74 FLRA No. 81

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 177
(Union)

0-AR-5897

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DECISION

September 23, 2026

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

I. Statement of the Case

Arbitrator Roger C. Williams issued an award finding the Agency violated the parties' agreement by failing to follow Agency rules or regulations that require agricultural specialists to be assigned to only agricultural inspectional activities. The Agency excepted to the award on contrary-to-law and nonfact grounds. For the reasons explained below, we partially dismiss and partially deny the exceptions.

II. Background and Arbitrator's Award

The Agency employs agricultural specialists who inspect travelers and cargo, in order to prevent prohibited agricultural materials from entering the United States. In 2006, a Government Accountability Office (GAO) report revealed that (1) agricultural specialists were being assigned to perform work that was unrelated to agricultural inspection activities, and (2) pest infestations increased in the United States.

In response to the GAO report, Thomas S. Winkowski – then-Assistant Commissioner of the U.S. Customs and Border Protection (CBP) Office of Field Operations – issued a memorandum (the Winkowski Memo) on December 10, 2007. The Winkowski Memo stated that its "purpose . . . [was] to ensure that [a]griculture [s]pecialists [were] performing inspectional activities directly related to the protection of American agriculture," and emphasized that the Agency "must ensure that [agricultural specialists] are assigned to agricultural inspectional activities at the individual ports of entry."[1]

On December 13, 2007, Michael Chertoff – then-Secretary of Homeland Security – also wrote Congress a letter (the Chertoff Letter), which stated:

> [A]t my direction, the Assistant Commissioner of Field Operations [of] CBP has sent a memo to all field offices (attached) reaffirming that the [a]griculture [s]pecialists are to be specifically assigned to agricultural inspection activities and will be dedicated to the mission of protecting the [n]ation's food supply and agricultural industry from pests, diseases, and related bio-threats, absent exigent operational circumstances.[2]

Accordingly, the Agency established a unit of agricultural specialists at the Port of Atlanta. When the unit was established in 2016, the then-Director of the Port of Atlanta stated agricultural specialists

> will follow national policy . . . and target specifically for ag[ricultural] purposes. They will not be counted as staffing for regular . . . purposes. They are a separate and apart [t]eam and will be scheduled and staffed as such. They may not be used to augment regular . . . activities.
>
> That said, in specific instances where their expertise may be needed or in cases of emergency, they may be assigned to regular . . . duties. However, this will require [w]atch[-c]ommander[-]level approval and be justified via specific email. . . .[3]

In 2020, the Director for the Port of Atlanta announced that, beginning in 2021, that port would require agricultural specialists' job duties to conform to CBP Directive 3340-051 (the Directive). The Director stated that § 6.2.1 of the Directive required agricultural specialists to "conduct all threats analysis" and to "target

[1] Exceptions, Ex. G, Winkowski Memo at 1.
[2] Exceptions, Ex. F, Chertoff Letter at 1.
[3] Exceptions, Ex. H.17 at 1.

all threats as indicated in the Directive."[4] He reiterated that "[t]he primary focus for [agricultural specialists] will be [a]griculture[,]" but stated that "their secondary focus" would be on "other threats."[5] As relevant here, Section 6.2.1 of the Directive states,

> [Passenger Analytical Units] must utilize all available automated tools to conduct advance targeting and risk assessments on travelers arriving in their area of responsibility to identify those who are high risk due to issues including, but not limited to:
>
> • Terrorism
> • National Security
> • Public Health
> • Weapons
> • Narcotics
> •Alien Smuggling/Human Trafficking
> • Fraudulent Documents/Fraud
> • Fugitives from Justice
> • Inadmissibility
> • Currency
> • Agriculture
> • Criminal Misconduct.[6]

In turn, § 3.9 of the Directive defines "Passenger Analytical Units," in relevant part, as "[a]ny Field Office or Port unit, in any operational environment, involved in the targeting or analysis of passengers destined to or departing from the United States to include . . . CBP personnel assigned to perform traveler targeting and risk assessment."[7]

The Union filed a grievance, alleging the Agency changed agricultural specialists' duties, in violation of several sections of the parties' agreement, and that the change eliminated overtime opportunities that were previously available to bargaining-unit employees who were not agricultural specialists. The grievance went to arbitration, where the parties stipulated to the following issue: "Did the Agency violate Article[s 2, 3, 13, or 26] of the parties' . . . [a]greement in relation to the Agency's assignment of duties performed by [a]griculture [s]pecialists . . . ? If so, what is the appropriate remedy?"[8]

The Arbitrator noted Article 3, Section 1 of the parties' agreement states that "[e]xcept as provided by law, in the administration of all matters covered by this [a]greement, the parties are governed by . . . Department of Homeland Security [(DHS)] and [CBP] rules and regulations."[9] The Arbitrator found the Winkowski Memo and the Chertoff Letter were rules or regulations within the meaning of Article 3, Section 1. Further, he held the Agency failed to comply with the Chertoff Letter and the Winkowski Memo when it mandated that agricultural specialists would be required to perform duties unrelated to agricultural inspections.

