74 FLRA No. 67

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES
LOCAL 1653
(Union)

0-AR-6076

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DECISION

June 3, 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

After the Agency redesignated several gender-neutral, single-occupancy restrooms as single-sex restrooms, the Union grieved the Agency's failure to provide notice and an opportunity to bargain over the change. Although the Union raised the Agency's obligation to bargain under both the Federal Service Labor-Management Relations Statute (the Statute) and the parties' collective-bargaining agreement, Arbitrator Deborah M. Gaines addressed only the Union's contractual arguments. Sustaining the grievance, she directed the Agency to bargain over the impact and implementation of the change.

The Agency filed contrary-to-law exceptions arguing that the Arbitrator erred in finding that the Agency had a duty to bargain. Because these arguments concern the Agency's statutory – rather than contractual – bargaining obligations, they do not demonstrate that the Arbitrator's contractual interpretation conflicts with law. The Agency also challenges the award on exceeded-authority and essence grounds. Because the Agency fails to establish that the award is deficient on either ground, we deny these exceptions.

II. Background and Arbitrator's Award

Following President Trump's issuance of Executive Order 14168,[1] the Agency elected to redesignate single-occupancy restrooms from gender-neutral to single-sex. The Agency changed the restrooms' designation and signage without notifying the Union. When the Union learned of the change, it filed a grievance arguing that the Statute and the parties' agreement required the Agency to notify the Union and to provide it an opportunity to bargain over the impact and implementation of the change. The matter proceeded to arbitration.

At arbitration, the Arbitrator declined to consider the Union's allegation that the Agency violated the Statute, stating that her "decision is limited to the parties' [a]greement."[2] Finding that the parties agreed the Agency had the authority to make the changes, she framed the issue as exclusively concerning the Agency's "obligation under the [parties' a]greement to comply with Article 7's requirement to provide notice and allow input from the Union on the impact of these changes, if any."[3]

Article 7 provides that "[t]he parties agree that personnel policies, practices, and matters affecting working conditions of bargaining[-]unit employees not covered by this agreement shall not be changed by the Agency without prior notice to[,] and negotiations with[,] the Union in accordance with applicable law."[4] When the Agency seeks to make such a change, it must provide the Union "thirty days['] written notice of the proposed change."[5]

The Arbitrator found it undisputed that the Agency changed the bathrooms' designation without providing notice to the Union or an opportunity to bargain over the impact of the change.[6] Observing that Article 7 requires the Agency to bargain over changes affecting working conditions of bargaining-unit employees, she also found that "bathrooms [are] part of office[] spaces and considered part of working conditions."[7] Thus, she concluded that the Agency violated Article 7 of the parties' agreement by changing the restroom designations without providing the Union notice and an opportunity to bargain over the impact of the change. Consequently, the

[1] Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 30, 2025).
[2] Award at 5.
[3] *Id.*
[4] *Id.* at 2-3.
[5] *Id.* at 3.
[6] *Id.* at 2 ("It is undisputed that . . . the Agency redesignated certain single[-]occupancy restrooms from 'gender neutral' to single[-]sex bathrooms. There is no dispute the Agency did not provide notice to the Union or meet to discuss any impact regarding the change.").
[7] *Id.* at 6.

Arbitrator directed the Agency to bargain over the impact of the change.

The Agency filed exceptions to the award on September 29, 2025. The Union did not file an opposition to the exceptions.

III. Analysis and Conclusions

A. The Agency's contrary-to-law arguments do not establish that the Arbitrator's contractual interpretation is deficient.

The Agency argues that the award is contrary to law because the Arbitrator's interpretation of Article 7 disregards the "established doctrines of 'covered by' and 'de minimis.'"[8] When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[9] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[10] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[11]

The de minimis and covered-by doctrines are both defenses to allegations that an agency failed to satisfy a statutory bargaining obligation.[12] The Authority has held that, where a dispute involves only a contractual bargaining obligation – rather than a statutory obligation – these defenses are inapplicable.[13]

The Agency argues that we should apply these statutory doctrines to the contractual interpretation here due to "the parties' express decision to incorporate statutory principles into the [parties' agreement]."[14] The Authority has applied statutory standards in assessing the application of contract provisions that mirror, or are intended to be interpreted in the same manner as, the Statute.[15] 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;[16] whether the arbitrator interpreted the parties' agreement as incorporating statutory requirements;[17] and whether the parties agree – or do not dispute – that the wording was intended to have the same meaning.[18]

Here, although Article 7 refers to the parties' obligation to bargain "in accordance with applicable

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[8] Exceptions Br. at 7.

[9] *AFGE, Loc. 3972*, 74 FLRA 252, 254 (2025) (citing *AFGE, Loc. 506*, 74 FLRA 201, 202 (2025)).

[10] *Id.*

[11] *Id.*

[12] *NTEU, Chapter 172*, 74 FLRA 80, 83-84 (2024) ("[T]he covered-by doctrine is an affirmative defense to an alleged failure-to-bargain [unfair labor practice] under § 7116(a)(5) of the Statute."); *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906, 913 (2000) ("It is an unfair labor practice to deny the [union] an opportunity to bargain over the impact and implementation of a change in unit employees' conditions of employment, provided that the change has more than a de minimis effect.").

