74 FLRA No. 60

UNITED STATES
DEPARTMENT OF THE NAVY
NAVY REGION MID-ATLANTIC FIRE &
EMERGENCY SERVICES
NAVAL WEAPONS
STATION EARLE, NEW JERSEY
(Agency)

and

INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS
LOCAL F-147
(Union)

0-AR-6049

_____

DECISION

April 28, 2026

_____

Before the Authority: Colleen Duffy Kiko, Chairman, and Anne Wagner and Charles O. Arrington, Members
(Chairman Kiko concurring)

I. Statement of the Case

The Union filed a grievance in 2024 (2024 grievance) alleging that the Agency violated the parties' collective-bargaining agreement and law by planning to contract out certain services, rather than allowing firefighters (the grievants) to perform those services. Arbitrator Eric W. Lawson issued an award that sustained the 2024 grievance. The Agency filed exceptions to the award on nonfact and contrary-to-law grounds. As an initial matter, we find that Executive Order 14,251 (EO 14251)[1] does not remove the exceptions from our jurisdiction, because it is undisputed that the Agency is the immediate, local employing office of firefighters. Additionally, because the Agency fails to demonstrate that the award is deficient, we deny the exceptions.

II. Background and Arbitrator's Award

In 2020, under the parties' 1996 collective-bargaining agreement, the Union filed a grievance (2020 grievance) regarding "prescribed burning."[2] A prescribed, or "controlled," burn is the intentional setting of a fire to reduce the amount of flammable material in a designated area.[3] In the 2020 grievance, the Union alleged that the Agency was "planning to contract out firefighting services," specifically burn services, which had been a firefighter responsibility at the Agency's Earle, New Jersey facility (Earle).[4] In 2021, after the Agency agreed not to contract out burns, the parties agreed to hold arbitration of the 2020 grievance "in abeyance."[5] The parties stipulated that the Union could "reactivate the arbitration proceeding . . . upon learning that the Agency has made a decision to contract out wildland firefighting activities or controlled burns"[6] (joint stipulation).

In November 2023, the parties executed a new collective-bargaining agreement (2023 agreement). As relevant here, they added Article 26, Section 15 (Article 26), which states that the Agency "agrees to abide by 10 [U.S.C. §] 2465,[7] i.e., [p]rohibition of [c]ontracts for [p]erformance of [f]irefighting . . . [f]unctions."[8] In February 2024, the Agency notified the Union of its intent "to obtain prescribed[-]burn services from state or local entities."[9]

The Union then filed the 2024 grievance, alleging that the Agency violated Article 26 and 10 U.S.C. § 2465 by intending to contract out burn services. While acknowledging the joint stipulation, the 2024 grievance stated that the Union "has chosen to file a new grievance due to a new [collective-bargaining agreement] being in place with different language and requirements regarding

[1] Exclusions from Federal Labor-Management Relations Program, EO 14251, 90 Fed. Reg. 14553 (Apr. 3, 2025) (amending Exclusions from the Federal Labor-Management Relations Program, Exec. Order No. 12171, 44 Fed. Reg. 66565 (Nov. 19, 1979)).

[2] Award at 4; *see also id.* at 9 (citing a "Motion to Dismiss Decision").

[3] *Id.* at 5; *see also id.* at 2 n.1 (stating that the Agency described one of its proposed issues as whether the Union demonstrated an "intentional setting of a fire, i.e.[,] a prescribed burn," was a "firefighting function").

[4] Opp'n, Ex. 1, Arbitrator's Motion to Dismiss Decision (Mot. Decision), at 1 (internal quotation mark omitted); *see* Award at 4 (citing Mot. Decision).

[5] Award at 9.

[6] Mot. Decision at 1-2 (internal quotation mark omitted).

[7] As relevant here, 10 U.S.C. § 2465(a) states: "Except as provided in subsection (b), funds appropriated to the Department of Defense may not be obligated or expended for the purpose of entering into a contract for the performance of firefighting . . . functions at any military installation or facility."

[8] Exceptions, Ex. F, 2023 Agreement, at 74 (Article 26).

[9] Mot. Decision at 2.

contracting out."[10] The Agency denied the 2024 grievance, and the parties proceeded to arbitration.[11]

The parties did not stipulate an issue. The Arbitrator framed the following issues: "Is the Agency's stated intent of exploring options for contracting out prescribed[-]burn services at [Earle] . . . a violation of the [2023 agreement and] [i]f so, what shall the remedy be?"[12]

The Arbitrator stated that "[c]entral to a determination of the substantive issue pending in this matter is the question as to whether prescribed or controlled burns [(burns, collectively)[13]] constitute a firefighting function"[14] because Article 26 requires the Agency to adhere to 10 U.S.C. § 2465 and "prohibits the Agency from contracting out . . . firefighting . . . functions at any military installation or facility."[15] In resolving whether burns are included within the meaning of Article 26's "firefighting functions,"[16] the Arbitrator examined the provision's plain meaning, and the parties' bargaining history and practices, noting that this is "not the first time the parties have faced each other in arbitration over the issue of who shall perform" burns at the Agency.[17]

First, the Arbitrator set out the Agency's argument that "firefighting functions" applies only to fire-suppression activities, and the Union's argument that a "firefighting function . . . is an action for which a firefighter is used."[18] Rejecting the Agency's argument, the Arbitrator found that the Agency's claimed application "would prohibit the use of back fires, or fires deliberately set as a way to use a . . . burn to deprive an existing larger fire of fuel and is a means of extinguishing the larger fire."[19] Therefore, he concluded that burns are included within the plain meaning of "firefighting functions" in Article 26.

