68 FLRA No. 157

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4988

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DECISION

September 30, 2015

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

I. Statement of the Case

The Agency entered into a contract with a private contractor, ABBTECH, to perform work normally performed by bargaining-unit employees. The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement and committed an unfair labor practice (ULP) by unilaterally changing conditions of employment when it entered into the contract. Arbitrator Susan T. Mackenzie found the grievance timely and arbitrable. And she found that the Agency violated the parties' agreement and committed a ULP by not bargaining with the Union over the impact and implementation of the contract. She directed the Agency to: (1) bargain over the impact of the contract and over an implementation formula to make whole those employees it adversely affected; (2) provide relevant information to the Union to facilitate the parties' bargaining; and (3) return to the status quo ante (SQA).

This case presents us with six substantive questions. The first question is whether the Arbitrator's determination that the grievance was timely – and, thus, procedurally arbitrable – is based on a nonfact. Because parties may not directly challenge an arbitrator's procedural-arbitrability determination on nonfact grounds – and the Agency's exception attempts to do so – the answer is no.

The second question is whether the Arbitrator exceeded her authority by modifying the stipulated issue. Because the award directly responds to the stipulated issue, the answer is no.

The third question is whether the Arbitrator denied the Agency a fair hearing. Because a party's disagreement with the weight an arbitrator accords testimony and other evidence does not demonstrate that the arbitrator denied the party a fair hearing, and this is the substance of the Agency's claim, the answer is no.

The fourth question is whether the award's finding on certain merits issues is based on nonfacts. Because the Agency's nonfact claims – challenging (1) a factual matter that the parties disputed at arbitration and (2) the Arbitrator's evaluation of the evidence – do not provide a basis for finding that an award is based on a nonfact, the answer is no.

The fifth question is whether the award's ULP finding is contrary to law because the matter is covered by the parties' agreement. Because, under Authority case law, the covered-by defense is not available where a party relies on a contract provision that specifically contemplates bargaining – as is the case here – the answer is no.

The sixth question is whether the Arbitrator's SQA remedy is contrary to law. Because the Arbitrator's SQA remedy satisfies the requirements for such a remedy under the Authority's case law, the answer is no.

II. Background and Arbitrator's Award

The Agency uses two working groups in its information technology (IT) services department. Bargaining-unit employees in the "desk[-]side" support group (desk-side employees) compose one group.[1] Desk-side employees work at thirty-five locations throughout the country, providing on-site assistance to Agency employees who experience computer problems at all Agency locations. Service-desk employees (service-desk employees) compose the other group. These employees provide remote computer assistance, and do not make on-site calls.

Since 2001, the Agency has used the IT services of a private contractor, ABBTECH. The Union was aware at least since 2009 that ABBTECH provided such services in remote locations and, in the circumstance of "a special project," at every Agency location.[2]

[1] Award at 2.
[2] *Id.* at 3.

In 2010, the parties entered into a memorandum of understanding concerning an Agency-initiated reorganization and Agency-wide layoff. The Agency did not lay off any desk-side or service-side employees, but the Agency did require some desk-side employees to transfer to the service desk. The Agency believed that the remaining desk-side employees would be able to handle the desk-side work. A year later, the Agency imposed a hiring freeze.

In August 2011, the Agency and ABBTECH entered into a contract (2011 ABBTECH contract) for "[n]ationwide and [r]emote [p]lace of [d]uty [s]upport [s]ervices, . . . involving '. . . installation or replacement of IT equipment at any [Agency] location.'"[3] The Agency did not notify the Union of its intent to enter into, or its execution of, the 2011 ABBTECH contract.

In May 2012, the Union filed an institutional grievance alleging that the Agency violated the parties' collective-bargaining agreement and committed a ULP under the Federal Service Labor-Management Relations Statute (the Statute)[4] when it "unilaterally implement[ed] a change in conditions of employment by contracting out work that is normally performed by the bargaining[-]unit employees . . . without providing notice to or bargaining with [the Union]."[5] The Union further alleged that the change resulting from the 2011 ABBTECH contract was more than de minimis. The Union requested that the Agency provide the Union with a copy of contracts between the Agency and ABBTECH, beginning with fiscal year 2011, but the Agency provided only a copy of the 2011 ABBTECH contract. Later, the Agency denied the grievance, and the matter was submitted to arbitration.

The parties stipulated to the issues as: "Whether the grievance was timely[.] If so, did the Agency violate any law as alleged in the grievance or the parties' [collective-bargaining agreement] by not bargaining over the ABBTECH . . . contract? If so, what is the appropriate remedy?"[6]

Before the Arbitrator, the Union acknowledged the Agency's statutory right to contract out the work, but argued that the Statute obligated the Agency to bargain over the "impact" of contracting out because that action caused a greater than de minimis change in bargaining-unit employees' conditions of employment.[7] The Agency "stipulated that it did not provide any notice to the Union of the [2011] ABBTECH contract."[8] But, the Agency argued, the Union had "prior effective notice of the work in question by virtue of a long-standing relationship with ABBTECH dating back to 2001."[9] Therefore, the Agency argued, the grievance was untimely and not arbitrable.

The Arbitrator disagreed. She cited the parties' collective-bargaining agreement stating that the 180-day time limit for filing grievances alleging a ULP under § 7116 of the Statute runs "from the time the Union learned, or should have learned, of the matter out of which the [ULP] arose."[10] She found that the Union's grievance raised only an allegation concerning the 2011 ABBTECH contract, and that the Union claimed that ABBTECH contract employees were performing duties that (1) had not been performed under prior agreements with ABBTECH; or (2) were being performed in different locations than before. The Arbitrator also found that the Agency "represented to the Union that the . . . 2011 ABBTECH contract was the only agreement" at issue.[11] Therefore, she found that the May 2012 grievance was timely and arbitrable because unrebutted evidence established that most of the work under the 2011 ABBTECH contract began in March 2012, and the Union did not become aware of this until the spring of 2012.

