68 FLRA No. 85

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4985

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DECISION

April 27, 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 M. David Vaughn (the Arbitrator) issued a second remedial award setting forth a methodology for determining remedies in response to his charge in the remedial and final award (the first remedial award) that: "[t]he Union may petition to show cause that named individual bargaining[-unit] members have incurred material economic losses."[1] We must determine six substantive questions.

First, we must determine whether the second remedial award is contrary to the Back Pay Act (BPA)[2] insofar as it requires the parties to utilize formulae "similar to" those proposed by the Union at arbitration, or those set forth in an award issued by Arbitrator Susan R. Meredith (the Meredith award) in a separate matter between these same parties. Because the Authority ruled that the formulae contained in the Meredith award are not contrary to the BPA,[3] we deny this exception.

Second, we must determine whether the second remedial award is contrary to the legal doctrine that the federal government is immune from monetary damages unless a federal statute waives that immunity (the doctrine of sovereign immunity). Because the second remedial award is consistent with the BPA, and the BPA waives sovereign immunity, we find that the award is not contrary to the doctrine of sovereign immunity.

Third, we must determine whether the second remedial award is contrary to law because it relies on an Authority decision that is currently pending on appeal before the U.S. Court of Appeals for the D.C. Circuit.[4] Because Authority decisions are binding unless they have been reversed by an appropriate authority, we deny this exception.

Fourth, we must determine whether the second remedial award is contrary to the Customs Officer Pay Reform Act (COPRA)[5] and the Antideficiency Act[6] because it compensates employees for work that was not actually performed on Sundays, holidays, or at night. Because COPRA and the Antideficiency Act do not prohibit an award of backpay for work not actually performed on Sundays, holidays, or at night, we deny this exception.

Fifth, we must determine whether the second remedial award is contrary to law because the Arbitrator found that the Agency's proposed remedial process would improperly bypass the Union. Because the Arbitrator rejected the Agency's proposed remedial process on separate and independent grounds, we deny this exception.

Sixth, we must decide whether the second remedial award is based on a nonfact. Because the Agency's nonfact argument challenges the Arbitrator's factual findings on matters that the parties disputed below, we find that the award is not based on a nonfact.

II. Background and Arbitrator's Award

This dispute involves the Agency's Revised National Inspectional Assignment Policy (RNIAP).[7] The RNIAP replaced an earlier National Inspectional Assignment Policy (NIAP) that had been negotiated by the Agency and the Union and that provided for local bargaining of certain matters, including permissive subjects of bargaining. In contrast, the RNIAP stated that the Agency would no longer bargain at the local level or be bound by any locally bargained assignment policies. After implementing the RNIAP, the Agency made changes to local assignment policies at various Agency ports without providing the Union with notice or an opportunity to bargain, at the national level (the level of

[1] Opp'n, Ex. 2, First Remedial Award (First Remedial Award) at 20.
[2] 5 U.S.C. § 5596.
[3] *U.S. DHS, U.S. CBP*, 68 FLRA 253, 257 (2015) (*CBP II*).
[4] *U.S. DHS, U.S. CBP, Scobey, Mont. v. FLRA*, No. 14-1052 (D.C. Cir., filed Apr. 8, 2014).
[5] 19 U.S.C. § 267.
[6] 31 U.S.C. § 1341.
[7] *U.S. DHS, CBP*, 64 FLRA 989, 989 (2010) (*CBP I*) (Member Beck dissenting).

recognition), over the impact and implementation of those changes. The Union filed a grievance, which was unresolved, and the parties proceeded to arbitration.[8]

A. The interim award

The parties stipulated to the following issue before the Arbitrator:

> Did the Agency violate 5 U.S.C. [§] 7116(a)(1) and (5) and Article 37, Sections 1, 2, 3, 4, 6, 10, and 11 of [the parties' agreement] by failing to notify and/or provide an opportunity to negotiate over changes to the assignment of regular and overtime work to CBP [o]fficers represented by [the Union]?[9]

The Arbitrator found, in pertinent part, that the Agency violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute by failing to provide notice and an opportunity to negotiate local assignment-policy changes at the national level. The Arbitrator directed the parties to attempt to agree on an appropriate remedy, and retained jurisdiction in order to resolve the remedy in the event that the parties were unable to agree.

