73 FLRA No. 102

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3601
(Union)

and

UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
INDIAN HEALTH SERVICE
CLAREMORE INDIAN HOSPITAL
(Agency)

0-AR-5838

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DECISION

May 11, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Steven A. Zimmerman found that the Agency complied with the parties' collective-bargaining agreement, as well as applicable law and regulation, when the Agency discontinued hazard-pay differential (HPD) and environmental-differential pay (EDP) for bargaining-unit employees (employees). The Arbitrator stated that § 7106(a) of the Federal Service Labor-Management Relations Statute (the Statute) did not alter his findings related to HPD and EDP.

The Union excepted to the award on impossible-to-implement, exceeded-authority, nonfact, essence, contrary-to-law, and contrary-to-regulation grounds. For the reasons explained below, we deny the exceptions.

II. Background and Arbitrator's Award

The employees perform duties at healthcare worksites with COVID-19 patients, thereby increasing the employees' job-related exposure to COVID-19.[1] At the beginning of the COVID-19 national and public-health emergencies,[2] the Agency authorized HPD and EDP for on-site employees (the pay differentials). Thereafter, the Agency published – and sent to the Union – a guidance document that outlined the circumstances under which the Agency would terminate the pay differentials (first guidance document). The Agency later revised that guidance and sent the revised document to the Union (second guidance document).

Roughly five weeks after revising the guidance, the Agency notified employees that – due to the implementation of preparedness and control measures to reduce the risks from COVID-19 – the Agency would discontinue the pay differentials at the end of the next pay period (discontinuation notice). During the next pay period, the Union filed a grievance challenging the discontinuation. Then, consistent with the discontinuation notice's schedule, the Agency terminated the pay differentials.

The grievance went to arbitration, where the parties stipulated two issues: (1) whether the Agency's discontinuation of the pay differentials violated the parties' agreement, or applicable law, rule, or regulation; and (2) whether the Agency's decision to discontinue the pay differentials was an exercise of management's right to carry out the Agency's mission during emergencies, under § 7106(a)(2)(D) of the Statute.[3]

In the award, the Arbitrator addressed some events that preceded the discontinuation. Specifically, the Arbitrator stated that when the Agency published the first and second guidance documents, the Union did not grieve, or otherwise object to, these steps towards discontinuing the pay differentials. Further, the Arbitrator found that the parties' agreement entitled the Union to representation on a local safety committee, but the Union did not use its committee representation to be "involved in any safety matters regarding COVID-19."[4] The Arbitrator concluded that these findings "prove[d] that the Union did not pursue involvement in COVID-19 matters until" it filed the grievance – "just . . . before the Agency was to stop" the pay differentials.[5]

[1] *See* Exceptions, Attach., Joint Ex. 3, Agency's Decision Authorizing HPD and EDP Related to COVID-19 (Authorization Letter) at 1 (Agency "presum[ed] that employees working in . . . healthcare facilities with COVID-19 patients have encountered direct or indirect exposure to COVID-19").

[2] *See* Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337, 15,337 (Mar. 13, 2020); Determination of Public Health Emergency, 85 Fed. Reg 7,316, 7,317 (Feb. 7, 2020).

[3] 5 U.S.C. § 7106(a)(2)(D).

[4] Award at 9.

[5] *Id.*

Turning to the discontinuation notice, the Arbitrator credited several of the Agency's claims about changes the Agency made that lowered employees' risks from COVID-19. In particular, he found that the disputed worksites implemented all of the Agency's recommended COVID-19 preparedness and control measures, and adopted a process to monitor that implementation. Primarily through such measures, the Arbitrator found that the Agency reduced the risks from COVID-19 to a "less than significant" level for the employees.[6] For example, the Arbitrator found that the number of positive COVID-19 employees fell to a "0.07% incidence rate" at the disputed worksites.[7] "Based on this evidence," the Arbitrator found "sufficient factual information to prove that the Agency [wa]s . . . in a position to protect its employees at a level that allow[ed] the discontinuation of" the pay differentials.[8] Therefore, the Arbitrator determined that the discontinuation did not violate the agreement, law, rule, or regulation.

