74 FLRA No. 63

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2499
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-5872

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DECISION

May 12, 2026

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

I. Statement of the Case

Arbitrator Eric M. Fine issued an award finding that the parties' collective-bargaining agreement obligated the Agency to notify the Union of changes to conditions of employment, and to engage in Union-initiated midterm bargaining. Further, the Arbitrator found that the Agency violated the parties' agreement and § 7116(a)(5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by failing to bargain in good faith with the Union. More specifically, the Arbitrator found the Agency improperly refused to negotiate certain midterm-bargaining proposals related to changes in a vehicle-pursuit policy.

The Agency has filed exceptions to the award arguing that the Arbitrator exceeded his authority, and that the award is based on nonfacts, fails to draw its essence from the agreement, and is contrary to law. For the reasons explained below, we set aside portions of the award as moot, dismiss parts of the exceptions that challenge mooted portions of the award, and deny the remainder of the exceptions.

II. Background and Arbitrator's Award

The parties' substantive negotiations for their agreement lasted roughly six years. During that time, the Union's desire to negotiate a provision concerning midterm bargaining was a "recurrent theme."[2] The parties eventually included in the agreement Article 3A, titled "Impact and Implementation Bargaining at the National and Sector Level."[3] Article 3A, Section A (Section A) states, in pertinent part, "The Union, in accordance with law and the terms of this [a]greement[,] has the right to initiate bargaining on its own and engage in mid[]term bargaining over proposed changes in conditions of employment . . . ."[4] As a concession for the Agency's agreement to Section A, the parties also agreed that when the Agency made more-than-de-minimis changes to conditions of employment, any bargaining over those changes would occur only post-implementation. The parties memorialized that concession in Article 3A, Section B (Section B), which states, in relevant part, "When any bargaining is required during the term of the agreement, the parties agree to utilize post-implementation bargaining exclusively. . . . Bargaining will not be required over changes in conditions of employment where the effect of the change is de minimis."[5]

Later, the parties disagreed about the application of Article 3A to the Agency's issuance of a revised vehicle-pursuit policy (the second pursuit policy). Following the publication of the second pursuit policy, the Union submitted a demand to bargain "to the fullest exten[t] allowed by law," and provided nine proposals.[6] The Agency asserted that it was not obligated to bargain, because any changes in the second pursuit policy were de minimis, and, further, because some of the Union's proposals were outside the scope of the changes in the second pursuit policy. The Union disagreed that the changes were de minimis. Additionally, even if some of the proposals were outside the scope of the changes in the second pursuit policy, the Union argued that Article 3A obligated the Agency to bargain over all of the proposals because Section A gave the Union the "right to initiate bargaining on its own"[7] – irrespective of Agency-initiated changes.

The parties' disagreements concerning Article 3A persisted, so the Union filed a grievance. As relevant here, the Union alleged that the Agency's refusal to negotiate was an unfair labor practice under § 7116(a)(5) of the Statute[8] and a violation of Article 3A. The Agency denied the grievance, contending that

[1] 5 U.S.C. § 7115(a)(5).
[2] Award at 35.
[3] *Id.* at 3 (quoting Article 3A).
[4] *Id.* (quoting Section A).
[5] *Id.* (quoting Section B).
[6] *Id.* at 20.
[7] *Id.* at 3 (quoting Section A); *see also id.* at 21 (discussing Union's email relying on Section A to assert a Union right to initiate bargaining on its own).
[8] 5 U.S.C. § 7116(a)(5).

Article 3A "limited midterm negotiations to [impact-and-implementation] bargaining when changes in conditions of employment are more than de minimis."[9] The Agency noted that it had not provided the Union notice about the second pursuit policy precisely because any changes were de minimis, and, thus, Article 3A did not require bargaining. The unresolved grievance proceeded to arbitration.

The parties did not stipulate issues, and the Arbitrator did not expressly frame any. However, the Arbitrator wrote that the "case largely [r]evolve[d] around the parties' opposing views as to the interpretation of Article 3A . . . as it relates to midterm bargaining, as well as the obligation to bargain concerning [the second pursuit policy] . . . [, consistent with] Article 3A and the parties' rights under the Statute."[10]

Before the Arbitrator, the parties presented their interpretations of Article 3A. The Agency emphasized: (1) the article's title – "*Impact and Implementation Bargaining* at the National and Sector Level";[11] and (2) Section B's commitment that "the parties agree to utilize post-implementation bargaining exclusively"[12] – and only over those changes that are more than de minimis. According to the Agency, the article's title demonstrated that the Union's contractual midterm-bargaining rights were limited to negotiating the impact and implementation of Agency-initiated changes. Moreover, the Agency insisted that bargaining exclusively post-implementation over more-than-de-minimis changes was irreconcilable with Union-initiated midterm bargaining, which would be unconnected to changes of any kind. By contrast, the Union focused on Section A's guarantee of a "right to initiate bargaining on [the Union's] own *and* engage in mid[]term bargaining over proposed changes in conditions of employment."[13] The Union asserted that the Agency's interpretation would negate the Union's right, under Section A, to initiate bargaining on its own.

