

71 FLRA No. 210

UNITED STATES
DEPARTMENT OF EDUCATION
OFFICE OF FEDERAL STUDENT AID
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 252
(Union)

0-AR-5445

DECISION

November 10, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Chairman Kiko dissenting)

I. Statement of the Case

This case reiterates the basic principle that parties are bound by the terms of a negotiated agreement throughout its term and any changes are subject to its terms and the bargaining requirements of the Federal Service Labor-Management Relations Statute (Statute).¹

The Union grieved the Agency's implementation of a new telework policy that limits employees to two days of telework per week. Arbitrator Ellen S. Saltzman found that the Agency violated the parties' agreement and the Statute when it unilaterally implemented the new policy without affording the Union an opportunity for pre-decisional involvement, as required by the parties' agreement, and without giving the Union notice and an opportunity to bargain over implementation of the new policy.²

The Agency argues that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement and challenges the merits of the award on several grounds. As described below, the Agency fails to demonstrate how the award is deficient on those grounds, and therefore, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

As relevant here, on August 31, 2017, the Agency informed employees of the Program Compliance Office that telework would be restricted to two days a week effective October 2, 2017. The Union filed a grievance alleging that the Agency failed to provide notice and an opportunity to bargain over the change in telework. Months later, after attempts to resolve the grievance failed, the Union invoked arbitration.

The issues, as framed by the Arbitrator, were whether: (1) the arbitration invocation was procedurally flawed; (2) the Union failed to comply with the arbitration procedures; (3) the Agency violated the parties' agreement when it modified and changed existing telework agreements and schedules; and (4) the Agency violated the Statute by failing to provide the Union with notice and an opportunity to bargain over the changes in the telework policy prior to implementation. The Arbitrator concluded that the 2013 collective-bargaining agreement (CBA) governed the grievance because the original grievance was filed and arbitration invoked before the 2013 CBA expired.³ As such, the Arbitrator found that the arbitration invocation was not procedurally flawed because the AFGE Council 252 President approved the grievance and any procedural deviations did not warrant a finding against arbitrability.

As to the merits, the Arbitrator found that Article 44 of the parties' agreement defined the policy and eligibility for telework, specified the "reasons an employee may be removed from telework,"⁴ and provided that "on a case-by-case basis, the employee and manager may *mutually* agree to change a fixed Telework schedule to meet ad hoc needs."⁵ The Arbitrator also found that the fourteen provisions specified in individual telework

¹ 5 U.S.C. § 7116(a)(1), (5).

² Award at 50-51.

³ The parties' 2013 CBA expired on December 17, 2017. Starting December 18, 2017, the parties operated under the "Consolidated Past Practice Document" (PPD) until a new agreement was reached in March 2018. *Id.* at 8, 10.

⁴ *Id.* at 47.

⁵ *Id.*

agreements (of which only one addressed termination of the agreement) established a condition of employment.⁶

The Arbitrator determined that an Agency email sent on August 31, 2017 “effectively terminate[d]” all of the existing telework agreements,⁷ and thereby violated Article 44 by failing to provide notice and an opportunity to bargain before implementing the new two-day restriction. According to the Arbitrator, “nothing in the law, regulations, policy or Agreement . . . permit[ted] the Agency to unilaterally [change telework agreements] for reasons other than what is included in the [parties’ agreement].”⁸

The Arbitrator also concluded that the Agency violated Article 44.01(C), which required the Agency to provide the Union with the opportunity for pre-decisional involvement before modifying the telework policy.

As a remedy, the Arbitrator ordered the Agency to post a notice that it violated the Statute by unilaterally implementing the changes and that the parties would “work together to agree to an additional remedy or remedies.”⁹ The Arbitrator retained jurisdiction to award attorney fees/arbitration costs and any additional remedies if the parties were unable to agree.

On December 13, 2018, the Agency filed exceptions to the Arbitrator’s award. On January 14, 2019, the Union filed its opposition to the Agency’s exceptions.

