74 FLRA No. 76

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 246
(Union)

0-AR-5884

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DECISION

August 27, 2026

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

I. Statement of the Case

Two employees (the grievants) requested to telework full time, seeking to continue an arrangement the Agency permitted during the COVID-19 pandemic. Although the Agency denied these requests, it approved the grievants to telework four days per week. The Union grieved, arguing that the denials violated Article 15 of the parties' collective-bargaining agreement (Article 15) and a "Reintegration of the Workforce"[1] memorandum of understanding (Reintegration MOU). Arbitrator Jeffrey W. Jacobs sustained the grievance and directed the Agency to grant the grievants' requests for full-time telework.

The Agency filed exceptions in which it argues, as relevant here, that the award is contrary to management's rights under § 7106 of the Federal Service Labor-Management Relations Statute (the Statute).[2] Because the Agency demonstrates that the award conflicts with management's right to determine its organization under § 7106(a) of the Statute, we set the award aside.

II. Background and Arbitrator's Award

During the COVID-19 pandemic, the Agency placed most employees on emergency full-time telework. After the pandemic emergency abated, the parties negotiated the Reintegration MOU, which governed employees' "reintegration" into the office.[3] The Reintegration MOU detailed the process by which employees could apply for telework, and provided that the Agency would "take into account the use of telework during the COVID-19 pandemic," when assessing new telework requests.[4] Additionally, the MOU referred to Article 15 of the parties' agreement, which provides that, "[i]n the event a telework request is denied by the approving official, the employee will be provided with a written justification supporting the denial."[5]

Shortly after the parties executed the Reintegration MOU, the Agency assigned the grievants to the newly formed Office of Facilities Management Rent Branch. Both of the grievants applied for full-time telework. The Agency denied these requests, in writing, and directed the grievants to report to the office one day per week. The Agency noted that the grievants' supervisors and colleagues would also report on the same day each week and that the grievants' presence would "strengthen these relationships" and provide "the added benefit of visibility to other staff you may not work with on a regular basis."[6] In responding to one grievant, the Agency explained that, as it set up the new branch, "developing trust and clarity on roles and responsibilities across our new division is a priority."[7] In responding to the other grievant's request, the Agency noted that his "duties require [him] to collaborate with others[, and that d]uties requiring collaboration are performed more effectively and efficiently when the parties meet face to face."[8]

The Union grieved these denials, and the matter proceeded to arbitration. The Arbitrator framed the issue as: "Did the [Agency] violate the [Reintegration MOU] and/or Article 15 of the [parties' agreement] . . . when management terminated [the grievants'] full[-]time telework agreement[s] and then denied [their] request[s]

[1] Award at 8.
[2] 5 U.S.C. § 7106.
[3] Award at 8.
[4] Exceptions, Joint Ex. 2, Reintegration MOU (Reintegration MOU) at 2.
[5] Exceptions, Joint Ex. 1, Collective-Bargaining Agreement (CBA) at 54.
[6] Exceptions, Joint Ex. 3, Denial Email (March 31, 2022 Email) at 1; Exceptions, Joint Ex. 8, Denial Email (April 4, 2022 Email) at 1.
[7] March 31, 2022 Email at 3.
[8] April 4, 2022 Email at 1.

for five . . . core days of telework per week? If so, what should be the remedy?"[9]

At arbitration, the Union argued that the Agency failed to "take into account the [grievants'] use of telework during the COVID-19 pandemic," as the Reintegration MOU required.[10] The Union further argued that the Agency violated Article 15 by not providing written justification for the denials.

Responding to the Union's arguments, the Agency asserted that during the COVID-19 pandemic, management observed that "there was a reduction of team performance that it asserted was directly tied to telework."[11] In particular, management identified several costly budgeting errors that impacted the Agency's finances and reputation with stakeholders.[12] While the Agency did not attribute these errors to any individual employee's performance, it concluded that reduced collaboration and communication between employees on the relevant teams created the conditions for these errors to occur.[13] As such, the Agency determined that increased in-person interaction between team members could prevent future errors from occurring and improve overall performance.[14] Explaining this analysis at arbitration, the Agency argued that "it did take into account the grievants['] work during the pandemic, but determined that working in the office one day [per week] was critical . . . to avoid the issues that arose during the pandemic."[15]

The Arbitrator found that Article 15's requirement for "a written justification supporting the denial,"[16] and the Reintegration MOU's requirement to "take into account the use of telework during the COVID-19 pandemic"[17] together created an evidentiary burden that the Agency must satisfy before denying a telework request from any employee who teleworked during the pandemic. Specifically, the Arbitrator found that the Agency could not deny a telework request unless it "provide[d] some basis that the telework that was done by the affected employee was unsuccessful in some respect or that that there were actual identifiable problems with that employee's telework experience during the pandemic."[18]

The Arbitrator reasoned that the parties – through the language they agreed to – intended for telework to be favored, and that any denial of telework "require[d] a detailed analysis that both recognized the work done during the pandemic and . . . [explained] why future telework would not be appropriate."[19] To support this reasoning, the Arbitrator explained that, because the parties' agreement provides examples of work that would *not* be appropriate for telework, other types of work are, by implication, "presumptively appropriate for telework."[20]

Because the Agency did not attribute the budgeting errors during the pandemic to the grievants, the Arbitrator found that the Agency presented "insufficient evidence of any actual problems with either grievant's telework" during the pandemic.[21] Finding that the parties' agreements "specifically limit[the Agency's] authority" to assess whether "telework would have an adverse impact on operations or team performance,"[22] the Arbitrator determined that Article 15 and the Reintegration MOU required "evidence, not mere speculation[,] as to whether an employee can work effectively by telework."[23] Thus, the Arbitrator concluded that the Agency's denial of the grievants' telework requests, without evidence of individual pandemic-era performance issues, violated Article 15 and the Reintegration MOU. As a remedy, the Arbitrator directed the Agency to grant the grievants' full-time telework requests.