[13] *U.S. Dep't of the Air Force, Scott Air Force Base, Ill.*, 72 FLRA 526, 529 (2021) (*Air Force*) (Chairman DuBester concurring) (rejecting covered-by argument where arbitrator addressed only a contractual – rather than statutory – bargaining obligation); *AFGE, Loc. 3974*, 67 FLRA 306, 308-09 (2014) (finding it "critical" to determine whether arbitrator was considering "only a contractual issue, only a statutory issue, or both issues" because the excepting party's de minimis argument only applied if the arbitrator addressed the statutory duty to bargain).

[14] Exceptions Br. at 7.

[15] *AFGE, Loc. 2338*, 73 FLRA 845, 847-48 (2024) (Chairman Grundmann concurring).

[16] *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) (*Loc. 1633*) (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").

[17] *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[ed] the Statute").

[18] *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'").

law,"[19] the wording of Article 7 is not identical to any provision of the Statute, nor does it expressly incorporate any provision of the Statute.[20] The Agency contends that the Authority should treat Article 7 as incorporating statutory principles because "Article 7 does not contain language which *adds* obligations beyond the Statute."[21] However, Article 7 contains many additional obligations not required by the Statute. Specifically, Article 7 establishes an extensive timeline for notice and opportunity to bargain, requiring the following:

> Should the Agency propose a change described in Section 1, thirty (30) days written notice of the proposed change shall be provided to the Union . . . . The Union shall have up to fifteen (15) days from receipt of the notice to request a meeting regarding the change. If the Union requests a meeting, the meeting will be held within ten (10) days of the Union's request, and the Parties will review the proposed changes. The Union may submit written proposals within fifteen (15) days of the meeting or within thirty (30) days of receipt of the original notice of the change(s), whichever is later. If the Union submits written proposals that meet the duty and scope of bargaining, the Parties will meet at a mutually agreeable time and place to conduct negotiations. The Union will be advised regarding their failure to submit negotiable proposals and may, within ten (10) days of being advised, amend their initial offering to make it negotiable.[22]

Moreover, neither the Union, nor the Arbitrator, agreed that the parties intended Article 7 to mirror the Statute. The Union argued at arbitration that "Article 7 of the parties' . . . agreement expands upon th[e] statutory [bargaining] requirement,"[23] and the Arbitrator considered only the meaning of Article 7, declining to address both the Union's statutory claim and the Agency's statutory defenses.[24]

Under these circumstances, we find the Agency fails to demonstrate that the Arbitrator was required to apply statutory standards to determine the parties' bargaining obligations under Article 7.[25] Consequently, the Agency's statutory defenses do not demonstrate that the Arbitrator's contractual interpretation is deficient, and we deny this exception.[26]

[19] Exceptions, Attach. 5, AFSCME FAA Collective-Bargaining Agreement (CBA) at 14. Article 7, Section 1 states: "The Parties agree that personnel policies, practices, and matters affecting working conditions of bargaining[-]unit employees not covered by this Agreement shall not be changed by the Agency without notice to and negotiations with the Union in accordance with applicable law." *Id.*

[20] Member Arrington notes that Article 7, Section 1 of the parties' agreement uses the term "working conditions." CBA at 14. He would find this is another key difference between the parties' agreement and the Statute, which only requires bargaining over "conditions of employment" not "working conditions." *See* 5 U.S.C. 7103(a)(12) ("'[C]ollective bargaining' means the performance of the mutual obligation . . . to consult and bargain in a good-faith effort to reach agreement with respect to conditions of employment affecting [bargaining-unit] employees . . . ."); *id.* § 7103(a)(14) ("'[C]onditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . ."); *see also U.S. DHS, U.S. CBP, El Paso., Tex.*, 72 FLRA 7, 9-10 (2021) (*El Paso*) (Member DuBester dissenting in part) (finding that "conditions of employment" and "working conditions" cannot be synonymous); *AFGE, Loc. 0906*, 74 FLRA 146, 155-56 (2024) (Dissenting Opinion of then-Member Kiko) (stating that the majority erred by overturning *El Paso* and returning to the "previous circular definition . . . that 'there is no substantive difference between conditions of employment and working conditions'").

[21] Exceptions Br. at 6.

[22] CBA at 14-15.

[23] Exceptions, Attach. 3, Union's Post-Hr'g Br. at 3; *see also id.* at 9 (arguing that, under Article 7, "the Union has the right to have prior notice of changes such that the Union can communicate to the bargaining unit what management has changed, why they[have] done it, and what the Union will do about those changes, if anything").

[24] Award at 5 ("[A]t issue[] is [the Agency's] obligation under the [a]greement to comply with Article 7's requirement to provide notice and allow input from the Union on the impact of these changes . . . .").