Considering these arguments, the Arbitrator found that "Article 3A is internally inconsistent, and[,] therefore[,] . . . ambiguous in nature."[14] Having found the article ambiguous, the Arbitrator examined extrinsic evidence to decipher the article's meaning and the parties' intent.

First, the Arbitrator found that the parties copied Section A's wording directly from another collective-bargaining agreement between the Agency and NTEU (concerning a different bargaining unit). The Arbitrator determined that this word-for-word adoption from the NTEU agreement was consistent with the Union's demand, during negotiations, that the Agency afford the Union the same right to union-initiated midterm bargaining that the Agency had afforded to NTEU.

Second, the Arbitrator credited a Union negotiator's testimony that the "Agency had agreed to the concept of Union[-]initiated [midterm] bargaining" three years before the parties executed their agreement, but a "constant change . . . of members of the Agency's negotiating team caused a delay and hampered the negotiating process."[15]

Third, the Arbitrator found that, shortly before the parties executed the agreement, the Union asserted to the Agency that the Union needed the right to negotiate with local management over the Union's "good ideas that . . . assist[] with border security,"[16] and the Agency responded that it did not intend to prevent that type of midterm bargaining. Relying on this exchange, the Arbitrator determined that the Agency accepted the Union's position that the agreement would authorize Union-initiated midterm bargaining for the purpose of negotiating local memoranda of understanding.

Fourth, the Arbitrator credited the Union president's testimony that, during a 2019 meeting with President of the United States Donald J. Trump, President Trump called the Agency's Acting Commissioner to ask why the Agency would not agree to permit Union-initiated midterm bargaining. According to this credited testimony, President Trump agreed with the Union that allowing it to initiate midterm bargaining would improve Agency operations by promoting "a perspective from a ground level that nobody else had."[17] The Arbitrator found that, as a result of that call and "pressure" from President Trump, the parties agreed to "clearly provide[]" the Union a right to initiate midterm bargaining in Section A.[18]

The Arbitrator found these four aspects of the parties' bargaining history more persuasive than the reference to impact-and-implementation bargaining in Article 3A's title because the Arbitrator found that the article's title came from an email that was not "the topic of actual discussions between the parties."[19]

For those reasons, the Arbitrator found that "the Union's interpretation that . . . Article 3A allows the

[9] Award at 23.
[10] *Id.* at 2.
[11] *Id.* at 3 (emphasis added) (quoting Article 3A).
[12] *Id.* (quoting Section B).
[13] *Id.* (emphasis added) (quoting Section A).
[14] *Id.* at 35.
[15] *Id.* at 36.
[16] *Id.* at 40.
[17] *Id.* at 38.
[18] *Id.* at 40.
[19] *Id.*

Union to initiate midterm bargaining on its own is the correct one."[20] Thus, the Arbitrator turned to analyzing how this interpretation of Article 3A applied to the circumstances surrounding the second pursuit policy.

Initially, the Arbitrator found that Article 3A obligated the Agency to formally notify the Union of the second pursuit policy's adoption, even if the Agency believed that any changes were de minimis. Specifically, the Arbitrator stated that "the Agency does not have the right, . . . pursuant to the contract, to unilaterally determine what policy changes are de minimis."[21] The Arbitrator clarified that "the Agency is free to notify the Union [of] its position . . . [that] policy changes are de minimis," but the Agency violates the agreement by "assert[ing] that its unilateral position on the matter is definitive, and fail[ing] to provide notice to the Union of those changes."[22] Thus, the Arbitrator found that the Agency violated Article 3A by failing to formally notify the Union about the second pursuit policy.

Next, the Arbitrator assessed whether each of the Union's nine proposals was negotiable as part of midterm bargaining under Article 3A or the Statute. The Arbitrator concluded that six of the proposals were mandatory subjects for midterm bargaining – under both Article 3A and the Statute – because (1) if adopted, they would not violate management's rights under § 7106 of the Statute,[23] and (2) where the proposals arose from changes in the second pursuit policy, those changes were more than de minimis. Because he found six proposals negotiable, the Arbitrator found that the Agency violated Article 3A and § 7116(a)(5) of the Statute by failing to bargain in good faith over those proposals.

Finally, the Arbitrator directed the Agency to (1) bargain in good faith concerning Union-initiated midterm bargaining proposals, as Article 3A and the Statute require; (2) present the Union with all changes to existing rules, regulations, and practices before, or at the same time as, the Agency's presentation of those changes to employees, in order to allow the Union to formulate its own position about whether any changes are de minimis; and (3) upon request, bargain over the six proposals that the Arbitrator found negotiable.

The Agency filed exceptions to the award on February 28, 2023, and the Union filed an opposition on March 29, 2023.

III. Preliminary Matters

A. The adoption of a third pursuit policy moots portions of the award, so we modify the award and dismiss some Agency arguments.