The Agency filed exceptions to the award on April 18, 2023, and the Union filed an opposition to the Agency's exceptions on May 23, 2023. On September 27, 2023, the Authority issued an order giving the parties an opportunity to file supplemental briefings addressing how

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[9] Award at 4.
[10] *Id.* at 9, 12.
[11] *Id.* at 24.
[12] *Id.* at 20 ("The Agency reiterated throughout the hearing that there were problems that occurred during the pandemic that it attributed to a lack of in[-]person communication."); *id.* ("The Agency asserted that its budgeting must be seen as reliable and accurate and that errors of this nature can severely impact [the Agency's] overall relationship with funding entities.").
[13] *Id.* ("The Agency[,] in analyzing what went wrong, determined that the lack of collaboration was not a failure on the part of any individual employees, but was instead a broader office-wide issue that required more communication [and] collaboration by employees who are in the office.").
[14] *Id.* at 21 ("The Agency . . . determined that working in the office one day [per week] was critical . . . to ensure that the [Agency] team would function effectively and efficiently and to avoid the issues that arose during the pandemic regarding errors in the budgeting process."); *id.* at 24 ("Having at least some in-person interaction could in the Agency's view prevent any adverse impact on team performance and ensure greater accuracy and reliability of the . . . [t]eam's performance.").
[15] *Id.* at 21; *see also* Reintegration MOU at 2.
[16] Award at 30 (quoting Art. 15, § 4(M)) (internal quotation mark omitted); *see also* CBA at 54.
[17] Award at 30; *see also* Reintegration MOU at 2.
[18] Award at 31.
[19] *Id.* at 32.
[20] *Id.* at 33.
[21] *Id.* at 31.
[22] *Id.* at 37.
[23] *Id.* at 32.

the revised management-rights test articulated in *Consumer Financial Protection Bureau* (*CFPB*)[24] should apply in this case. The Agency filed a supplemental brief on November 2, 2023, and the Union filed a supplemental brief on November 3, 2023.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments that could have been, but were not, presented to the arbitrator.[25]

The Agency argues that the award is contrary to the Telework Enhancement Act (the Act).[26] The Union contends that the Authority should dismiss this argument because the Agency failed to raise it before the Arbitrator.[27] However, in the award, the Arbitrator acknowledged that the Agency raised this argument regarding the Act.[28] As such, the Authority's Regulations do not bar the Agency from raising this argument.[29]

The Agency also argues that the award is contrary to management's rights under § 7106(a) of the Statute to: (1) determine the Agency's budget; (2) direct employees; (3) assign work; (4) determine the personnel by which Agency operations shall be conducted; and (5) determine the Agency's organization.[30] The Union argues that the Authority should dismiss these arguments because the Agency did not raise them before the Arbitrator.[31]

In his award, the Arbitrator noted that the Agency cited § 7106(a)(1) of the Statute,[32] and argued that it "has a managerial right to determine if telework would have an adverse impact on operations or team performance."[33] Also, in its closing brief to the Arbitrator, the Agency argued that mandatory duty-station changes would "impact[] management's right to determine the 'organization' of the Agency."[34] Therefore, we find that, at arbitration, the Agency raised its arguments regarding management's right to determine the Agency's organization, and we address those arguments in Section IV below.[35]

However, there is no indication that the Agency raised its arguments concerning management's rights to determine the budget, direct employees, assign work, or determine the personnel by which Agency operations shall be conducted before the Arbitrator. Because the Union requested as a remedy that the Agency grant the grievants' telework requests,[36] the Agency could have argued at arbitration that such a remedy would violate these management rights. Consequently, we dismiss these remaining management-rights arguments.[37]

Similarly, the Agency contends that granting full-time telework fails to draw its essence from the management-rights provision in Article 6 of the parties' agreement.[38] In his award, the Arbitrator listed Article 6 as a "relevant contract provision."[39] Yet, there is no indication in the record that the Agency argued to the Arbitrator that awarding full-time telework would conflict with Article 6. Because the Agency could have raised its Article 6 arguments below, but did not do so, we also dismiss the Agency's essence argument regarding Article 6.[40]

IV. Analysis and Conclusion: The award is contrary to management's right to determine its organization under § 7106(a)(1) of the Statute.

The Agency argues that the award conflicts with management's right to determine its organization under § 7106(a)(1) of the Statute because it excessively interferes with the Agency's discretion to determine

[24] 73 FLRA 670, 681 (2023).
[25] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also U.S. Dep't of VA, James A. Haley VAMC, Tampa, Fla.*, 73 FLRA 47, 47-48 (2022) (*VAMC Tampa*).
[26] Exceptions Br. at 20-24 (citing 5 U.S.C. § 6502(b)(1)).
[27] Opp'n Br. at 11-15.
[28] *See* Award at 24 (stating Agency argued the Act "restricts the use of telework where such work might 'diminish employee performance or Agency operations'"); *id.* at 35 (denying Agency's argument regarding the Act due to "insufficient evidence").
[29] *See U.S. Dep't of Energy, Rocky Flat Field Off., Golden, Colo.*, 59 FLRA 159, 161 (2003) (*Dep't of Energy*) (finding arguments not barred where record establishes the party raised those arguments at arbitration).
[30] Exceptions Br. at 25-33.
[31] Opp'n Br. at 17-19.
[32] Award at 10.
[33] *Id.* at 37.
[34] Exceptions, Ex. B, Agency's Closing Br. at 48-49.
[35] *See Dep't of Energy*, 59 FLRA at 161.
[36] Award at 19.
[37] *See VAMC Tampa*, 73 FLRA at 48 (dismissing management-rights argument because excepting party failed to raise it before arbitrator). We acknowledge that, as noted above, the Authority issued an order granting the parties an opportunity to submit supplemental briefs regarding how the revised management-rights test, set forth in *CFPB*, applies in this case. Order to File Supp. Briefing at 1. However, in doing so, the Authority stated, "[I]rrespective of any party's supplemental submission, the Authority may ultimately resolve this case on grounds unrelated to management rights." *Id.* Our dismissal of some of the Agency's management-rights exceptions under §§ 2425.4(c) and 2429.5 is consistent with that statement.
[38] Exceptions Br. at 48.
[39] Award at 4.
[40] *VAMC Tampa*, 73 FLRA at 48.