Next, the Arbitrator examined the parties' bargaining history. He noted that before negotiating Article 26, the parties entered into the joint stipulation where they agreed that the "scope of the [2020] grievance-arbitration includes any subsequent acts by the Agency to contract out wildland firefighting functions or . . . burns" at the Agency.[20] He also found significant that, during bargaining over the 2023 agreement, the Union proposed, and the Agency agreed to, the wording of Article 26 which incorporated 10 U.S.C. § 2465. The Arbitrator concluded that "[g]iven the pendency of arbitration" concerning "firefighting functions or . . . burns[,]" and the adoption of Article 26's wording proposed by the Union, "it is difficult to conclude that when th[e] contractual language was negotiated . . . the parties were in disagreement as to whether firefighting function[s] included . . . burns."[21]

Additionally, the Arbitrator agreed with the Union's argument that a past practice existed where, "for more than ten years[,] all . . . burns at [Earle] were performed by bargaining[-]unit members."[22] In reaching this conclusion, the Arbitrator favorably cited testimony indicating that, of the Agency facilities covered by the parties' 1996 and 2023 agreements, only Earle firefighters conducted burns. For these reasons, the Arbitrator concluded that firefighting functions include burns within the meaning of Article 26's contracting prohibition.

Additionally, the Arbitrator rejected the Agency's arguments that (1) Department of Defense Instruction 6055.06 (DODI 6055.06) is the "controlling guidance for firefighting services[,]"[23] and (2) because that regulation does not include burns in the "scope of services" performed by firefighters, burns are not a firefighting function.[24] Instead, the Arbitrator adopted the Union's counterarguments that (1) although DODI 6055.06 does not discuss burns, it does discuss wildland fires and fire-prevention activities, and (2) the "skills and abilities required to engage in fighting wildland fires are . . . identical to those needed to engage in a . . . burn."[25] While making this finding, the Arbitrator made a passing reference in a footnote to the Agency's "Standard Operating Guideline" (guideline), which states that "[burns] will greatly reduce the danger and severity of damaging wildfires [and] [t]his is of benefit not only to our [n]atural [r]esources, but most important to the safety of [the Agency]."[26]

[10] Exceptions, Ex. B, 2024 Grievance, at 1.
[11] Before a hearing on the merits, the Agency argued in a motion to dismiss that the 2024 grievance was not arbitrable. The Arbitrator denied the motion, finding the 2024 grievance arbitrable. Because neither party disputes this finding, we do not address it further.
[12] Award at 2 (internal quotation marks omitted).
[13] At arbitration, the Arbitrator and parties used the terms "controlled burns" and "prescribed burns" interchangeably. *Id.* at 9.
[14] *Id.*
[15] *Id.* at 9-10 (internal quotation marks omitted).
[16] *Id.* at 10.
[17] *Id.* at 9.
[18] *Id.* at 10 (internal quotation marks omitted).
[19] *Id.*
[20] *Id.* at 9.
[21] *Id.* at 10 (internal quotation mark omitted).
[22] *Id.*
[23] *Id.* at 8-9 (internal quotation marks omitted).
[24] *Id.* at 5.
[25] *Id.* at 10.
[26] *Id.* at 10 n.4 (quoting guideline) (internal quotation marks omitted).

Further, the Arbitrator rejected the Agency's argument that, under § 7106 of the Federal Service Labor-Management Relations Statute (the Statute)[27] and Article 4 of the 2023 agreement, management had the right to determine the personnel that performs burns at the Agency. In this regard, the Arbitrator concluded that the Agency knew or should have known when it negotiated Article 26 that the provision "limited its ability to engage outside parties in . . . burns at [Earle]."[28]

The Arbitrator concluded that the Agency violated Article 26 when it pursued contracting out burns. Therefore, he sustained the 2024 grievance. As a remedy, the Arbitrator directed the Agency to refrain from contracting out burns.

On June 23, 2025, the Agency filed exceptions to the award, and, on July 23, 2025, the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: The Authority has jurisdiction to review the exceptions.

In its exceptions, the Agency asserts that the Authority has jurisdiction to review its exceptions because EO 14251 does not exempt "the immediate, local employing offices of any . . . firefighters" from the Statute's coverage.[29] We agree with the Agency's assertion.

On March 27, 2025, President Donald J. Trump issued EO 14251.[30] Pursuant to § 7103(b)(1) of the Statute[31] and 22 U.S.C. § 4103(b), EO 14251 excluded certain agencies and agency subdivisions from the coverage of the Statute. As relevant here, Section 2 of EO 14251 excludes the Department of Defense, and, therefore, the Department of the Navy[32] from the Statute's coverage.[33] Section 2 of EO 14251 states that "nothing in this section shall exempt from coverage of [the Statute] . . . the immediate, local employing offices of any agency . . . firefighters."[34] The Agency states,[35] and the Union does not dispute,[36] that the Agency is the immediate, local employing office of firefighters. Therefore, EO 14251 does not exclude the Agency from the Statute's coverage, and we have jurisdiction to review the Agency's exceptions.[37]

IV. Analysis and Conclusions

A. The Agency does not demonstrate that the award is based on nonfacts.

The Agency argues that the award is based on several nonfacts.[38] 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.[39] Disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.[40] The Authority also rejects nonfact exceptions that challenge an arbitrator's legal conclusions,[41] interpretations of agency regulations,[42] or contractual interpretations.[43]

At the outset, the Agency claims the following statement in the award is unsupported "by fact" and is an "[im]permissible legal conclusion":[44]

> [G]iven the pendency of arbitration on the matter of[] wildland firefighting functions or controlled burns, the adoption of the language at . . . Article 26, which appended [10 U.S.C. §]2465 to [Article 26] using language that was proposed by the Union, it is difficult to conclude that when that contractual language was

