."[229] Therefore, we deny this exception.

Finally, the Union argues that the award is contrary to law because the article "is comparable to flyers found by a court and found by the Agency itself to be protected."[230] In support, the Union cites to three cases[231] that, it argues, involved "flyers and other communications [with language] similar and comparable to and even stronger than the news article at issue" that were found to contain protected speech.[232] However, here, unlike the cases cited by the Union, the Arbitrator found that the speech in question contained a threat in violation of § 7116(b)(1) of the Statute. As such, these cases are inapposite. Consequently, this argument fails to demonstrate that the award was contrary to law, and we deny this exception.

L. The arbitration was not retaliatory.

The Union contends that the award is contrary to law and public policy because, "[b]y proceeding with the arbitration to deprive the Union of fundamental free[-]speech rights, the [Agency] is engaging in outright retaliation."[233] However, not only has the Union failed to demonstrate that the award interfered with its free-speech rights in any manner, but the Union provides no argument to support the assertion that the arbitration was retaliatory. The Union does refer to cases which concern the NLRA, but does not explain how these cases apply here.[234]

As far as the Union argues that award is contrary to public policy because the arbitration was retaliatory, as noted above, an appealing party must identify the policy "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[235] However, the Union does not identify any public policy "by reference to the laws [or] legal precedents."[236] Consequently, we reject these exceptions.

V. Decision

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

[221] *Id.* at 135, 139.
[222] *Id.* at 135 (arguing that a collective-bargaining agreement cannot abridge First Amendment rights).
[223] *Id.*
[224] Award at 4 (quoting CBA) (internal quotation marks omitted).
[225] *See FAA*, 65 FLRA at 211; *NTEU I*, 64 FLRA at 985 n.4; *Dep't of the Air Force*, 4 FLRA at 23.
[226] *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003).
[227] Exceptions at 141.
[228] *Id.* ("The statements . . . are protected because they are true and are protected as argument and opinion [under § 7116(e) of the Statute].").
[229] *Id.*
[230] *Id.* at 125.
[231] *Id.* at 126 (citing *Baird v. Gotbaum*, 888 F. Supp. 2d 63 (D.C. Cir. 2012); *Perry v. Gotbaum*, 766 F.Supp.2d 151 (D.C. Cir. 2011); *PBGC*, 66 FLRA 349 (2011)).
[232] *Id.* at 125-26.
[233] *Id.* at 144.
[234] *Id.* (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983); *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366 (7th Cir. 1997); *Local 32B-32-J, SEIU v. NLRB*, 68 F.3d 490 (D.C. Cir. 1995)).
[235] *NTEU II*, 63 FLRA at 201 (quoting *Rubber Workers*, 461 U.S. at 766) (internal quotation marks omitted).
[236] *Id.* (internal quotation marks omitted).