employees' duty stations, and to assess "the impact that full[-]time telework has on Agency operations."[41] According to the Agency, the Arbitrator's interpretation of Article 15 and the Reintegration MOU would both "force a change of duty station[, and] . . . largely eliminate in-person collaboration and coordination amongst the workforce," which management determined was necessary due to "specific negative operational consequences [from full-time telework] during the COVID-19 pandemic."[42]

In *CFPB*, the Authority revised its test for resolving management-rights exceptions in cases where an arbitrator has found a contractual violation.[43] Under the four-part *CFPB* framework, the first question is whether the excepting party establishes that the arbitrator's interpretation and application of the parties' agreement, or the awarded remedy, affects a management right.[44] Under government-wide regulations, the official duty stations for teleworking employees are their residences if they do not report to the office at least twice per pay period.[45] The Authority has found that an award requiring an agency to grant full-time telework and, thus, change an employee's duty station affected management's right to determine "where[,] organizationally[,] certain functions shall be established and where the duty stations of the positions providing those functions shall be maintained."[46] As the award directs the Agency to grant the grievants' full-time telework requests,[47] we find that it affects the Agency's right to determine its organization.[48]

In *CFPB's* second question, we ask whether the arbitrator correctly found, or the opposing party demonstrates, that the provision – as interpreted and applied by the arbitrator – is enforceable under § 7106(b) of the Statute.[49] The Arbitrator did not address this question, but the Union asserts that the Arbitrator's interpretation of Article 15 and the Reintegration MOU is enforceable under § 7106(b)(3)[50] of the Statute because the provisions "balance the employee interest in continuing to telework post pandemic against the Agency['s]" management right.[51] The Union argues that the Agency retains discretion to deny telework based on the eligibility criteria in the parties' agreement.[52]

To resolve that argument, we apply a modified version of the two-pronged test established in *NAGE, Local R14-87* (*KANG*).[53] Under the first prong of the *KANG* test, the Authority determines whether the provision is intended to be an "arrangement" for employees adversely affected by the exercise of the relevant management right.[54] If the provision is an arrangement, then the Authority determines whether it is "appropriate" because it does not excessively interfere with the relevant management right.[55] The Authority makes this determination by weighing "the competing practical needs of employees and managers" in order to ascertain whether the benefits to employees outweigh the provision's burden on the exercise of the management right involved.[56] However, the Authority has held that an appropriate arrangement "may not negate the exercise of a management right by reversing management's substantive decision altogether."[57]

Even assuming the Arbitrator's interpretation of Article 15 and the Reintegration MOU constitutes an arrangement, we find, for the following reasons, that the arrangement is not appropriate because the burden on management's rights outweighs the limited benefit to the grievants. Regarding the benefit to employees, the Agency did not deny the grievants the right to telework; it

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[41] Agency's Supp. Br. at 36-38.
[42] *Id.* at 33.
[43] 73 FLRA at 676-81.
[44] *Id.* at 676-77.
[45] 5 C.F.R. § 531.605(d)(1) ("If the employee is scheduled to work at least twice each biweekly pay period on a regular and recurring basis at the regular worksite for the employee's position of record, the regular worksite (where the employee's work activities are based) is the employee's official worksite.").
[46] *U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 934 (2018) (*DOD*) (Member DuBester dissenting) (alteration in original) (quoting *U.S. Dep't of Transp., Maritime Admin.*, 61 FLRA 816, 822 (2006)); *see also IFPTE, Loc. 4*, 74 FLRA 59, 61 (2024) (*IFPTE*) (finding proposal dictating where agency must establish bargaining-unit employees' duty stations affected the agency's right to determine its organization).
[47] Award at 39 ("The Agency is directed to grant the grievants' requests for [full-time] telework.").
[48] *See DOD*, 70 FLRA at 934.
[49] *See CFPB*, 73 FLRA at 677-80.
[50] 5 U.S.C. § 7106(b)(3) (defining exception to management rights as "appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials").
[51] Union's Supp. Br. at 14-16.
[52] *Id.* at 15.
[53] 21 FLRA 24, 31-32 (1986).
[54] *Id.* at 31.
[55] *NAGE, Loc. R1-134*, 73 FLRA 637, 644 (2023).
[56] *Id.* (quoting *KANG*, 21 FLRA at 31-32).
[57] *NTEU*, 72 FLRA 752, 755 (2022) (Chairman DuBester concurring in part and dissenting in part) (quoting *Ass'n of Civilian Technicians, Ky. Long Rifle Chapter & Bluegrass Chapter*, 70 FLRA 968, 970 (2018) (Member DuBester dissenting)) (internal quotation marks omitted); *see also AFGE, Loc. 1164*, 66 FLRA 112, 117 (2011) (*Loc. 1164*) (proposal to use different model workstations than agency had chosen "negate[d] the [a]gency's determinations entirely" as to methods and means of performing work under § 7106(b)(1)), *pet. for review denied per curiam*, 483 F. App'x 577, 578 (D.C. Cir. 2012) (unpublished).

authorized *four telework days per week*.[58] Thus, the Arbitrator's interpretation of the parties' agreements relieves the grievants from a single weekly commute. While an extra day of telework is certainly a benefit – particularly for the one grievant who lives outside the commuting area[59] – it is also a limited one.