As for the stipulated issue concerning management's rights, the Arbitrator found that neither § 7106(a)(2)(D) of the Statute, nor the parties' acknowledgment of management's rights in their agreement, "alter[ed] his findings, decision[,] and/or award."[9] Thus, he determined "the Agency did not violate" that issue.[10]

The Union filed exceptions to the award on September 15, 2022, and the Agency filed an opposition on October 17, 2022.

III. Analysis and Conclusions

A. We deny the contrary-to-Agency-regulation and impossible-to-implement exceptions under § 2425.6(e)(1) of the Authority's Regulations.

Under § 2425.6(e)(1) of the Authority's Regulations, "[a]n exception may be subject to . . . denial if . . . [t]he excepting party fails to raise and support a ground" for finding an award deficient.[11] On its exceptions form, the Union asserts that the award is contrary to an Agency regulation and is "incomplete, ambiguous, or contradictory as to make implementation of the award impossible."[12] However, the Union does not – in either its exceptions form or brief – identify an Agency regulation with which the award conflicts, or offer any arguments about why implementing the award would be impossible. Thus, we deny these exceptions under § 2425.6(e)(1).[13]

B. The Arbitrator did not exceed his authority.

The Union argues that the Arbitrator exceeded his authority in several ways. As relevant here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration or fail to resolve an issue submitted to arbitration.[14] However, arbitrators need not address every argument that parties raise.[15] Moreover, arguments based on a misunderstanding of an award do not demonstrate that the award exceeded the arbitrator's authority.[16]

First, the Union contends that the Arbitrator exceeded his authority by finding the grievance untimely even though timeliness was not one of the stipulated issues.[17] The Union's contention that the Arbitrator found the grievance untimely relies on the Arbitrator's findings that the Union did not: (1) grieve, or otherwise object to, the first or second guidance document;[18] (2) address COVID-19 through the safety committee;[19] or (3) seek involvement in COVID-19 matters until the grievance was

[6] *Id.* at 6.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 10.
[10] *Id.*
[11] 5 C.F.R. § 2425.6(e)(1).
[12] Exceptions Form at 4.
[13] *See U.S. Dep't of the Air Force, Davis-Monthan Air Force Base*, 72 FLRA 716, 717 n.17 (2022) (Chairman DuBester concurring) (denying exception where party raised a recognized ground for review but failed to offer supporting arguments (citing 5 C.F.R. § 2425.6(e)(1))).
[14] *E.g., U.S. DHS, U.S. CBP, L.A., Cal.*, 72 FLRA 411, 412 (2021).
[15] *AFGE, Loc. 3911*, 64 FLRA 686, 687 (2010) (*Loc. 3911*) (citing *U.S. DHS, CBP Agency, N.Y.C., N.Y.*, 60 FLRA 813, 816 (2005) (arbitrator did not exceed authority by failing to specifically address argument that stipulated issues did not implicate)).
[16] *E.g., U.S. Dep't of VA, W. Palm Beach VA Med. Ctr., W. Palm Beach, Fla.*, 61 FLRA 712, 714 (2006) (*VA*).
[17] Exceptions Br. at 8-9, 12.
[18] *Id.* at 11 (citing Award at 8).
[19] *Id.* at 9 (stating that timeliness argument in exceeded-authority exception incorporates timeliness arguments from nonfact and essence exceptions), 14 (challenging safety-committee finding as part of nonfact exception), 17-18 (challenging safety-committee finding as part of essence exception).

filed, just before the pay differentials' discontinuation.[20] However, none of those arbitral findings alone, or collectively, amounts to a determination that the grievance was untimely. Further, rather than dismissing the grievance on timeliness grounds, the Arbitrator rendered a merits determination on the issues before him.[21] Thus, the Union's timeliness argument misunderstands the award, and we reject it on that basis.[22]