B. The first remedial award

When the parties could not agree to a remedy, they resubmitted the matter to the Arbitrator. He then directed the Agency to provide the Union with notice and an opportunity to bargain. In addition, the Arbitrator ordered a status-quo-ante remedy – directing the Agency to restore the status quo that existed six months prior to the filing of the grievance – based upon his findings that: (1) the Agency gave the Union no notice of its changes to assignment policies; (2) the Agency gave the Union no opportunity to bargain and refused all negotiation requests; and (3) the Agency's conduct was willful. The Arbitrator stayed the return to the status quo ante for 120 days following the disposition of any exceptions to the Authority, during which time the parties could bargain with respect to inspectional work assignments and implement required transitions.

The Arbitrator stated that any remedy should "make whole individual employees who lost wages and benefits as a result of the Agency's improper action."[10] He further found that the Union had established the necessary causal nexus between the Agency's violation and losses to employees and was "entitled to make its case to establish losses suffered by individual employees and for [such] employees . . . to be awarded monetary compensation."[11] To this end, the Arbitrator granted, in part, the Union's motion to compel the Agency to disclose documents necessary for the Union to ascertain and demonstrate individual employees' lost wages and benefits. In addition, he set forth detailed instructions concerning the process by which the parties would share information and determine individual employees' entitlement to backpay. The parties stipulated that the Arbitrator would retain jurisdiction for purposes of enforcement.

The Agency filed exceptions to the interim award and the first remedial award with the Authority, and the Union filed an opposition to the Agency's exceptions. The Authority denied the Agency's exceptions in *U.S. DHS, CBP*.[12]

C. The second remedial award

When the parties again were unable to resolve the remaining remedial issues, they resubmitted the matter to the Arbitrator. As the parties were unable to stipulate to an issue, the Arbitrator framed the issue as follows:

> What methods, procedures[,] and schedules shall be used to ascertain the entitlements, if any, of individual employees or groups of employees covered by the grievance to back[p]ay pursuant to the [BPA] and previous [a]wards in this proceeding and to provide for payments of amounts due?[13]

The Agency proposed a claims procedure by which the Agency would notify eligible grievants of their ability to make a claim and, "once the claim was received, the Agency would determine whether there was a loss in pay as a result of the Agency's scheduling policies."[14] The Agency would then notify the Union "of claims not paid and [the Union] would be permitted to submit those claims to arbitration."[15]

The Union proposed ten different formulae to calculate backpay for each category of violations to which the parties had stipulated. Each formula is similar to those used in the Meredith award but differs according

[8] *Id.*
[9] Opp'n Ex. 1, Interim Award at 2.
[10] *CBP I*, 64 FLRA at 990 (quoting First Remedial Award at 16) (internal quotation marks omitted).
[11] *Id.* (quoting First Remedial Award at 16-17) (internal quotation marks omitted).
[12] *Id.* at 998.
[13] Opp'n, Ex. 3, Second Remedial Award (Second Remedial Award) at 6.
[14] *Id.* at 12.
[15] *Id.*

to the type of violation it would remedy. Six of the formulae rely on a calculation of the amount of overtime worked by each employee during the fiscal year that immediately preceded the violation. That figure, in turn, would be used to compute the amount of overtime that was lost by each employee as a result of the violation. The other four formulae rely on the identification of individual employees who were denied overtime or premium pay on specific dates.

While the Agency "acknowledge[d] that employees covered by the grievance may have been affected by an unwarranted or unjustified personnel action," it argued that "the Union failed to produce sufficient evidence that [the Agency's] action[] necessarily resulted in the withdrawal or reduction of pay, allowances[,] or differentials."[16] Specifically, the Agency claimed that the Union failed to prove: (1) "that employees suffered actual losses of pay and not merely potential losses or the 'expectation of work;'" (2) "specifically calculated amounts of lost pay;" and (3) "that employees who might have been eligible for such work would have in fact performed the overtime work and received overtime pay."[17] The Agency further argued that "the Union's reliance on [*NTEU, Chapter 231* (*Scobey*)[18]] to support a broad finding that all of the employees covered by the . . . grievance are entitled to back[p]ay is erroneous."[19]