Addressing the grievance's merits, the Arbitrator found that the Agency did not assert or offer evidence that the 2011 ABBTECH contract was "identical or even substantially similar" to prior ABBTECH contracts.[12] The Arbitrator found that before 2011, both Agency and Union representatives understood that ABBTECH services were limited to special desk-side projects and remote locations. She determined that Agency testimony supported this understanding. She also found that, unlike before, contract IT employees under the 2011 ABBTECH contract worked with desk-side employees in all places of duty, not just remote locations, and performed work on all desk-side functions, not just special projects. The Arbitrator found additional support for this finding from an Agency witness who testified that at his non-remote location he used contract employees "in the same way [he] use[d] . . . bargaining[-]unit [employees]."[13] The Agency witness also testified that without the contract workers, "the workload would increase for . . . bargaining[-]unit employees," requiring more overtime, employees, or details.[14] Therefore, the Arbitrator concluded that the 2011 ABBTECH contract

[3] *Id.* (some alterations in original).
[4] 5 U.S.C. §§ 7101-7135.
[5] Award at 3 (some alterations in original) (quoting the Union's grievance) (internal quotation marks omitted); *see* 5 U.S.C. § 7114(b)(4).
[6] Award at 1.
[7] *Id.* at 5.
[8] *Id.* at 10.
[9] *Id.*
[10] *Id.* (internal quotation marks omitted).
[11] *Id.* at 12.
[12] *Id.*
[13] *Id.* (alterations in original) (internal quotation marks omitted).
[14] *Id.* (internal quotation marks omitted).

changed the conditions of employment for the desk-side employees.

Next, the Arbitrator considered whether the effects of this change were greater than de minimis. The Agency argued that any changes in conditions of employment were de minimis, and that in the event the Arbitrator should disagree, "the Union would only be entitled to a[n SQA] remedy for failure to bargain over the contracting[-]out work."[15] The Arbitrator, however, determined that the Agency could have reasonably foreseen that "[t]he act of contracting out bargaining[-]unit work raises an inference" that the change would be more than de minimis.[16] Therefore, she concluded that the Agency had an obligation to notify, and bargain with, the Union over the 2011 ABBTECH contract.

In finding that the Agency had a duty to bargain, the Arbitrator rejected the Agency's argument that it had no obligation to bargain over the 2011 ABBTECH contract because bargaining over contracting out desk-side work was covered by Article 8, Section 9 of the parties' collective-bargaining agreement. Article 8, Section 9 provides that "[i]f the [Agency] decides to contract[ ]out work that may result in the loss of work normally performed by bargaining[-]unit employees . . . the [Agency] will notify the [Union] and bargain to the extent required by law and [the parties'] agreement."[17]

Based on the foregoing, the Arbitrator found that the Agency violated § 7116(a)(1) and (5) of the Statute and the parties' collective-bargaining agreement when it failed to notify the Union of the 2011 ABBTECH contract and bargain over its impact on the working conditions of desk-side employees.

As for the remedy requested by the Union, the Arbitrator, noting that the Agency entered into another ABBTECH contract in 2013, issued a cease-and-desist order to prevent the Agency from engaging in "any similar improper conduct until it has provided [the Union] notice and [an] opportunity to bargain."[18]

She also directed the Agency "to return to the [SQA] in the assignment of all routine [d]esk[-]side work to bargaining[-]unit employees other than in remote locations until the Agency and the Union engage in impact bargaining."[19] In so doing, the Arbitrator concluded that "given the likelihood of a 'causal nexus' between the Agency's refusal to bargain and some loss of compensation or other benefits by individual adversely affected [d]esk-side [e]mployees," an SQA remedy "is appropriate, if not required."[20] In the Arbitrator's view, this might include alternatives to contracting out such as detailing service-desk employees to desk-side work and assigning more overtime to bargaining-unit employees. And although the Arbitrator was "mindful of certain [Agency] budget constraints," such as a hiring freeze, the Arbitrator found that the Agency did not show sufficiently that an SQA order would disrupt or impact the efficiency of the Agency's operations.[21]

Finally, the Arbitrator found that backpay was appropriate and directed the Agency to bargain with the Union over an implementation formula to make whole adversely affected desk-side employees.

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

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's contrary-to-law exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any argument that could have been, but was not, presented to the arbitrator.[22] Here, the Agency argues that the SQA remedy and cease-and-desist order are contrary to management's rights under the Statute and Authority precedent.[23] The record establishes that the Agency was on notice, before the Arbitrator, that the Union requested an SQA remedy and a cease-and-desist order.[24] However, nothing in the record indicates that the Agency argued before the Arbitrator, as it does now, that an SQA remedy and a cease-and-desist order would be contrary to management rights under the Statute and Authority precedent. In fact, the Agency argued before the Arbitrator that if the Union should prevail, then it "would only be entitled to a[n SQA] remedy for [the Agency's] failure to bargain over contracting[-]out work."[25] Accordingly, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency from making this argument now, and we dismiss this Agency contrary-to-law exception.[26]

[15] *Id.* at 7.
[16] *Id*. at 15.
[17] Exceptions Br. at 19 (quoting the parties' agreement).
[18] Award at 17.
[19] *Id*. at 19.
[20] *Id*. at 17 (citations omitted).
[21] *Id*. at 18.
[22] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also U.S. DHS, U.S. CBP*, 66 FLRA 335, 337-38 (2011); *AFGE*, 65 FLRA 833, 833 (2011).
[23] Exceptions Br. at 21.
[24] Award at 5.
[25] *Id*. at 7.
[26] *U.S. DHS, U.S. CBP*, 66 FLRA 634, 636-37 (2012); *Dep't of the Treasury, IRS, Atlanta Compliance Servs., Jacksonville, Fla.*, 66 FLRA 295, 297 (2011).