Second, the Union contends that the Arbitrator exceeded his authority because he did not "sufficiently address" the stipulated issues.[23] For example, the Union argues that the Arbitrator failed to address its assertion that the dangers of COVID-19 actually increased between the time when the Agency authorized the pay differentials and the date when the Agency discontinued them.[24] In addition, the Union argues that the Arbitrator "failed to address" the stipulated management-rights issue.[25]

The Arbitrator found that the pay differentials' discontinuation was not contrary to the agreement, law, rule, or regulation. That finding completely resolved one of the stipulated issues.[26] In resolving that stipulated issue, the Arbitrator was not required to address every specific supporting argument that the Union made – including its assertion about comparing risks from COVID-19 at two points in time.[27]

As for the management-rights issue, the Arbitrator found that § 7106(a)(2)(D) of the Statute, and the contract provision on management rights, did not "alter his findings, decision[,] and/or award," so the Agency "did not violate" that issue.[28] Although the Arbitrator's choice of words – that the Agency did not violate *an issue* – is unusual,[29] this wording expresses the Arbitrator's denial of the grievance as to the management-rights issue.[30]

Therefore, the Arbitrator resolved both stipulated issues, and we reject the exceeded-authority arguments to the contrary.

C. The award is not based on nonfacts.

The Union contends that the award is based on several nonfacts. To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[31] 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.[32] In addition, parties may not successfully challenge as nonfacts either an arbitrator's evaluation of evidence, or an arbitrator's interpretation of a collective-bargaining agreement.[33] Moreover, arguments based on a misunderstanding of an award do not demonstrate that the award is based on nonfacts.[34]

First, the Union argues that the Arbitrator found the grievance untimely based on nonfacts.[35] As explained above, the Arbitrator did not find the grievance untimely,

[20] *Id.* at 9 (stating that timeliness argument in exceeded-authority exception incorporates timeliness argument from nonfact exception), 11-12 (as part of nonfact exception, challenging finding that Union was not involved in COVID-19 matters until filing the grievance).
[21] *See* Award at 8 (finding discontinuation did not violate agreement, law, rule, or regulation), 10 (finding management rights did not affect earlier discontinuation analysis); *see also id.* at 10 (finding "the Agency did not violate" the two stipulated issues relevant here).
[22] *E.g.*, *VA*, 61 FLRA at 714.
[23] Exceptions Br. at 10.
[24] *Id.*
[25] *Id.*
[26] Award at 7 (stipulated issue asked whether discontinuation violated agreement, law, rule, or regulation), 8 (finding no violations), 10 (denying grievance as to stipulated issue about violations).
[27] *See Loc. 3911*, 64 FLRA at 687 (arbitrators need not specifically address every argument that parties raise).
[28] Award at 10.
[29] *Id.*
[30] *See* Exceptions Br. at 10 (conceding Arbitrator "conclude[ed] that the [g]rievance was not sustained as to that issue").
[31] *E.g.*, *U.S. DHS, U.S. CBP*, 71 FLRA 243, 245 (2019) (Member Abbott concurring).
[32] *Int'l Bhd. of Boilermakers, Loc. 290*, 72 FLRA 586, 588 & n.28 (2021) (Chairman DuBester concurring as to other matters; Member Abbott concurring as to other matters) (citing *U.S. Dep't of the Treasury, IRS, Greensboro, N.C.*, 61 FLRA 103, 105 (2005) (*IRS*) (Member Armendariz concurring in part and dissenting in part); *SSA, Off. of Hearings & Appeals*, 58 FLRA 405, 407 (2003) (Chairman Cabaniss dissenting in part)).
[33] *U.S. DOD, Def. Logistics Agency, Disposition Servs., Battle Creek, Mich.*, 70 FLRA 949, 950 (2018) (Member Abbott concurring; Member DuBester concurring) (denying nonfact exception about evaluation of evidence); *Fraternal Ord. of Police, Lodge No. 168*, 70 FLRA 788, 790 (2018) (*Lodge 168*) (same); *AFGE, Loc. 1802*, 50 FLRA 396, 398 (1995) (*Loc. 1802*) (denying nonfact exception about contractual interpretation).
[34] *AFGE, Council of Prison Locs. #33, Loc. 0922*, 69 FLRA 351, 353 (2016) (*AFGE*).
[35] Exceptions Br. at 10-11.