Although the Agency claimed the Directive superseded the Chertoff Letter and the Winkowski Memo, the Arbitrator rejected that claim. In this regard, he stated that the Directive "does not say that it supersedes, rescinds[,] or replaces the Winkowski [Memo] or the Chertoff [Letter]."[10] Further, the Arbitrator found the 2016 email demonstrated that Agency management believed the Chertoff Letter and the Winkowski Memo created a "national policy" that agricultural specialists "should not be assigned to perform non-agricultural targeting . . . unless their expertise was needed or there was an emergency."[11]

The Arbitrator also determined that "the language [in the Directive] relied on by the Agency does not mean what the Agency says it means," but that it merely described "procedures to be followed by [employees] engaged in passenger analys[i]s."[12] Additionally, the Arbitrator found that § 6.2.1 of the Directive "requires a Passenger Analysis *Unit*[,] collectively[,] to 'utilize all available automated tools' to target[,] and then includes a broad description of targeting."[13] According to the Arbitrator, the Directive does not state that "every [agricultural specialist] . . . is required to target for all threats, or that . . . [s]pecialists . . . are required to routinely target for non-agriculture threats."[14] In this connection, the Arbitrator stated that the Directive "is not a policy statement which requires every member of a [Passenger Analysis Unit] to target for all threats or prohibits any individual employee or group of [Passenger Analysis Unit] members from being assigned to target for only one type of threat or from being exempted from targeting for some threats."[15]

The Arbitrator concluded that, by failing to comply with the Chertoff Letter and the Winkowski Memo, the Agency violated Article 3, Section 1 of the parties' agreement. The Arbitrator also concluded the Agency violated the parties' agreement in two other respects: (1) by failing to comply with the Chertoff Letter

[4] Exceptions, Ex. H.2 at 3.
[5] *Id.*
[6] Exceptions, Ex. H.8 (Directive) at 9.
[7] *Id.* at 4.
[8] Award at 2.
[9] Exceptions, Ex. H-1, Collective-Bargaining Agreement (CBA) at 5.
[10] Award at 27.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 28.
[14] *Id.* at 27.
[15] *Id.* at 28.

and the Winkowski Memo, the Agency violated Article 13, Section 1.O's requirement that work units be "based on the regular and recurring functions that will be performed";[16] and (2) the Agency violated Article 26, Section 3 because it made a more than de minimis change to employees' conditions of employment without engaging in the requisite bargaining.[17]

The Arbitrator directed the Agency to comply with the requirements of the Chertoff Letter and the Winkowski Memo. Additionally, for "any [employees] who were deprived of overtime assignments or other monetary rewards" by the Agency's violations, the Arbitrator directed the Agency to pay "full [backpay], benefits[,] and interest to which [those employees] may be entitled under the Back Pay Act" (BPA).[18] Further, the Arbitrator stated, "[t]he Union has prevailed in this case to an extent that it is entitled to file a request for an order seeking the payment of attorneys' fees and costs from the Agency."[19] He retained jurisdiction for 180 days "to enable the Union to file a request for an order" of attorney fees and costs, and "to enable either party or both parties to request and receive clarification of any disagreement(s) over the [a]ward . . . which the parties are unable to resolve between themselves."[20]

The Agency filed exceptions to the award on June 20, 2023, and the Union filed an opposition on July 19, 2023.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's contrary-to-law exceptions.

In its contrary-to-law exceptions, the Agency argues the award is contrary to the Administrative Procedure Act (APA)[21] because the Arbitrator allegedly found the Chertoff Letter and the Winkowski Memo had the effect of a law, rule, or regulation.[22] The Agency also argues the Arbitrator erred, as a matter of law, by not deferring to the Agency's interpretations of the Chertoff Letter, the Winkowski Memo, and the Directive.[23] The Union argues the Authority should dismiss these arguments because the Agency failed to raise them at arbitration.[24]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[25] the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[26] The parties stipulated that one of the issues to be decided at arbitration was whether the Agency violated Article 3 of the parties' agreement.[27] Again, Article 3, Section 1 states that "[e]xcept as provided by law, in the administration of all matters covered by this [a]greement, the parties are governed by . . . [DHS] and [CBP] rules and regulations."[28] At arbitration, the Union argued the Agency violated Article 3, Section 1 by not assigning agricultural specialists to only agricultural inspection activities;[29] that those actions were contrary to the Chertoff Letter and the Winkowski Memo, which had the force and effect of a law, rule, or regulation;[30] and that the Directive did not obviate the requirements of the Chertoff Letter and the Winkowski Memo.[31] Therefore, at arbitration, the Agency should have known to argue that the Chertoff Letter and the Winkowski Memo were not laws, rules, or regulations under the APA, and that the Arbitrator should defer to the Agency's interpretations of the Chertoff Letter, the Winkowski Memo, and the Directive. Although the Agency argued for its preferred interpretations at arbitration, there is no evidence that the Agency raised its APA and deference arguments.

Our colleague concludes that "the Agency preserved its right to argue" that the Chertoff Letter and Winkowski Memo do not constitute a rule or regulation.[32] In reaching this conclusion, she relies on arguments the Agency made at arbitration.[33] At arbitration, the Agency argued that assigning agricultural specialists "to only target for agriculture-related threats was inconsistent with

[16] CBA at 33.

[17] Article 26, Section 3 of the parties' agreement provides, in pertinent part, that "the Employer shall provide the Union with reasonable advance notice of intended changes where the reasonably foreseeable adverse effect of the change on the bargaining unit's conditions of employment is more than de minimis." *Id.* at 118.

[18] Award at 32.

[19] *Id.*

[20] *Id.* at 33.

[21] 5 U.S.C. §§ 551-596.