The Arbitrator rejected all of the Agency's arguments as an "attempt to relitigate the issue of whether the BPA is applicable . . . and whether [the grievants] are entitled to [backpay]," a matter that was already addressed in his prior awards.[20] The Arbitrator also rejected the Agency's claim that "the evidence of actual loss by identified employees [wa]s insufficient to meet the BPA requirements."[21] On this point, the Arbitrator found that, "but for the unjustified and unwarranted actions of the Agency, employees in the bargaining unit would not have suffered . . . losses [in pay, allowances, or differentials]."[22]

The Arbitrator concluded that the Union proved that the Agency's unilateral change to the assignments of affected employees had "the effect of reducing the overtime hours and wages to which they otherwise would have been entitled."[23] As a remedy, he ordered the Agency to "provide to all employees[,] on a facility-wide basis for all periods covered by the grievance[,] a detailed list of all changes made to [the] RNIAP at each facility or facilities to which each such employee was assigned."[24] The Arbitrator further ordered the parties to "jointly design procedures and . . . claims forms" for individual grievants to use.[25]

"In those circumstances in which the [Agency] has provided full and accurate records and documentation of schedules and assignments made prior to [the] RNIAP and changes made after [the] RNIAP" to the Union, the Arbitrator ordered individual grievants to "assert their entitlement to wages and benefits lost by filing individual claims, using agreed standard claim forms."[26] In cases where the Agency cannot or does not provide such records and documentation with respect to a grievant, the Arbitrator ordered the Union to "assert covered employees' entitlement to wages and benefits lost on an individual or group basis . . . us[ing formulae] to estimate actual damages, similar to the procedures it proposed in its post-hearing brief and to those adopted in" the Meredith award.[27]

The Agency filed exceptions to the second remedial award, and the Union filed an opposition to the Agency's exceptions. The Agency also requested leave to file, and did file, a supplemental submission.

III. Preliminary Matters

A. The Agency's supplemental submission is properly before us, but we dismiss it as moot.

Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 of those Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as it deems appropriate.[28] The Authority has granted leave to file other documents where the supplemental submission responds to issues that could not have been addressed previously.[29] Conversely, where a party seeks to raise issues that it could have addressed in a previous submission, the Authority ordinarily denies requests to file supplemental submissions concerning those issues.[30]

In Section IV.C. of its exceptions, the Agency argues that the award is contrary to law because it relies

[16] *Id.* at 18.
[17] *Id.*
[18] 66 FLRA 1024 (2012).
[19] Second Remedial Award at 19.
[20] *Id.* at 26.
[21] *Id.*
[22] *Id.* at 32.
[23] *Id.* at 36.
[24] *Id.* at 37.
[25] *Id.*
[26] *Id.* at 38 (emphasis omitted).
[27] *Id.* at 39; *see CBP II*, 68 FLRA 253, 253 (2015).
[28] *E.g., Cong. Research Emps. Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004) (internal quotation marks omitted).
[29] *See id.*
[30] *See, e.g., U.S. Dep't of the Army, Corps of Eng'rs, Portland Dist.*, 61 FLRA 599, 601 (2006).

on *Scobey*, which, at the time, was on appeal to, and awaiting a decision from, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit).[31] In its supplemental submission, the Agency notes that, subsequent to the filing of the Agency's exceptions to the second remedial award, the D.C. Circuit remanded *Scobey* to the Authority for reconsideration of the Agency's motion for reconsideration.[32] In its supplemental submission, the Agency clarified "that the case is now pending review by the Authority."[33]

However, after the Agency's supplemental submission, the Authority reconsidered its decision in *Scobey*, but still denied the Agency's motion for reconsideration.[34] The Agency appealed the Authority's decision, and that case is currently pending before the D.C. Circuit.[35] Therefore, the supplemental submission is now moot, and we dismiss it as such.