so this argument misunderstands the award and does not show that the award is based on a nonfact.[36]

Second, the Union challenges the Arbitrator's finding that the Union did not get involved in COVID-19 matters until filing the grievance.[37] That finding is not central to the award, so it does not provide a basis to grant the nonfact exception.[38]

Third, the Union challenges as a nonfact the Arbitrator's finding that the Union did not take advantage of its contractual entitlement to representation on a local safety committee.[39] If this finding is factual, it is not central to the award;[40] if the finding is a contractual interpretation,[41] it cannot support a nonfact challenge.[42]

Fourth, the Union argues that the Arbitrator wrongly credited the Agency's claim that the disputed worksites had a "0.07% incidence rate"[43] of COVID-19.[44] However, the Union acknowledges that the parties disputed the incidence rate at arbitration.[45] Thus, the Arbitrator's determination of that factual matter does not establish a deficiency in the award.[46]

Fifth, the Union asserts that the Arbitrator did not properly consider evidence that the Union presented.[47] That assertion cannot support a nonfact challenge.[48]

For these reasons, we deny the nonfact exception.

D. The award draws its essence from the agreement.

According to the Union, the award fails to draw its essence from the agreement because the Arbitrator found that the grievance was untimely[49] and that "management rights was a relevant factor" in his decision.[50] Further, the Union claims that the Arbitrator did not properly address evidence that the Union presented.[51]

The Authority will find that 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.[52] Under Authority precedent, neither arguments based on a misunderstanding of an award[53] nor disputes about an arbitrator's evaluation of evidence[54] demonstrate that an award fails to draw its essence from an agreement.

As explained earlier, the Arbitrator did not find the grievance untimely. In addition, the Arbitrator did not find that "management rights was a relevant factor" in his decision[55] – he found precisely the opposite.[56] The Union's two misunderstandings do not establish that the award fails to draw its essence from the agreement.[57] Moreover, the Union's claim that the Arbitrator did not properly address its evidence merely disputes the Arbitrator's evaluation of evidence, and such disputes cannot support an essence challenge.[58] Therefore, we deny the essence exception.

E. The award is consistent with law and government-wide regulation.

The Union argues that the award is contrary to 5 U.S.C. §§ 5343(c)(4) and 5545(d) (§ 5343(c)(4) and § 5545(d), respectively),[59] as well as 5 C.F.R. part 550,

[36] *See AFGE*, 69 FLRA at 353. The Union requests leave, under § 2429.26(a) of the Authority's Regulations, to support its nonfact timeliness challenge with evidence that was not presented at arbitration. Exceptions Br. at 12 n.3 (citing 5 C.F.R. § 2429.26(a) ("The Authority . . . may in [its] discretion grant leave to file other documents as [it] deem[s] appropriate."")). Because the existing record is sufficient to resolve the timeliness challenge, we deny the Union's § 2429.26(a) request. *E.g.*, *Allen Park Veterans Admin. Med. Ctr.*, 34 FLRA 1091, 1091 n.2 (1990).

[37] Exceptions Br. at 12-13.

[38] *See AFGE, Loc. 3917*, 72 FLRA 651, 653 (2022) (*Loc. 3917*) (Chairman DuBester concurring) (award not deficient on nonfact grounds where challenged finding was not central to award).

[39] Exceptions Br. at 14.

[40] *See Loc. 3917*, 72 FLRA at 653.