IV. Analysis and Conclusions

A. The Arbitrator's determination that the grievance is timely, and, thus, procedurally arbitrable, is not deficient.

The Agency contends that the Arbitrator's determination that the grievance is timely, and, thus, procedurally arbitrable, is based on a nonfact.[27] Specifically, the Agency argues that the Arbitrator improperly excluded evidence showing "the Agency's past practice before 2011" of providing contract IT employees to perform desk-side work when she limited the issue for arbitration to the 2011 ABBTECH contract.[28] In so doing, the Agency argues, the Arbitrator "rendered an otherwise untimely claim timely."[29]

An arbitrator's finding regarding a grievance's timeliness is a procedural-arbitrability determination.[30] The Authority generally will not find a procedural-arbitrability determination deficient on grounds that directly challenge the determination itself – including nonfact challenges.[31] Here, the Agency uses a nonfact exception to directly challenge the Arbitrator's procedural-arbitrability determination that the grievance was timely and arbitrable. Therefore, consistent with these legal principles, we find that the exception provides no basis for finding the award deficient.

Although the dissent claims that the Agency raises an "obvious" essence exception,[32] we disagree. In fact, in its exceptions form, when asked whether it is raising an essence exception, the Agency responded, "No."[33] And in its exceptions brief, the Agency makes no such argument. Even if it had, the Authority has held that an excepting party may not directly challenge an arbitrator's procedural-arbitrability determination on essence grounds[34] – so the exception would not support setting aside the determination. Moreover, although the dissent appears to engage in a de novo review of the parties' agreement, we emphasize that "the parties jointly chose the Arbitrator – not us – to interpret their agreement."[35] For these reasons, we disagree with the dissent's assessment of the timeliness issue.

B. The Arbitrator did not exceed her authority.

The Agency contends that the Arbitrator exceeded her authority.[36] 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.[37] As the Agency acknowledges, arbitrators do not exceed their authority when the award is directly responsive to the stipulated issue.[38]

The award is directly responsive to the stipulated issue. As relevant here, the issue before the Arbitrator was: "Whether the grievance was timely[.] If so, did the Agency violate any law as alleged in the grievance or the parties' [collective-bargaining agreement] by not bargaining over the ABBTECH . . . contract?"[39] The Arbitrator found that the grievance was timely[40] and that the Agency violated the Statute and the parties' collective-bargaining agreement by not bargaining with the Union over the impact of the 2011 ABBTECH contract.[41] In resolving the issue, she found that the Union's grievance raised only allegations under the 2011 ABBTECH contract – that the "ABBTECH contract employees are performing duties not performed under prior agreements with ABBTECH, or they are performing duties in different locations th[a]n in the past."[42] The Agency argues that the Arbitrator exceeded her authority when she modified the stipulated issue by limiting her consideration of the issue to the 2011 ABBTECH contract.[43] But the award is directly responsive to the stipulated issue. Therefore, we find that the Agency has not demonstrated that the Arbitrator exceeded her authority, and we deny this exception.

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[27] Exceptions Br. at 4, 9-11.
[28] *Id*. at 9.
[29] *Id*.
[30] *AFGE, Local 3283*, 66 FLRA 691, 692 (2012).
[31] *AFGE, Council of Prison Locals 33, Local 3976*, 66 FLRA 289, 290 (2011).
[32] Dissent at 20.
[33] Exceptions Form at 9; *see also U.S. DHS, U.S. CBP, U.S. Border Patrol, Yuma Sector*, 68 FLRA 189, 192 (2015) (Member Pizzella dissenting) (relying on, among other things, "No" answer on exceptions form to conclude that excepting party did not raise essence exception).
[34] *E.g.*, *U.S. DOJ, Fed. BOP*, 68 FLRA 728, 730 (2015) (citation omitted).
[35] *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 601 (2014) (Member Pizzella dissenting) (citation omitted).
[36] Exceptions Br. at 5.
[37] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996) (citation omitted).
[38] Exceptions Br. at 5-6 (citing *AFGE, Local 1770*, 67 FLRA 93, 94 (2012)).
[39] Award at 1.
[40] *Id*. at 15.
[41] *Id.* at 16.
[42] *Id*. at 11.
[43] Exceptions Br. at 8.

C. The Arbitrator did not deny the Agency a fair hearing.

The Agency contends that the Arbitrator denied the Agency a fair hearing because she did not consider evidence showing the Agency's "prior practice of utilizing contract IT employees" before the 2011 ABBTECH contract.[44] 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.[45] But disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, does not provide any basis for finding an award deficient on this ground.[46]

The award in this case reflects that the Arbitrator gave extensive consideration to the Agency's claim that the Union had prior notice of the Agency's use of contract IT employees as far back as 2001.[47] But the Arbitrator found that "changes in contractor duties and locations under the August 2011 ABBTECH contract"[48] made consideration of Agency actions under that contract particularly relevant in resolving the issue before her. The Agency's disagreement with the weight that the Arbitrator accorded this testimony and other evidence does not demonstrate that the Arbitrator denied the Agency a fair hearing. Accordingly, we deny the Agency's fair-hearing exception.

D. The award is not based on nonfacts.

The Agency contends that the award, on its merits, is based on nonfacts.[49] 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.[50] 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.[51] Additionally, a party's challenge to an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient on this basis.[52]

The Agency claims that the Arbitrator's finding that the 2011 ABBTECH contract constituted a change in how the Agency utilized contract employees previously is a nonfact because the Arbitrator "ignor[ed] the unrebutted evidence demonstrating [that] the Agency has used . . . IT contract employees in non-remote locations since 2001."[53] Additionally, the Agency argues, "no evidence was provided" showing that there was a change in conditions of employment that was more than de minimis.[54] The Agency further argues that the Arbitrator's finding that an SQA remedy "would not substantially disrupt the efficiency and effectiveness of the Agency's operations is based on a nonfact."[55]