Conversely, the burden on management is substantial. This burden is heightened because full-time telework necessarily triggers a change in the grievants' official duty station under 5 C.F.R. § 531.605(d),[60] and the Authority has repeatedly held that determining where duty stations are established and maintained is a core organizational judgment under § 7106(a)(1).[61] Compelling full-time telework therefore obligates the Agency to restructure the geographic placement of positions, which is a direct and substantial intrusion into an organizational determination the Statute reserves to management. As the Agency argues, the award "effectively eliminat[ed] the Agency's ability to deny full[-]time telework to employees who teleworked during the pandemic."[62] After granting full-time telework to all employees during the pandemic, the Agency determined that "there was a reduction of team performance that it asserted was directly tied to [full-time] telework."[63]

In particular, the Agency asserts – and the Union does not dispute – that the teams at issue here made several costly budgeting errors that adversely affected the Agency's finances and reputation with stakeholders.[64] The Agency did not attribute these errors to any individual employee; rather, it viewed them as systemic and linked to insufficient in-person collaboration.[65] Thus, the Agency addressed this systemic issue by directing employees engaged in collaborative work to report to the office one day per week.[66] Although the Arbitrator acknowledged the Agency's "clear interest in preventing errors" from occurring, he nonetheless concluded that the Agency lacked the authority to require in-person collaboration unless it could demonstrate "actual identifiable problems with [a particular] employee's telework experience during the pandemic."[67] Under that reasoning, any employee who worked for the Agency during the pandemic without making identifiable errors would be *guaranteed* full-time telework upon request[68] – even if, in the aggregate, such requests recreate the very conditions the Agency believes contributed to the pandemic-era mistakes. By conditioning management's ability to require in-person collaboration on individualized proof of telework inadequacy, the Arbitrator's interpretation imposes an elevated evidentiary threshold that effectively mandates full-time telework for all telework-eligible employees who performed adequately during the pandemic.[69] An arrangement that compels the Agency to approve full-time telework absent individualized errors fundamentally restricts management's ability to make organizational decisions based on broader operational needs.

The Union's contention, that the burden on management is limited because the Agency retains discretion to deny telework if an employee fails to meet the contractual eligibility criteria, is flawed for the same

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[58] Award at 11 (summarizing Union's argument that Agency violated parties' agreements by requiring "grievants [to] appear for one day per week in person"); *id.* at 19 (summarizing Agency's argument that it did not violate the parties' agreements by requiring one day in the office per week).

[59] *Id.* at 21, 26 (observing Agency's acknowledgement that one of the grievants lives outside the commuting area – "nearly 125 miles from the Indianapolis office").

[60] 5 C.F.R. § 531.605(d).

[61] *IFPTE*, 74 FLRA at 61; *DOD*, 70 FLRA at 934; *cf. Ass'n of Civilian Technicians, N.Y. State Council*, 56 FLRA 444, 449 (2000).

[62] Agency's Supp. Br. at 14.

[63] Award at 24 (summarizing Agency's arguments).

[64] *Id.* at 20 ("The Agency reiterated throughout the hearing that there were problems that occurred during the pandemic that it attributed to a lack of in[-]person communication."); *id.* ("The Agency asserted that its budgeting must be seen as reliable and accurate and that errors of this nature can severely impact [the Agency's] overall relationship with funding entities.").

[65] *Id.* ("The Agency[,] in analyzing what went wrong, determined that the lack of collaboration was not a failure on the part of any individual employees, but was instead a broader office-wide issue that required more communication [and] collaboration by employees who are in the office.").

[66] *See id.* at 21 ("The Agency . . . determined that working in the office one day [per week] was critical . . . to ensure that the [Agency] team would function effectively and efficiently and to avoid the issues that arose during the pandemic regarding errors in the budgeting process."); *id.* at 24 ("Having at least some in-person interaction could in the Agency's view prevent any adverse impact on team performance and ensure greater accuracy and reliability of the . . . [t]eam's performance.").

[67] *Id.* at 31.

[68] *Id.* at 37-38.

[69] Member Arrington notes that too often agency justifications for denying telework are subject to excessive scrutiny that effectively shifts decision-making authority on how to conduct operations from management to the employee. *See U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1167 (2020) (Member DuBester concurring) (arbitrator found denial of telework request violated parties' agreement because agency failed to demonstrate "operational need for the grievant to report" to the office); *U.S. Dep't of HHS, Off. of Medicare Hearings & Appeals*, 71 FLRA 677, 677 (2020) (Member Abbott concurring; Chairman Kiko dissenting) (arbitrator found denial of telework requests violated parties' agreement because the agency failed to demonstrate "a fourth day of telework by these [g]rievants would compromise the mission of the [a]gency in any way"). In this regard, it is irrational for the "requester" to assume the authority of the "approver" in determining whether a telework request is appropriate. This inversion defies logic, organizational hierarchy, and management rights granted by the Statute.

reason: the Agency is prohibited from denying a full-time telework request unless it can demonstrate that the employee is ineligible for telework at all. Requiring the Agency to justify each denial with proof tied to an individual employee's telework experience, rather than organizational needs, is incompatible with management's ability to make organizational determinations based on unit-wide operational requirements, systemic performance concerns, or collaboration needs that extend beyond a single employee. Thus, under the Union's argument, the Agency must designate employees' residences as their official duty stations if the employee is eligible for telework and seeks full-time telework; the Agency may not base its decision on management's determination of the most efficient and effective organization of Agency personnel.[70]

Weighing the award's requirement for the Agency to restructure the official duty stations for *all* eligible employees interested in full-time telework against the limited benefit of relieving the grievants of a single weekly commute, we find the Arbitrator's interpretation of the parties' agreements excessively interferes with management's right to determine its organization. Thus, the Union has not met its burden of establishing that Article 15 and the Reintegration MOU, as interpreted and applied by the Arbitrator, constitute an enforceable appropriate arrangement.[71]