In its opposition, the Union asserts that, after the Arbitrator issued the award, the Agency promulgated a third pursuit policy that superseded the second pursuit policy.[24] The Union states that the parties are currently negotiating proposals related to the third pursuit policy, and, consequently, portions of the award and exceptions are now moot.[25] In response, the Authority ordered the parties to clarify their positions on mootness,[26] and ordered the Agency to show cause why the Authority should not dismiss any exceptions that the Union maintains are moot.[27]

Both parties filed supplemental briefs as ordered.

The Authority will set aside an arbitration award where the underlying dispute has become moot.[28] If part of an award becomes moot, then the Authority will set aside only that part.[29] In addition, the Authority will dismiss an exception to any part of an arbitrator's award that is moot.[30] A dispute becomes moot when the parties no longer have a legally cognizable interest in the outcome.[31] To establish that a matter is moot, a party must demonstrate that (1) there is no reasonable expectation that the alleged violation will recur; and (2) events have completely or irrevocably eradicated the effects of the alleged violation.[32]

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[20] *Id.*; *see also id.* at 47 (reiterating that Article 3A "provides the Union with the right to initiate midterm bargaining on its own").
[21] *Id.* at 41.
[22] *Id.*; *see also id.* at 47 (reiterating that Section B "sets forth the parties' rights pertaining to [i]mpact[-]and[-i]mplementation [b]argaining[] but . . . does not provide the Agency with the unilateral right to determine when changes in employment conditions are de minimis, although the Agency retains the right to argue that is the case").
[23] 5 U.S.C. § 7106.
[24] Opp'n Br. at 5.
[25] *Id.*
[26] Order (Aug. 1, 2023) at 2-3.
[27] *Id.* at 3.
[28] *U.S. DOD, Def. Logistics Agency*, 73 FLRA 331, 332 (2022) (*DLA*).
[29] *See, e.g.*, *U.S. DOD, Def. Cont. Mgmt. Agency*, 59 FLRA 396, 402 n.9 (2003) (Member Pope dissenting in part on other grounds); *U.S. Dep't of the Army, Headquarters, III Corps & Fort Hood, Fort Hood, Tex.*, 56 FLRA 1121, 1122 n.2 (2001) (*Army*).
[30] *E.g.*, *SSA, Off. of Disability Adjudication & Rev.*, 64 FLRA 527, 530 (2010) (*SSA*).
[31] *U.S. DHS, CBP, U.S. Border Patrol, Laredo Sector*, 70 FLRA 921, 922 (2018) (*Laredo*) (Member DuBester concurring) (citing *IAMAW Dist. Lodge 776*, 63 FLRA 93, 94 (2009)); *U.S. Small Bus. Admin.*, 55 FLRA 179, 183 (1999) (*SBA*) (citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).
[32] *DLA*, 73 FLRA at 332; *SBA*, 55 FLRA at 183 (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

The parties agree that the third pursuit policy has superseded the second pursuit policy, and that they are negotiating proposals related to the third pursuit policy only.[33] As the Union no longer seeks to bargain its proposals concerning the second pursuit policy, the Union argues that the Arbitrator's finding that the Agency violated Article 3A and § 7116(a)(5) of the Statute by failing to bargain six of the Union's proposals is moot.[34] The Agency disagrees that this finding is moot, for reasons that we discuss further below.[35] However, the parties agree that the Arbitrator's remedy directing the Agency to negotiate, upon request, six proposals regarding the second pursuit policy is moot.[36]

Regarding the Article 3A and § 7116(a)(5) violations, the Agency argues that the parties still have a legally cognizable interest in the Arbitrator's findings because the parties still disagree about the proper interpretation of Article 3A.[37] The Arbitrator identified and addressed two issues in his award: (1) "the parties' opposing views as to the interpretation of Article 3A . . . as it relates to midterm bargaining" generally; and (2) "the obligation to bargain concerning" the second pursuit policy specifically, consistent with "Article 3A and the parties' rights under the Statute."[38] Because the Arbitrator identified and addressed these two issues separately, the Arbitrator's *general interpretation* of Article 3A is a distinct part of the award that would remain subject to exceptions, regardless of whether the Authority sets aside, as moot, the finding that the Agency *violated* Article 3A and § 7116(a)(5) concerning the second pursuit policy specifically.[39] In this regard, arbitration awards may concern only the general interpretation of a collective-bargaining agreement, apart from any alleged violations of that agreement or the Statute.[40] This point reinforces that the portion of the Arbitrator's award concerning the general interpretation of Article 3A is severable from the portions of the award concerning alleged violations of Article 3A and § 7116(a)(5).