Assuming without deciding that these findings are factual matters, as noted above, the Authority will not find that an award is deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[56] The record indicates that the parties disputed at arbitration whether the 2011 ABBTECH contract constituted a change that had more than a de minimis impact on desk-side employees' conditions of employment.[57] The record also indicates that the parties disputed at arbitration whether the efficiency and effectiveness of the Agency's operations would be substantially disrupted if the Agency was prevented from using contract IT employees.[58] Accordingly, as the parties disputed these matters at arbitration, they do not provide a basis for finding that the award is based on a nonfact.[59]

The Agency also argues, in support of its nonfact claims, that the Arbitrator failed to make credibility determinations,[60] and that the Union did not prove its ULP allegations by a preponderance of the evidence.[61] To the extent these are factual matters, the Agency's challenge to the Arbitrator's evaluation of the evidence and testimony, including the weight she gave to the evidence, does not provide a basis for finding that the

[44] *Id*. at 8-9.
[45] *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995) (citing *U.S. Dep't of the Air Force, Hill Air Force Base, Utah*, 39 FLRA 103, 105-07 (1991)).
[46] *Antilles Consol. Educ. Ass'n*, 64 FLRA 675, 678 (2010).
[47] Award at 10-12.
[48] *Id.* at 11.
[49] Exceptions Br. at 4, 11.
[50] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[51] *Id*. (citation omitted).
[52] *U.S. DOD, Def, Logistics Agency*, 66 FLRA 49, 51-52 (2011) (*Def. Logistics)*; *AFGE, Local 3295*, 51 FLRA 27, 32 (1995).
[53] Exceptions Br. at 12.
[54] *Id*. at 18.
[55] *Id*. at 4.
[56] *U.S. Dep't of the Treasury, IRS*, 66 FLRA 528, 529 (2012) (*IRS*).
[57] Award at 4-6, 13-15.
[58] *See id.* at 18 ("[T]here is an insufficient demonstration that [an SQA] order would disrupt or impact the efficiency and effectiveness of the Agency's operations . . . ." (citations omitted) (internal quotations omitted)).
[59] *IRS*, 66 FLRA at 529.
[60] Exceptions Br. at 5.
[61] *Id*. at 17.

award is based on a nonfact.[62] Accordingly, consistent with Authority precedent, we find that these nonfact arguments also do not provide a basis for finding the award deficient because it is based on a nonfact.

E. The award is not contrary to law.

The Agency argues that the award is contrary to the covered-by doctrine and that the SQA remedy is contrary to the Statute and Authority precedent.[63] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award de novo.[64] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[65] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are based on nonfacts.[66]

1. The covered-by doctrine does not apply.

The Agency argues that it does not have any obligation to bargain over the use of contract workers because that matter is covered by Article 8, Section 9 of the parties' collective-bargaining agreement.[67] As set forth above, Article 8, Section 9 provides that "[i]f the [Agency] decides to [contract out] work that may result in the loss of work normally performed by bargaining[-]unit employees . . . the [Agency] will notify the [Union] and bargain to the extent required by law and [the parties'] collective-bargaining agreement."[68]

The covered-by doctrine provides that the Statute does not require a party to bargain over matters that already have been resolved by bargaining.[69] An argument that a matter is covered by a collective-bargaining agreement is an affirmative defense that a respondent has the burden of proving.[70] The Authority has declined to find a matter covered by a collective-bargaining agreement where the agreement specifically contemplates bargaining to resolve the matter.[71] Article 8, Section 9's plain language, specifically providing for "bargain[ing] to the extent required by law and [the parties' collective-bargaining] agreement" "[i]f the [Agency] decides to [contract out] work that may result in the loss of work normally performed by bargaining[-]unit employees,"[72] satisfies this requirement.

For these reasons, we find that the Agency has not shown that the Arbitrator erred in rejecting the Agency's covered-by defense. Accordingly, we deny this Agency exception.

2. The SQA remedy is not contrary to law.

The Agency argues that the Arbitrator's SQA remedy is contrary to law.[73] Where an arbitrator has granted an SQA remedy based on a finding that an agency committed a ULP by violating its duty to engage in impact and implementation bargaining, and a party has excepted to that remedy, the Authority applies the factors established in *Federal Correctional Institution* (*FCI*)[74] to determine whether the SQA remedy is deficient.[75] Because the Arbitrator granted a SQA remedy, and found only a duty to engage in "impact" bargaining,[76] we apply the *FCI* factors.[77] The *FCI* factors are:

> (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon;
> (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change;
> (3) the willfulness of the agency's conduct in failing to discharge its

[62] *Def. Logistics*, 66 FLRA at 52.
[63] Exceptions Br. at 19, 21.
[64] *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[65] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[66] *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012).
[67] Exceptions Br. at 19-20.
[68] *Id*. at 19 (quoting parties' agreement).
[69] *NTEU*, 68 FLRA 334, 338 (2015) (citation omitted).
[70] *U.S. Dep't of the Treasury, IRS*, 63 FLRA 616, 617 n.2 (2009).
[71] *U.S. DOJ, Fed. BOP, Fed Corr. Inst. Williamsburg, Salters, S.C.*, 68 FLRA 580, 582 (2015) (citations omitted).
[72] Exceptions Br. at 19 (quoting parties' agreement).
[73] *Id*. at 21, 23.
[74] 8 FLRA 604, 606 (1982).
[75] *U.S. DHS, CBP*, 64 FLRA 989, 996 (2010) (*CBP*).
[76] Award at 20.
[77] *CBP*, 64 FLRA at 996.