The Union also argues that the Arbitrator's interpretation of the parties' agreements is enforceable as a procedure under § 7106(b)(2) of the Statute.[72] In this regard, the Union contends[73] that this case is analogous to *U.S. Department of Education, Federal Student Aid* (*FSA*).[74] In *FSA*, the agency argued that an award requiring the agency to return a grievant to her prior telework schedule violated management rights under § 7106(a)(1) and (2).[75] Noting that the agency "[did] not contend that the telework procedures in the parties' agreement [were] themselves unlawful,"[76] the Authority upheld the award enforcing those procedures and requiring the agency to allow the grievant to resume her prior telework schedule in a situation that did not require a duty-station change.[77] However, the Authority has held that proposals or provisions that affect the substantive exercise of a management right are not negotiable as procedures under § 7106(b)(2).[78] As interpreted and applied here, the award requires the Agency to grant full-time telework[79] and – under 5 C.F.R. § 531.605(d) – to change the employee's duty station.[80] That result crosses from a "procedure which management officials . . . will observe in exercising" management rights[81] into a substantive constraint on the Agency's § 7106(a)(1) right to determine where duty stations are maintained and how its organizational structure will support in-person collaboration. The substantive constraint is further demonstrated by the Arbitrator's rejection of the Agency's argument that it has "a managerial right to determine if telework would have an adverse impact on operations or team performance," finding that the parties' agreements "specifically limit[] that authority."[82] Because the relevant contract provisions, as interpreted and applied by the Arbitrator, "specifically limit[]"[83] the Agency's substantive exercise of its right to determine its organization, they do not constitute an enforceable procedure under § 7106(b)(2).[84]

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[70] *Cf. DOD*, 70 FLRA at 934 (setting aside award requiring agency to change official duty station of certain employees by granting full-time telework requests).

[71] *See U.S. DHS, U.S. CBP, U.S. Border Patrol, Rio Grande Valley Sector, Edinburg, Tex.*, 73 FLRA 784, 786 (2024) (setting aside award where union had "not met its burden of demonstrating that [the provisions] – as interpreted and applied by the [a]rbitrator – f[e]ll within an exception to management's rights under § 7106(b)"); *Loc. 1164*, 66 FLRA at 117 (finding burden on management outweighed benefit to employee where "proposal would essentially negate the [a]gency's determinations entirely"); *AFGE, Loc. 1226*, 62 FLRA 459, 461 (2008) (finding arrangement not appropriate where proposal would prevent agency from changing an employee's duty station without their consent as this restriction excessively interfered with management right to determine organization).

[72] Union's Supp. Br. at 12-13.

[73] *Id.*

[74] 71 FLRA 1166.

[75] *Id.* at 1168.

[76] *Id.* at 1169 n. 34.

[77] *See id.* at 1166 (under reinstated telework schedule, grievant reported to the office two days per pay period); *id.* at 1169 (noting the effect on management rights of an award concerning the frequency of telework did not, standing alone, "allow an [a]gency to get out of a lawful provision that it agreed to pursuant to § 7106(b)(2)"). We note that *FSA* was decided before the Authority revised its test for resolving management-rights exceptions to arbitration awards finding contract violations in *CFPB*, 73 FLRA at 676-81.

[78] *Marine Eng'rs' Beneficial Ass'n, Dist. No. 1-PCD*, 60 FLRA 828, 831 (2005) (Chairman Cabaniss dissenting on other grounds; Member Pope writing separately on other grounds) (citing *NFFE, Loc. 1214*, 40 FLRA 1181, 1188 (1991)).

[79] Award at 39.

[80] 5 C.F.R. § 531.605(d)(1) ("If the employee is scheduled to work at least twice each biweekly pay period on a regular and recurring basis at the regular worksite for the employee's position of record, the regular worksite (where the employee's work activities are based) is the employee's official worksite.").

[81] 5 U.S.C. § 7106(b)(2) (defining exception to management rights as "procedures which management officials of the agency will observe in exercising any authority" under § 7106).

[82] Award at 37.

[83] *Id.*

[84] *See Ass'n of Civilian Technicians, Treasure State Chapter #57*, 56 FLRA 1046, 1048 (2001) (finding provision did not constitute § 7106(b)(2) procedure where it "establishe[d] a particular mandatory requirement that would restrict the [a]gency's discretion under [§] 7106(a)").

Based on the foregoing, we find the Union has not met its burden of demonstrating that Article 15 and the Reintegration MOU, as the Arbitrator interpreted and applied them, fall within an enforceable exception to management's rights under § 7106(b) of the Statute. Therefore, the answer to the second *CFPB* question is no, and we find the Agency has successfully challenged the Arbitrator's finding of a contract violation on management-rights grounds. Under *CFPB*, where an excepting party "successfully challenges the underlying finding of a [contract] violation," "the Authority will set aside both the finding of a violation and the remedy for the violation."[85] Consistent with that principle, we set aside the award.[86] Consequently, we need not consider the third or fourth questions under *CFPB*.[87]

V. Decision

We dismiss, in part, the Agency's contrary-to-law and essence exceptions, grant its management-rights exception, in part, and set aside the award.

[85] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Seagonville, Tex.*, 74 FLRA 40, 44 (2024) (quoting *CFPB*, 73 FLRA at 680); *see also U.S. Dep't of the Treasury, IRS*, 73 FLRA 888, 891 (2024) (setting aside finding of a violation and the awarded remedy where union did not meet its burden of establishing enforceable exception to management rights).

[86] The Agency also argues that the award is contrary to the Act, Exceptions Br. at 20-24, and that it fails to draw its essence from Article 15, Exceptions Br. at 33-48. Because we set aside the award as contrary to management's rights, we do not need to consider the Agency's remaining exceptions. *See, e.g.*, *U.S. Dep't of the Treasury, BEP*, 74 FLRA 235, 238 (2025).

[87] *See CFPB*, 73 FLRA at 680 (recognizing that it is unnecessary to address the third and fourth *CFPB* questions unless "the answer to the [second] question is yes").

Member Wagner, concurring in part and dissenting in part:

I agree that §§ 2425.4(c) and 2429.5 of the Authority's Regulations:[1] (1) do not bar the Agency's argument regarding management's right to determine the Agency's organization under § 7106(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute)[2] or the Agency's argument regarding the Telework Enhancement Act;[3] but (2) *do* bar the Agency's remaining management-rights arguments and its essence arguments regarding Article 6 of the parties' collective-bargaining agreement (CBA). However, for the following reasons, I do not agree that the award is contrary to management's right to determine the Agency's organization (the right to determine organization).