This case is unlike previous decisions in which the Authority found that a party did not have a legally cognizable interest in disputing the general interpretation of its collective-bargaining agreement, because "arbitration awards are not precedential."[41] In this case, the Arbitrator identified and addressed two separate issues – one of which was the general interpretation of the parties' agreement.[42] By contrast, in previous decisions where the Authority found that the parties did not have a legally cognizable interest in the general interpretation of their agreements, the *only* issues resolved in the challenged awards were allegations of specific contractual and statutory violations.[43] In other words, when the findings about those specific violations became moot, all of the resolved issues in those awards were moot, and the Authority set aside the awards accordingly. Here, however, the award resolved two distinct issues and is, therefore, about more than specific alleged violations.[44]

Further, the award in this case includes certain directions to the Agency that are fully supported by the Arbitrator's general interpretation of Article 3A alone.[45] Specifically, the award directs the Agency to bargain in good faith concerning Union-initiated midterm bargaining proposals, as Article 3A requires, and to present the Union with all changes to existing rules, regulations, and practices before, or at the same time as, the Agency's presentation of those changes to employees, in order to allow the Union to formulate its own position about whether any changes are de minimis.[46] Moreover, although the collective-bargaining agreement at issue here has expired, the Agency asserts, and there is no dispute,

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[33] Union's Mootness Br. at 4; Agency's First Mootness Br. at 2.
[34] Union's Mootness Br. at 4.
[35] *Id.*
[36] *Id.*; Agency's First Mootness Br. at 2.
[37] Agency's First Mootness Br. at 2.
[38] Award at 2.
[39] *Compare id.* at 35 (beginning a section entitled "The Meaning of Article 3A"), *and id.* at 35-40 (analyzing Article 3A's wording and bargaining history, and finding "the Union's interpretation that . . . Article 3A allows the Union to initiate midterm bargaining on its own is the correct one," without mentioning the second pursuit policy or any of the Union's proposals), *with id.* at 40 (beginning a section entitled "The Duty to Bargain Relating to the Agency's Pursuit Policy"), *and id.* at 42-47 (devoting a separate section to the negotiability of each of the Union's proposals); *see also id.* at 47 (in the section entitled "Conclusions," setting forth the meaning of Article 3A separately from the finding that the Agency violated Article 3A and § 7116(a)(5)).
[40] *See DOD Dependents Schs.*, 12 FLRA 52, 52-53 (1983) (*Dependents Schs.*) (arbitrator decided agency-filed grievance about whether parties' agreement required negotiations below level of exclusive recognition, and arbitrator framed issues to include only the agreement's "proper interpretation," without any alleged violations of the agreement or Statute); *see also* 5 U.S.C. § 7103(a)(9)(C) (defining "grievance," in pertinent part, as any complaint by any employee, labor organization, or agency concerning "*the effect or interpretation, or* a claim of breach, of a collective[-]bargaining agreement" (emphasis added)).
[41] *Laredo*, 70 FLRA at 922; *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 60 FLRA 966, 967 n.3 (*IRS*), *recons. denied*, 61 FLRA 352 (2005).
[42] *See* Award at 2.
[43] *See Laredo*, 70 FLRA at 922 (noting grievance challenged "only . . . the [a]gency's denial of this grievant's [compassionate-transfer] request"); *IRS*, 60 FLRA at 966 (award concerned whether the agency's reduction-in-force notice violated the parties' agreement and the Statute).
[44] *See* Award at 2; *see also Dependents Schs.*, 12 FLRA at 52-53 (framed issue for arbitration may include general interpretation of agreement, without alleged violations).
[45] *See* Award at 47.
[46] *Id.*

that the parties' current agreement maintains the contested provisions of the earlier agreement without change.[47] Thus, these directions to the Agency could have continuing effect because they are supported by the Arbitrator's general contract interpretation – even if the Authority sets aside the Arbitrator's findings of specific violations, as well as the remedies that pertain only to those violations, as moot.

Separately, the Agency asserts that it has a legally cognizable interest in having the Authority review the Arbitrator's determinations that six of the second-pursuit-policy proposals were negotiable.[48] Such an Authority review would, according to the Agency, influence the third-pursuit-policy negotiations because those negotiations involve some proposals that are similar to ones that the Arbitrator found negotiable.[49] However, the Authority will not offer negotiability determinations on proposals that a union no longer seeks to bargain[50] because those negotiability rulings would be advisory opinions prohibited by § 2429.10 of the Authority's Regulations.[51]

Having reviewed the parties' positions on the mootness of the violations of Article 3A and § 7116(a)(5), we must determine whether the Union has shown that (1) there is no reasonable expectation that the alleged violations will recur; and (2) events have completely or irrevocably eradicated the effects of the alleged violations.[52] As to the first prong, neither party suggests any possibility that the Agency might reinstate its second pursuit policy and then, once again, refuse to bargain over the reinstated second pursuit policy.[53] In fact, the parties agree that the Agency is currently bargaining over the Union's proposals related to the third pursuit policy.[54] Concerning the second prong, the Union – which is best positioned to explain any lasting effects from the Agency's failure to bargain – states that the third pursuit policy's adoption has "completely and irrevocably eradicated the effects of the violation[s]."[55] Accepting these representations, we conclude that the Arbitrator's finding that the Agency violated Article 3A and § 7116(a)(5) by failing to bargain in good faith over the six proposals is moot. Therefore, we set aside that finding, as well as the Arbitrator's negotiability determinations in support of that finding.[56]

As for the remedy directing the Agency to bargain, upon request, over six proposals concerning the second pursuit policy, the Union states that it no longer seeks to bargain over the second pursuit policy.[57] As such, we agree with the parties that this remedy is moot.[58] Thus, we set aside this remedy.[59]