> bargaining obligations under the Statute;
> (4) the nature and extent of the impact experienced by adversely affected employees; and,
> (5) whether, and to what degree, a[n SQA] remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.[78]

The appropriateness of an SQA remedy must be determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that such a remedy would cause.[79] When an agency argues that an SQA remedy would disrupt the efficiency and effectiveness of the agency's operations, the Authority requires that the agency's argument be "based on record evidence."[80]

The Arbitrator found that "but for the [2011] ABBTECH contract employees, the Agency would have had to detail or hire more employees, or assign more overtime to current bargaining[-]unit employees."[81] She concluded that given the Agency's refusal to bargain with the Union, an SQA remedy is "appropriate[,] if not required."[82] In so doing, the Arbitrator considered the Agency's budget constraints, including a hiring freeze, but found that the Agency made an insufficient demonstration that an SQA remedy would disrupt or have an impact on the efficiency and effectiveness of the Agency's operations.[83]

The Agency asserts that the award fails to address the impact of the SQA remedy on Agency operations and to analyze the SQA remedy under the *FCI* factors.[84] The Agency, however, does not dispute the analysis under the first three *FCI* factors. The Agency acknowledges that it did not notify the Union of the 2011 ABBTECH contract.[85] As to the fourth factor, the Arbitrator found that the change had greater than de minimis effects, and the Agency has not demonstrated that the Arbitrator's finding is incorrect. Accordingly, these factors support a finding that an SQA remedy is appropriate in this case.[86]

The Agency's exception relies exclusively on the fifth factor – whether and to what degree an SQA remedy would disrupt or impair the efficiency and effectiveness of the Agency's operations. The Agency's claims focus on the availability of personnel to perform desk-side functions. The Agency argues that offering increased overtime to desk-side employees would not meet demands for IT services because desk-side work can "typically" be done only during normal business hours when the Agency customer is present, not during overtime hours.[87] But as the Union points out in its opposition, overtime can effectively address Agency customer needs where the work schedules of desk-side employees do not exactly overlap those of Agency customers, or where a desk-side employee works a compressed work schedule, with a regular day off every two weeks.[88] Also, some desk-side support can be provided outside of regular work hours.[89] And as for the Agency's suggestion that desk-side employees would not work available overtime,[90] the Agency does not challenge the Arbitrator's finding that "there is a sufficient demonstration . . . that [d]esk[-]side . . . employees would have worked more overtime but for the contracting out of their routine work."[91] Further, as an Agency witness acknowledged, the Agency could assign overtime.[92]

The Agency's claims under the fifth *FCI* factor are unpersuasive for other reasons. As the Union notes, the Arbitrator's SQA remedy does not disturb any agreement between the Agency and ABBTECH for IT-contractor support that predates the 2011 ABBTECH agreement.[93] Moreover, the Agency retains the option to detail service-desk employees to desk-side duties,[94] and any alleged disruptiveness of the SQA remedy is mitigated by its temporary nature. Specifically, the Arbitrator's SQA remedy applies only "until the Agency and the Union bargain over the impact of the August 2011 ABBTECH contract."[95]

For the foregoing reasons and weighing the *FCI* factors, we find that the Agency has not shown that an SQA remedy is not appropriate. Accordingly, we deny this exception.

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[78] *Id.* (quoting *FCI*, 8 FLRA at 606) (internal quotation marks omitted).
[79] *U.S. DOD, Def. Commissary Agency, Peterson Air Force Base, Colo. Springs, Colo.*, 61 FLRA 688, 694 (2006) (internal quotation marks omitted) (citation omitted).
[80] *Id.* at 695 (citation omitted).
[81] Award at 18.
[82] *Id.* at 17.
[83] *Id.* at 18.
[84] Exceptions Br. at 23, 25.
[85] Award at 10.
[86] *E.g., U.S. DHS, Border & Transp. Sec., Directorate Bureau of CBP, Wash., D.C.*, 63 FLRA 406, 408 (2009).
[87] Exceptions Br. at 24.
[88] Opp'n at 26-27.
[89] *Id.* at 27.
[90] Exceptions Br. at 24-25.
[91] Award at 18 (citations omitted).
[92] Exceptions, Ex. C, Tr. Vol. II at 188.
[93] Opp'n at 22.
[94] *Id.* at 18 (citations omitted).
[95] Award at 20.

We note the dissent's statement that we "refuse[] to address th[e] seminal issue" of whether the Arbitrator's finding of a bargaining obligation is contrary to law.[96] But we have addressed, above, the only contrary-to-law claims that are properly before us. We also note the dissent's assertion that the Agency's decision to contract out part of its IT functions is a management right under § 7106 of the Statute, and, "[t]herefore," that the Arbitrator's finding of a bargaining obligation "is contrary to law" because the Union "has no say."[97] To the extent that the dissent is implying that the Union has absolutely no say in matters involving management rights, that is clearly not the case. Section 7106(a) of the Statute undoubtedly sets forth various rights that are reserved to management, but those rights are expressly "*[s]ubject to*" § 7106(b).[98] Section 7106(b)(2) requires bargaining over the procedures that management will observe when it exercises a management right,[99] and § 7106(b)(3) requires bargaining over appropriate arrangements for employees who are adversely affected by the exercise of a management right.[100] So, when an agency makes a change that involves the exercise of management rights, the union has the right to bargain over the impact and implementation of that change[101] – precisely what the Arbitrator found here. In other words, the Union *does* have a say, even though its say is limited to the right to bargain impact and implementation.

V. Decision

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

[96] Dissent at 17.
[97] *Id.*
[98] 5 U.S.C. § 7106(a) (emphasis added).
[99] *Id.* § 7106(b)(2).
[100] *Id.* § 7106(b)(3).
[101] *U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 737 (2015).

Member Pizzella, dissenting:

Here we go again . . .