[27] 5 U.S.C. § 7106.
[28] Award at 11.
[29] Exceptions Br. at 16 (quoting EO 14251, 90 Fed. Reg. at 14554).
[30] EO 14251; *see* OPM, *Guidance on Executive Order Exclusions from Federal Labor-Management Programs* (Mar. 27, 2025) (OPM Guidance), https://www.opm.gov/policy-data-oversight/latest-memos/guidance-on-executive-order-exclusions-from-federal-labor-management-programs.pdf.
[31] 5 U.S.C. § 7103(b)(1).
[32] The Department of the Navy "operates under the authority, direction, and control of the Secretary of Defense." 10 U.S.C. § 8011.
[33] EO 14251, 90 Fed. Reg. at 14553; *see* OPM Guidance at 1.
[34] EO 14251, 90 Fed. Reg. at 14554; *see* OPM Guidance at 3 n.2 (noting exception to statutory exclusions for "the immediate employing offices of . . . firefighters").
[35] Exceptions Br. at 16-17.
[36] *See* Award at 3.
[37] *See U.S. Dep't of the Navy, Commander Navy Region Nw., Fire & Emergency Servs.*, 74 FLRA 286, 288 (2025) (holding EO 14251 did not deprive Authority of jurisdiction over arbitration exceptions where there was no dispute that the agency was "the immediate, local employing office of firefighters").
[38] Exceptions Br. at 11-16; *see also* Exceptions Form at 6-7.
[39] *NTEU, Chapter 46*, 73 FLRA 654, 655-56 (2023) (*Chapter 46*) (citing *AFGE, Loc. 4156*, 73 FLRA 588, 590 (2023) (*Local 4156*)).
[40] *Id.* at 656 (citing *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018)).
[41] *AFGE, Loc. 3954*, 73 FLRA 39, 41 (2022) (*Local 3954*) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 201 (2016) (Member Pizzella dissenting in part)).
[42] *Fraternal Ord. of Police, Lodge 12*, 68 FLRA 616, 619 (2015) (*Lodge 12*) (citing *U.S. DHS, CBP*, 68 FLRA 157, 161 (2015) (Member Pizzella dissenting on other grounds)).
[43] *NLRB Union*, 74 FLRA 230, 233 (2025) (*NLRB*) (citing *AFGE, Loc. 310*, 74 FLRA 22, 24 (2024)).
[44] Exceptions Br. at 12.

> negotiated that the parties were in disagreement as to whether firefighting function[s] included controlled burns.[45]

According to the Agency, the 2023 agreement "was entered into between the Agency and eight . . . different local unions at eight . . . different fire districts."[46] The Agency contends that the record is devoid of any "fact" that the Agency or the multiple union signatories to the 2023 agreement "agreed upon [burns] as a firefighting function[,]" or "that a [burn] has been performed" under the 2023 agreement at Earle or any of the other facilities covered by that agreement.[47] However, the Arbitrator made the finding that burns were a firefighting function as part of his interpretation of Article 26, and his contractual interpretation does not provide a basis for finding the award is based on a nonfact.[48] Even if the Arbitrator's statement is a factual finding that can be challenged on nonfact grounds, the Agency's argument amounts to disagreement with the Arbitrator's evaluation of the evidence, which also does not provide a basis for finding that the award is based on a nonfact.[49] Finally, even if the statement could be considered a legal conclusion (as the Agency asserts), it may not be challenged as a nonfact.[50] For these reasons, the Agency's argument does not demonstrate that the award is based on a nonfact.

Next, the Agency argues that the Arbitrator "erroneously combined" DODI 6055.06 and the guideline, by "imput[ing] information within" the guideline into the DODI 6055.06 definitions to find that burns are a firefighting function.[51] In this regard, the Agency points to the Arbitrator's citation to the guideline in a footnote following his statement that DODI 6055.06 describes wildland fires and prevention activities.[52] According to the Agency, the guideline is merely a "unit[-]level procedure" that – unlike DODI 6055.06 – "does not dictate" the scope of the Agency's fire and emergency services.[53] The Agency further argues that the Arbitrator ignored "the explicit terms" in DODI 6055.06 concerning wildland fires and fire prevention, which do not involve setting or extinguishing fires.[54] Additionally, the Agency argues that the Arbitrator's reliance on the guideline to find that burns are a firefighting function is based on nonfacts because witness testimony indicated that there is no policy requiring firefighters to conduct burns and no firefighters are conducting burns.[55] The Agency asserts that the award "does not contest the veracity" of this evidence.[56]

It is not clear from the award whether the Arbitrator conflated the guideline and DODI 6055.06. However, even assuming that he did so, the Agency's argument challenges the Arbitrator's interpretations of the guideline and DODI 6055.06. As this argument challenges the Arbitrator's interpretations of Agency regulations, the argument does not demonstrate that the award is based on a nonfact.[57] Further, the Agency's remaining arguments challenge the Arbitrator's evaluation of the evidence and, thus, also provide no basis for finding that the award is based on a nonfact.[58]

In addition, the Agency asserts that the Arbitrator erroneously found there was a past practice of bargaining-unit members performing burns at Earle, and then relied on that finding to conclude that burns are a firefighting function.[59] The Agency contends that record evidence generally demonstrates that no such past practice existed,[60] and that the Arbitrator "misstat[ed]" specific record evidence involving the number of burns occurring at Earle as well as the type of personnel who performed burns at another Agency facility.[61] However, the Arbitrator credited testimony that unit employees had performed burns at Earle, and that burns were conducted at another Agency facility.[62] The Agency's argument merely challenges the Arbitrator's evaluation of the evidence, and provides no basis for finding the award is based on a nonfact.[63] Moreover, the Arbitrator's conclusion that burns are a firefighting function was based only partially

[45] *Id.* (quoting Award at 10) (internal quotation marks omitted).
[46] *Id.*
[47] *Id.*
[48] *NLRB*, 74 FLRA at 233.
[49] *Chapter 46*, 73 FLRA at 655-56.
[50] *Local 3954*, 73 FLRA at 41.
[51] Exceptions Br. at 14; *see id.* at 13.
[52] *Id.* at 13-14.
[53] *Id.* at 13.
[54] *Id.* at 14.
[55] *Id.* at 13.
[56] *Id.* at 14.
[57] *Lodge 12*, 68 FLRA at 619.
[58] *Chapter 46*, 73 FLRA at 656.
[59] Exceptions Br. at 15-16.
[60] *Id.* at 15 (arguing that record evidence demonstrates that: burns have not occurred at Earle since 2012; the Agency objected to firefighters performing burns at Earle as it was the basis underlying the 2020 grievance-arbitration; and no burns were conducted at Earle during the effective period of the 2023 agreement).
[61] *Id.* at 15 n.6. (arguing that Arbitrator "misstat[ed]" testimony because he found that the Union president had participated in hundreds of burns at Earle even though the testimony demonstrated a lesser amount; that the personnel performing burns at another Agency facility as firefighters, but testimony demonstrated that the personnel were not "certified firefighters"; and that burns were performed only at Earle except for one other Agency facility where outside personnel conducted the burns, but testimony demonstrated that the other Agency facility has an agreement with a different federal agency to conduct burns).
[62] Award at 10.
[63] *Chapter 46*, 73 FLRA at 656.

on a past-practice finding[64] because he also relied on several other findings, including Article 26's plain meaning and the parties' bargaining history, to reach that conclusion.[65] Therefore, even assuming the Arbitrator's finding of a past practice is clearly erroneous, there is no basis for finding that it is a central fact underlying the award, but for which the Arbitrator would have reached a different result. Consequently, the Agency's argument does not establish the award is based on a nonfact.[66]

For the above reasons, we deny the Agency's nonfact exceptions.