[22] Exceptions Br. at 15-18.

[23] *Id.* at 18-23.

[24] Opp'n Br. at 15-17, 21-22.

[25] 5 C.F.R. §§ 2425.4(c), 2429.5.

[26] *U.S. Dep't of VA*, 73 FLRA 660, 661 (2023) (*VA*); *U.S. DOJ, U.S. BOP, Fed. Corr. Complex, Victorville, Cal.*, 73 FLRA 624, 625 (2023) (*Victorville*).

[27] Award at 2.

[28] CBA at 5.

[29] Exceptions, Ex. D, Tr. at 12 ("[U]nder the parties' . . . [a]greement, in Article 3[,] Section 1, the parties are bound by [DHS] rules and regulations. Here the Agency violated a DHS directive.").

[30] Exceptions, Ex. C, Union's Closing Br. at 17 ("The Agency violated the Agency-wide rule and regulation when it assigned non-agriculture inspection functions to [a]griculture [s]pecialists . . . . Further, it is well established in arbitral precedent that an agency is bound by governing agency regulations.").

[31] *Id.* at 7 ("[T]he 2014 [CBP] Directive did not overturn . . . Chertoff[Letter].").

[32] Dissent at 12.

[33] *Id.* at 12-13.

[the Directive]," that targeting for all threats was "consistent with nationwide and Agency[-]wide policy that had been in effect since 2014," and that the 2007 documents contained "no prohibition" against agricultural specialists targeting for all threats.[34] The Agency also relied on testimony that the Directive and the Agency's actions "did not contradict" the 2007 documents.[35]

However, the Agency never claimed at arbitration that the Chertoff Letter and the Winkowski Memo are not laws, rules, or regulations under the APA.[36] Our colleague states that "[a]n inherent aspect" of de novo review "is determining whether the alleged agency regulation *actually constitutes* a rule or regulation."[37] However, she does not cite any support for the notion that, in assessing whether a document is an agency rule or regulation *within the meaning of a collective-bargaining agreement*, the Authority automatically considers whether that document is a law, rule, or regulation *within the meaning of the APA*. Nor did the Agency argue, as our colleague states, that "only the 2014 Directive reflects the Agency's current policy."[38] Rather, the Agency's arguments concerned which policy governed and whether they conflicted.[39] Those arguments are substantively different from the Agency's new argument that the Chertoff Letter and the Winkowski Memo are not laws, rules, or regulations under the APA.[40] Further, the same reasoning applies to the Agency's claim that the Arbitrator erred by not deferring to the Agency's interpretations of the Chertoff Letter, the Winkowski Memo, and the Directive.[41] While the Agency urged the Arbitrator to adopt its interpretation of the Chertoff Letter, the Winkowski Memo, and the Directive, these arguments are not tantamount to arguing that the Arbitrator is required – as a matter of law – to defer to the Agency's interpretations. Therefore, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency from making those arguments before the Authority, and we dismiss the portions of the Agency's contrary-to-law exceptions that raise those arguments.[42] Because these arguments are barred, we do not opine on the merits of whether the Chertoff Letter and Winkowski Memo constitute laws, rules, or regulations under the APA.

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency argues the award is based on nonfacts.[43] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[44] The Authority has held that disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.[45]

According to the Agency, the Arbitrator based his award on a clearly erroneous finding "there is a [n]ational Agency policy that prohibits the assignment of all-threats targeting duties" to agricultural specialists.[46] Specifically, the Agency argues the Arbitrator erred by finding the Chertoff Letter and the Winkowski Memo are "directives" that "mandated" assigning agricultural specialists only to agricultural inspection activities.[47] The Agency cites witness testimony and other evidence that purportedly establishes the Chertoff Letter and Winkowski Memo did not "speak to – or limit – the types of duties that may be assigned to [a]griculture [s]pecialists in furtherance of their agricultural inspection duties."[48] The Agency also cites witness testimony that "assigning the [a]griculture [s]pecialists . . . to only target for agriculture-related threats was inconsistent with [the Directive]."[49]

In his award, the Arbitrator credited the 2016 email from the then-Director of the Port of Atlanta, finding it demonstrated the Agency believed the Chertoff Letter and the Winkowski Memo created a "national policy" that agricultural specialists "should not be assigned to perform non-agricultural targeting . . . unless their expertise was needed or there was an emergency."[50] While the Agency claims other testimony proves otherwise, the Agency's arguments merely challenge the Arbitrator's evaluation of the evidence and provide no basis for finding the award is based on a nonfact.[51] Therefore, we deny the Agency's nonfact exception.

