

74 FLRA No. 62

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR
TRAFFIC CONTROLLERS ASSOCIATION
(Union)

0-AR-6045

DECISION

May 11, 2026

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

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties’ collective-bargaining agreement by suspending an employee (the grievant) for fourteen days without just cause. Arbitrator Martin Henner issued an award sustaining the grievance, finding that the Agency violated the grievant’s due-process rights and did not have just cause for the suspension. On exceptions, the Agency argues that the award is contrary to law and based on nonfacts. As discussed below, we are unable to determine whether the award is deficient on the grounds alleged. Therefore, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for clarification of the award.

II. Background and Arbitrator’s Award

The grievant worked as an air traffic controller at the Denver International Airport. The Agency required employees, including the grievant, to proceed through a designated security checkpoint to access the air traffic control tower. On February 9, 2023, during a security examination of the grievant’s bag, the grievant made physical contact with the inspecting security guard’s hand.

A confrontation ensued, and an airport security official issued the grievant a citation for inappropriate conduct on airport property.

Upon learning that the grievant received a citation on airport grounds, the Agency directed its Office of Security and Hazardous Material Safety to investigate the grievant’s incident with the security guard. Following an investigation, that office drafted a report and provided a copy to the grievant’s supervisor. Based on the report, the grievant’s supervisor initially proposed a twenty-day suspension. After the grievant submitted a response to the proposed discipline, the supervisor reduced the suspension to fourteen days. The Union grieved the fourteen-day suspension, and the grievance advanced to arbitration.

At arbitration, the parties stipulated to the following issue: “Was the [Agency’s] suspension of [the grievant] for fourteen . . . days without pay imposed for such cause as will promote the efficiency of the service, and if not, what shall the remedy be?”¹

Regarding the confrontation, the Arbitrator found that the grievant asked the inspecting security guard to put on fresh gloves before searching her bag and, when he did not do so, she “swatted” his hand away, asked him how long he had worked at the airport, and accused him of improperly touching her belongings.²

Addressing the investigation and resulting discipline, the Arbitrator drew an inference that management officials in the grievant’s chain of command “directed” the grievant’s supervisor to administer “at least some level of discipline” for the grievant’s conduct.³ Next, the Arbitrator found that “hav[ing] a single individual serve as both the [proposing official] and [deciding official] in a disciplinary case violates standards of due process.”⁴ As such, the Arbitrator concluded that the Agency denied the grievant due process when the grievant’s supervisor proposed discipline and then later decided the final disciplinary action.

Additionally, the Arbitrator found that “[j]ust cause and due process require[d]” the Agency to conduct “a full and fair investigation of the incident,” and consider “all pertinent factors.”⁵ On this point, the Arbitrator emphasized that the grievant’s supervisor should have interviewed the grievant personally instead of “rel[ying] solely on the Agency’s [Office of Security and Hazardous Material Safety] investigation.”⁶ Thus, the Arbitrator determined that the grievant’s supervisor – by not

¹ Award at 2.

² *Id.* at 4.

³ *Id.* at 5.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*; see also *id.* (finding that grievant’s supervisor “made no attempt to interview the [g]rievant, or to ascertain any special factors which might influence a decision regarding discipline”).

inquiring as to the grievant's state of mind during the incident – could not have known whether any external circumstances influenced the grievant's conduct, nor whether the grievant's questioning of the security guard was accusatory or innocuous.⁷

Ultimately, the Arbitrator concluded that because “due process and concepts of just cause for discipline require a full and impartial investigation,” he was “constrained to grant th[e] grievance.”⁸

The Agency filed exceptions to the award on June 11, 2025, and the Union filed an opposition on July 11, 2025.

III. Analysis and Conclusion: We remand the award for further proceedings.

The Agency argues that the award is contrary to law because the Arbitrator's due-process findings are inconsistent with established case law.⁹ 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.¹⁰ 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.¹¹ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.¹²

Citing *Cleveland Board of Education v. Loudermill*,¹³ *Stone v. FDIC*,¹⁴ and Merit Systems Protection Board precedent,¹⁵ the Agency asserts that the grievant received sufficient due process, including written notice of the proposed suspension, an explanation of the Agency's basis for the proposal, and an opportunity to respond.¹⁶ According to the Agency, the Arbitrator erred as a matter of law by considering extraneous factors not found in the cited case law – including the thoroughness of the Agency's investigation and the proposing official's dual status as the deciding official – to conclude that the Agency violated the grievant's due-process rights.¹⁷ In response, the Union argues that the award does not conflict

with the cited precedent because the Arbitrator interpreted a *contractual* just-cause standard that “provides more protection than the constitutional due-process standards.”¹⁸ The Union also contends that the Arbitrator “based his decision on [an] industrial due[-]process standard” in finding that the Agency did not conduct a “full and fair” investigation.¹⁹