III. Analysis and Conclusion

A. The exceptions are not interlocutory.

The Union argues that the Agency’s appeal is interlocutory and should be dismissed.¹⁰ We disagree.

The Authority has held that exceptions to an award are not interlocutory when the award represents a complete resolution of all of the issues submitted to

arbitration.¹¹ Here, the Arbitrator resolved all of the issues submitted to her and determined that the Agency violated the parties’ agreement and the Statute.¹² Unlike *U.S. Dep’t of VA, Western New York Healthcare System, Buffalo, New York*,¹³ where the Authority held that exceptions were interlocutory because the arbitrator did not award a remedy, but instructed the parties to develop a remedy on their own, here, the Arbitrator did award a remedy – a notice posting.¹⁴ Therefore, the Arbitrator’s decision to instruct the parties to develop an additional remedy does not make the Agency’s exceptions interlocutory.¹⁵

Accordingly, we review the exceptions.

B. The Arbitrator’s procedural-arbitrability determinations draw their essence from the parties’ agreement.¹⁶

The Agency argues that the Arbitrator’s conclusion that the Union properly invoked arbitration “is not consistent with the clear language of . . . Article 3,”

⁶ *Id.* at 47-48 (“The employee, if after two (2) weeks’ notice or less if agreed to by the supervisor, may terminate participation in the Telework Program. After two (2) weeks’ notice, Management has the right to remove the employee from the Program for failure to adhere to Telework procedures contained within.”); *see also* Exceptions, Attach. 4, 2013 CBA (2013 CBA) at 183-84.

⁷ Award at 48.

⁸ *Id.* at 49.

⁹ *Id.* at 51.

¹⁰ Opp’n Br. at 8-11.

¹¹ *U.S. DOD Educ. Activity*, 70 FLRA 863, 864 (2018) (Member DuBester dissenting on other grounds) (citing *Cong. Research Emp. Ass’n, IFPTE, Local 75*, 64 FLRA 486, 489 (2010) and *U.S. Dep’t of Navy, Norfolk Naval Shipyard*, 63 FLRA 144, 144 n.* (2009)); *see also U.S. Small Bus. Admin.*, 70 FLRA 729, 729 (2018) (Member DuBester dissenting on other grounds) (citing *U.S. Dep’t of the Navy, Naval Undersea Warfare Ctr. Div. Keyport, Keyport, Wash.*, 69 FLRA 292, 293 (2016)) (finding exceptions interlocutory because the arbitrator had not yet resolved the grievance on the merits).

¹² Award at 51.

¹³ 61 FLRA 173, 174-75 (2005) (citations omitted). *But see AFGE, Local 2145*, 69 FLRA 563, 565 (2016) (Member Pizzella dissenting) (citation omitted) (finding an exception interlocutory when the Arbitrator refused to rule on the appropriateness of compensation until after receiving the audit results).

¹⁴ Award at 51.

¹⁵ Given the particular circumstances of this case, Member DuBester agrees that the exceptions are not interlocutory.

¹⁶ The Authority will find a procedural-arbitrability determination deficient as failing to draw its essence from a collective-bargaining agreement when the excepting party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (Member DuBester concurring in part and dissenting in part) (citing *Library of Cong.*, 60 FLRA 715, 717 (2005) (*LOC*)).

which, according to the Agency, requires all national grievances to be filed at the “Level of Recognition.”¹⁷

On this point, the Arbitrator found that the 2013 CBA governed the grievance.¹⁸ Article 3, Section 3.19 provides that “‘Level of Recognition’ means that notification should be provided or approval sought from the highest level of the Union, being the AFGE Council 252 President or designee.”¹⁹ The Arbitrator interpreted this provision to provide two methods for “Level of Recognition” to be satisfied: (1) notification provided by the President or designee, or (2) *approval* sought from the President or designee.²⁰ The Arbitrator found that the “Level of Recognition” requirement was satisfied because the record indicates that the “AFGE Council 252 President *approved* of [the] grievance.”²¹

Because the Arbitrator’s interpretation is a plausible interpretation of Article 3, Section 3.19,²² we deny the Agency’s exception.