[34] Exceptions, Ex. B, Agency's Post-Hr'g Br. (Agency's Post-Hr'g Br.) at 19-20, 26-27.
[35] *Id.* at 28.
[36] Exceptions Br. at 15-18.
[37] Dissent at 13.
[38] *Id.*
[39] *See* Agency's Post-Hr'g Br. at 19-20, 26-28.
[40] *See id.*
[41] Exceptions Br. at 18-23.
[42] *VA*, 73 FLRA at 661 (dismissing contrary-to-law argument that excepting party could have, but failed to, present to the arbitrator); *AFGE, Loc. 2338*, 71 FLRA 1039, 1040 (2020) (same).
[43] Exceptions Br. at 30-33.
[44] *NTEU, Chapter 46*, 73 FLRA 654, 656 (2023); *AFGE, Loc. 3601*, 73 FLRA 515, 517 (2023).
[45] *U.S. Dep't of the Navy, Navy Region Mid-Atl. Fire & Emergency Servs., Naval Weapons Station, Earle, N.J.*, 74 FLRA 384, 386-87 (2026) (*Naval Weapons Station*) (Chairman Kiko concurring); *Ass'n of Admin. L. Judges, IFPTE*, 74 FLRA 325, 331 (2026) (*AALJ*) (Member Arrington concurring).
[46] Exceptions Br. at 30.
[47] *Id.*
[48] *Id.* at 31.
[49] *Id.* at 32.
[50] Award at 27.
[51] *Naval Weapons Station*, 74 FLRA at 387 (denying a nonfact exception where it merely challenged the arbitrator's evaluation of the evidence); *AALJ*, 74 FLRA at 331 (same).

B. The award is not contrary to law.

The Agency argues the award is contrary to law.[52] When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[53] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[54] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[55] Exceptions based on misunderstandings of an arbitrator's award do not demonstrate that the award is contrary to law.[56]

1. The BPA

According to the Agency, the award is contrary to the BPA in two respects.[57]

First, the Agency argues that the Arbitrator allegedly awarded backpay without "mak[ing] the requisite inquiry" under the BPA, and that he "assume[d], without any evidence, that an employee . . . suffered a monetary loss."[58] The Union argues that the Authority should dismiss this argument because it was not raised below.[59] We assume, without deciding, that this argument is properly before us,[60] but we reject it for the following reasons.

The BPA authorizes an award of backpay when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified and unwarranted personnel action, such as the violation of a collective-bargaining agreement; and (2) the personnel action resulted in the withdrawal or the reduction of an employee's pay, allowances, or differentials.[61] Although the Arbitrator directed the Agency to pay backpay to "any" employees who "may" be entitled to such pay as a result of the Agency's contract violations, he did not actually award backpay to any individual employees.[62] There is no basis for concluding that the Arbitrator directed the Agency to pay backpay to any employees who would not meet the BPA's requirements.[63] Therefore, we deny this exception.

Second, the Agency argues the award is contrary to the BPA because the Arbitrator (1) awarded attorney fees without giving the Agency an opportunity to respond to a petition for fees,[64] and (2) failed to determine whether fees were in the interest of justice under 5 U.S.C. § 7701(g)(1).[65] However, the Arbitrator merely gave the Union the opportunity to seek attorney fees; he did not actually award any, or deny the Agency an opportunity to respond to a fee petition. Therefore, the Agency's arguments are based on a misunderstanding of the award, and provide no basis for finding the award contrary to law.[66] Accordingly, we also deny this exception.

2. The Chertoff Letter, the Winkowski Memo, and the Directive

In the context of arguing that the award is contrary to law because the Arbitrator failed to defer to the Agency's interpretations of the Chertoff Letter, the Winkowski Memo, and the Directive – arguments that we have dismissed, for the reasons stated above – the Agency also disagrees with the Arbitrator's interpretations of those documents.[67] Specifically, the Agency argues that: (1) neither the Chertoff Letter nor the Winkowski Memo prohibited the Agency from directing "[a]griculture [s]pecialists [to] utiliz[e] all-threats targeting in the course of performing their agriculture-related inspectional duties";[68] and (2) the Directive anticipates that agricultural specialists will perform all-threats targeting duties.[69] Even assuming that these arguments sufficiently raise separate contrary-to-law exceptions, we reject them for the following reasons.

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[52] Exceptions Br. at 15-29.
[53] *U.S. DHS, U.S. CBP*, 74 FLRA 403, 411 (2026).
[54] *U.S. Dep't of HHS, Indian Health Serv.*, 74 FLRA 421, 422 (2026).
[55] *Id.*
[56] *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 419 (2023) (*Nat'l Park Serv. I*); *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 220, 221 (2022) (*Nat'l Park Serv. II*); *U.S. DHS, U.S. CBP*, 67 FLRA 461, 463 (2014) (*CBP*).
[57] Exceptions Br. at 23-29.
[58] *Id.* at 25.
[59] Opp'n Br. at 27-29.
[60] *See, e.g.*, *AFGE, Loc. 2338*, 73 FLRA 522, 525 n.50 (2023) (assuming, without deciding, argument was properly before the Authority).
[61] *Victorville*, 73 FLRA at 626 (citing *U.S. Dep't of the Air Force, 11th Wing, Joint Base Andrews, Md.*, 72 FLRA 691, 692 (2022)).
[62] Award at 32.
[63] *See, e.g.*, *U.S. DHS, CBP*, 68 FLRA 157, 164 (2015) (Member Pizzella dissenting on other grounds) (holding that "an arbitrator['s award] need not require evidence of itemized individual losses to support an award of backpay under the BPA, as long as an award sufficiently identifies the specific circumstances under which employees are entitled to backpay" (citation modified)).
[64] Exceptions Br. at 29.
[65] *Id.*; *see also id.* at 28.
[66] *Nat'l Park Serv. I*, 73 FLRA at 419-20; *Nat'l Park Serv. II*, 73 FLRA at 221; *CBP*, 67 FLRA at 463-64.
[67] Exceptions Br. at 18-23.
[68] *Id.* at 20.
[69] *Id.* at 22-23.