B. The award is not contrary to law.

The Agency argues the award is contrary to law in several respects.[67] 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.[68] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[69] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts,[70] and defers to the arbitrator's interpretation of the parties' collective-bargaining agreement unless the award fails to draw its essence from the agreement.[71]

1. The award is not contrary to Agency regulations.

The Agency argues the award is contrary to DODI 6055.06 because burns do not fall within the scope of firefighter services identified in that regulation.[72] Citing *U.S. Department of the Army, Lexington-Blue Grass Army Depot, Lexington, Kentucky* (*Lexington*),[73] the Agency asserts that "arbitrators are required to consider any relevant law, rule[,] or regulation when determining a grievance award," and "the Arbitrator blatantly disregarded an Agency regulation and issued an [a]ward contrary to such regulation(s)."[74]

The Authority will find an award deficient if it is inconsistent with a governing agency regulation.[75] However, when both a collective-bargaining agreement and an agency-specific rule or regulation apply to a matter, the negotiated agreement governs the matter's disposition.[76]

The Arbitrator found that Article 26 prohibits contracting out firefighting functions, and that burns are a firefighting function within the meaning of Article 26. The Agency does not challenge the Arbitrator's interpretation of Article 26 on essence grounds, so we defer to that interpretation.[77] Even assuming the award conflicts with DODI 6055.06, Article 26 governs over the agency-specific regulation in the disposition of this matter.[78] As such, the alleged inconsistency between the award and DODI 6055.06 does not provide a basis for finding the award deficient.

Lexington does not support a different result. That case involved a government-wide regulation that required agencies to pay certain types of employees an environmental differential when the employees were exposed to certain categories of conditions (categories).[79] The regulation did not enumerate the specific work situations that fell within those categories, but left that question to local determinations, including those made through collective bargaining.[80] The Authority found that an arbitrator erroneously refused to enforce a collective-bargaining agreement without assessing whether the local work situation at issue fell within the categories.[81] *Lexington* did not involve a situation where a collective-bargaining agreement governed over an allegedly conflicting agency-wide regulation. Therefore, it is inapposite here.

The Agency also argues that the award is contrary to Department of the Navy Instruction 11320.23H

[64] Award at 10.
[65] *Id.* at 9-10.
[66] *NTEU, Chapter 105*, 74 FLRA 257, 260 (2025) (denying nonfact exception where excepting party failed to show that, but for the alleged errors, the arbitrator would have reached a different result).
[67] Exceptions Br. at 7-11*; see also* Exceptions Form at 4-6.
[68] *NTEU, Chapter 133*, 74 FLRA 242, 244 (2025) (citing *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Se. Fisheries Sci. Ctr.*, 74 FLRA 205, 206 (2025) (*Fisheries*)).
[69] *Id.* (citing *Fisheries*, 74 FLRA at 206).
[70] *Id.*
[71] *NTEU*, 73 FLRA 816, 819 (2024) (*NTEU*) (Chairman Grundmann concurring) (citing *Consumer Fin. Prot. Bureau*, 73 FLRA 670, 679 (2023) (*CFPB*)).
[72] Exceptions Br. at 8-10.
[73] 43 FLRA 1074 (1992).
[74] Exceptions Br. at 10.
[75] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Memphis, Tenn.*, 73 FLRA 26, 30 (2022) (*BOP Memphis*) (citing *AFGE, Loc. 3254*, 70 FLRA 577, 581 (2018)).
[76] *Id.* (citing *NAGE*, 71 FLRA 775, 775-76 (2020) (*NAGE*)).
[77] *NTEU*, 73 FLRA at 820 (deferring to arbitrator's interpretation of collective-bargaining agreement in absence of essence exception challenging that interpretation).
[78] *E.g.*, *BOP Memphis*, 73 FLRA at 30-31 (finding that arbitrator's application of parties' agreement over conflicting agency regulation was consistent with law (citing *NAGE*, 71 FLRA at 776; *AFGE, Loc. 200*, 68 FLRA 549, 550 (2015); *U.S. Dep't of the Treasury, IRS*, 68 FLRA 145, 147 (2014); *U.S. Dep't of Transp., FAA*, 61 FLRA 750, 752 (2006))).
[79] 43 FLRA at 1082.
[80] *Id.* at 1083.
[81] *Id.*

(DONI 11320.23H) because that instruction provides that burns are not a firefighting function.[82] The Agency asserts that the instruction issued after the arbitration – on May 20, 2025 – and requests that the Authority take official notice of DONI 11320.23H.[83] The Union argues that the Agency has "waived" its argument regarding DONI 11320.23H by failing to raise that instruction to the Arbitrator, when it was promulgated four days before the Arbitrator served the parties with the award.[84]

The award is dated May 22, 2025,[85] and the parties acknowledged receipt of the award on May 24, 2025.[86] As DONI 11320.23H was issued on May 20, 2025,[87] the Agency could have presented this instruction to the Arbitrator before the award issued, but did not. However, even assuming DONI 11320.23H is properly before the Authority, again the 2023 agreement governs over an agency-wide regulation.[88] Therefore, any alleged inconsistency between the award and DONI 11320.23H does not provide a basis for finding the award deficient.[89]

We deny this exception.[90]