The Arbitrator concluded that he was “constrained to grant th[e] grievance” because “due process and concepts of just cause for discipline require a full and impartial investigation.”²⁰ However, the Arbitrator did not provide the relevant due-process and just-cause standards that governed the grievance's disposition. Thus, it is unclear whether the Arbitrator based his award on: (1) constitutional, statutory, or regulatory provisions; (2) case law; (3) contractual provisions; or (4) other uncited authority. Because it is unclear what standards the Arbitrator applied in finding that the Agency denied the grievant due process and lacked just cause for discipline, we are unable to assess whether the award is contrary to law, as the Agency alleges.²¹

Absent clarity on the award's basis, the dissent would nonetheless resolve the Agency's contrary-to-law exceptions at this stage. According to the dissent, the Authority need not wait to deny the exceptions on the merits because, “as a matter of law . . . the Agency deprived the grievant of constitutional due process.”²² In reaching this conclusion, the dissent relies on the Arbitrator's “inference” that the “[g]rievant's referral to her supervisor for disciplinary review” was a “direct[ion] from above to actually impose discipline on her.”²³ From this inference, the dissent concludes that the Arbitrator found the Agency deprived the grievant of “a meaningful opportunity to respond” to the allegations against her.²⁴

However, there is no indication that *the Arbitrator* based his award on that reasoning. The Arbitrator did not refer to the principle of a “meaningful opportunity to respond” or cite the authorities on which the dissent relies.²⁵ Additionally, after inferring that the referral for disciplinary review constituted an implied direction – but not an “explicit[] mandate”²⁶ – to

⁷ *Id.* at 6.

⁸ *Id.*

⁹ Exceptions Br. at e-i.

¹⁰ *NTEU, Chapter 133*, 74 FLRA 242, 244 (2025).

¹¹ *Id.*

¹² *Id.*

¹³ 470 U.S. 532 (1985).

¹⁴ 179 F.3d 1368 (Fed. Cir. 1999).

¹⁵ *E.g., Davis v. Dep't of Transp., FAA*, 39 M.S.P.R. 470 (1989).

¹⁶ Exceptions Br. at e, g.

¹⁷ *Id.* at f-i.

¹⁸ Opp'n Br. at 13.

¹⁹ *Id.* at 15.

²⁰ Award at 6.

²¹ See *U.S. Dep't of VA, Veterans Health Admin.*, 73 FLRA 855, 859 (2024) (*VHA*) (where arbitrator's findings insufficient to determine applicable legal standard, Authority did not resolve contrary-to-law exception and remanded for further findings); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mendota, Cal.*, 73 FLRA 788, 790 (2024) (*DOJ, Mendota*) (Authority unable to resolve party's contrary-to-law exception where arbitrator's findings insufficient for conducting de novo review).

²² Dissent at 8.

²³ *Id.* (quoting Award at 5).

²⁴ *Id.* at 8-9.

²⁵ *Id.*

²⁶ Award at 5.

impose discipline, the Arbitrator did not mention this inference again in the due-process analysis. Instead, the Arbitrator focused his analysis on the supervisor's dual status as a proposing and deciding official and his failure to personally interview the grievant before deciding on her discipline.²⁷ To the extent the Arbitrator found a constitutional due-process violation on the grounds that the supervisor both proposed and decided the discipline or that the grievant received an opportunity to submit a written response – but not an *additional* oral response – neither finding would be consistent with the due-process requirements under *Loudermill*.²⁸

Connecting the dots between the Arbitrator's inference of implied direction to the supervisor and uncited constitutional principles, the dissent would deny the Agency's contrary-to-law exception without more information. But we reiterate that the Agency and the Union themselves dispute whether the Arbitrator based his award on constitutional due process or another due-process standard.²⁹ The dissent does not reconcile the parties' opposing positions on this question, and we see no means of doing so based on the record at hand. In our view, it would be premature to conclude that the Agency violated the grievant's constitutional due-process rights when the Arbitrator did not indicate whether there was a question of law before him, much less mention constitutional due process.