As we have set aside the violations and the remedy concerning the six proposals, we also dismiss the Agency's challenges to these parts of the award.[60] In particular, we dismiss the arguments that, because none of the Union's proposals were negotiable, and because the Arbitrator could not lawfully direct the Agency to bargain over them, the award is contrary to law.[61]

However, neither party has challenged, as moot, the Arbitrator's directions that the Agency (1) bargain in good faith concerning Union-initiated midterm bargaining

[47] Because the Union stated that the parties' obligations under their agreement would continue "until September 2025," Union's Mootness Br. at 3; *see also id.* at 3 n.7 (summarizing the Effective Date and Duration clause of the agreement), the Authority issued a second mootness order in December 2025 directing the parties to explain whether they continued to have a legally cognizable interest in the outcome of this dispute. Order (Dec. 9, 2025) at 1. In response, as noted above, the Agency explains that the parties' subsequent agreement maintains the contested provisions of the earlier agreement without change. Agency's Second Mootness Br. at 1-2. Thus, the Agency continues to assert an interest in the resolution of its exceptions. *Id.* at 2 ("Our [earlier-explained] rationale . . . remains intact and is incorporated in its entirety . . . ."). The Union did not respond to the second mootness order, and, thus, the Agency's claims are undisputed.

[48] Agency's First Mootness Br. at 3.

[49] *Id.*

[50] *See, e.g.*, *NTEU*, 67 FLRA 280, 281-82 (2014) (*NTEU*).

[51] 5 C.F.R. § 2429.10 ("The Authority . . . will not issue advisory opinions."); *see AFGE, Loc. 1864*, 45 FLRA 691, 695 (1992) (citing 5 C.F.R. § 2429.10) ("Rendering a decision on the merits of these proposals based on speculation that they might be submitted in future negotiations would constitute an advisory opinion.").

[52] *See DLA*, 73 FLRA at 332.

[53] *Cf. id.* (applying the first prong of the mootness inquiry, Authority found that because Executive Orders were rescinded, there was no reasonable expectation that the agency would subsequently attempt to implement them without fulfilling its bargaining obligations).

[54] Union's Mootness Br. at 4; Agency's First Mootness Br. at 2.

[55] Union's Mootness Br. at 4.

[56] *See Army*, 56 FLRA at 1122 n.2 (the Authority will set aside any portion of an award that is moot); *see also Louis A. Johnson Veterans Admin. Med. Ctr., Clarksburg, W.Va.*, 15 FLRA 347, 350-51 (1984) (holding that an arbitrator may address negotiability issues only where they are collateral to another dispute that is appropriately resolved through a negotiated grievance procedure).

[57] Union's Mootness Br. at 4.

[58] *See, e.g.*, *NTEU*, 67 FLRA at 281-82 (finding negotiability petition moot where union expressly stated that it was not seeking to bargain over the proposals in the petition).

[59] *See Army*, 56 FLRA at 1122 n.2 (the Authority will set aside any portion of an award that is moot).

[60] *See SSA*, 64 FLRA at 530 (the Authority will dismiss an exception to part of an award that the Authority has set aside as moot).

[61] *See* Exceptions Br. at 25-30 (arguing that the proposals as a group are outside the duty to bargain for various reasons), 31-37 (arguing that the six proposals are outside the duty to bargain on bases specific to each of them).

proposals, as Article 3A and § 7116(a)(5) require; and (2) present the Union with all changes to existing rules, regulations, and practices before, or at the same time as, the Agency's presentation of those changes to employees, in order to allow the Union to formulate its own position about whether any changes are de minimis.[62] Consequently, those directions – which are supported by the Arbitrator's general interpretation of Article 3(A) – remain undisturbed by our mootness analysis.[63]

The Union asserts that the Agency's nonfact exception should also be dismissed as moot.[64] But we explain why we reject this assertion in Part IV.A. below.

B. We dismiss the arguments in the Agency's supplemental management-rights brief.

While this case was pending, the Authority revised its test for assessing management-rights exceptions to arbitration awards enforcing collective-bargaining agreements.[65] Accordingly, the Authority issued an order providing the parties an opportunity to file briefs addressing how the revised test applied in this case.[66] The order stated that, "irrespective of any party's supplemental submission, the Authority may ultimately resolve this case on grounds unrelated to management rights."[67] Pursuant to the order, the Agency filed a supplemental brief arguing that each of the Union's proposals should be found nonnegotiable. These arguments address the violations and remedy that we have set aside as moot.[68] Hence, we dismiss these supplemental-brief arguments.[69]

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency asserts that the award is based on nonfacts because the Arbitrator either (1) misunderstood the meaning of the NTEU agreement from which he found the parties copied the wording of Section A; or (2) drew erroneous conclusions about the meaning of Article 3A, based on the use of the NTEU-agreement wording.[70]

Before addressing the merits of this exception, we must consider the Union's assertion that it is moot due to being "tied to the failure to bargain" the Union's second-pursuit-policy proposals.[71] We disagree with the Union's assertion because the nonfact exception concerns the Arbitrator's reliance on the NTEU agreement in connection with Article 3A, rather than the Arbitrator's more specific examination of the Agency's failure to bargain particular proposals. We conclude that the nonfact exception is not moot.