The Arbitrator noted the Chertoff Letter states "[a]griculture [s]pecialists are to be specifically assigned to agricultural inspection activities," and that the Winkowski Memo directed the Agency to "ensure that [agricultural specialists] are assigned to agricultural inspectional activities at the individual ports of entry."[70] Further, the Arbitrator found a 2016 email from the then-Director of the Port of Atlanta – that was sent after the Directive became effective – demonstrated that Agency management believed the Chertoff Letter and Winkowski Memo created a "national policy" that agricultural specialists "should not be assigned to perform non-agricultural targeting . . . unless their expertise was needed or there was an emergency."[71] Consequently, the Arbitrator found the Chertoff Letter and Winkowski Memo require the Agency "to assign [a]griculture [s]pecialists to agricultural inspectional activities . . . [and to] refrain from assigning them to other duties except in exigent operational circumstances."[72]

With regard to the Directive, as noted above, § 6.2.1 provides that *Passenger Analytical Units* "must utilize all available automated tools to conduct advance targeting and risk assessments on travelers arriving in their area of responsibility to identify those who are high risk due to issues including, but not limited to" several listed types of threats.[73] The Arbitrator found that § 6.2.1 "requires a Passenger Analysis *Unit*[,] collectively[,] to 'utilize all available automated tools' to target[,] and then includes a broad description of targeting."[74] He also found that the Directive does not state that *every member* of a Passenger Analysis Unit must target for all of the listed threats, or that any individual or group of members of such a unit may be assigned to target only some of the listed threats.[75]

The Agency does not cite any wording from the Chertoff Letter, the Winkowski Memo, or the Directive that conflicts with the Arbitrator's interpretations of those documents. Nor does the Agency provide any other basis for finding those interpretations contrary to law. Our colleague also does not identify any language in the Directive that undermines these findings. Rather, she relies on the Agency's view that every employee should conduct all-threats targeting,[76] even though the Directive itself speaks in terms of the obligations of Passenger Analytical Units as a whole.[77] The plain wording of the Directive does not clearly require, as our colleague claims, that "*every employee*" must target for all threats.[78] Nor does she address the 2016 email, issued after the Directive took effect, in which the Agency's own Port Director described the Chertoff Letter and Winkowski Memo as establishing a "national policy" that agricultural specialists should not be assigned non-agricultural targeting duties absent specified circumstances.[79]

Accordingly, we deny this exception.

V. Decision

We partially dismiss and partially deny the Agency's exceptions.[80]

[70] Award at 25 (quoting the Chertoff Letter and Winkowski Memo).
[71] *Id.* at 27.
[72] *Id.* at 26.
[73] Directive at 9.
[74] Award at 28.
[75] *Id.*
[76] Dissent at 16-17.
[77] Directive at 9.
[78] Dissent at 16.
[79] Award at 27.

[80] We note that the Agency also cites the Authority's standard for finding an award deficient on the ground that it is incomplete, ambiguous, or contradictory as to make implementation of the award impossible. Exceptions Br. at 6-7. However, the Agency does not provide any additional arguments regarding that ground for review. Therefore, to the extent that the Agency intended to raise a separate exception based on that ground, we deny that exception as unsupported. *See, e.g.*, *AFGE, Nat'l VA Council #53*, 74 FLRA 52, 54 n.27 (2024) (citing 5 C.F.R. § 2425.6(e)(1) ("An exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground [for review].")). Additionally, we note the Union argues that: the Arbitrator found violations of three of the agreement's articles; the Agency excepts to only the finding of an Article 3 violation; and, thus, "if the [Authority] sides with the Agency with respect to . . . [that] violation, the award must still stand." Opp'n Br. at 35. Given our disposition of the Agency's exceptions, we need not address whether the Arbitrator's other contractual findings provide separate and independent grounds supporting his award. *See U.S. DOL, Bureau of Lab. Stat.*, 67 FLRA 77, 81 (2012) ("[I]f the excepting party does not demonstrate that the award is deficient on one of the grounds relied on by the arbitrator, then it is unnecessary to address exceptions to the other grounds.").

Chairman Kiko, concurring in part, dissenting in part:

I agree that the Agency has not demonstrated that the Arbitrator directed the Agency to pay backpay to any employees who would not meet the requirements of the Back Pay Act. Additionally, I agree that the Agency's arguments concerning attorney fees are based on a misunderstanding of the award, and therefore provide no basis for finding the award contrary to law. However, the Arbitrator's finding that the Agency violated Article 3 of the parties' agreement is based entirely on his erroneous conclusion that the Chertoff Letter and Winkowski Memo were governing Agency rules. For the reasons described below, I find that the Agency sufficiently preserved its arguments challenging this portion of the award, which I would set aside as deficient.

At its heart, this case concerns the Agency's efforts to utilize all available resources to protect our nation from any and all threats posed by foreign visitors, returning U.S. citizens, and imported cargo that enters the United States.[1] The Agency's diligent work, in Fiscal Year (FY) 2025 alone, resulted in 2,997 weapons and ammunition seizures,[2] 691,906 immigration "enforcement encounters,"[3] the seizure of 583,000 pounds of illegal drugs,[4] and the seizure of 1,328,121 prohibited or restricted agricultural products.[5] Agricultural specialists inspected 2,830,085 passengers in FY 2025,[6] while other agency personnel screened 109.8 million passengers in FY 2025.[7] The Agency's important mission – demonstrated by these statistics – illustrates the real-world consequences of the Arbitrator's erroneous conclusions.