In its nonfact exceptions, the Agency asserts that the Arbitrator erred in finding that the grievant's

supervisor “relied solely” on an outside investigation, and did not interview the grievant or “ascertain any special factors.”³⁰ The Agency contends further that the Arbitrator's finding that management officials “directed” the grievant's supervisor to impose formal discipline is a nonfact.³¹ 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.³² As discussed above, the Arbitrator did not identify the standards he applied in resolving the stipulated just-cause issue and did not clearly identify the factual foundation for his just-cause determination. And without knowing the bases for the Arbitrator's legal conclusions, we cannot determine whether the challenged factual findings are *central* to the award. Consequently, we find that the award does not contain sufficient findings for us to resolve the Agency's nonfact exceptions.³³

Where an arbitrator's findings are insufficient for the Authority to determine whether the award is deficient on the grounds raised by a party's exceptions, the Authority will remand the award.³⁴ Accordingly, we remand the award to the parties for resubmission to arbitration, absent settlement, for clarification and, if necessary, further findings. Consistent with this decision, the resulting award should state the basis for sustaining the grievance by reference to legal authorities, contractual provisions, or both; explain any applications or

²⁷ *Id.* (“I believe that to have a single individual serve as both the ‘prosecutor’ and the ‘judge’ in a disciplinary case violates standards of due process.”); *id.* at 6 (“Importantly, by not interviewing the [g]rievant, this proposing official missed the opportunity to consider the impact the COVID pandemic then occurring had on the [g]rievant's actions.”); *id.* (Arbitrator finding that he was “constrained to grant th[e] grievance” based on Agency's deficient investigation into the grievant's conduct).

²⁸ See *SSA, Balt., Md.*, 64 FLRA 516, 518 (2010) (upholding arbitrator's finding that grievant was not denied constitutional due process where agency provided grievant with notice of the charges, an explanation of its evidence, and an opportunity to reply); *U.S. DHS, CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 4, 7 (2005) (setting aside arbitrator's finding of due-process violation where agency satisfied 5 U.S.C. § 7503 by “provid[ing] the grievant with the material relied on . . . to propose the charge,” and “an opportunity to . . . respond”); *U.S. Dep't of VA, Nat'l Mem'l Cemetery of the Pac.*, 45 FLRA 1164, 1177 (1992) (finding, as a constitutional matter, that employees covered by 5 U.S.C. § 7503 are “due predecisional proceedings no more formal or extensive than those required by *Loudermill*”).

²⁹ Compare *Exceptions Br. at e* (Agency asserting that “the award is predicated on an erroneous understanding of . . . [c]onstitutional due process”), and *id.* at g-i (Agency arguing that its investigation was consistent with constitutional due process), with *Opp'n Br. at 13* (“[The Union] submits that the applicable standard of law is the [collective-bargaining agreement] and its incorporated concept of ‘just cause’ that the [p]arties’ bargained for.”), and *id.* at 15 (Union arguing that Arbitrator based award on an “industrial due[-]process standard when he found the investigation . . . violat[ed] . . . just cause and due process”).

³⁰ *Exceptions Br. at i-j* (quoting Award at 5).

³¹ *Id.* at k-m (quoting Award at 5).

³² *U.S. DHS, U.S. CBP*, 74 FLRA 6, 8 (2024).

³³ See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 73 FLRA 775, 777 (2024) (where award “unclear as to what the [a]rbitrator relied on for his just-cause findings,” Authority concluded award lacked “sufficient findings . . . to assess the [a]gency's nonfact arguments”).

³⁴ *VHA*, 73 FLRA at 859 (citing *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., S.D., Cal.*, 73 FLRA 495, 497 (2023)); see also *AFGE, Loc. 3408*, 70 FLRA 638, 639 (2018) (Member DuBester concurring) (remanding for further findings where Authority unable to assess whether award deficient on the grounds raised in exceptions because arbitrator did not sufficiently explain or support bases for legal conclusions); *AFGE, Loc. 1617*, 55 FLRA 345, 347 (1999) (finding a remand for clarification appropriate where Authority unable to determine whether award was based on nonfact).

interpretations of law or contract; and clarify the factual findings underlying any conclusions.³⁵

IV. Decision

We remand this case for action consistent with this decision.