To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[72] 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.[73] Additionally, parties may not successfully challenge as nonfacts an arbitrator's interpretation of a collective-bargaining agreement.[74]

Even assuming the Agency's arguments here concern factual matters, the parties disputed at arbitration the meaning of the NTEU-agreement wording and the implications of transferring that wording into their agreement.[75] Thus, the Agency's disagreement with the Arbitrator's resolution of that disputed matter does not

[62] Award at 47.
[63] However, these directions are still subject to exceptions, and we address those exceptions in Part IV.
[64] Union's Mootness Br. at 4-5.
[65] *See Consumer Fin. Prot. Bureau*, 73 FLRA 670 (2023).
[66] Order (Sept. 27, 2023) at 1.
[67] *Id.*
[68] *See* Agency's Supplemental Br. at 2-20.
[69] *See SSA*, 64 FLRA at 530 (the Authority will dismiss an exception to part of an award that the Authority has set aside as moot).
[70] *See* Exceptions Br. at 38-41.
[71] Union's Mootness Br. at 5.
[72] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 501 (2023) (citing *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022)).
[73] *AFGE, Loc. 3601*, 73 FLRA 515, 517 (2023) (*Loc. 3601*).
[74] *Id.*; *AFGE, Loc. 1802*, 50 FLRA 396, 398 (1995) (*Loc. 1802*) (denying nonfact exception that challenged contract interpretation).
[75] *See* Exceptions Br., Ex. B, Agency's Post-Hr'g Br. at 24 (setting forth Agency's views on interpreting the NTEU-agreement wording), 28 (explaining Agency's contrasting views on the meaning of the NTEU agreement versus the agreement with the Union); Exceptions Br., Ex. C, Hr'g Tr. at 207 (testimony from Agency's negotiator that NTEU-agreement wording would not have the same effect in the agreement with the Union because "the NTEU [agreement] is structured differently – very[,] very differently"); Exceptions Br., Ex. E, Union's Post-Hr'g Br. at 11-17 (quoting Union's bargaining notes, which indicated that the Union wanted wording from the NTEU agreement in order to establish a contractual right to Union-initiated midterm bargaining), 18 (asserting that, by adopting NTEU's wording, the parties gave the Union a contractual right to initiate midterm bargaining on its own).

establish that the award is based on nonfacts.[76] In the alternative, the Agency's nonfact arguments appear primarily concerned with challenging the Arbitrator's interpretation of Article 3A, which cannot be a basis for a nonfact challenge.[77] For these reasons, we deny the nonfact exception.

B. The Arbitrator did not exceed his authority by addressing the Agency's notice obligations or by allegedly failing to address the meaning of Article 3A.

The Agency argues that the Arbitrator exceeded his authority in two ways that are discussed further below. 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.[78] When parties have not stipulated, and an arbitrator has not expressly framed, any issues, the Authority will assess whether the issues are nevertheless apparent from the award.[79]

First, the Agency argues the Arbitrator exceeded his authority when he found that, "by failing to provide the Union notice and a copy of the [second] pursuit policy[,] the Agency breached Article 3A."[80] According to the Agency, this notice issue was not before the Arbitrator.[81] The parties did not stipulate, and the Arbitrator did not expressly frame, the issues in this case. Nonetheless, the Arbitrator wrote that the "case largely [r]evolve[d] around the parties' opposing views as to the interpretation of Article 3A . . . as it relates to midterm bargaining."[82] Due to this characterization of the parties' central dispute, we find that the issues before the Arbitrator are apparent from the award.[83] Those issues included the parties' midterm-bargaining obligations. The Arbitrator's finding that the Agency breached Article 3A by failing to provide the Union notice is directly responsive to the question of the parties' midterm-bargaining obligations.[84] Accordingly, the Agency's first exceeded-authority argument lacks merit.

Second, the Agency argues that the Arbitrator exceeded his authority because he did not "clear[ly] find[]" what certain terms in Article 3A mean – such as "initiat[ing] bargaining on its own," "engage in mid[]term bargaining," and bargaining "over proposed changes in conditions of employment" – despite the meaning of those terms being "central to the entire dispute."[85] Contrary to the Agency's argument, the Arbitrator devoted several pages of analysis to explaining the parties' rights and obligations under the terms of Article 3A.[86] Consequently, the Agency's second exceeded-authority argument also lacks merit.

For these reasons, we deny the exceeded-authority exception.