[41] *See* Exceptions Br. at 16 ("The Arbitrator further relied on non[]facts when he addressed an inapplicable contract provision concerning the [s]afety [c]ommittee . . . .").

[42] *See Loc. 1802*, 50 FLRA at 398.

[43] Award at 6.

[44] Exceptions Br. at 15.

[45] *See id.*

[46] *IRS*, 61 FLRA at 105.

[47] Exceptions Br. at 16.

[48] *See Lodge 168*, 70 FLRA at 790 (denying nonfact exception about evaluation of evidence).

[49] Exceptions Br. at 17-18 (timeliness challenge as part of essence exception).

[50] *Id.* at 18 (emphasis omitted); *see also id.* at 22.

[51] *Id.* at 17.

[52] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

[53] *U.S. DOD, Def. Cont. Mgmt. Agency*, 66 FLRA 53, 57 (2011) (*DOD*) (citing *NAGE, Loc. R4-45*, 55 FLRA 789, 794 (1999)).

[54] *AFGE, Loc. 3911*, 69 FLRA 233, 236 (2016) (*Loc. 3911*).

[55] Exceptions Br. at 18 (emphasis omitted).

[56] Award at 10 (finding that management rights did "not alter his findings, decision[,] and/or award").

[57] *See DOD*, 66 FLRA at 57.

[58] *Loc. 3911*, 69 FLRA at 236.

[59] Exceptions Br. at 22, 24.

subpart I, Appendix A (Appendix A)[60] – each of which will be discussed in further detail below. When an exception involves an award's consistency with a statute or government-wide regulation, the Authority reviews any question of law raised by the exception and the award de novo.[61] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[62] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party demonstrates that the findings are deficient as nonfacts.[63]

As relevant here, § 5343(c)(4) authorizes the Office of Personnel Management (OPM) to promulgate government-wide regulations that provide federal-wage-system employees with "proper differentials . . . for duty involving unusually severe working conditions or unusually severe hazards."[64] OPM exercised this authority to promulgate government-wide regulations governing EDP.[65] However, the Union does not explain how the award *conflicts with* § 5343(c)(4). Thus, we reject the § 5343(c)(4) argument.

In pertinent part, § 5545(d) authorizes OPM to "establish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazard" that affects general-schedule employees.[66] OPM exercised this authority to promulgate government-wide regulations concerning HPD[67] – including Appendix A.[68] Again, however, the Union does not explain how the award *conflicts with* § 5545(d). Therefore, we reject the § 5545(d) argument.

Concerning Appendix A, as relevant here, it authorizes HPD for exposure to hazardous agents – more specifically, "work with or in close proximity to . . . [v]irulent biologicals."[69] Appendix A further defines virulent biologicals as "[m]aterials of micro-organic nature which when introduced into the body are likely to cause serious disease or fatality and for which *protective devices do not afford complete protection*."[70] The Agency relied on this provision of Appendix A when it authorized HPD for employees due to the COVID-19 pandemic.[71] The Union asserts that HPD should have continued, and that the award is contrary to Appendix A for holding otherwise, because employees were never "complete[ly] protect[ed]" from the risk of COVID-19.[72]

The Arbitrator determined that the discontinuation of HPD did not violate government-wide regulation because the Agency had reduced the risks from COVID-19 to a less-than-significant level (less-than-significant determination).[73] Because we have already denied the Union's nonfact challenge to one of the bases for the less-than-significant determination,[74] and because the Union does not challenge the remaining bases for that determination as nonfacts,[75] we defer to this factual finding in our analysis.[76]

In its opposition, the Agency argues that the award is not contrary to Appendix A because a different OPM-promulgated regulation required the Agency's discontinuation of HPD.[77] In particular, the Agency relies on 5 C.F.R. § 550.906 (§ 550.906),[78] which says, in pertinent part, "An agency *shall discontinue* payment of hazard pay differential to an employee when . . . [s]afety