³⁵ See, e.g., *VHA*, 73 FLRA at 859 (remanding where the Authority could not determine “whether the [a]rbitrator was enforcing a [contract] provision, [an agency] directive, or something else”); *AFGE, Loc. 779*, 64 FLRA 672, 674 (2010) (remanding case for clarification because it was unclear whether “the [a]rbitrator would have reached a different result” but for alleged factual errors raised in party’s nonfact exceptions). Our remand is without prejudice to the Agency’s ability to resubmit its exceptions to the Authority if they remain unresolved after the completion of remand proceedings. See *DOJ, Mendota*, 73 FLRA at 791 n.41.

Member Wagner, dissenting:

For the following reasons, I would deny the Agency's exceptions, rather than remand.

First, the Agency's nonfact exceptions challenge the Arbitrator's evaluation of the evidence – including the weight he accorded that evidence – and, in my view, do not demonstrate that the challenged findings are clearly erroneous. As such, I would deny those exceptions on that basis.¹ I note that, if an excepting party does not demonstrate that an arbitrator's factual findings are clearly erroneous, it is unnecessary to go on to assess whether the factual findings are central to the award.²

Second, the Agency's contrary-to-law exceptions contend that the award is contrary to constitutional due-process principles and precedent.³ For the following reasons, I would reject the Agency's arguments.

The Authority has held that, under 5 U.S.C. § 7503, nonprobationary, federal employees in the competitive service have a constitutionally protected property interest in employment such that they may not be suspended for fourteen days or less without due process.⁴ Thus, “[w]hen an agency charges such an employee with misconduct, . . . the employee is entitled to: (1) notice of

the charges; (2) an explanation of the employer's evidence; and (3) an opportunity to respond.”⁵

However, the due-process requirement of an opportunity to respond actually requires that the employee have “a *meaningful* opportunity to respond.”⁶ In this regard, “the fact that the employee is entitled to make a reply ‘implies an intent that the employee may succeed with it It is not to be a futile ritual.’”⁷ Consequently, the deciding official must “exercise independent judgment regarding the sustaining of the charges in each case.”⁸ “A reply procedure that compromises a deciding official's authority or objectivity can constitute a constitutional due[-]process violation.”⁹

Here, the Arbitrator found: “While the [g]rievant's referral to her supervisor for disciplinary review did not *explicitly* mandate that at least some level of discipline be imposed, I take it as an inference that this is the case, and that he was being directed from above to actually impose discipline on her.”¹⁰ The Agency challenges that finding as a nonfact, arguing, among other things, that it is “a central fact underlying the award because the [A]rbitrator decided the case on due[-]process grounds, and undue pressure on a manager to take discipline implicates due process.”¹¹ However, as noted above, I would deny the nonfact exceptions.

¹ See, e.g., *U.S. Dep't of the Army, Fort Huachuca, Ariz.*, 74 FLRA 317, 320-21 (2025) (*Fort Huachuca*) (Authority stated that “disagreement with an arbitrator's evaluation of evidence, including the weight accorded such evidence, does not provide a basis for finding that an award is based on a nonfact,” and rejected nonfact arguments because excepting party did not demonstrate that arbitrator's findings were clearly erroneous).

² See, e.g., *id.* (rejecting nonfact arguments because excepting party did not demonstrate findings were clearly erroneous, without assessing whether findings were central facts underlying the award); *U.S. DHS, U.S. CBP*, 74 FLRA 6, 8 (2024) (same).

³ Exceptions at e-i.

⁴ *NAIL, Loc. 19*, 74 FLRA 25, 26 (2024) (*Local 19*) (citing *AFGE, Loc. 1897*, 67 FLRA 239, 240 (2014) (*Local 1897*) (Member Pizzella concurring); *U.S. Dep't of VA, Nat'l Mem'l Cemetery of the Pac.*, 45 FLRA 1164, 1175 (1992)); see also *NTEU, Chapter 45*, 52 FLRA 1458, 1464 (1997).

⁵ *Local 19*, 74 FLRA at 26 (citing *Local 1897*, 67 FLRA at 242).

⁶ *Bryant v. Dep't of VA*, Docket No. AT-0714-23-0137-I-1, 2024 M.S.P.B. 16, ¶ 11, 2024 WL 4824371, at *3 (Nov. 18, 2024) (emphasis added) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)); see also *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (holding that due process requires, at a minimum, that an employee being deprived of his property interest be given “the opportunity to be heard ‘at a meaningful time and in a meaningful manner’” (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

⁷ *Noe v. U.S. Postal Serv.*, 28 M.S.P.R. 86, 89 (1985) (quoting *Ricucci v. United States*, 192 Ct. Cl. 1, 6 (1970)).