C. The award draws its essence from the parties’ agreement.²³

The Agency also argues that the Arbitrator ignored the clear language of the parties’ agreement that allowed for telework to be changed if organizational

performance was affected.²⁴ As relevant here, Article 44.01 provides “[e]ligible employees may participate in Teleworking to the maximum extent possible without diminished employee or organizational performance.”²⁵ Although the Agency demonstrated that the changes were for business reasons,²⁶ the Arbitrator determined that the Agency could not “unilaterally make these changes.”²⁷ The Arbitrator found that Article 44.04 provided for an annual renewal/review²⁸ and the unilateral termination of telework agreements that “still had months to run” before the annual review was a change in conditions of employment.²⁹ In order to make the change to two telework days per week, the Arbitrator found that Article 44.01(C) required the Agency to provide the Union with pre-decisional involvement.³⁰

As stated above, the Authority will not find an award deficient on essence grounds when the arbitrator’s interpretation is a plausible interpretation of the parties’ agreement.³¹ Therefore, the Agency fails to demonstrate how the Arbitrator’s interpretation is implausible, irrational, or in manifest disregard of the parties’ agreement. Accordingly, we deny the Agency’s essence exception.

D. The award is not contrary to law.³²

The Agency argues the award is contrary to the Statute because it is inconsistent with Authority precedent on conditions of employment, is “covered by”

¹⁷ Exceptions at 59-64. The Agency also claims the procedural-arbitrability determination is contrary to Authority precedent on past practice and Article 8 of the parties’ agreement, which deals with past practices. *Id.* at 59. However, the Arbitrator does not rely on the parties’ past practices in her determination that arbitration was invoked at the proper level of recognition. Award at 25-27. Therefore, we dismiss this exception because it is based on a misunderstanding of the award. *See AFGE, Local 1897*, 67 FLRA 239, 241 (2014) (*Local 1897*) (Member Pizzella concurring) (finding an exception based on a misunderstanding of the award does not demonstrate that the award is deficient).

¹⁸ Award at 26.

¹⁹ 2013 CBA at 8.

²⁰ Award at 27.

²¹ *Id.* (emphasis added).

²² *U.S. Dep’t of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 104-05 (2019) (*Malcolm Randall*).

²³ The Authority will find an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *LOC*, 60 FLRA at 717 (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

²⁴ Exceptions at 34. While the argument is technically under the heading “Incomplete, Ambiguous, or Contradictory,” the Agency is clearly making an essence argument. *Id.* at 30. The Authority will not penalize a party for failing to invoke “magic words.” *U.S. Dep’t of Treasury, IRS*, 70 FLRA 806, 809 n.34 (2018) (Member DuBester dissenting); *see also NTEU v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) (“A party is not required to invoke ‘magic words’ in order to adequately raise an argument before the Authority.”).

²⁵ 2013 CBA at 176.

²⁶ Award at 49.

²⁷ *Id.* at 48-50.

²⁸ *Id.* at 47-49.

²⁹ *Id.* at 48.

³⁰ *Id.* at 50.

³¹ *Malcolm Randall*, 71 FLRA at 104-05 (2019).

³² The Authority reviews questions of law de novo. *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)). In conducting a de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party established that they are nonfacts. *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (*Brownsville*) (Member Pizzella concurring).

the parties' agreement, is contrary to Agency regulation, and excessively interferes with management's rights.³³

The Agency argues that it had no duty to bargain with the Union over the change because changing the number of days employees may telework was only a change to working conditions.³⁴ However, that argument misses the point. The parties had negotiated a specific policy on telework into its CBA.³⁵ Limiting the number of days in a manner not provided for in the agreement was most certainly a change to that policy, and thus, was a condition of employment over which the Agency was obligated to bargain. As the Arbitrator put it, the fourteen provisions set forth in the individual telework agreements were, in fact, a condition of employment.³⁶ As already noted, the Arbitrator found that the decision to restrict telework to two days per week and to restrict the ability to work at alternative duty locations were changes in *policy* because the parties' agreement provided that telework should be allowed "to the maximum extent possible."³⁷ The Agency does not challenge these findings.³⁸ Accordingly, the limitations imposed by the Agency were clearly changes in *policy* and those changes affected how *employees would perform their jobs*.