As the majority states,[4] to resolve management-rights exceptions in cases where an arbitrator has found a CBA violation, the Authority applies the four-part test established in *Consumer Financial Protection Bureau* (*CFPB*).[5] Under this test, the first question is whether the excepting party establishes that the arbitrator's interpretation and application of the CBA, or the awarded remedy, affects a management right.[6] In *CFPB*, the Authority stated "if it is clear that the CBA provision is enforceable under § 7106(b) [of the Statute[7]], then the Authority may assume, without deciding, that the interpretation and application of the CBA and/or the awarded remedy 'affects' a management right."[8] For the reasons discussed below, I would find that Article 15 of the parties' CBA and the parties' "Reintegration of the Workforce"[9] memorandum of understanding (the Reintegration MOU) – as interpreted and applied by the Arbitrator – are enforceable under § 7106(b)(3) of the Statute.[10] Thus, I assume, without deciding, that the Arbitrator's interpretation and application of Article 15 and the Reintegration MOU affect the right to determine organization.[11]

Under the second part of the *CFPB* test, the Authority asks whether the arbitrator correctly found, or the opposing party demonstrates, that the provision – as interpreted and applied by the arbitrator – is enforceable under § 7106(b) of the Statute.[12] The Arbitrator did not address this question, but the Union asserts that Article 15 and the Reintegration MOU are enforceable as appropriate arrangements under § 7106(b)(3) of the Statute.[13] As the majority notes,[14] to resolve that argument, the Authority applies a modified version of the two-pronged test established in *NAGE, Local R14-87* (*KANG*).[15] Under the first prong of that test, the Authority determines whether the provision is intended to be an "arrangement" for employees adversely affected by the exercise of the relevant management right.[16] In the arbitration context, when assessing whether CBA provisions, as interpreted and applied, are arrangements, the Authority will presume that the provisions are tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights.[17] However, that presumption is rebuttable.[18] If the provision is an arrangement, then, under the second prong of the *KANG* test, the Authority determines whether the arrangement is "appropriate" because it does not excessively interfere with the relevant management right.[19] The Authority makes this determination by weighing "the competing practical needs of employees and managers" in order to ascertain whether the benefits to employees outweigh the provision's burden on the exercise of the management right involved.[20]

The Arbitrator found that the Reintegration MOU provides that the "approval/denial [of a telework request] will take into account the use of telework during the COVID-19 pandemic," and that "[s]uch accounting will be included in the written justification for any denial of a telework request."[21] Article 15 provides, "In the event a telework request is denied by the approving official, the employee will be provided with a written justification supporting the denial."[22] The Arbitrator interpreted these provisions as requiring that, in order to deny a telework request, the Agency must "provide some basis that the telework that was done by the affected employee was unsuccessful in some respect or that there were actual

[1] 5 C.F.R. §§ 2425.4(c), 2429.5.
[2] 5 U.S.C. § 7106(a)(1).
[3] *Id.* § 6502(b)(1).
[4] Majority at 6.
[5] 73 FLRA 670 (2023).
[6] *Id.* at 676-77.
[7] 5 U.S.C. § 7106(b).
[8] 73 FLRA at 681 n.123.
[9] Award at 8.
[10] 5 U.S.C. § 7106(b)(3).
[11] *See, e.g.*, *U.S. Dep't of the Navy, Navy Region Mid-Atl. Fire & Emergency Servs., Naval Weapons Station Earle, N.J.*, 74 FLRA 384, 389 (2026) (Chairman Kiko concurring on other grounds) (assuming, without deciding, that the first part of the *CFPB* test was met).
[12] *CFPB*, 73 FLRA at 677-80.
[13] Opp'n Br. at 23, 24 n.2.
[14] Majority at 7.
[15] 21 FLRA 24, 31 (1986).
[16] *Id.*
[17] *CFPB*, 73 FLRA at 680.
[18] *Id.*
[19] *KANG*, 21 FLRA at 31.
[20] *NAGE, Loc. R1-134*, 73 FLRA 637, 644 (2023) (quoting *KANG*, 21 FLRA at 31-32) (internal quotation marks omitted).
[21] Award at 30.
[22] *Id.* (quoting Art. 15, § 4(M) of the CBA) (internal quotation marks omitted).

identifiable problems with that employee's telework experience during the pandemic."[23] The Arbitrator further found that the provisions require "evidence, not mere speculation[,] as to whether an employee can [or cannot] work effectively by telework," and that any denial "requires a detailed analysis that both recognized the work done during the pandemic and a detailed analysis of why future telework would not be appropriate."[24] Therefore, the provisions – as interpreted and applied by the Arbitrator – require that, in order to deny a telework request, management must provide a detailed analysis that (1) takes into account telework completed during the pandemic, and (2) explains why telework is no longer appropriate, based on actual evidence.

The Union asserts that the provisions, as interpreted and applied, are intended to be arrangements for employees adversely affected by management's decision to "reintegrate employees into the office environment" and "end the pandemic telework" that allowed employees to work from home full-time.[25] The Agency argues that the provisions are not arrangements, because "[r]equiring employees to report to their regularly assigned official duty station should not be considered an 'adverse effect' upon the employees."[26] Citing 5 C.F.R. § 551.422(b) and the U.S. Comptroller General's opinion in *New York Transit Strike*,[27] the Agency contends that commuting cannot be considered an adverse effect because it is not considered work hours and is an employee's responsibility.[28] Further, the Agency asserts that the Authority should not presume that the tailoring requirement for "arrangements" is met, because the award of full-time telework is not a sufficiently tailored remedy.[29]

The Authority recently, unanimously stated that, "[i]n determining whether a proposal is an arrangement, the Authority has considered the effects that the exercise of management rights may have on employees' lives outside of the workplace."[30] The Authority also stated that it previously "has recognized that an agency's unilateral decision to relocate an employee adversely affects the relocated employee."[31] The Authority also has recognized that a longer commute may adversely affect employees.[32] Accordingly, the Authority held that "[a]gency decisions to terminate remote-work agreements and direct employees to report in-person to an [a]gency office indefinitely – which may include relocation and disruption of daily lives arranged contingent on remote work – adversely affects those employees."[33]

Given this precedent and the specific, undisputed facts of this case – that the reintegration is occurring after a lengthy period of full-time telework due to the pandemic – I would find that imposing a commute on these employees, and the attendant reduction in their personal time, adversely affects the employees. Although the Agency cites 5 C.F.R. § 551.422(b) and *New York Transit Strike*, those authorities involve whether employees' normal home-to-work commutes are compensable hours of work; they do not concern whether imposition of a commute may be an adverse effect for § 7106(b)(3) purposes. Therefore, those authorities are inapposite.