⁸ *Anderson v. Dep't of Transp.*, 15 M.S.P.R. 157, 168 (1983), *aff'd*, 735 F.2d 537 (Fed. Cir. 1984).

⁹ *Buelna v. DHS*, 118 M.S.P.R. 115, 122 (2012) (*Buelna*) (citing *Stone v. FDIC*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999)); see also *Buelna v. DHS*, 121 M.S.P.R. 262, 277 (2014) (finding that, “to the extent there may have existed viable alternatives” to the action taken, “the appellant had a due[-]process right to invoke the discretion of a deciding official with authority to select such alternatives”); *Diehl v. Dep't of the Army*, 118 M.S.P.R. 344, 350 (2012) (finding that, because the deciding official “lacked the authority to change the outcome of the adverse action, and therefore the agency failed to afford the appellant a meaningful opportunity to respond to the proposed . . . action, . . . the agency violated the appellant's constitutional due[-]process rights”); *Buelna*, 118 M.S.P.R. at 122 (finding that “a question . . . exists as to whether the appellant had a meaningful opportunity to respond” where, among other things, the deciding official “had very limited authority to affect the outcome of the proposed indefinite suspension”); *McGriff v. Dep't of the Navy*, 118 M.S.P.R. 89, 103 (2012) (citing *Swindell v. Veterans Admin.*, 12 M.S.P.R. 148, 150-51 (1982)) (“Providing an appellant with a reasonable opportunity to reply that satisfies constitutional due process requires more than mere notice; the reply opportunity may not be an empty formality, and the reply or deciding official should have authority to take or recommend agency action based upon the reply.”). Cf. *Rosenberg v. Dep't of Transp.*, 105 M.S.P.R. 130, 141 (2007) (“The issue raised by the uncertainty over the identity of the deciding official is whether the appellant's opportunity to respond was meaningful, i.e., whether his response was received and considered by the person who actually made the decision to suspend him.”).

¹⁰ Award at 5 (emphasis added).

¹¹ Exceptions at k-m.

Consequently, in assessing the award's consistency with law, I would defer to the Arbitrator's factual finding.¹² Thus, the supervisor – purportedly the “deciding” official – lacked discretion, after considering the grievant's response, to decide that *no* discipline was warranted (even if he had authority to *reduce* the originally proposed suspension from twenty to fourteen days). As a matter of law, this means that the Agency deprived the grievant of constitutional due process, and the Agency's contrary-to-law exceptions lack merit. Therefore, I would deny those exceptions as well.

Moreover, I note that constitutional due process, i.e., notice of the charge and a meaningful opportunity to respond, represents the *minimum* process due federal employees facing potentially consequential disciplinary action. Statutes, regulations, and collective-bargaining agreements may afford such employees with additional protections, but cannot diminish the constitutional due-process rights discussed above. Here, the Arbitrator found that the Agency failed to afford the grievant a meaningful opportunity to respond to the charge against her, one of the bare minimum components of constitutional due process. As such, whether the Arbitrator based his finding of a due-process violation on some other statutory, regulatory, or contractual basis is entirely irrelevant to the disposition of the Agency's exception, rendering a remand a meaningless exercise.¹³

In sum, I would find that the Agency's exceptions lack merit and that there is no need to remand for additional proceedings. Accordingly, I dissent.

¹² *Fort Huachuca*, 74 FLRA at 322 (in applying “de novo” review of contrary-to-law exceptions, “the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes they are based on nonfacts”).

¹³ *See, e.g., AFGE, Loc. 3972*, 74 FLRA 252, 254 (2025) (finding it “not clear” whether the arbitrator was assessing a statutory or a contractual duty to bargain, but concluding that, “[t]o the extent” the arbitrator was resolving a statutory issue or applying statutory principles, the excepting party's arguments “provide[d] no basis for finding the award contrary to law”); *AFGE, Nat'l Border Patrol Council, Loc. 2595*, 67 FLRA 361, 366 (2014) (finding it “unclear whether the [a]rbitrator resolved statutory issues”; “assum[ing], without deciding,” that the arbitrator did so; and concluding that the award was “not contrary to the pertinent statutory standards”).