³³ Exceptions at 4-29.

³⁴ *Id.* at 5.

³⁵ 2013 CBA at 176-82.

³⁶ Award at 47-48.

³⁷ *Id.* at 49.

³⁸ *Brownsville*, 67 FLRA at 690. The Agency argues that the award is based on two nonfacts—that the change to the frequency in telework applied to business unit employees, as well as Program Compliance, and that the employees' duty station changed. Exceptions at 46-49. To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *U.S. DHS, Citizenship & Immigration Servs., Dist. 18*, 71 FLRA 167, 167 (2019) (Member DuBester dissenting on other grounds) (citing *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010)). The Agency's first alleged nonfact—that the change in frequency in telework applied to business unit employees—is not a central fact, but for which the arbitrator would have reached a different result. *See U.S. DHS, CBP*, 71 FLRA 243, 245 (2019) (*CBP*) (Member Abbott concurring) (finding that the arbitrator's erroneous finding, that the Agency promulgated the standards it gives to physicians, had no connection to the arbitrator's finding that the Agency violated the parties' agreement, and therefore, the Agency failed to demonstrate that "but for" this factual error, the arbitrator would have reached a different conclusion). The Agency's second nonfact exception—that the employees' duty stations changed—is not a central fact underlying the Arbitrator's award because she did not rely on it to find the violations, but instead relied on the fact that the parties' agreement did not allow the Agency to change all telework agreements in one action, Award at 49, and implement a new policy that affected how the employees perform their job without bargaining with the Union, Award at 50. *See CBP*, 71 FLRA at 245.

Without a doubt, the Agency changed the conditions of employment not just the working conditions of the employees who were working under telework agreements. For these reasons, we deny the Agency's exception.

The Agency also argues that the restriction of telework to two days per week was "covered by" the parties' agreement, and that, contrary to the Arbitrator's findings, it had no statutory duty to bargain.³⁹ Specifically, the Agency asserts that the authority to change the number of days employees are allowed to telework is encompassed by Article 44, Section 44.01.⁴⁰ On this point, the Agency fails to meet either prong of the two-prong test to determine whether a proposal is "covered by" an existing agreement.⁴¹

Under the first prong, the Authority considers whether the subject matter of the change is expressly contained in the agreement⁴² or falls within the scope of the agreement.⁴³ As relevant here, Article 44, Section 44.01(B) provides: "Eligible employees may participate in Teleworking to the maximum extent possible without diminished employee or organizational performance."⁴⁴ Here, the parties' agreement neither expressly or implicitly addresses how changes are to be implemented short of the annual review discussed above. As such, the Agency's argument fails the first prong of the "covered by" test.⁴⁵

Under the second prong, the Authority considers whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement.⁴⁶ In determining whether a matter is inseparably bound up with, the Authority will look at the

³⁹ The "covered by" doctrine is a defense to a statutory duty to bargain, and does not apply as a defense to a contractual obligation to bargain. *U.S. DOD, Nat'l Guard Bureau, Adjutant Gen., Kan. Nat'l Guard*, 57 FLRA 934, 936-37 (2002) (Chairman Cabaniss dissenting on other grounds); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667, 675 (D.C. Cir. 2017) (*BOP II*) (finding the application of the "covered by" doctrine is an exercise of construction, and "the scope of what is covered must be construed to give the parties the benefit of their bargain").

⁴⁰ Exceptions at 53.

⁴¹ *NTEU*, 70 FLRA 941, 942 (2018) (Member DuBester dissenting) (citing *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 813-14 (2000) (*Customs*)).