I also would find that the CBA provisions, as interpreted and applied, seek to ameliorate the adverse effects of management's exercise of its rights by limiting the circumstances in which the Agency may deny full-time-telework requests. Although the Agency argues that the provisions are not tailored, the Agency does not explain how the Arbitrator's award – which applies to only the two grievants at issue in this case and is not precedential[34] – extends beyond employees who are adversely affected. Thus, the Agency has not rebutted the presumption that the provisions, as interpreted and applied, are sufficiently tailored,[35] and I would find that the provisions are arrangements.[36]

Turning to whether the arrangements are appropriate, the Union claims that they are because they benefit employees by allowing them to "continu[e] to telework post[-]pandemic."[37] The Union further asserts that any burdens on management's right to determine organization are limited because, among other things:

[23] *Id.* at 31.
[24] *Id.* at 32.
[25] Union's Supp. Br. at 14.
[26] Agency's Supp. Br. at 30.
[27] 60 Comp. Gen. 633 (1981).
[28] Agency's Supp. Br. at 30.
[29] *Id.* at 37. To the extent this assertion challenges the awarded remedy, I discuss the remedy in connection with *CFPB* steps 3 and 4 below.
[30] *NTEU, Chapter 337*, 74 FLRA 412, 415 (2026) (*Chapter 337*) (citing *SSA, Indianapolis, Ind.*, 66 FLRA 62, 65 (2011) (Member DuBester dissenting in part on other grounds); *AFSCME, Loc. 3097*, 42 FLRA 412, 468-69 (1991)).
[31] *Id.* (citing *AFGE, Loc. 3172*, 46 FLRA 322, 330-31 (1992) (*Local 3172*)).
[32] *Local 3172*, 46 FLRA at 331 (finding new duty station that was only ten miles from the original duty station created an adverse effect on the employee by requiring additional commuting time).
[33] *Chapter 337*, 74 FLRA at 415.
[34] *AFGE, Loc. 2338*, 73 FLRA 756, 759 (2023) (stating that "arbitration awards are non-precedential").
[35] *See, e.g.*, *AFGE, Council of Prison Locs. 33, Loc. 506*, 66 FLRA 929, 941 (2012) (proposal sufficiently tailored because it addressed adverse effects for only the employees affected by the exercise of management right).
[36] *See, e.g.*, *Chapter 337*, 74 FLRA at 415 (finding remote-work proposal to be an arrangement).
[37] Union's Supp. Br. at 15.

(1) the Agency already determined that full-time telework is appropriate for the grievants' division by allowing members of that division to telework full-time;[38] (2) one grievant was teleworking full-time prior to the pandemic and it did not present an issue then;[39] and (3) the CBA preserves management's ability to change or terminate telework agreements.[40]

In response, the Agency asserts – and the majority appears to agree – that the provisions are not appropriate because: (1) any adverse impact from commuting is limited because the grievants only have to commute once a week;[41] (2) "any benefit the employees would gain from an additional day of telework is far outweighed by the negative impact on management's rights, given that it would force a change of duty station," and "would largely eliminate in-person collaboration and coordination amongst the workforce, which management determined led to specific negative operational consequences during the . . . pandemic";[42] and (3) the provisions negatively affect effective and efficient government operations due to the errors that occurred while employees were on emergency telework during the pandemic.[43] The Agency further asserts the grievants could mitigate the adverse effects by choosing to live closer to the office, thereby reducing their respective commutes.[44]

In my view, allowing the grievants to continue not having to commute to the office – and the attendant avoidance of reduction of their personal time – is a significant benefit, particularly given that they already have been teleworking full-time for a long period of time. It is true that the Agency is requiring the grievants to come into the office only once per week, which arguably mitigates the adverse effects of the exercise of management's right. At the same time, it is undisputed that other employees in the grievants' division have been approved to telework full-time.[45] This indicates that the Agency has already changed the duty stations of some employees in the division, which mitigates any adverse effects the award may have on the right to determine organization.[46] As for the Agency's reliance on budgeting errors during the pandemic, the Arbitrator found that the grievants were not responsible for those errors[47] and that there was no evidence that full-time telework prevented the grievants from collaborating with coworkers or participating in informal and formal discussions.[48] The Agency does not demonstrate those findings are based on nonfacts, so I defer to them.[49]

The Agency further argues the provisions, as interpreted and applied, are not appropriate arrangements, because they: (1) "do not mitigate management's exercise of rights but rather wholly eliminate the exercise of certain management rights";[50] and (2) effectively require the Agency to grant full-time telework for employees who teleworked during the pandemic, even when the Agency has found that full-time telework would adversely affect Agency operations.[51] I disagree on both counts. The provisions, as interpreted and applied, do not eliminate management's ability to deny telework requests; they merely require management to "provide some basis that the telework that was done by the affected employee was unsuccessful in some respect or that there were actual identifiable problems with that employee's telework experience during the pandemic."[52] Further, the Arbitrator specifically stated: "That is not to say that all such requests must be granted if the affected employee(s) were successful in their telework during the pandemic. All cases must be assessed and determined on a case[-]by[-]case basis."[53] The Arbitrator merely found that the Agency did not demonstrate that granting *these particular grievants'* full-time telework requests, in the circumstances of *this case*, would adversely affect Agency operations;[54] he did *not* effectively require the Agency to continue to allow full-time telework without regard to its impact on Agency operations.