2. The award does not conflict with management's rights under § 7106 of the Statute.

The Agency argues the award conflicts with management's rights to determine the Agency's mission and organization under § 7106(a)(1) of the Statute, and to assign work under § 7106(a)(2)(B) of the Statute.[91] The Agency states generally that the "Arbitrator lack[ed] jurisdiction to create new firefighting functions for the [Agency]" because DODI 6055.06 does not include burns within firefighters' scope of services, and, therefore, the Arbitrator "violated . . . §[ ]7106 when he found, contrary to [DODI 6055.06], that [burns] are a firefighting function of the [Agency]."[92] In addition, the Agency argues that "by adding additional mission requirements on firefighting personnel," the award: "exposes the Agency to increased risk [of] liability for property damage to local civilian communities" and "environmental impacts"; and creates new administrative systems because the Agency does not maintain training standards for burns.[93]

In Consumer Financial Protection Bureau (*CFPB*),[94] the Authority revised its test for resolving management-rights exceptions in cases where an arbitrator has found a collective-bargaining-agreement violation.[95] Under the four-part *CFPB* framework, the first question is whether the excepting party establishes the arbitrator's interpretation and application of the parties' agreement, and/or the awarded remedy, affects a management right.[96] In *CFPB*, the Authority stated that "if it is clear that the [collective-bargaining-agreement] provision is enforceable under § 7106(b), then the Authority may assume, without deciding, that the interpretation and application of the [agreement] and/or the awarded remedy 'affects' a management right."[97] As explained below, we find that, as interpreted and applied by the Arbitrator, Article 26 concerns an enforceable, permissive subject of bargaining under § 7106(b)(1) of the Statute. Therefore, we assume, without deciding, that the Arbitrator's interpretation and application of Article 26 affects management's rights under § 7106(a).[98]

Under *CFPB*'s second question, the Authority determines whether the arbitrator correctly found, or the opposing party demonstrates, that the pertinent contract language – as interpreted and applied by the arbitrator – is enforceable under § 7106(b) of the Statute.[99] As the Arbitrator did not address § 7106(b), we examine whether

[82] Exceptions Br. at 10-11. DONI 11320.23H provides: "[Fire and Emergency Services] does not directly conduct prescribed wildland burns, but serves in support to respond if the prescribed burn deviates from pre-established boundaries. The use of prescribed burns does not generate a requirement for the wildland mission with the locations [Scope of Services] SoS." *Id.* at 10 (alteration in original) (emphasis omitted) (quoting DONI 11320.23H).

[83] *Id.* at 16.

[84] Opp'n at 13.

[85] Award at 11.

[86] Exceptions Br. at 1; Opp'n at 15.

[87] Exceptions Br. at 16; *see* Exceptions, Ex. H, DONI 11320.23H (dated May 20, 2025).

[88] *BOP Memphis*, 73 FLRA at 30-31 (holding that when both a collective-bargaining agreement and an agency-specific rule or regulation apply to a matter, the negotiated agreement governs the matter's disposition).

[89] *See, e.g.*, *Local 4156*, 73 FLRA at 589 (assuming contrary-to-law argument was properly before the Authority but denying the exception); *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 420 & n.25 (2023) (same).

[90] Because granting the Agency's request to take official notice of DONI 11320.23H would not affect the decision's outcome, we find it unnecessary to resolve the Agency's request. *See NTEU, Chapter 338*, 73 FLRA 487, 489 n.22 (2023) (finding it unnecessary to resolve request that Authority take official notice of certain evidence where granting the request would not affect the decision's outcome).

[91] Exceptions Br. at 7-9.

[92] *Id.* at 9.

[93] *Id.* at 11.

[94] 73 FLRA 670.

[95] *Id.* at 676-81.

[96] *Id.* at 676-77.

[97] *Id.* at 681 n.123.

[98] *See, e.g.*, *U.S. Dep't of the Army, Fort Huachuca, Ariz.*, 74 FLRA 317, 323 (2025) (*Fort Huachuca*) (assuming effect on § 7106(a) rights where Authority found provision interpreted and applied by arbitrator was enforceable as an appropriate arrangement under § 7106(b)(3) (citing *U.S. DHS, U.S. CBP*, 74 FLRA 6, 10 (2024) (*CBP*))).

[99] 73 FLRA at 677-80.

the Union demonstrates that Article 26, as interpreted and applied by the Arbitrator, is enforceable under § 7106(b).[100] The Union contends that Article 26 is a permissive subject of bargaining under § 7106(b) of the Statute, and that the Agency elected to negotiate over that subject.[101] Specifically, the Union asserts that Article 26 concerns "the types of employees assigned to a work project – firefighters to all firefighting functions."[102]

As relevant here, § 7106(b)(1) of the Statute permits an agency to negotiate regarding the "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty."[103] The Authority has held that this phrase applies to the establishment of agency staffing patterns, or the allocation of staff, for the purpose of an agency's organization and the accomplishment of its work."[104] A provision concerns "types" if it involves "distinguishable classes, kinds, groups, or categories of employees or positions that are relevant to the establishment of staffing patterns."[105] Further, "work project" means "a particular job or task."[106] Where an agency has elected to negotiate a § 7106(b)(1) matter, and agreed to a provision, that provision is fully enforceable at arbitration.[107]

We find that firefighters are a distinguishable class, kind, group, or category of employees.[108] We also find that burns are a particular job or task that firefighters would perform.[109] Therefore, we agree with the Union that Article 26, as interpreted and applied by the Arbitrator, concerns the types of employees assigned to a work project. As such, it is enforceable under § 7106(b)(1).[110] Thus, we move on to the third *CFPB* question.[111]

CFPB's third question asks whether the excepting party challenges the remedy separate and apart from the underlying violation.[112] Here, the Agency does not separately challenge the remedy. Therefore, the *CFPB* analysis ends, and we need not reach the fourth question.[113]

For the above reasons, the award is not contrary to § 7106 of the Statute. Consequently, we deny the management-rights exception.[114]

V. Decision

We deny the Agency's exceptions.