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's public-policy exception.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[36] In its exceptions, the Agency argues that the remedy is contrary to public policy.[37] The Agency could have raised this argument at arbitration, but did not do so. The Agency argues that the remedy is contrary to public policy because it permits awards of backpay that "significantly exceed the amounts [that] employees normally would have earned or received during the period if the personnel action had not occurred"[38] using "a formulaic approach to estimate actual damages."[39] But because the Union requested a formulaic remedy at arbitration, the Agency could have raised this argument to the Arbitrator. And because it failed to do so, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar this exception.[40]

[31] *See* Exceptions Br. at 23-24.
[32] Supplemental Submission at 2.
[33] *Id*.
[34] *NTEU, Chapter 231*, 67 FLRA 247, 250 (2014).
[35] *U.S. DHS, U.S. CBP, Scobey, Mont. v. FLRA*, No. 14-1052 (D.C. Cir., filed Apr. 8, 2014).
[36] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also AFGE, Local 3571*, 67 FLRA 218, 219 (2014).
[37] Exceptions Br. at 28-29.
[38] *Id*. at 28.
[39] *Id*. (quoting Second Remedial Award at 39) (internal quotation marks omitted).
[40] *E.g., Int'l Bhd. of Elec. Workers, Local 26*, 67 FLRA 455, 456 (2014) (contrary to public policy); *NTEU, Chapter 190*, 67 FLRA 412, 413 (2014) (contrary to law); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 357 (2014) (challenge to remedy).

IV. Analysis and Conclusions

A. The second remedial award is not contrary to law.

The Agency argues that the second remedial award is contrary to law because it: (1) grants the grievants compensation in violation of the BPA and (2) the doctrine of sovereign immunity; (3) relies on *Scobey*; and (4) "improperly found that the Agency's proposed remedy would unlawfully bypass the Union."[41] When an exception involves an award's consistency with law, the Authority reviews any questions of law raised by the exception and the award de novo.[42] In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[43]

1. The second remedial award is not contrary to the BPA.

The Agency contends that the second remedial award is contrary to the BPA to the extent the Arbitrator ordered the Union to compute economic losses using formulae "similar to" those proposed in the Union's post-hearing brief, or to those found in the Meredith award.[44]

In *U.S. DHS, U.S. CBP* (*CBP II*), the Authority found that the formulae set forth in the Meredith award do not violate the BPA when an arbitrator has determined that the Agency's unwarranted and unjustified personnel actions resulted in a loss to the grievants.[45] In that case, the Authority held that using formulae to compute economic losses is permissible so long as the arbitrator "sufficiently identifies the *specific circumstances* under which employees are entitled to backpay."[46] Here, the Arbitrator found that, as a result of its unilateral changes to employees' work assignments under the RNIAP, bargaining unit employees were harmed by unjustified or unwarranted personnel actions.[47] We find, consistent with our decision in *CBP II*, that the second remedial award is not contrary to the BPA insofar as it requires the parties to apply formulae similar to those contained within the Meredith award.[48]

[41] Exceptions Br. at 26.
[42] *E.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 770 (2006).
[43] *Id.*
[44] Exceptions Br. at 12, 12 n.3 (internal quotation marks omitted).
[45] *CBP II*, 68 FLRA at 257.
[46] *Id*. (emphasis added) (citing *IAMAW, Lodge 2261 & AFGE, Local 2185*, 47 FLRA 427, 434-35 (1993)); *see also Fed. Emp. Metal Trades Council, Local 831*, 39 FLRA 1456, 1459 (1991).
[47] Second Remedial Award at 7.
[48] *CBP II*, 68 FLRA at 257.

Accordingly, we deny this exception.

2. The second remedial award is not contrary to the doctrine of sovereign immunity.

As set forth above, generally, 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.[49] However, the Authority has declined to apply §§ 2425.4(c) and 2429.5 to bar claims regarding sovereign immunity because such claims may be raised at any time.[50] Therefore, even though the record does not indicate that the Agency presented its sovereign-immunity argument to the Arbitrator, §§ 2425.4(c) and 2429.5 do not preclude the Agency from raising this claim before the Authority.[51]

The Agency argues that the second remedial award is contrary to law because the remedy does not fall within the BPA's waiver of sovereign immunity.[52] The Agency asserts that the "possibility of working overtime does not provide employees with an entitlement to overtime assignments at appropriate overtime rates of pay, and as such, is not . . . 'pay, allowances, and differentials' recoverable under the [BPA]."[53] The Agency also cites *Sanford v. Weinberger*[54] for the proposition that "overtime pay, or any monetary remedy, is not appropriate in the case of [§] 6101(a)(3) violations."[55] In *Sanford*, the court noted that a "fundamental precept of law holds that no monetary damages can be awarded against the United States unless some provision of law commands the payment of same."[56] Relying on *Sanford*, the Agency argues that "[n]o provision of law exists that commands the payment of overtime in situations where an employee did not actually work an overtime assignment."[57]

But this argument is unavailing. Under Authority precedent, even if employees do not actually work overtime, they may receive backpay under the BPA if an unjustified or unwarranted personnel action precluded them from working overtime.[58] And when a party's sovereign-immunity claim depends on an argument that an arbitration award is contrary to the BPA, and the Authority finds that the award is consistent with the BPA, the Authority will deny the sovereign-immunity claim.[59] Consistent with our finding above that the award is consistent with the BPA, the Agency's sovereign-immunity claim does not establish that the award is contrary to law.