⁴² *Id.*; *see also U.S. Dep't of the Treasury, IRS, Office of Chief Counsel*, 70 FLRA 783, 785 (2018) (Member DuBester dissenting) (citing *Customs*, 56 FLRA at 813-14).

⁴³ *BOP II*, 875 F.3d at 675.

⁴⁴ 2013 CBA at 176.

⁴⁵ *Id.* at 176-82.

⁴⁶ *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993).

entire record to determine whether the parties “reasonably should have contemplated that the agreement would foreclose further bargaining [over the subject matter].”⁴⁷ Here, we need look no further than the plain language of Article 44 to find that the matter – limiting telework to two days per week – is not inseparably bound up with the parties’ agreement.^{48, 49} To the contrary, Section 44.02 provides that telework is generally “one (1) or more days per week at an alternative workstation,” and other options, such as “hoteling” are available for employees who telework “for three (3) days per week or more.”⁵⁰ Further, the telework agreement specifies the reasons for which an employee’s telework may be revoked or suspended.⁵¹ Therefore, the limitation of telework to two days per week is not covered by the parties’ agreement, and we deny the Agency’s contrary-to-law exception.⁵²

The Agency’s alternative argument that the award is contrary to regulations that require annual recertification is similarly unavailing.⁵³ The award does not prevent an annual review and the changing of telework agreements at that time. As explained above, the Arbitrator simply found that the Agency violated the parties’ agreement and the Statute by unilaterally terminating *all* existing telework agreements before the annual review.⁵⁴ Therefore, we deny this exception.⁵⁵

⁴⁷ *U.S. Dep’t of Interior, U.S. Geological Survey, Great Lakes Science Center, Ann Arbor, Mich.*, 68 FLRA 734, 739 (2015) (citing *Customs*, 56 FLRA at 813-14).

⁴⁸ Member DuBester notes that because the Agency’s action clearly violates the plain language of Article 44, it simply could not be “covered by” the parties’ agreement.

⁴⁹ In any event, we note that the covered-by doctrine “warrants a fresh look.” *SSA, Balt. Md.*, 66 FLRA 569, 576 (2012) (*SSA, Balt.*) (Dissenting Opinion of Member DuBester); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Williamsburg, Salters, S.C.*, 68 FLRA 580, 585 (2015) (Dissenting Opinion of Member Pizzella) (“The Authority needs to revisit not only the manner in which we apply the [covered-by] standard but to reexamine the Statutory purpose that it should serve.”). It is “[p]articularly noteworthy . . . that the covered-by standard’s second prong so lacks precision as to raise a question about its practical usefulness to parties or the Authority.” *SSA, Balt.*, 66 FLRA at 575 (Dissenting Opinion of Member DuBester).

⁵⁰ 2013 CBA at 176 (emphasis added).

⁵¹ *Id.* at 178-79.

⁵² We do not address the Agency’s essence exception, Exceptions at 50-54, because it merely restates its covered-by claim. *NAIL, Local 5*, 69 FLRA 573, 576 (2016) (citing *AFGE, Nat’l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009)) (finding it unnecessary to address the party’s essence exception when it merely restated the party’s contrary-to-law exception).

⁵³ Exceptions at 15-19, 24-25.

⁵⁴ Award at 50-51.

⁵⁵ *Local 1897*, 67 FLRA at 241 (finding an exception based on a misunderstanding of the award does not demonstrate that the award is deficient).

The Agency also argues that the award excessively interferes with management’s rights to assign work and direct its employees because it interferes with supervisors’ discretion to change the number of telework days based on business needs.⁵⁶ However, the Agency does not support this argument.⁵⁷ Accordingly, we dismiss this exception.⁵⁸

E. The Arbitrator did not exceed her authority.⁵⁹

The Agency argues that the Arbitrator exceeded her authority by deciding that the Agency violated the agreement when it did not provide the Union with pre-decisional involvement.⁶⁰ We dismiss this exception because the Agency simply restates the same arguments made in support of its contrary-to-law exceptions, which we dismiss for the reasons stated above.⁶¹

⁵⁶ Exceptions at 18-19.