[100] *Fort Huachuca*, 74 FLRA at 323.
[101] Opp'n at 9-10.
[102] *Id.* at 10.
[103] 5 U.S.C.§ 7106(b)(1).
[104] *AFGE, Loc. 1748, Nat'l Council of Field Lab. Locs.*, 73 FLRA 233, 235 (2022) (citing *AFGE, Loc. 723*, 66 FLRA 639, 645 (2012) (*Local 723*)).
[105] *Id.* (quoting *Local 723*, 66 FLRA at 645).
[106] *AFGE, Loc. 3302*, 37 FLRA 350, 355 (1990) (*Local 3302*).
[107] *CFPB*, 73 FLRA at 678 (noting that "courts and the Authority have repeatedly held that parties may – at the agency's election – lawfully bargain over matters falling within § 7106(b)(1), and that agreements over such matters . . . are enforceable"); *see also U.S. Dep't of Transp., FAA., Alaskan Region*, 62 FLRA 90, 92 (2007) (*FAA*) (citing *U.S. Dep't of Transp., FAA*, 60 FLRA 159, 162, 164 (2004) (finding that provision negotiated under § 7106(b)(1) was enforceable at arbitration)).
[108] *See, e.g.*, *AFGE, Loc. 1203*, 55 FLRA 528, 531 (1999) (finding registered nurses were a type of employee); *NAGE, Loc. R5-184*, 52 FLRA 1024, 1031-32 (1997) (Member Armendariz dissenting in part on other grounds) (finding dental hygienists were a type of employee).
[109] *See, e.g.*, *Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 853 (1999) (finding foreman duty to supervise inmates was a work project); *Local 3302*, 37 FLRA at 355 (finding interviewing particular types of claimants was a work project).
[110] *CFPB*, 73 FLRA at 678; *FAA*, 62 FLRA at 92.
[111] *CBP*, 74 FLRA at 11.
[112] *CFPB*, 73 FLRA at 680-81.
[113] *Id.* at 681 ("Does the excepting party challenge the remedy separate and apart from the underlying [collective-bargaining-agreement] violation? If no, then the Authority will deny the exception.").
[114] We note that the Union argues that Article 26 – as interpreted and applied by the Arbitrator – is an enforceable appropriate arrangement under § 7106(b)(3) of the Statute. Opp'n at 10-11. Because we find that the provision, as interpreted and applied by the Arbitrator, is enforceable under § 7106(b)(1), we need not address the Union's § 7106(b)(3) claim. *See Fort Huachuca*, 74 FLRA at 324 n.99 (citing *U.S. Dep't of VA, James A. Haley Veterans Hosp. & Clinics*, 73 FLRA 880, 885 n.85 (2024) (then-Member Kiko concurring) (finding it unnecessary to address claim that provision was enforceable under § 7106(b)(2) where Authority found provision enforceable under § 7106(b)(3)).

Chairman Kiko, concurring:

When I was growing up in North Dakota, my mother often used controlled burns to clear brush covering a hill on our property that would otherwise create a wildfire hazard. Although she was careful, I vividly remember a few instances when this activity resulted in the involvement of the local fire department – to my father's alarm and my mother's chagrin. Watching these dramatic environmental-management operations on our property, I gained an appreciation for the meticulous, unpredictable, and incredibly valuable work of intentionally using flames to prevent uncontrollable wildfires.

So, naturally, I understand the concern of both parties that only qualified professionals should perform any controlled burns on military installations. I am particularly sympathetic to the Agency's position that management should have flexibility in determining *which* qualified professionals to assign this important work. But, for the reasons articulated in the majority rationale and those explained below, I agree the Agency does not demonstrate that the award is deficient. Accordingly, I join my colleagues in denying the Agency's exceptions. However, I write separately to identify an aspect of the award that I found troubling: the Arbitrator's reliance on past practice and bargaining history to interpret a federal statute.

In its grievance,[1] the Union claimed that the Agency violated 10 U.S.C. § 2465 (§ 2465) and Article 26, Section 15 (Article 26) of the parties' collective-bargaining agreement by intending to "explor[e] options to obtain prescribed burn services from state or local entities that are qualified to perform this function."[2] Article 26 provides that "[t]he [Agency] agrees to abide by . . . [§] 2465[:] Prohibition on Contracts for Performance of Firefighting or Security Guard Functions."[3] As relevant here, § 2465 provides that "funds appropriated to the Department of Defense may not be obligated or expended for the purpose of entering into a contract for the performance of firefighting . . . functions at any military installation or facility."[4]

Although the Union's grievance and the Agency's proposed issues raised statutory questions,[5] the Arbitrator framed the issue as purely contractual.[6] However, he also interpreted Article 26 of the parties' agreement as "append[ing §] 2465 to the [parties' agreement]."[7] When a contract provision mirrors, or is intended to be interpreted in the same manner as, a statute, the Authority will apply statutory standards and review the arbitrator's application of that contract provision de novo.[8] In determining whether to apply statutory standards, the Authority considers several factors, including whether the contractual provision clearly incorporates the statute either by reference, or by use of similar or identical wording;[9] whether the arbitrator interpreted the parties' agreement as incorporating statutory requirements;[10] and whether the parties agree – or do not dispute – that the wording was intended to have the same meaning.[11] Here, there is no dispute that statutory standards apply: Article 26 expressly incorporates § 2465; the Arbitrator found that the parties intended to "append[§] 2465 to the [parties' agreement];"

[1] Exceptions, Ex. B, Grievance (Grievance) at 1-2 ("The Agency's decision to contract out wildland firefighting functions at [the Agency facility] is a direct and flagrant violation of both the [parties' agreement] and 10 [U.S.C.] § 2465.").

[2] Opp'n, Ex. 2, Notification to Union at 1.

[3] Award at 2 (quoting Art. 26).

[4] 10 U.S.C. § 2465(a).

[5] Grievance at 1; Exceptions, Ex. G, Agency's Post-Hr'g Br. (Agency's Post-Hr'g Br.) at 3-4 (listing proposed issues, including "Has the Union met its burden of proving that . . . a prescribed burn[] is included within the statutory definition of a 'firefighting function' pursuant to . . . § 2465?").