[25] *See Loc. 1633*, 70 FLRA at 520 (declining to apply statutory standards where arbitrator framed issue in contractual terms and the excepting party failed to establish that the provision mirrored, or was intended to be interpreted in the same manner as, the Statute). The Agency also argues that the Arbitrator exceeded her authority by failing to consider whether the restroom redesignation constituted a change that was more than de minimis. Exceptions Br. at 10-11. However, as the Arbitrator framed the issue in contractual terms, and the Agency does not demonstrate that statutory standards apply, the Agency does not demonstrate the Arbitrator was required to address whether the change was de minimis. *See Loc. 1633*, 70 FLRA at 520 n.10 (arbitrator was not "required to apply the statutory 'de minimis' doctrine" where the issue, as framed by the arbitrator, addressed only a contractual claim); *AFGE, Loc. 505, Nat'l INS Council*, 60 FLRA 774, 776 (2005) (denying exceeded-authority exception arguing arbitrator failed to resolve statutory claims because the arbitrator "framed the issue as a contractual one"). Accordingly, we reject this exceeded-authority argument.

[26] *See Air Force,* 72 FLRA at 529 (denying covered-by argument where arbitrator addressed only a contractual – rather than statutory – bargaining obligation); *U.S. DHS, U.S. ICE*, 65 FLRA 792, 795-96 (2011) ("Because the matter here involves a contractual violation, the Authority precedent cited by the [a]gency – which involves the duty to bargain under the Statute – is inapposite and provides no basis for finding the award contrary to law." (citing *Broad. Bd. of Governors, Off. of Cuba Broad.*, 64 FLRA 888, 891 (2010)); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 66 FLRA 978, 981 (2012) ("If . . . the [a]rbitrator [was] applying a contract provision that does not mirror the Statute, . . . then the question is one of contract interpretation, and the award would not be contrary to law.").

B. The Agency does not demonstrate that the award fails to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Agency's contractual bargaining obligations are "aligned with the Statute's bargaining obligations."[27] The Authority will find an arbitration award fails to draw its essence from the parties' agreement when the appealing party establishes 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.[28] The Agency's essence exception effectively restates its argument that Article 7 mirrors the Statute.[29] As noted above, the Agency does not establish that the parties intended Article 7 to have the same meaning as the Statute. The Agency raises no other grounds for finding the award was irrational, unfounded, implausible, or evidence of a manifest disregard for the agreement. Consequently, we deny this exception.[30]

C. The Agency does not demonstrate that the Arbitrator exceeded her authority by directing the parties to bargain over the impact of the restroom-designation change.

The Agency argues that the remedy the Arbitrator directed – to bargain over the impact of the restroom-designation change – exceeded her authority.[31] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed by the grievance.[32] When parties do not stipulate to the issues, arbitrators have the discretion to frame them, and the Authority accords the arbitrator's formulation substantial deference.[33] The Authority has held that arbitrators do not exceed their authority where the award is directly responsive to the formulated issues.[34]

The Agency contends that the remedy the Arbitrator awarded "was not directly responsive to the issue as the [A]rbitrator framed" it and impermissibly "expanded the parties' bargaining obligations."[35] As the parties did not stipulate to issues, the Arbitrator framed the issue as concerning the Agency's "obligation under the [parties' a]greement to comply with Article 7's requirement to provide notice and allow input from the Union on the impact of these changes, if any."[36] Finding that the Agency violated Article 7 by failing to provide the Union the required notice and an opportunity to bargain over the impact of the change, the Arbitrator directed the Agency to offer the Union that opportunity.[37] Because this remedy directs the Agency to comply with the contractual obligation identified in the framed issue, we find that the award is directly responsive to the formulated issue, and deny this exception.[38]

IV. Decision

We deny the Agency's exceptions.

[27] Exceptions Br. at 13.
[28] *SSA*, 73 FLRA 708, 713 (2023).
[29] Exceptions Br. at 11 ("[T]he contractual bargaining obligations remain expressly grounded in, and coextensive with[,] the Statute.").
[30] *See U.S. DOJ, Fed. BOP, Fed. Corr. Ctr., Petersburg, Va.*, 72 FLRA 477, 480 n.30 (2021) (Chairman DuBester concurring; Member Abbott concurring) (denying essence exception premised on same argument Authority rejected in previously denied contrary-to-law exception (citing *U.S. DHS, U.S. CBP, Savannah, Ga.*, 68 FLRA 319, 322-23 (2015); *NFFE, Loc. 376*, 67 FLRA 134, 136 (2013)).
[31] Exceptions Br. at 12-13.
[32] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex., Victorville, Cal.*, 73 FLRA 835, 836 (2024) (citing *USDA, Food Safety & Inspection Serv.*, 73 FLRA 683, 684 (2023) (*USDA*)).
[33] *Id.* at 836-37 (citing *USDA*, 73 FLRA at 684-85; *AFGE, Loc. 522*, 66 FLRA 560, 562 (2012)).
[34] *Id.* at 837 (citing *USDA*, 73 FLRA at 685).
[35] Exceptions Br. at 12.
[36] Award at 5.
[37] *Id.* at 6-7.
[38] *See USDA*, 73 FLRA at 685 (finding arbitrator did not exceed authority in awarding remedy that was directly responsive to his interpretation of the framed issue).