⁵⁷ *Id.*

⁵⁸ *AFGE, Local 2328*, 70 FLRA 797, 798 (2018) (citing *NTEU*, 70 FLRA 57, 60 (2016)) (denying an exception when the party failed to provide support); *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014); see also 5 C.F.R. § 2425.6(e)(1) (An exception “may be subject to dismissal or denial if . . . [t]he excepting party fails to . . . support a ground.”). The Agency also argues that the award is contrary to public policy because it is not consistent with the requirement of an effective and efficient government. Exceptions at 40-42. The Authority construes public-policy exceptions extremely narrowly. *U.S. Dep’t of HUD*, 66 FLRA 106, 108 (2011) (citing *NTEU*, 63 FLRA 198, 201 (2009)). For an award to be found deficient on this basis, the asserted public policy must be explicit, well-defined, and dominant, and a violation of the policy must be clearly shown. *Id.* at 108-09 (citing *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987); *W.R. Grace & Co. v. Local Union 759, Int’l Union of the United Rubber Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983)). Specifically, the Agency argues that the award is contrary to an effective and efficient government because limiting telework to two days per week is not a change in a condition of employment, or, if so, it is covered by the parties’ agreement. Award at 40-42. Because the Agency’s exception is premised on its contrary-to-law exceptions, which we denied above, we also deny this exception. *AFGE, Local 1698*, 70 FLRA 96, 99 (2016) (citing *Indep. Union of Pension Emp. for Democracy & Justice*, 68 FLRA 999, 1007 (2015)) (denying exceptions that were based on previously denied exceptions).

⁵⁹ The Authority will find that an arbitrator exceeded his or her authority when he or she fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to those not encompassed within the grievance. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

⁶⁰ Exceptions at 79-80.

⁶¹ *Brownsville*, 67 FLRA at 692; see also *U.S. Dep’t of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 622-23 (2014).

- F. The award is not incomplete, ambiguous, or contradictory.⁶²

Finally, the Agency argues the award is incomplete because the arbitrator did not issue a remedy,⁶³ and the award is ambiguous because it is not specific in its scope.⁶⁴ Because the Agency fails to address how the award is so unclear or uncertain to make it impossible to implement, we deny these exceptions for failing to establish that the award is deficient.⁶⁵

IV. Order

We deny the Agency's exceptions.

Chairman Kiko, dissenting:

As a preliminary matter, the exceptions in this case are interlocutory. The Authority has held that where an arbitrator possesses remedial authority, but has not made a final disposition as to a remedy, an award is not final, and exceptions to such an award are interlocutory.¹ Where an arbitrator who has remedial authority directs the parties to attempt to develop an appropriate remedy, the Authority has held that the award was not final.²

Here, the parties agree that the remedy is incomplete and unresolved.³ The Arbitrator directed a notice posting, but also directed the parties to “work together to agree to an additional remedy or remedies.”⁴ Further, she retained jurisdiction “should the parties not reach agreement on a remedy.”⁵ “In that event,” she continued, “the Arbitrator will determine the additional remedy.”⁶ According to the majority, that the Arbitrator directed a notice posting renders the award final. But the majority provides no examples of Authority decisions in which an arbitrator's award of one remedy rendered an award final for purposes of filing exceptions where the arbitrator also

¹ E.g., *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 68 FLRA 640, 641 (2015) (*Army*).

² E.g., *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 807-08 (2018) (*Treasury*) (Member DuBester dissenting); *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 850-51 (2012) (*Air Force*); *U.S. Dep't of HHS, Navajo Area Indian Health Serv.*, 58 FLRA 356, 357 (2003). In contrast, where an award resolves all remedial issues, but directs the parties to calculate the particular damages owed to employees, or retains jurisdiction solely to assist in the implementation of awarded remedies, the award is final. See *U.S. DOJ, Fed. BOP, U.S. Penitentiary Coleman II, Fla.*, 68 FLRA 52, 54 (2014) (*BOP*) (Member Pizzella concurring in part, dissenting in part). “In this regard, such an award is final for purposes of filing exceptions because, while the award may leave room for further disputes about compliance, the award does not indicate that the arbitrator or the parties contemplate the introduction of some new measure of damages.” *Id.* (citing *NTEU, Chapter 164*, 67 FLRA 336, 337 (2014)).