Just several months ago, the Office of Personnel Management (OPM) informed federal employees and retirees that "the personal data of as many as [eighteen] million [current, former, and prospective federal employees]" was "pilfered" from OPM computers.[1] It was reported that such attacks occur "almost daily."[2] In 2013, 2.9 million incidents of "tax-related identity theft" was reported, supposedly due the security weaknesses in IRS computer systems.[3] In 2015, an audit released by the Government Accounting Office identified sixty-nine (69) weaknesses in IRS computer systems, some of which put "critical tax-payment data" at risk.[4]

Against this backdrop, IRS Commissioner, John Koskinen, reported to Congress that, as the IRS assumes additional responsibilities under the Affordable Care Act, "[t]he security and privacy of taxpayer information" takes on even greater significance and has required a "shift" in "information-technology [(IT)]."[5]

Agency managers and federal unions are well aware that the Federal Information Security Management Act[6] requires, as one of many responsibilities, federal agency officials to "ensur[e] the effectiveness of *information resources that support* [f]ederal operations and assets."[7]

One year ago, in *U.S. DHS, U.S. ICE* (*ICE*),[8] I observed that "neither the [Federal Labor Relations

[1] Government Executive Staff, *Size of the OPM Hack Quadruples to 18 Million*, Government Executive (June 22, 2015), http://www.govexec.com/pay-benefits/2015/06/size-opm-hack-quadruples-18-million/116011; *see also OPM to Notify Employees of Cybersecurity Incident*, OPM (June 4, 2015), http://www.opm.gov/news/releases/2015/06/opm-to-notify-employees-of-cybersecurity-incident.
[2] Ian Smith, *OPM Data Breach: What You Need to Know*, FedSmith.com (June 5, 2015), http://www.fedsmith.com/2015/06/05/opm-data-breach-what-you-need-to-know.
[3] Charles S. Clark, *IRS may Offer Hope to Feds Affected by OPM Hack*, Government Executive (June 23, 2015), http://www.govexec.com/management/2015/06/irs-may-offer-hope-feds-affected-opm-hack/116116.
[4] Stephen Dinan, *IRS Botches computer security, risks taxpayer info: audit*, Washington Times (Mar. 19, 2015), http://www.washingtontimes.com/news/2015/mar/19/audit-finds-irs-botches-computer-security.
[5] Dinan, *supra* note 4 (internal quotation marks omitted).
[6] 44 U.S.C. §§ 3541-3549.
[7] *Id.* § 3541(1) (emphasis added).
[8] 67 FLRA 501, 505 (2014) (Dissenting Opinion of Member Pizzella).

Authority] nor [an a]rbitrator possesses the specialized knowledge or expertise that would permit us to decide . . . how [an] agency should exercise those responsibilities."[9] In *ICE*, the arbitrator and the majority determined that the agency could not make changes to its policies concerning the use of its computers even though the agency's computers were exposed to "daily malware attacks . . . [that resulted] in a significant 'uptick in mail infections and privacy spills'"[10] without first bargaining with the union over how, when, and if the agency could make those changes.

I did not agree with the majority that the Federal Service Labor-Management Relations Statute (the Statute)[11] obligated the agency to bargain with the union before it could change a policy concerning what personal activities employees could engage in on their agency computers. For many of the same reasons that I discussed in that case, I do not agree with the majority today that the Statute requires the IRS to seek permission from, and bargain with, the union before it may extend a contract which supplements the IT support that is provided to IRS employees throughout the country and which has been in effect, and renewed several times, *since 2001*.[12] And I certainly do not agree that the Arbitrator has the authority to nullify that contract.

In *NTEU, Chapter 83* (*NTEU I*),[13] decided only thirteen days ago, NTEU convinced the majority that an arbitrator could unilaterally usurp the rights of the IRS to make selections and assign work.[14] Now, in this grievance – one of at least three that take the same tact[15] – NTEU seeks to block the IRS from exercising two more fundamental rights that, according to the Statute, belong solely to the IRS – its right to contract out work[16] and its right to determine its own budget.[17] In both cases, however, the arbitrators' awards have "the potential to upend the fundamental mission of [the IRS]."[18]

Since 2001, the IRS has had a contract with the same staffing services contractor (the contractor), a "[w]omen-owned [s]mall [b]usiness . . . that specializes in the nation[]wide placement of [IT] . . . personnel [at the IRS]" and other federal agencies including the Departments of State, Treasury, Energy, Justice, and Health and Human Services; the Federal Deposit Insurance Corporation; and the U.S. Postal Service.[19] Under this long-standing contract, the IRS supplements its IT workforce with contract employees who are provided by the contractor whenever and wherever they are needed.[20]

Arbitrator Susan Mackenzie orders the IRS to void this contract, which was renewed with the contractor in 2011, until such time as *NTEU gives the IRS permission* to implement the contract.[21] In effect, Arbitrator Mackenzie's award drags the IRS *backwards in time now four years* and, in the process, *usurps* the fundamental rights of the IRS "to make determinations with respect to contracting out"[22] and "to determine . . . [its] budget."[23]

Arbitrator Mackenzie acknowledged that the contract had been in effect since 2001, and that it was an integral component of a memorandum of understanding, which was negotiated with NTEU in 2010.[24] But she ignored entirely the equally significant fact that the 2011 "contract"[25] was simply an extension of the same contract that had been in effect since 2001 and concluded that the 2011 "contract" changed the "conditions of employment" of bargaining-unit employees in the IRS's IT department.[26]

That billing adjustment could not affect the working conditions of any *employee in the IRS's IT department* any more than it could change the working conditions of *the contractor's employees*. The only "feature" of the 2011 contract extension that was different in any manner[27] was *how the contractor* would bill the IRS for its services – "per incident."[28]

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[9] *Id.*
[10] *Id.* at 506 (internal citation omitted).
[11] 5 U.S.C. §§ 7101-7135
[12] Award at 2.
[13] 68 FLRA 945 (2015) (Member Pizzella dissenting) (upholding an award granting a remedy of priority consideration to thousands of internal applicants).
[14] *Id.* at 959 (Dissenting Opinion of Member Pizzella).
[15] *See* Opp'n, Ex. 4 at 1 ("NTEU requests that the IRS . . . *cease and desist contracting out* . . . ." (emphasis added)); *Id.*, Ex. 9 at 1 ("NTEU requests that the IRS . . . *cease and desist contracting* . . . ." (emphasis added)); *Id.*, Ex. 10 at 1 ("NTEU requests that the IRS . . . *cease and desist contracting out* . . . ." (emphasis added)).
[16] 5 U.S.C. § 7106(a)(2)(B).
[17] *Id.* § 7106(a)(1).
[18] *NTEU I*, 68 FLRA at 954 (Dissenting Opinion of Member Pizzella).
[19] *ABBTECH Staffing Services, Inc. Careers and Employment*, Indeed.com, http://www.indeed.com/cmp/Abbtech-Staffing-Services,-Inc.
[20] Award at 2-3.
[21] *Id.* at 20; Exceptions Br. at 22.
[22] 5 U.S.C. § 7106(a)(2)(B).
[23] *Id.* § 7106(a)(1).
[24] Award at 3; *see also* Opp'n, Ex. 6 at 1.
[25] Award at 3.
[26] *Id.* at 17.
[27] Opp'n, Ex. 4 at 3.
[28] *Id.* (internal quotation marks omitted).