In its arguments at arbitration, the Agency preserved its right to argue that the Arbitrator erred as a matter of law by: (1) relying on the 2007 Chertoff Letter[8] and Winkowski Memo[9] rather than a 2014 Directive[10] to determine governing Agency rules and regulations; and (2) concluding that the Chertoff Letter and Winkowski Memo prohibited the Agency from assigning agricultural specialists to target all threats, rather than only agricultural threats.[11] The Agency raised these arguments to the Arbitrator, arguing: (1) "assigning [a]gricultural [s]pecialists . . . to only target for agriculture-related threats was inconsistent with [the 2014] Directive";[12] (2) only the 2014 Directive reflects the Agency's current policy;[13] and (3) nothing in the Chertoff Letter or the Winkowski Memo prohibited the Agency from assigning

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[1] *See* U.S. CBP, *Stats and Summaries*, https://www.cbp.gov/newsroom/stats (on file with the Federal Labor Relations Authority (FLRA)) (last visited Sep. 22, 2026).

[2] U.S. CBP, *Weapons and Ammunition Seizures*, https://www.cbp.gov/newsroom/stats/weapons-and-ammunition-seizures (on file with the FLRA) (last visited Sep. 22, 2026).

[3] U.S. CBP, *CBP Enforcement Statistics*, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics (on file with the FLRA) (last visited Sep. 22, 2026).

[4] U.S. CBP, *Drug Seizure Statistics*, https://www.cbp.gov/newsroom/stats/drug-seizure-statistics (on file with the FLRA) (last visited Sep. 22, 2026).

[5] U.S. CBP, *Agriculture Enforcement Statistics*, https://www.cbp.gov/newsroom/stats/agriculture-enforcement-statistics (on file with the FLRA) (last visited Sep. 22, 2026).

[6] *Id.*

[7] U.S. CBP, *Traveler and Conveyance Statistics*, https://www.cbp.gov/newsroom/stats/travel (on file with the FLRA) (last visited Sep. 22, 2026).

[8] Exceptions, Ex. F (Chertoff Letter).

[9] Exceptions, Ex. G (Winkowski Memo).

[10] Exceptions, Ex. H.8 (2014 Directive) at 3 (CBP Directive No. 3340-051 titled "Passenger Analytical Unit Procedures for Targeting High-Risk Travelers").

[11] *See* Award at 1 (summarizing grievance as alleging Agency violated parties' agreement by assigning agricultural specialists "to target high-risk passengers for narcotics, weapons, immigration violations, smuggling[,] and other criminal violations, when they had previously been assigned to target passengers only to prevent the introduction of harmful exotic plant pests, foreign animal diseases, and potential ag/bio-terrorism into the United States").

[12] Exceptions, Ex. B (Agency's Post-Hr'g Br.) at 19; *see also id.* at 17 ("[H]aving the [a]griculture [s]pecialists . . . only target for agriculture-related threats did not align with the [2014 D]irective . . . , as the [2014 D]irective stated that all personnel in the [Passenger Analytical U]nit – to include [o]fficers and [a]griculture [s]pecialists assigned to [that unit] at the Port of Atlanta – should be targeting for all threats."), 20 ("The assignment of all threats targeting for both [o]fficers and [a]gricultur[al] [s]pecialists . . . was consistent with nationwide and Agency[-]wide policy that had been in effect since 2014.").

[13] *See id.* at 26-27 (arguing that the Union had "failed to demonstrate how [the Chertoff Letter or the Winkowski Memo] establish a past practice that is being violated in the Port of Atlanta by having [a]griculture [s]pecialists . . . target for all-threats" and that, "since the issuance of th[o]se items," the units at issue were "realign[ed]" under the National Targeting Center and the 2014 Directive requiring officers *and agriculture specialists* to target all threats); *see also* Exceptions, Ex. E, Day 2 Hr'g. Tr. (Tr.) at 94-95 (Port Director of Atlanta characterizing the 2014 Directive as "the national directive that [the Agency] has with regards to passenger analysis unit procedures for targeting of high-risk travelers" and asserting that bid descriptions exempting agriculture specialists from targeting all threats were inconsistent with the 2014 Directive), 98 (Port Director of Atlanta testifying that the changes she wanted to implement were "to bring the unit into alignment with the national [2014 D]irective").

agricultural specialists to target for all threats.[14] Therefore, these arguments are properly before the Authority.

When evaluating exceptions asserting that an arbitrator's award is contrary to a governing agency rule or regulation, the Authority considers the matter de novo and determines whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, the rule or regulation.[15] An inherent aspect of this inquiry is determining whether the alleged agency regulation *actually constitutes* a rule or regulation, which under Authority precedent must be "mandatory and prescriptive in [its] application."[16] For the reasons that follow, the Chertoff Letter and the Winkowski Memo are not governing Agency rules, while the 2014 Directive constitutes a governing Agency rule or regulation.

The Arbitrator's conclusion that the Chertoff Letter and the Winkowski Memo constitute Agency rules is illogical. The plain language of the Chertoff Letter – "Dear Senator Feinstein: I appreciate the discussions we have had over the last few weeks concerning the agricultural mission within [the Agency]" – makes it clear that it is simply correspondence responding to U.S. Senator Dianne Feinstein.[17] The timing of the Winkowski Memo – disseminated at the direction of Secretary of Homeland Security Michael Chertoff three days before the Chertoff Letter,[18] and cited therein[19] – connects the Winkowski Memo to Chertoff's assurances to Senator Feinstein, but nothing in the Winkowski Memo identifies it as a rule or regulation.[20] The Chertoff Letter and Winkowski Memo may very well have articulated genuine goals of the 2007 administration – but they do not constitute Agency rules that are "mandatory and prescriptive"[21] in application to govern a completely different administration *over fifteen years later*.