C. The award draws its essence from Article 3A.

The Agency asserts the award fails to draw its essence from Article 3A for four reasons. The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the appealing 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.[87] Mere disagreement with an arbitrator's interpretation does not establish that an award fails to draw its essence from the agreement.[88] Moreover, challenges to an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, do not demonstrate that an award fails to draw its essence from an agreement.[89]

First, the Agency argues that the Arbitrator erroneously found that Article 3A was ambiguous in order

[76] *See Loc. 3601*, 73 FLRA at 518 (denying nonfact argument that challenged resolution of a matter disputed at arbitration).
[77] *See id.* (denying nonfact argument that challenged contract interpretation); *Loc. 1802*, 50 FLRA at 398 (same).
[78] *NTEU, Chapter 66*, 72 FLRA 70, 71 (2021) (Chairman DuBester concurring; Member Abbott dissenting on other grounds).
[79] *Off. & Prof'l Emps. Int'l Union, Loc. 2001*, 65 FLRA 456, 458 (2011) (*Loc. 2001*).
[80] Exceptions Br. at 41 (quoting Award at 41).
[81] *Id.* at 41-42.
[82] Award at 2.
[83] *See Loc. 2001*, 65 FLRA at 458; *U.S. Dep't of VA, Fin. Ctr., Aus., Tex.*, 50 FLRA 73, 76-77 (1994) (arbitrator established issue for resolution by characterizing nature of dispute); *see also* Award at 3 ("The Agency shall present the changes it wishes to make to existing rules, regulations and existing practices to the Union. The Union will present its views and concerns . . . within a set time after receiving *notice*." (emphasis added) (quoting Art. 3A, § D)).
[84] *See AFGE, Loc. 918*, 68 FLRA 113, 114 (2014) (denying exceeded-authority exception where the award was "directly responsive" to the issue in dispute, as the arbitrator characterized it).
[85] Exceptions Br. at 43.
[86] *See* Award at 35-42.
[87] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 73 FLRA 620, 622 (2023) (*Yazoo*).
[88] *Fed. Educ. Ass'n, Stateside Region*, 73 FLRA 747, 750 (2023).
[89] *AFGE, Loc. 3911*, 69 FLRA 233, 236 (2016) (*Loc. 3911*).

to justify relying on extrinsic evidence to determine the article's meaning and the parties' intent.[90] The Arbitrator weighed the article's impact-and-implementation title and its commitment to post-implementation bargaining over more-than-de-minimis changes against the portion of Section A that states the Union "has the right to initiate bargaining *on its own*."[91] The Arbitrator found that these provisions were internally inconsistent, and, consequently, the article was ambiguous.[92] The Agency fails to establish that this finding is irrational, unfounded, implausible, or in manifest disregard of Article 3A.[93] Further, even if the Arbitrator erred in determining Article 3A was ambiguous, the Agency fails to establish that the Arbitrator's interpretation of Article 3A is inconsistent with the article's plain wording.[94]

Second, the Agency asserts that the Arbitrator misunderstood the parties' bargaining history,[95] "relie[d] heavily upon irrelevant Union testimony,"[96] and "ignore[d]" and "mischaracterize[d]" Agency witnesses' testimonies.[97] Because challenges to the Arbitrator's evaluation of evidence provide no basis for granting an essence exception, the Agency's second essence argument does not establish that the award is deficient.[98]

Third, the Agency argues that Section B is silent about who can make de minimis determinations, so the Arbitrator's finding that the Agency cannot unilaterally determine what is de minimis fails to draw its essence from Section B.[99] The pertinent sentence of Section B states, "Bargaining will not be required over changes in conditions of employment where the effect of the change[s] is de minimis."[100] Because the Agency acknowledges that Section B does not *expressly* grant it a unilateral right to determine whether changes are de minimis,[101] the Arbitrator's finding that the Agency lacks such a right is not irrational, unfounded, implausible, or in manifest disregard of Section B.[102] Although the Agency also contends that the "Arbitrator d[id] not cite any . . . [authority] holding that an [a]gency *cannot* unilaterally determine de minimis changes,"[103] the Agency likewise does not cite any authority establishing that it *can* unilaterally make such determinations.[104] Accordingly, the Agency's third essence argument does not demonstrate that the award is deficient.

Fourth, the Agency argues that the Arbitrator's determination that the Agency must "present the Union with all changes to existing rules, regulations, and practices *at or before the time it presents those changes to employees*" fails to draw its essence from Article 3A.[105] According to the Agency, a temporal requirement for providing notice conflicts with the contractual commitment to exclusively use post-implementation bargaining.[106] We find that notifying the Union "at . . . the time [the Agency] presents . . . changes to employees"[107] – which the award expressly permits – is consistent with bargaining over those changes after their implementation. While the Agency also asserts that Article 3A does not include this temporal constraint,[108] a requirement to formally notify the Union no later than the Agency notifies all employees is not irrational, unfounded, implausible, or in manifest disregard of Article 3A.[109] In short, the Agency's fourth essence argument does not establish that the award is deficient.

For the above reasons, we deny the essence exceptions.