It is clear to me that the *decision* of the IRS *to contract out* part of its IT support functions – (or *any* function of the IT department) – is an undeniable right that is reserved to the IRS by the Statute.[29] Therefore, to the extent the Arbitrator determined that the Agency violated the Statute and Article 47.2.A. and B., of the parties' national agreement, a provision that mirrors the statutory obligation to provide notice and bargaining, the award is contrary to law.

In other words, NTEU has no say.

But the majority refuses to address this seminal issue. Instead, they circuitously assert that the IRS, in its exceptions, only argues that the status-quo-ante remedy is contrary to § 7106(a). According to the majority, the IRS did not raise the status-quo-ante-remedy issue before the Arbitrator, and we should dismiss the IRS's exception.

But that is not an accurate characterization of the arguments made by the IRS. To the contrary, the IRS argued that the entire award, and its "*remedies*" including not just the status-quo-ante remedy, was contrary to law.[30]

From the outset of this case, the IRS conceded that if a "change in working conditions" had occurred,[31] then the IRS would have had an obligation under both the Statute and Article 47.2.A. and B. of the national agreement to provide "notice" and to "bargain" over the impact and implementation of the change.[32] The IRS specifically argued that "contracting out is a management right qualified at 5 [U.S.C. §] 7106."[33] But, the IRS also argued that no "change in working conditions" occurred[34] and that NTEU was not entitled to *any* remedy because there is "*no evidence* to demonstrate these employees suffered *any sort of harm*. . . . [T]here is simply *nothing* that they can recover . . . [and] the grievance [should] be denied *in its entirety*."[35]

The contract had been in effect for nearly twelve years at the time NTEU filed its untimely grievance and had been renewed several times. During the course of those twelve years, NTEU and the IRS negotiated four collective-bargaining agreements and not one of them addressed any concern about the contract or how the IRS should mollify any employees in the IT department who supposedly were impacted by that contract.

The timing of NTEU's grievance here is just as "telling" as was the timing in *NTEU I*,[36] which NTEU filed[37] *just after* the 2012 national agreement went into effect.[38] NTEU filed[39] this grievance *just days before* it executed the 2012 national agreement.[40] The failure of NTEU to raise any concerns about this contract, during the 2006, 2009, or 2012 national-agreement negotiations, leads to the inexplicable conclusion that NTEU did not act in a timely manner. Article 42, Section 2.B. of the 2009 national agreement, which was technically still in effect when this grievance was filed on May 3, 2012, requires NTEU to file grievances within 180 days of when "[NTEU] learned, or should have learned, of the matter out of which the grievance arose."[41]

The IRS first contracted for IT support from the contractor in 2001.[42] In a press release, dated August 5, 2004, NTEU announced that it was "strenuous[ly]" challenging the decision that had been made by the IRS "to restructure its [IT] operation . . . [and the] job losses [that] will occur *because the IRS chose to compete this work*."[43] Then, in a June 30, 2010, Memorandum "T[o]:

[29] 5 U.S.C. § 7106(a)(2)(B); *U.S. Dep't of the Army, Corps of Eng's, Nw. Div. & Portland Dist.*, 60 FLRA 595, 597 (2005); *NAGE, Local R1-203*, 55 FLRA 1081, 1087 (1999).

[30] Exceptions Br. at 2; *see also id.* at 1-2 (The award "hinder[s] the Agency's statutory right to contract out" and "awards remedies [that] are contrary to Statute."); *id.* at 4 ("The decision is contrary to statute because it excessively impairs the Agency's management rights. . . . The decision awards remedies contrary to statute or case law."); *id.* at 21 ("THE DECISION AWARDS REMEDIES CONTRARY TO STATUTE AND CASE LAW").

[31] Exceptions, Ex. C, Tr. Vol. I at 14-15.

[32] *Id.*

[33] *Id.* at 14.

[34] *Id.* at 15.

[35] *Id.* at 25 (emphasis added).

[36] 68 FLRA at 957 (Dissenting Opinion of Member Pizzella).

[37] Merits Award at 20 in *NTEU I*, 68 FLRA 945 ("December 7, 2012").

[38] 2012 National Agreement, 156, http://www.NTEU.org/Documents/IRSContract.pdf (2012 Agreement) ("October 1, 2012").

[39] Award at 3 ("May 3, 2012").

[40] 2012 Agreement at 156 ("June 14, 2012").

[41] Exceptions Br. at 9 (emphasis omitted) (quoting the parties' agreement).

[42] Award at 2.

[43] *IRS Announcement of Loss of 218 Jobs Result of an "Unfortunate and Unnecessary Choice," Kelley Says*, NTEU (August 5, 2004), http://www.nteu.org/PressKits/PressRelease/PressRelease.aspx?ID=551 (emphasis added).

IRS Chapter Presidents," NTEU's leadership proudly announced that at the "second Labor-Management Relations Committee . . . meeting under the [2009 agreement] and new IRS leadership," NTEU informed the IRS that it was "requir[ed] . . . to try to bring contracted[-]out work back into the [IRS]."[44] In the same publication, NTEU announced that the IRS agreed to provide NTEU with "all contracting out agreements currently in force."[45]

In May 2009, and again in September 2009, IRS officials "briefed NTEU" about looming budget realities that would result in the "reorganization" and "realignment" of the IT department[46] and about "a special project" that would "refresh[] Agency computers at every IRS location."[47] But, NTEU did not address the matter in either its 2009 or 2012 national-agreement negotiations.