³ Opp'n Br. at 8 (arguing that the exceptions are interlocutory because of “the unresolved nature of the remedy”); Exceptions at 30 (“The arbitrator's award is not clear and specific on its scope and left open a portion of the remedy for the parties to decide if they can – a job that the arbitrator was hired to do – before the arbitrator steps in to issue an ‘additional remedy.’”); *id.* at 31 (“the award lacks a complete remedy”); *id.* (“The matter was referred to arbitration as the parties were unable to settle the grievance. The arbitrator referred the matter back to the parties to try to work a remedy together – in consideration of her findings and decision. However, the arbitrator was hired to hear the case and issue the remedy, if the grievance was granted in full or partial.”).

⁴ Award at 51.

⁵ *Id.* at 52.

⁶ *Id.*

⁶² The Authority will find an award deficient when the award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible. See *U.S. Dep't of the Army, Corps of Eng'rs, Walla Walla Dist., Pasco, Wash.*, 63 FLRA 161, 163 (2009). Furthermore, the Authority has held that the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain. See *NATCA*, 55 FLRA 1025, 1027 (1999) (Member Wasserman dissenting).

⁶³ Exceptions at 30.

⁶⁴ *Id.* at 31.

⁶⁵ *U.S. DHS, U.S. CBP*, 64 FLRA 916, 919 (2010) (denying a parties' exception alleging the award was deficient as incomplete, ambiguous, or contradictory because the party failed to demonstrate how the award was impossible to implement).

expressly directed additional relief, either as mutually agreed upon by the parties, or as an issue that would return to the arbitrator. This award indicates that the Arbitrator and the parties “contemplate the introduction of some new measure of damages.”⁷ Thus, consistent with Authority precedent, I would find that the exceptions are interlocutory.⁸ Nevertheless, I would grant interlocutory review because several of the exceptions – if meritorious – would advance the ultimate disposition of the case.⁹

Turning to the merits, I would not find that the Agency violated either its contractual or statutory bargaining obligations.¹⁰ Regarding the Agency’s statutory bargaining obligation, I would find that the Agency’s actions were “covered by” the agreement.¹¹ Consistent with the requirements of the Telework Enhancement Act of 2010, the Agency took care to establish a telework policy that “ensure[s] that telework does not diminish employee performance or agency operations.”¹² Accordingly, Article 44 states that “[e]ligible employees may participate in [t]eleworking to the maximum extent possible *without diminished*

employee or organizational performance.”¹³ Although Article 44 provides various procedures that apply to individual employees’ telework agreements, it also preserves an overarching Agency discretion to make telework changes where necessary to prevent diminished organizational performance.

The Agency changed employees’ ability to telework based on staffing issues that implicated organizational performance.¹⁴ Indeed, the Arbitrator found that “[t]he Agency [had] presented credible testimony that the schedule changes were necessary for business reasons and it was necessary for the functioning of the Department to restrict and rescind existing agreements/contracts providing more than two days of [telework] for each employee absent special consideration[s].”¹⁵ Thus, the Agency acted within its contractual discretion when it restricted telework to two days per week. In the Agency’s determination, two days per week constituted the “maximum extent possible” that the Agency could accommodate employees’ desire to telework “without diminished . . . organizational performance.”¹⁶ The parties’ agreement covers not just the telework program generally, but the circumstances under which the Agency would be empowered to alter the availability of telework.¹⁷ Thus, the Agency’s change was “covered by” the parties’ agreement and did not trigger a statutory obligation to bargain.¹⁸

Additionally, the Arbitrator’s conclusion that the Agency violated the collective-bargaining agreement fails to draw its essence from the parties’ agreement.¹⁹ Because the Agency acted within its discretion under Article 44, the Agency did not violate Article 44. And

⁷ *BOP*, 68 FLRA at 54. I note that the Union’s requested remedies included money damages and a return to the status quo ante. Award at 51. By directing the parties to work together to agree to additional remedies, the Arbitrator neither granted nor denied the Union’s request.