[6] Award at 2 ("Is the Agency's stated intent of 'exploring options' for contracting out prescribed burn services . . . a violation of the [parties' agreement]?").

[7] *Id.* at 10.

[8] *AFGE, Loc. 2338*, 73 FLRA 845, 847-48 (2024) (Chairman Grundmann concurring); *see also U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Aus., Tex.*, 70 FLRA 924, 926 n.12 (2018) (Member DuBester concurring in part and dissenting in part on other grounds) (applying statutory standards where parties' agreement incorporated the Fair Labor Standards Act by reference); *Antilles Consol. Educ. Ass'n*, 64 FLRA 675, 676 n.2 (2010) (applying statutory standards where parties' agreement incorporated the Age Discrimination in Employment Act by reference).

[9] *Compare U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 63 FLRA 351, 354 (2009) (applying statutory standards where, among other things, the contract provision was "identical to . . . the Statute in all relevant aspects"), *and AFGE*, 59 FLRA 767, 769-70 (2004) (Chairman Cabaniss concurring; Member Pope dissenting on other grounds) (finding "even greater reason to interpret [a contractual provision] as a statutory provision" where the provision "specifically reference[d] the Statute"), *with AFGE, Loc. 1633*, 70 FLRA 519, 520 (2018) (declining to apply statutory standards where, among other things, "the record d[id] not . . . demonstrate[] that either [contractual provision at issue] mirror[ed], or was intended to be interpreted in the same manner as, the Statute").

[10] *Compare GSA, Region 9, L.A., Cal.*, 56 FLRA 683, 685 (2000) (applying statutory standards where "the [a]rbitrator found that . . . the parties[']' agreement 'parallel[led]' . . . the Statute"), *with AFGE, Loc. 2152*, 69 FLRA 149, 151 (2015) (*Loc. 2152*) (declining to apply statutory standards where, among other things, "the [a]rbitrator did not find . . . that [the contract] mirror[red] the Statute").

[11] *Compare NFFE, Loc. 2010*, 55 FLRA 533, 534 (1999) (applying statutory standards where contract provision "parallel[led]" the Statute and opposing party did not dispute excepting party's claim that the agreement "simply reiterate[d]" the Statute), *with Loc. 2152*, 69 FLRA at 151 (declining to apply statutory standards where, among other things, "the parties agreed that the arbitration concerned 'contract violations'").

and the parties agree that they intended to incorporate this statutory requirement into the contract.[12] Thus, having properly established the parties' intent to be bound by the restriction in § 2465, the Arbitrator considered the parties' arguments regarding the definition of "firefighting functions" under § 2465.[13]

At arbitration, the Agency raised statutory-construction arguments, contending that the plain meaning of "firefighting" includes only the extinguishment of fires, and not the setting of preventative fires,[14] which it distinguished as an "ecological[and]land management function."[15] The Agency also "relie[d] on guidance, policy, and procedures" from the Department of Defense to "determine the scope of services" of Agency firefighters, asserting that controlled burns were not consistent with the Agency-wide definition of "firefighting functions."[16]

By contrast, the Union raised both statutory[17] and contractual[18] arguments. Although the Union agreed that Article 26 "incorporates [the statute] by reference," it also claimed paradoxically that, as a result, "the [A]rbitrator may decide this case solely by engaging in contract interpretation."[19] Among its contractual arguments, the Union contended that the parties had a past practice whereby the Agency assigned firefighters to conduct controlled burns.[20] The Union also argued that Article 26's bargaining history supported its interpretation because the parties negotiated that provision in the context of a previous grievance over an Agency decision to contract out controlled burns.[21]

With almost no mention of the parties' statutory arguments,[22] the Arbitrator sided with the Union for two reasons. First, based on the history of controlled burns at the facility, he found that "[t]he past[-]practice argument favors the Union."[23] Second, he found that, as the parties adopted Article 26 following a previous grievance on the same issue, "it is difficult to conclude that[,] when that contractual language was negotiated[,] . . . the parties were in disagreement as to whether [the term] firefighting function included controlled burns."[24] Thus, rather than applying any canons of statutory construction, the Arbitrator relied on circumstantial evidence of the parties' intent at the time they executed the contract as the decisive lens for interpreting the statute.

When parties call on arbitrators to interpret ambiguous contract provisions, arbitrators may rely on extrinsic evidence of the parties' intent in some circumstances.[25] But, when arbitrators interpret statutes, it is *congressional intent* that matters.[26] Thus, I write

[12] *See* Agency's Post-Hr'g Br. at 24 ("The Union cannot prove that prescribed burns are firefighting function[s] under . . . [§] 2465 and[,] as a result, the Union cannot prove a violation of Article 26."); Opp'n, Ex. 3, Union's Post-Hr'g Br. (Union's Post-Hr'g Br.) at 5 ("[T]he [parties' agreement] incorporates[,] by reference[,] the statute."); Opp'n Br. at 1 ("The [parties' agreement] incorporates . . . § 2465, which prohibits the contracting out of firefighting functions at any military installation.").

[13] Award at 6 ("The [parties' agreement] binds the Agency to abide by [§] 2465 which, by incorporation, forbids the Agency from utilizing funds for the purpose of contracting out, 'the performance of firefighting functions at any military installation.'"); *id.* at 9 ("Central to a determination of the substantive issue pending in this matter is the question as to whether prescribed or controlled burns constitute a firefighting function.").

[14] Agency's Post-Hr'g Br. at 13; *see also id.* at 23 ("[T]he Agency's position is firefighting is putting wet stuff on red stuff . . . [not] creating red stuff.").

[15] *Id.* at 24.

[16] *Id.* at 2, 7 (citing DOD Instruction 6055.06, DOD Fire & Emergency Servs. (F&ES) Program (2019)).

[17] Union's Post-Hr'g Br. at 6 (arguing that the "the legislative intent underlying . . . § 2465[,] and . . . the [Department of Defense's] policies and operational practices regarding firefighting functions" supported its proposed definition of firefighting functions).

[18] *Id.* (arguing that the Arbitrator "should consider . . . the bargaining history and the parties' intent in agreeing to the language, [and] . . . the historical practice of prescribed burns as a firefighting function").