The Agency also asserts that it has "concerns about the long-term impacts [full-time] telework would have on its workforce, including concerns about

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[38] *Id.* (referencing the division organization chart); *see also id.* at 11 (stating that two members of the grievants' team are full-time teleworkers and the team's chain of command is spread out across the country); *id.* at 15 (stating that the grievants' team lead is remote and the direct supervisor is based in another city).
[39] Opp'n Br. at 27.
[40] Union's Supp. Br. at 11.
[41] Agency's Supp. Br. at 32.
[42] *Id.* at 33.
[43] *Id.* at 33-34.
[44] *Id.* at 32.
[45] Opp'n Br. at 27.
[46] *Cf. NTEU v. FLRA*, 550 F.3d 1148, 1155 (D.C. Cir. 2008) (faulting the Authority for failing to consider evidence that, if credited, would significantly diminish management's alleged interest).
[47] Award at 29.
[48] *Id.* at 29, 32-33.
[49] *AFGE, Loc. 2142*, 72 FLRA 764, 766-67 (2022) (Chairman DuBester concurring) (deferring to arbitrator's factual findings in resolving contrary-to-law exception where excepting party did not demonstrate that those findings were nonfacts).
[50] Agency's Supp. Br. at 31.
[51] *Id.* at 31-32.
[52] Award at 31.
[53] *Id.*
[54] *Id.* at 33.

collaboration, cross-collaboration among different areas, and team-building."[55] However, the Agency's general concerns do not overcome the Arbitrator's factual findings – not shown to be nonfacts – that these particular grievants were able to effectively collaborate with coworkers.[56] Further, nothing in the award precludes the Agency from denying full-time telework if it is able to demonstrate the alleged impacts in the future. As such, I do not find these arguments persuasive.

Finally, the Agency argues *U.S. Department of Defense, Defense Logistics Agency* (*DLA*)[57] supports finding the provisions are not appropriate arrangements.[58] However, in *DLA*, the Authority applied the pre-*CFPB*, "*DOJ* framework"[59] and found the remedies at issue there were not "reasonably and proportionally related" to the found contractual violation.[60] *DLA* did not address § 7106(b)(3)[61] and, thus, is inapposite to the appropriate-arrangement issue.

In sum, I would find that the Agency's arguments do not demonstrate that the award imposes significant burdens on the right to determine organization. When weighed against the benefits that continued, full-time telework would have for the grievants, I would find that the CBA provisions, as interpreted and applied, do not excessively interfere with that management right. Therefore, I would conclude that the provisions, as interpreted and applied, are appropriate arrangements under § 7106(b)(3) of the Statute, and the second part of the *CFPB* test is therefore met.[62]

The third part of the *CFPB* test asks whether the excepting party challenges the remedy separate and apart from the underlying contract violation.[63] Here, the Agency challenges both the Arbitrator's finding of a CBA violation and his remedy of full-time telework.[64] Therefore, the answer to the third *CFPB* question is yes, and I move to the fourth step of the *CFPB* test.[65]

The fourth *CFPB* question is whether the Agency demonstrates the remedy fails to reasonably correlate to the enforced provision, as interpreted and applied by the Arbitrator.[66] The Agency argues that the remedy of full-time telework does not reasonably correlate with the enforced CBA provisions, which expressly state that telework is not an employee entitlement and merely require the Agency to consider an employee's telework performance during the pandemic, if applicable, and to provide a written justification if the Agency does not grant the telework request.[67] According to the Agency, the CBA does not: discuss the particular number of telework days for which telework-eligible employees must be approved; state that telework should be maximized; or provide that full-time telework should be granted whenever possible.[68] Further, the Agency argues that an appropriate remedy would be to direct the Agency to either reconsider its denial of the grievants' requests in light of additional criteria, or to issue more fulsome written explanations of those denials – not to grant full-time telework.[69] By contrast, the Union argues that the remedy reasonably correlates to the CBA violation.[70]

The Arbitrator found that the Agency violated the CBA by denying the grievants' requests for full-time telework. The remedy merely directs the Agency to do what it would have done if it had not violated the CBA: grant the grievants' requests. That remedy is reasonably correlated to the CBA violation.[71] Therefore, the answer to the fourth *CFPB* question is no. As such, I would deny the exception regarding the right to determine organization,[72] and I would resolve the remaining exceptions that are properly before us.

Accordingly, I concur in part and dissent in part.

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[55] Agency's Supp. Br. at 33.
[56] Award at 29, 32-33.
[57] 70 FLRA 932 (2018) (Member DuBester dissenting).
[58] Exceptions Br. at 26-27, 28.
[59] *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting).
[60] *DLA*, 70 FLRA at 933.
[61] *Id.* at 933-34.
[62] The Union also argues that the provisions, as interpreted and applied, are procedures under § 7106(b)(2) of the Statute. Union's Supp. Br. at 12-14. Because I would find the provisions to be appropriate arrangements under § 7106(b)(3), I would find it unnecessary to also determine whether they are procedures. *See, e.g.*, *U.S. Dep't of VA, James A. Haley Veterans Hosp. & Clinics*, 73 FLRA 880, 885 n.85 (2024) (then-Member Kiko concurring on other grounds) (finding it unnecessary to address claim that provision was enforceable under § 7106(b)(2) where authority found provision enforceable under § 7106(b)(3)). As such, I do not address the majority's finding that the provisions are not procedures. *See* Majority at 10-11.
[63] *CFPB*, 73 FLRA at 681.
[64] Agency's Supp. Br. at 3; 38-39.
[65] *U.S. DHS, U.S. CBP*, 74 FLRA 6, 11 (2024) (*CBP*).
[66] *CFPB*, 73 FLRA at 681.
[67] Agency's Supp. Br. at 3; 39-40.
[68] *Id.* at 39-40.
[69] *Id.* at 3, 40.
[70] Union's Supp. Br. at 16-18.
[71] *See CBP*, 74 FLRA at 12 (finding remedies reasonably correlated to enforced CBA provision).
[72] *See id.*