In contrast, the Authority has consistently found that directives – including Customs and Border Protection inspection directives – constitute governing agency regulations.[22] On January 23, 2012, the Agency reorganized in order to consolidate the targeting and analysis efforts of all field operations under the National Targeting Center (NTC), and made the NTC responsible for policy oversight at passenger-analysis units at ports nationwide.[23] Consequently, the Agency issued the 2014 Directive "to provide *operational guidance* and communication *protocols* for [Agency] personnel assigned to passenger targeting duties."[24] The 2014 Directive further states, under a section titled "Policy," that the Agency's "priority mission is to safeguard the American homeland and protect the public against terrorists and instruments of terror, by detecting and interdicting the cross-border movement of terrorists and their funding, weapons, and instruments."[25] The 2014 Directive defines Agency personnel governed by the directive as "CBP Officers (CBPO), CBP Agricultural Specialists (CBPAS), and supervisory CBPO and CBPAS,"[26] and directs those employees to "utilize all available automated tools to conduct advance targeting and risk assessments on travelers arriving in their area . . . to identify those who are high risk."[27] Therefore, the 2014 Directive is a governing agency rule or regulation because it is mandatory and prescriptive in application.

Presumably recognizing that the 2014 Directive is a governing agency regulation, the Arbitrator emphasized that the 2014 Directive "does not say that it supersedes, rescinds[,] or replaces . . . the Chertoff/Winkowski rule."[28] Notwithstanding the Arbitrator's creative characterization of those documents as a "rule," he failed to address the absurdity of expecting an agency-wide directive enacting a nationwide reorganization of targeting efforts by passenger-analysis units to expressly rescind *a seven-year-old letter to a senator* and a related memorandum.

The Agency argues that the Arbitrator erred as a matter of law by finding the Chertoff Letter and Winkowski Memo constituted the Agency's current policy

[14] Agency's Post-Hr'g Br. at 26-28.

[15] *U.S. DHS, U.S. CBP, Laredo Sector, Laredo, Tex.*, 72 FLRA 171, 172 (2021) (Chairman DuBester dissenting) (*Laredo Sector*) (citing *U.S. Dep't of VA, Med. Ctr., Dayton, Ohio*, 68 FLRA 360, 362 (2015) (Member Pizzella dissenting))

[16] *See U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 195 (1990) (*Fort Campbell*) ("[T]he term 'rule or regulation' must be defined to include agency rules and regulations that are mandatory and prescriptive in their application.").

[17] *See* Chertoff Letter at 1; *see also id.* ("I want to inform you of two actions the [Agency] is taking to address the concerns you have raised.").

[18] *See* Winkowski Memo at 1 (dated December 10, 2007); Chertoff Letter at 1 (dated December 13, 2007).

[19] *See* Chertoff Letter at 1 ("[A]t my direction, Assistant Commissioner [Winkowski] has sent a memo to all field offices . . . .").

[20] *See* Winkowski Memo at 1-2.

[21] *Fort Campbell*, 37 FLRA at 195.

[22] *See U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 630 (2012) (finding a 2007 directive concerning vehicle crossings constituted a governing agency regulation); *DOD, Dependents Schs.*, 54 FLRA 259, 266 (1998) (indicating the Authority has defined the term "regulation" as encompassing directives); *U.S. DOD, Off. of Dependents Schs., Ger. Region*, 48 FLRA 979, 985 (1993) (finding a directive constituted a governing agency regulation).

[23] Award at 7.

[24] 2014 Directive at 3.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 9.

[28] Award at 27.

– i.e. governing Agency rules – and by relying on this conclusion to find a violation of the parties' agreement.[29] As relevant here, Article 3 of the parties' agreement provides that "in the administration of all matters covered by this [a]greement, the parties are governed by . . . [Agency] rules and regulation[s] which do not conflict with this [a]greement and over which all bargaining responsibilities have been fulfilled."[30] The Arbitrator found the Chertoff Letter and Winkowski Memo were Agency rules, and therefore, the Agency's failure to adhere to them violated Article 3.[31] Because this alleged contract violation was based entirely on the Arbitrator's erroneous conclusion that the Chertoff Letter and Winkowski Memo were governing Agency rules – a finding inconsistent with Authority precedent and common sense – there is no basis for finding the Agency violated Article 3 by following the 2014 Directive.