According to Arbitrator Mackenzie, NTEU *was aware* of the IT contract "at least *since 2009*."[48] It is a mystery for the ages, therefore, how the Arbitrator nonetheless concluded that NTEU *could not have been expected to know* that it should have filed its grievance within 180 days of August 30, 2011.[49]

As I discussed in *U.S. DHS, U.S. CBP*,[50] I do not share the majority's unbending obeisance that, in all cases, the Authority must defer to an arbitrator's erroneous procedural-arbitrability determination no matter how wrong and without any consideration of the consequences of the erroneous determination.[51]

Similarly, I have also noted that "I do not believe that the Authority should go out of its way to catch parties in technical trapfalls and summarily dismiss otherwise meritorious arguments."[52]

In its exceptions, the IRS argues that NTEU's grievance is untimely and should be dismissed. According to the IRS, the Arbitrator's timeliness determination "render[s] meaningless" Article 42, § 2.B. of the national agreement and directly challenges her interpretation of that provision. That is an obvious essence claim, and it deserves to be addressed.

In this case, that argument is no small matter. If the grievance was not filed in accordance with the parties' agreement, then the Arbitrator was without authority to nullify a contract that had been in effect, and of which NTEU has been aware, since 2001.

Acting as though it were a referee in a game of "mother may I," the majority first refuses to address this important question because someone at the IRS typed the word "*[n]o*"[53] − to one question on an *optional* pre-printed thirteen-page form that asks no less than seventy-eight questions[54] − and then summarily dismisses the argument because, in the majority's view, exceptions "*may not* directly challenge [the A]rbitrator's procedural-arbitrability determination."[55] But this is not a game – the consequences are real.

Both the Arbitrator and the majority clearly differentiate the preliminary question, "*[t]imeliness* of the [g]rievance,"[56] *from* the "*merits*" of the grievance,[57] in

[44] *Memorandum to IRS Chapter Presidents, RE: National Labor-Management Relations Committee Meeting*, NTEU, Chapter 46 (June 30, 2010), http://www.nteu46.org/nteu46org/news/06.html.
[45] *Id*.
[46] Union Ex. 6 at 1, 3.
[47] Award at 3.
[48] *Id.* at 2-3 (emphasis added).
[49] *Id.* at 9-15.
[50] 68 FLRA 1015, 1024-26 (2015) (Dissenting Opinion of Member Pizzella).
[51] *Id.* at 1025-26.

[52] *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 607 (2014) (*SSA ODAR*) (Dissenting Opinion of Member Pizzella) (citing *U.S. Dep't of the Air Force, Space and Missile Sys. Ctr., L.A. Air Force Base, El Segundo, Cal.*, 67 FLRA 566, 573 (2014) (Dissenting Opinion of Member Pizzella); *AFGE, Local 2198*, 67 FLRA 498, 500 (2014) (Concurring Opinion of Member Pizzella)).
[53] Exceptions Form at 8 (emphasis added).
[54] *Id.* at 1-11.
[55] Majority at 7 (emphasis added).
[56] Award at 9 ("Timeliness of the [g]rievance . . . [t]he [IRS] has *failed to demonstrate* that the grievance and ULP at issue were *not timely filed*.") (underlining in original, emphasis added); Majority at 4 ("[T]he [*IRS*] *argued*[]the *grievance* was *untimely* and not arbitrable. The Arbitrator disagreed . . . and *found* that the [] *grievance was timely* and arbitrable.") (emphasis added).
[57] Award at 15 (emphasis added); *see also id.* ("Merits[:] The *. . . grievance asserted a violation of Article 47 as well as a ULP* . . . for failure to provide [NTEU] with notice of a change in conditions of employment and an opportunity to bargain over the impact of those changes." (emphasis added)); Majority at 4 ("Addressing the *grievance's merits*, the Arbitrator found . . . " (emphasis added)).

their respective decisions. Why then does the majority refuse to accord the IRS the same latitude?

When the exceptions form and the actual exceptions brief are read in context *together*, rather than as a "technical trapfall,"[102] it is obvious that the exceptions form addressed only the merits of "the award"[103] and that the Agency's brief addressed separately the Arbitrator's preliminary determination concerning the timeliness of the grievance. On this point, the IRS argues, in its twenty-seven page submission, that "*the parties*' *[agreement]* language requiring [the] timely filing of claims *was rendered meaningless* by modifying the stipulated issue and allowing [NTEU] to unilaterally choose the date the statute of limitations would begin to run."[60]

This case demonstrates why, in all circumstances, it is not appropriate to simply defer to an arbitrator's procedural-arbitrability determination, no matter how wrong is the arbitrator. The Majority's dismissive observation that "the parties jointly chose the Arbitrator"[61] seems to fall short of the Authority's responsibility to "provide leadership"[62] and to "take such action and make such recommendations concerning [an arbitrator's] award as it considers necessary, consistent with applicable laws, rules, or regulations."[63]

It is inconceivable to me that Congress ever intended for a single arbitrator to have such expansive power to directly undermine the ability of a federal agency to issue contracts and to manage its IT department, fundamental management prerogatives. Congress certainly did not intend for the Authority to simply rubberstamp such arbitral overreach.

Therefore, I would conclude that the Arbitrator's determination that the grievance was timely is not a plausible interpretation of the plain language of the parties' national agreement.

I would also vacate the award in its entirety because it is contrary to 5 U.S.C. §§ 7106(a)(2)(B) and 7106(a)(1).

Thank you.

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[102] *SSA ODAR*, 67 FLRA at 607 (Dissenting Opinion of Member Pizzella).
[103] Exceptions Form at 9.
[60] Exceptions Br. at 11.
[61] Majority at 7 (internal quotation marks omitted) (quoting *SSA, ODAR*, 67 FLRA at 601).
[62] 5 U.S.C. § 7105(a)(1).
[63] *Id.* § 7122(a).