[19] *Id.* at 5.

[20] Award at 10 ("The Union raises a past[-]practice argument stating that[,] for more than ten years[,] all prescribed burns at [the Agency facility] were performed by bargaining[-]unit members.").

[21] Union's Post-Hr'g Br. at 8 (arguing that the "the Agency knew the Union's meaning in proposing the inclusion of the language in the [parties' agreement]").

[22] *Cf.* Award at 10 (noting briefly that "[t]he Agency refers to DOD 6055.06, and states that controlled burns are not described there").

[23] *Id.*

[24] *Id.*

[25] *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755 (2018) (Member DuBester dissenting) ("[A]rbitrators may consider parties' past practices when interpreting an ambiguous contract provision, but they may not rely on past practice to *modify* the terms of the contract." (citing *U.S. Dep't of the Treasury, U.S. Customs Serv., Region IV, Mia. Dist.*, 41 FLRA 394, 396, 398-99 (1991))).

[26] *See, e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007) ("[I]f the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis."); *U.S. Agency for Glob. Media*, 72 FLRA 447, 448 (2021) (Chairman DuBester dissenting) (finding award contrary to law where arbitrator's review of agency decision conflicted with congressional intent to give agency "unreviewable discretion").

separately to express my concern at the Arbitrator's misapplication of this important principle. Parties often choose to incorporate statutory requirements into their agreements. When they do, arbitrators must interpret these statutory obligations in the same manner as a court – according to the plain meaning, the legislative history, and the canons of statutory construction;[27] they may not disregard these principles by rewriting the law to conform to their circumstantial construction of the parties' intent at the bargaining table.

Notwithstanding the Arbitrator's flawed analytical process, the Agency does not demonstrate that the Arbitrator's conclusion is deficient as a matter of law – nor does my de novo review compel that conclusion. As an initial matter, the term "firefighter functions"[28] does not clearly include or exclude controlled burns for the purpose of wildfire prevention, nor does § 2465's legislative history. The history of the restriction suggests that Congress was concerned with the reliability and quality of contract employees performing functions – such as firefighting on military installations – that are necessary for the safety and security of military installations and personnel.[29] Although Congress did not address controlled burns in § 2465, Congress's rationale that fire safety on military installations is too important to contract out applies just as well to fire prevention as it does to fire suppression.[30]

In fact, in other contexts, Congress has treated fire prevention as an aspect of firefighting.[31] For example, in the Fair Labor Standards Act, Congress defined an "[e]mployee in fire protection activities" broadly as "an employee, including a firefighter [or another enumerated emergency responder] . . . who is trained in fire suppression [and] . . . is engaged in the *prevention*, control, and extinguishment of fires."[32] Additionally, other federal agencies have specifically treated controlled burns as firefighting functions, including the Office of Personnel Management[33] and U.S. Forest Service.[34]

Thus, applying the statutory analysis that Article 26 required the Arbitrator to perform, I am inclined to reach the same conclusion: § 2465 likely prevents the Agency from contracting out controlled burn services. As the Agency provides no evidence that controlled burns are legally distinct from fire suppression, it does not establish a basis for overturning the award on contrary-to-law grounds.[35]

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[27] *See USDA, Food & Nutrition Serv.*, 73 FLRA 822, 825 (2024) ("[T]he Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law."); *see also, e.g.*, *United States v. Peterson*, 394 F.3d 98, 105 (2d. Cir. 2005) (noting that, when a statute's wording is ambiguous, courts "look to traditional canons of statutory construction to resolve the ambiguity, before looking to legislative history and interpretative regulations").

[28] 10 U.S.C. § 2465(a).

[29] The most in-depth discussion of § 2465's purpose comes from debate over the original prohibition on contracting firefighting functions in Section 1111 of the Department of Defense Authorization Act for Fiscal Year 1983, Pub. L. 97-252, 96 Stat. 718, 852 (Sept. 8, 1982). *See* 128 Cong. Rec. H4893-H4894 (daily ed. July 30, 1982) (Statement of Representative Gilman) (noting that "critical functions" should not be turned over to private contractors "who might not perform such jobs with the same sense of mission and concern" as federal employees and that commanding officers should maintain control over functions "on which the safety and security of personnel and costly facilities depend"); *id.* (Statement of Representative Emery) ("The central issue here is whether or not the negligible savings from contracting out justify the employment of private firefighting and security services which may be of uncertain quality and reliability."); *id.* (Statement of Representative Dougherty) ("The services performed by firefighters and security personnel at [m]ilitary installations across this country are too vital to even consider contracting out to the private sector.").

[30] *See* U.S. Gov't Accountability Off., B-277056, Base Operations: Contracting for Firefighting and Security Guards (1997) (noting that any efficiency from contracting out firefighting functions is circumstance dependent as "[t]he cost of the services at each base is affected by the specialized fire *prevention* and protection services required" (emphasis added)).

[31] *E.g.*, National Prescribed Fire Act of 2021, S. 1734, 117th Cong. § 202 (2021) (unenacted bill providing pathway for converting seasonal firefighters into full-time positions "implementing prescribed fires").

[32] 29 U.S.C. § 203(y) (emphasis added); *see also* 29 C.F.R. § 553.210 (defining fire protection activities as the "*prevention*, control, and extinguishment of fires" (emphasis added)).

[33] *E.g.*, Differential Pay for Prescribed Wildland Fire Activities, 91 Fed. Reg. 19081, 19082 (proposed April 14, 2026) ("[T]his proposed regulation would allow a . . . wildland firefighter to be able to receive [hazard differential pay] for working on the fireline of a prescribed fire.").

[34] *See generally* USDA, U.S. Forest Serv., National Prescribed Fire Resource Mobilization Strategy (2023) (detailing firefighters' extensive involvement in using controlled burns as a fire-prevention strategy).

[35] *See AFGE, Loc. 1235*, 66 FLRA 624, 625 (2012) (denying contrary-to-law exception challenging arbitrator's interpretation of parties' agreement where excepting party failed to demonstrate award was inconsistent with cited law).