The Agency also argues that awarding the grievants backpay would violate the U.S. Supreme Court's decision concerning sovereign immunity in *United States v. Testan*.[60] In *Testan*, federal employees claimed that they should receive backpay as compensation for the alleged misclassification of their positions,[61] but the Court found that the employees had no "substantive right . . . to backpay" under the BPA "for the period of their claimed wrongful classifications."[62] The Authority has previously held that *Testan* is inapposite to backpay claims that are not based on alleged classification errors.[63] Consequently, as the employees here are not seeking backpay due to classification errors, the Agency's argument regarding *Testan* does not demonstrate that the award is contrary to law.[64]

For these reasons, we find that the Agency has failed to demonstrate that the second remedial award is contrary to the doctrine of sovereign immunity.

3. The second remedial award is not contrary to law to the extent that it relies on *Scobey*.

The Agency further argues that the second remedial award is contrary to law because "it improperly relies on [*Scobey*]" which is still pending appeal and is not binding precedent.[65] As explained above, the appeal of *Scobey* currently pending before the D.C. Circuit is not the same appeal cited in the Agency's exceptions.

[49] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also AFGE, Local 3571*, 67 FLRA 218, 219 (2014).
[50] *U.S. Dep't of the Interior, U.S. Park Police*, 67 FLRA 345, 347 (2014) (*Park Police*); *SSA, Office of Disability Adjudication & Review, Region I*, 65 FLRA 334, 337 (2010) (*SSA Region I*).
[51] *Park Police*, 67 FLRA at 347; *SSA Region I*, 65 FLRA at 337.
[52] Exceptions Br. at 8-11.
[53] *Id.* at 9.
[54] 752 F.2d 636 (Fed. Cir. 1985).
[55] Exceptions Br. at 10.
[56] *Sanford*, 752 F.2d at 639.
[57] Exceptions Br. at 10.
[58] *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 66 FLRA 737, 739 (2012).
[59] *E.g., U.S. DHS, U.S. CBP*, 67 FLRA 461, 464 (2014); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 189-90 (2009).
[60] Exceptions Br. at 9-10 (citing *United States v. Testan*, 424 U.S. 392, 405-07 (1976)).
[61] *Testan*, 424 U.S. at 393-95.
[62] *CBP II*, 68 FLRA at 258 (quoting *Testan*, 424 U.S. at 407).
[63] *E.g., U.S. DHS, U.S. CBP*, 67 FLRA at 464-465; *U.S. Dep't of the Air Force, 82nd Training Wing, Sheppard Air Force Base, Tex.*, 65 FLRA 137, 140 (2010) (*Sheppard Air Force Base*).
[64] *See U.S. DHS, U.S. CBP*, 67 FLRA at 464-465; *Sheppard Air Force Base*, 65 FLRA at 140.
[65] Exceptions Br. at 23.

Nonetheless, the Agency's argument – that an Authority decision is not binding precedent while it is pending appeal – is still applicable, regardless of the change in *Scobey*'s procedural posture.

The Agency presents no legal authority to support this proposition.[66] To the contrary, "[p]ublic policy dictates that the decisions of the Authority must be enforced *unless and until* they are reversed by appropriate authority."[67] Thus, it was proper for the Arbitrator to rely on *Scobey* even while the case was pending appeal.[68] Accordingly, we deny this exception.