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[90] Exceptions Br. at 13-16.
[91] Award at 3 (emphasis added) (quoting Section A).
[92] *Id.* at 35 (finding the article "internally inconsistent" and, therefore, "ambiguous").
[93] *See, e.g.*, *Yazoo*, 73 FLRA at 622 (denying essence exception where excepting party did not provide a basis for finding the arbitrator's interpretation deficient).
[94] *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mia., Fla.*, 73 FLRA 154, 158 (2022) (*BOP*) (denying essence exception where party did not establish inconsistency between arbitrator's interpretation and plain wording of collective-bargaining agreement).
[95] Exceptions Br. at 16-17, 19.
[96] *Id.* at 18.
[97] *Id.* at 19 ("ignore[d]"), 21 ("mischaracterize[d]").
[98] *See Loc. 3911*, 69 FLRA at 236 (denying essence claim that challenged arbitrator's evaluation of evidence).
[99] Exceptions Br. at 20.
[100] Award at 3 (quoting Section B).
[101] *See* Exceptions Br. at 20 (arguing that Section B is "obvious[ly] silen[t] as to who can make de minimis determinations").
[102] *See, e.g.*, *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (an agreement's silence on a matter does not demonstrate that an arbitrator's interpretation of the agreement as to that matter is irrational, unfounded, implausible, or in manifest disregard of the agreement).
[103] Exceptions Br. at 21 (emphasis added).
[104] *See id.*
[105] *Id.* at 22 (emphasis added by Agency) (quoting Award at 47).
[106] *Id.*
[107] Award at 47.
[108] Exceptions Br. at 22 (citing Exceptions Br., Ex. D2, Joint Ex. 1 at 5 (Article 3A, § D ("The Agency shall present the changes it wishes to make to existing rules, regulations[,] and existing practices to the Union.")).
[109] *See, e.g.*, *AFGE, Council 220*, 65 FLRA 596, 600 (2011) (denying essence exception where excepting party did not show that arbitrator's interpretation was inconsistent with agreement). We also note that the Agency does not establish an inconsistency between this requirement and Article 3A, Section D, which provides, "The Agency shall present the changes it wishes to make to existing rules, regulations[,] and existing practices to the Union. The Union will present its views and concerns . . . within a set time after receiving notice . . . [t]hirty (30) calendar days at National Level[;] [t]en (10) calendar days at Sector [L]evel." Award at 3; *see BOP*, 73 FLRA at 158.

D. The Agency's remaining contrary-to-law arguments are unsupported or based on a misunderstanding of the award.

As described in Parts III.A. and III.B. above, we have already dismissed some of the Agency's contrary-to-law arguments as moot. But the Agency contends that there are two additional reasons to find the award contrary to law. When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[110] Exceptions based on misunderstandings of an award do not show that it is contrary to law.[111]

Initially, the Agency repeats arguments from its exceeded-authority exception and contends that the Arbitrator's failure to expressly frame the issues before him and to "squarely address" all issues was "contrary to law."[112] The Agency fails to cite a law, rule, or regulation, so this contention does not establish that the award is deficient.[113]

Next, the Agency contends that the Arbitrator erred by requiring negotiations over midterm proposals that arise from merely de minimis changes to conditions of employment.[114] However, the award says only that the Agency may not treat its view of whether changes are de minimis as *definitive*.[115] The Arbitrator explained that Article 3A prohibits the Agency from unilaterally determining whether changes are de minimis in order to "allow the Union to formulate its own position as to whether any changes are de minimis."[116] Therefore, the Agency's misunderstanding of the award does not establish that it is contrary to law.[117]

We deny the portions of the contrary-of-law exception that we have not dismissed as moot.

V. Decision

We set aside, as moot: (1) the arbitral finding that the Agency violated Article 3A and § 7116(a)(5) by refusing to bargain six proposals; (2) the negotiability determinations concerning those six proposals; and (3) the arbitral remedy directing bargaining over the proposals. We dismiss the arguments in the exceptions that: (1) the award is contrary to law because none of the Union's proposals were negotiable; and (2) the Arbitrator could not lawfully direct bargaining over any of the Union's proposals. We also dismiss the arguments in the Agency's supplemental management-rights brief. Finally, we deny the remainder of the exceptions.

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[110] *AFGE, Loc. 4156*, 73 FLRA 588, 589 (2023) (*Loc. 4156*) (citing *NTEU, Chapter 338*, 73 FLRA 487, 488 (2023)).

[111] *Id.* (citing *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 419 (2023)).

[112] Exceptions Br. at 43.

[113] *See U.S. Dep't of the VA, Montgomery Reg'l Off., Montgomery, Ala.*, 65 FLRA 487, 489 (2011) (stating that a general assertion that an award is contrary to law – without citation to a law, rule, or regulation with which the award allegedly conflicts – fails to establish that an award is deficient).

[114] Exceptions Br. at 23 (arguing that the award is contrary to management's rights under § 7106 of the Statute).

[115] *See* Award at 41 ("While the Agency is free to notify the Union [of] its position . . . [that] policy changes are de minimis, it is in violation of the [agreement] when [the Agency] asserts that its unilateral position on the matter is definitive . . . .").

[116] *Id.* at 47.

[117] *See Loc. 4156*, 73 FLRA at 589 (exceptions based on misunderstandings of an award do not show that it is contrary to law).