[60] *Id.* at 19, 24-26; *see also id.* at 20, 29-30, 31 (referring to an Appendix A standard for protection from hazards but not specifically citing Appendix A).
[61] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)); *see U.S. DHS, CBP*, 69 FLRA 579, 581 & n.27 (2016) (Member Pizzella concurring) (citing *U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 1148, 1150 (2010)) (Authority performs de novo legal review to resolve arguments that an award is inconsistent with government-wide regulations). The Union incorrectly asserts that when a collective-bargaining agreement refers to statutes or government-wide regulations, then the Authority will review an award's consistency with those statutes and regulations using the essence standard. Exceptions Br. at 19. Rather, when an agreement incorporates *agency-specific* rules or regulations, the Authority relies on the essence standard to review an award's consistency with those agency-specific authorities. *E.g.*, *U.S. Dep't of the Navy, Naval Air Station, Pensacola, Fla.*, 65 FLRA 1004, 1008 (2011); *SSA*, 65 FLRA 523, 527 (2011).
[62] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[63] *NAGE, Loc. R4-17*, 67 FLRA 4, 6 (2012) (*NAGE*) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).
[64] 5 U.S.C. § 5343(c)(4).
[65] *See* 5 C.F.R. pt. 532, subpt. E (regulations governing EDP).
[66] 5 U.S.C. § 5545(d).
[67] *See* 5 C.F.R. pt. 550, subpt. I (regulations governing HPD).
[68] *Id.*, app. A.
[69] *Id.*
[70] *Id.* (emphasis added).
[71] *See* Authorization Letter at 1 (quoting 5 C.F.R. pt. 550, subpt. I, app. A).
[72] Exceptions Br. at 19-20, 26, 29-30, 32.
[73] Award at 6; *see also id.* (determining that "sufficient factual information . . . prove[d] that the Agency [wa]s . . . in a position to protect its employees at a level that allow[ed] the discontinuation of HPD").
[74] *See* Part III.C. above (denying nonfact challenge to "0.07% incidence rate" (quoting Award at 6)).
[75] Award at 6 (crediting Agency's assertion that disputed worksites implemented all recommended preparedness and control measures, and adopted a process to monitor that implementation).
[76] *See NAGE*, 67 FLRA at 6.
[77] Opp'n Br. at 23-24.
[78] *Id.*

precautions have reduced the element of hazard to a *less than significant level of risk*, consistent with generally accepted standards that may be applicable."[79] The Agency asserts that, under § 550.906, the Arbitrator's less-than-significant determination supported his conclusion that the discontinuation was lawful.[80]

By contrast, the Union claims that only Appendix A specifically addresses hazards from virulent biologicals, and, according to the Union, the more general wording in § 550.906 cannot override the specific wording in Appendix A.[81] However, the Authority has previously recognized that § 550.906 sets forth the specific conditions for terminating HPD.[82] Further, the Authority defers to OPM's official interpretations of its regulations,[83] unless those interpretations are plainly erroneous or inconsistent with the regulations.[84] OPM's official guidance interpreting Appendix A and § 550.906 unequivocally states that HPD related to COVID-19 "is not payable if safety precautions have reduced the element of hazard to a less than significant level of risk, consistent with generally acceptable standards that may be applicable."[85] That guidance is not plainly erroneous or inconsistent with Appendix A or § 550.906. Consequently, in accordance with Authority precedent and OPM's official regulatory interpretation, we find that the Arbitrator's less-than-significant determination supported his conclusion that the Agency's discontinuation of HPD was lawful.

There is an additional reason to reject the Union's argument that Appendix A entitled employees to continued HPD. In *Adams v. United States*, the U.S. Court of Appeals for the Federal Circuit concluded that, under Appendix A, HPD was payable "only when the employee is working with or near a virulent biological . . . itself, not doing any task that might incur exposure to a virulent biological."[86] In other words, the court rejected the notion that OPM authorized HPD for duties that involved "ambient exposure to a virulent biological [like COVID-19] in the workplace due to transmission by infected humans."[87] Applying *Adams* here, and for the reasons that the court more fully explained in its decision, Appendix A does not authorize continued HPD in the circumstances of this case – where COVID-19 exposure occurred due to infected humans or human-contaminated intermediary objects or surfaces.[88] Thus, we reject the Union's Appendix A argument on this basis as well.