Even if the Chertoff Letter and Winkowski Memo were governing Agency rules, the Agency correctly argues the Arbitrator erred by finding those "rules" prohibited the Agency from assigning agricultural specialists to target all threats.[32] As stated above, the Authority conducts a de novo review of the plain language of any relevant governing agency-wide rule or regulation.[33] As relevant here, the Chertoff Letter references the Winkowski Memo as "reaffirming that the [a]gricultur[al] [s]pecialists are to be specifically assigned to agricultural inspection activities and will be dedicated to the mission of protecting the [n]ation's food supply and agricultural industry from pests, diseases, and related bio-threats, absent exigent operational circumstances."[34] In relevant part, the Winkowski Memo characterizes it as "imperative" that agricultural specialists' assignments "are dedicated to the mission of protecting the nation's food supply and agricultural industry from pests and diseases absent exigent operational circumstances" and instructs Directors of Field Operations to "ensure that [agricultural specialists] are assigned and utilized in alignment with that mission."[35]

While the plain language of these documents emphasizes the importance of agricultural specialists performing "agricultural inspection activities,"[36] nothing in these documents dictates that agricultural specialists perform these activities *exclusively*. Absent language such as "100% of the time," "full-time," or "only," the plain language of these documents does not *prohibit* the Agency from assigning agricultural specialists to target all threats. Moreover, as the 2014 Directive makes clear, *every employee* in any passenger analytical unit must "conduct advance targeting and risk assessments on travelers arriving in their area of responsibility to identify" risks involving a wide range of threats.[37] As an Agency witness explained, "Every suitcase you open is like a present. Anything could be in there, including narcotics and knockoffs . . . same thing with your targeting. You're targeting for [particular] things, but when you open up the thing that you target, all these other things could be in there."[38] Accordingly, the Arbitrator erred in concluding that the Chertoff Letter and Winkowski Memo prohibited the Agency from assigning agricultural specialists to "target all threats."[39]

Because the Agency preserved its contrary-to-law arguments; the Chertoff Letter and Winkowski Memo are not governing Agency rules; and, alternatively, they did not prohibit the Agency's actions here, I would grant the Agency's contrary-to-law exceptions in part. The Agency has demonstrated that the Arbitrator's finding that the Agency violated Article 3 of the parties' agreement was based on his erroneous conclusion that the Chertoff Letter and Winkowski Memo restricted the Agency's ability to assign agricultural specialists to target all threats.

However, the Arbitrator also found that the Agency violated Article 26 of the parties' agreement by making a more-than-de-minimis change to employees' conditions of employment without providing notice and an opportunity to bargain. As the Arbitrator noted,

> Article 26, Section 3.A. and B.(1) and (2) of the [parties' agreement] requires the Agency to provide the Union with reasonable advance notice of intended changes where the reasonably foreseeable adverse effect of the change on the bargaining unit's conditions of employment is more than de minimis, so that the Union will have an opportunity to engage in impact[-]and[-]implementation bargaining over the procedures which management officials would observe and

[29] Exceptions Br. at 15-17.
[30] Award at 16 (quoting Article 3, Section 1 of the parties' agreement).
[31] *Id.* at 25.
[32] Exceptions Br. at 18; *see also id.* at 20 ("Neither the [Chertoff] [L]etter [n]or the [Winkowski] [M]emo spoke to the *targeting* activities performed by . . . [a]griculture [s]pecialists or established a prohibition against [a]griculture [s]pecialists utilizing all-threats targeting in the course of performing their agriculture-related inspectional duties.").
[33] *See Laredo Sector*, 72 FLRA at 172.
[34] Chertoff Letter at 1.
[35] Winkowski Memo at 1.
[36] *Id.*; Chertoff Letter at 1.
[37] 2014 Directive at 9 (instructing officers to screen for threats related to terrorism, national security, public health, weapons, narcotics, human trafficking, fraud, fugitives from justice, inadmissibility, currency, agriculture, and criminal misconduct).
[38] Agency's Post-Hr'g Br. at 28 (quoting Tr. at 21-22).
[39] Award at 2.

> the appropriate arrangements which might be made for employees who would be adversely affected by the Agency's exercise of its management rights.[40]

The Arbitrator found that the Agency's assignment of agricultural specialists to target for non-agricultural threats "could reasonably have been foreseen to cause more than de minimis" effects on the conditions of employment of both agricultural specialists and non-agriculture officers, including loss of overtime opportunities and changes in daily work assignments.[41] By not providing the Union with notice and an opportunity to bargain the impact and implementation of the change, the Arbitrator concluded the Agency violated Article 26.[42] This contract violation – which the Agency does not challenge in its exceptions – provides a separate and independent ground for the award.[43] The Authority's review of arbitration awards is confined to the arguments raised by the parties,[44] and the Arbitrator's finding that the Agency violated Article 26 stands unchallenged. As a result, I concur with the majority's ultimate conclusion that the Agency's exceptions do not provide a basis for setting aside the Arbitrator's entire award.[45]

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[40] *Id.* at 31; *see also id.* at 18-19 (quoting relevant portions of Article 26).
[41] *Id.* at 31.
[42] *Id.*
[43] *See id.* at 32.
[44] 5 C.F.R. § 2425.6 (providing that an excepting party has the burden to raise recognized grounds for reviewing an arbitration award and to provide supporting arguments); *see also AFGE, Loc. 2052, Council of Prison Locs. 33*, 73 FLRA 59, 62 n.48 (2022) (Chairman DuBester concurring).
[45] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 901, 903 (2024) (where excepting party did not except to all of the separate and independent grounds for an award, exception did not provide a basis for finding award deficient); *U.S. DHS, U.S. CBP*, 68 FLRA 184, 187-88 (2015) (denying exception challenging remedy where remedy was based on separate and independent grounds and the agency did not establish one of those grounds was deficient); *SSA, Region VI*, 67 FLRA 493, 496 (2014) (denying exception where the arbitrator based the award on three grounds and excepting party did not challenge all grounds).