⁸ See *Treasury*, 70 FLRA at 807-08 (where arbitrator directed the parties to resolve the issue of remedy and retained jurisdiction in case they needed his assistance in determining an appropriate remedy, exceptions were interlocutory); *Army*, 68 FLRA at 641 (where issue of remedy was unresolved and remained pending before the arbitrator, exceptions were interlocutory); *Air Force*, 66 FLRA at 851 (where remedial issue was submitted to arbitration and arbitrator required the parties to determine the appropriate remedy, retaining jurisdiction to resolve any disputes concerning the remedy if the parties were unable to reach agreement, exceptions were interlocutory).

⁹ See *Treasury*, 70 FLRA at 808 (Authority will grant interlocutory review of exceptions which, if meritorious, would advance the ultimate disposition of the case by obviating the need for further arbitral proceedings).

¹⁰ See Award at 49-51 (finding Agency violated 5 U.S.C. § 7116(a)(1) and (5) and the parties’ agreement).

¹¹ Under the “covered-by” doctrine, a party is not required to bargain over matters that already have been resolved by bargaining. *U.S. Dep’t of the Treasury, IRS, Office of Chief Counsel*, 70 FLRA 783, 785 (2018) (*IRS*) (Member DuBester dissenting). To determine whether a matter is covered by an existing agreement, the Authority first examines whether the subject matter of the change in conditions of employment is expressly contained in the agreement. *Id.* If a matter is not expressly contained in the agreement, then the Authority assesses whether the matter is inseparably bound up with a subject expressly covered by the agreement. *Id.* at 785 n.26.

¹² 5 U.S.C. § 6502(b)(1).

¹³ Award at 9 (emphasis added).

¹⁴ See Award at 41-42 (describing significant vacancies, a hiring freeze, and an increased need for collaboration all of which required the Agency to restrict the frequency of telework).

¹⁵ *Id.* at 49-50.

¹⁶ *Id.* at 9 (quoting Article 44).

¹⁷ That the telework policy *also* provides procedures for making determinations, *on an individual level*, about the propriety of an employee’s requested telework arrangement, or a supervisor’s determination to revoke or suspend a specific telework arrangement, does not nullify the Agency’s contractual discretion to revise the telework program agency-wide in order to avoid “diminished organizational performance.”

¹⁸ See, e.g., *IRS*, 70 FLRA at 785; *U.S. Dep’t of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1019 (1993).

¹⁹ See Award at 51 (finding that the Agency violated the parties’ agreement); Exceptions at 26-30 (arguing that the contract provisions governing midterm bargaining limit the Agency’s obligation to matters that are not “covered by” the agreement and that the award failed to draw its essence from those provisions as well as Article 44).

although Article 8 imposes midterm contractual bargaining obligations, it limits midterm bargaining obligations to those “matters which are not covered in this [a]greement.”²⁰ Further, Article 8 includes the caveat that “[t]he parties agree that the Employer may implement procedures or changes where . . . necessary for the functioning of the Department.”²¹ And, as discussed above, the Arbitrator found that the telework schedule changes were “*necessary for the functioning of the Department.*”²²

Based on the foregoing, I would grant the Agency’s contrary-to-law and essence exceptions and set aside the award. Therefore, I dissent.

²⁰ Exceptions, Attach. 4, Collective-Bargaining Agreement (CBA) at 25. Additionally, Article 8 limits the Agency’s authority to make changes “unless otherwise permitted by law,” *id.* at 28, and the covered-by doctrine is, itself, part of the “law” that governs the Agency’s bargaining obligations. *NTEU*, 70 FLRA 941, 943 (2018) (Member DuBester dissenting).

²¹ CBA at 28.

²² Award at 49-50 (emphasis added).