Because EDP involves a different appendix of authorizations than HPD,[89] and the Union does not allege that the award is contrary to the EDP appendix, we do not address whether the award is contrary to OPM's EDP regulations. Still, we note that the Federal Circuit concluded in *Adams* that those EDP regulations did not authorize payments for "contagious-disease transmission via ambient exposure" to COVID-19.[90]

Finally, the Union separately contends that the award is contrary to law because the Arbitrator did not make sufficient findings for the Authority to determine whether the award is deficient.[91] Our discussion of the Union's other arguments above shows that the Arbitrator's findings were sufficient for us to determine whether the award is deficient. Thus, we reject the Union's contention.[92]

For the foregoing reasons, we deny the Union's contrary-to-law and contrary-to-government-wide-regulation exceptions.

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[79] 5 C.F.R. § 550.906 (emphases added).

[80] Opp'n Br. at 22-23, 28-29.

[81] Exceptions Br. at 19-20.

[82] *AFGE, Loc. 1858*, 66 FLRA 607, 609 (2012) ("The plain language of § 550.906(b) makes clear that the payment of HPD may be terminated when '[s]afety precautions have reduced the element of hazard to a less than significant level of risk.'" (alteration in original) (quoting 5 C.F.R. § 550.906(b))).

[83] *U.S. DHS, U.S. ICE*, 70 FLRA 628, 630 (2018) (*ICE*) (Member DuBester dissenting on other grounds) (citing *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 197-98 (2014) (*VAMC*)), *pet. for review denied sub nom. AFGE Nat'l Council, 118-ICE v. FLRA*, 926 F.3d 814, 819 (D.C. Cir. 2019).

[84] *VAMC*, 67 FLRA at 197-98 (quoting *Cong. Research Emps. Ass'n, IFPTE, Loc. 75*, 59 FLRA 994, 1000 (2004)).

[85] Compensation Policy Memorandum (CPM) 2020-05 (Mar. 7, 2020), https://chcoc.gov/sites/default/files/coronavirus-disease-2019-covid-19-additional-guidance_03-07-2020_508.pdf, Attach., Questions and Answers on Human Resources Flexibilities and Authorities for Coronavirus Disease 2019 (COVID-19) at 12 (question G(1)), https://www.opm.gov/policy-data-oversight/covid-19/questions-and-answers-on-human-resources-flexibilities-and-authorities-for-coronavirus-disease-2019-covid-19.pdf; *see ICE*, 70 FLRA at 629-30 (relying on CPM 97-5 for official interpretation of OPM's regulations concerning administratively uncontrollable overtime).

[86] 59 F.4th 1349, 1360 (Fed. Cir. 2023) (en banc).

[87] *Id.* at 1359.

[88] *See id.* at 1351 ("We conclude that OPM simply has not addressed contagious-disease transmission (e.g., human-to-human, or through human-contaminated intermediary objects or surfaces) outside two settings not present here – e.g., certain situations within laboratories and a jungle-work situation. Although OPM might well be able to provide for differential pay based on COVID-19 in various workplace settings, it has not to date adopted regulations that do so.").

[89] 5 C.F.R. pt. 532, subpt. E, app. A.

[90] 59 F.4th at 1361; *see also id.* at 1362 (concluding that "the HPD and EDP [s]chedules do not provide payment in situations where an employee is exposed to another employee or individual carrying an infectious disease").

[91] Exceptions Br. at 23.

[92] *See, e.g., NTEU, Chapter 110*, 63 FLRA 95, 98 (2009) (rejecting argument that arbitrator's findings were insufficient to evaluate contrary-to-law challenges).

IV. Decision

We deny the Union's exceptions.