4. The second remedial award is not contrary to COPRA or the Antideficiency Act.

The Agency also argues that the second remedial award is contrary to COPRA and the Antideficiency Act.[69] The Agency asserts that COPRA premium pay is allocated when customs officers *actually perform* work on Sundays, holidays, or at night.[70] Thus, the Agency claims that awarding COPRA premium pay for work not performed is a violation of the Antideficiency Act, which prohibits federal agencies from disbursing funds for anything other than the specific "expenditure or obligation" that has been appropriated by Congress.[71]

However, the Authority has previously recognized that, under the Agency's own COPRA-implementing regulations, compensation may be awarded under COPRA "for work not performed, which includes . . . awards made in accordance with back[p]ay settlements," such as the award in this case.[72] Accordingly, we deny the Agency's argument that the second remedial award is contrary to COPRA and the Antideficiency Act.

5. The second remedial award is not contrary to law to the extent that the Arbitrator found that the Agency's proposed remedy would unlawfully bypass the Union.

The Agency argues that the second remedial award is contrary to law because the Arbitrator wrongfully found that the Agency's proposed remedy would illegally bypass the Union.[73] However, the Arbitrator relied on separate and independent grounds in deciding not to adopt the Agency's proposed claims process. An arbitrator's remedy is based on separate and independent grounds when more than one ground independently would support the remedy.[74] The Authority has held that when an arbitrator bases an award on separate and independent grounds, the excepting party must establish that all of the grounds are deficient in order for the Authority to find the award deficient.[75] If the excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the arbitrator, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other grounds.[76]

Here, the Arbitrator found that the Agency's proposed claims process was "burdensome for individual employees to utilize," and that it did not require the Agency to provide "assistance to employees to establish their losses."[77] The Arbitrator also noted that the Agency's proposed process was inadequate because the burden of determining damages "must be shared by the Agency and individual employees."[78] Moreover, the Arbitrator rejected the Agency's proposed process because it was "unduly burdensome" insofar as it required employees to prove "to a certainty that they would have worked specific hours or overtime."[79] These findings constitute separate and independent grounds for the Arbitrator's decision not to adopt the Agency's proposed remedy. As the Agency has not demonstrated that these findings are deficient, the second remedial award would stand on these grounds alone. Consequently, it is unnecessary to address whether the Arbitrator erred in finding that the Agency's proposed remedy constituted an illegal bypass of the Union.

Accordingly, we deny this exception.

B. The second remedial award is not based on a nonfact.

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[66] *See id*.
[67] *Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 27 FLRA 823, 830 (1987) (emphasis added).
[68] *See id.*
[69] 19 U.S.C. § 267; 31 U.S.C. § 1341.
[70] Exceptions Br. at 25.
[71] *Id*. at 24 (citing 31 U.S.C. §§ 1301(a), 1341).
[72] *U.S. DHS, U.S. CBP*, 68 FLRA 157, 163 (2015) (quoting *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 560 (1999) (quoting 19 C.F.R. § 24.16(h))) (internal quotation marks omitted).
[73] Exceptions Br. at 26-27.
[74] *U.S. DHS, U.S. CBP*, 68 FLRA 184, 188 (2015) (citing *SSA, Region VI*, 67 FLRA 493, 496 (2014); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 86 (2011) (*Guaynabo*)).
[75] *Id*. (citing *SSA, Region VI*, 67 FLRA at 496; *Guaynabo*, 66 FLRA at 86; *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000)).
[76] *Id*. (citing *SSA, Region VI*, 67 FLRA at 496; *U.S. Dep't of the Air Force, 442nd Fighter Wing, Whiteman Air Force Base, Mo.*, 66 FLRA 357, 364-65 (2011)).
[77] Second Remedial Award at 34.
[78] *Id*. at 26.
[79] *Id*. at 34.

The Agency argues that the second remedial award is based on a nonfact.[80] 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.[81] 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.[82] Moreover, disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be given such evidence, provides no basis for finding the award deficient.[83]

Here, the Agency argues that the second remedial award is based on a nonfact because the Arbitrator found that the Agency's proposed remedy would improperly bypass the union.[84] The Agency argues that its proposed remedy would not bypass the Union because it "did not require such management-employee dealings that would exclude the Union from participation."[85] However, this issue was disputed by the parties at arbitration.[86] Accordingly, we find that the Agency's exception does not demonstrate that the second remedial award is based on a nonfact.

V. Decision

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

[80] Exceptions Br. at 26-28.
[81] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[82] *Id.*
[83] *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 103 (2012).
[84] Exceptions Br. at 26-27.
[85] *Id*. at 27.
[86] *See* Second Remedial Award at 13, 22.