

74 FLRA No. 89

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 421
(Union)

and

FEDERAL ENERGY REGULATORY COMMISSION
(Agency)

0-AR-6112

DECISION

October 30, 2026

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

I. Statement of the Case

Arbitrator John T. Nicholas issued an award finding that the Agency did not violate the parties' collective-bargaining agreement or the Federal Service Labor-Management Relations Statute (the Statute) when it implemented a presidential memorandum, terminated bargaining-unit employees' (employees) telework agreements, and returned employees to in-person work. The Union filed exceptions to the award on nonfact, essence, and contrary-to-law grounds. For the reasons explained below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The parties' agreement took effect starting in August 2024 for a six-year term. As discussed further below, Article 16 of the agreement (Article 16) concerns telework.

In January 2025,¹ President Donald J. Trump issued Presidential Memorandum 8251 (the

memorandum),² which directed agencies "to terminate remote[-]work arrangements and require employees to return to work in-person at their respective duty stations on a full-time basis," but authorized department and agency heads to "make exemptions they deem necessary," and provided that the memorandum "shall be implemented consistent with applicable law."³

On February 5, the parties had an initial meeting regarding implementing the memorandum. They then had four subsequent meetings. On March 4, after those meetings, the Agency notified the Union of its intent to implement a "return-to-[in-person-]work plan"⁴ (March 4 notice) in order to comply with the memorandum's "goal of addressing unutilized [federal] space."⁵ However, the March 4 notice explained that there was insufficient workspace for all employees to work in the office simultaneously. Therefore, the March 4 notice stated that the Agency's Chairman had established a temporary exemption allowing situational telework (the Chairman's exemption). Specifically, the Chairman's exemption allowed telework two or three days per pay period for certain employees, depending on their work schedule, until such time as the Agency acquired sufficient space for all employees to work in the office full time. Further, the March 4 notice provided that "employees who are not required by management to report in-office for [eighty] hours [per pay period] will utilize shared work space," and "employees who are currently assigned dedicated work space will be moved to an interior office or workspace."⁶ The March 4 notice stated that the Agency must "bargain any changes in working conditions . . . that are not already covered by the [parties'] agreement or are in direct conflict with the [parties'] agreement."⁷

On March 6, the Union submitted "preliminary" proposals concerning the Agency's return-to-in-person-work plan.⁸ Later that day, the Agency sent an email to employees (March 6 notice) stating that, "due to operational requirements established by the [memorandum],"⁹ effective April 7, all employees – except those covered by the Chairman's exemption (exempted employees) – were required to report in person on a full-time basis.¹⁰ The March 6 notice incorporated several Union proposals, including one allowing employees to keep their assigned offices if they work in the office eighty hours per pay period.¹¹ The March 6

¹ All subsequent dates occurred in 2025 unless otherwise noted.

² Return to In-Person Work, 90 Fed. Reg. 8251 (Jan. 20, 2025) (PM 8251); *see* Office of Personnel Management, Guidance on Presidential Memorandum Return to In-Person Work (Jan. 22, 2025) (OPM guidance), <https://www.opm.gov/media/q0tbu2eq/guidance-on-presidential-memorandum-return-to-in-person-work.pdf> (on file with the Federal Labor Relations Authority).

³ PM 8251, 90 Fed Reg. at 8251.

⁴ Award at 3.

⁵ Exceptions, Attach. 5, March 4 Notice, at 2.

⁶ *Id.* at 3.

⁷ *Id.*

⁸ Opp'n, Ex. 19 at 1.

⁹ Exceptions, Attach. 7, Emails Related to March 6 Notice (March 6 Notice) at 4.

¹⁰ *Id.* at 4-7; *see* March 4 Notice at 2-3.

¹¹ March 6 Notice at 6; *see id.* at 1 (Union email noting where parties had reached agreement).

notice also provided that exempted employees would have their telework and in-office days determined by an “algorithm,”¹² based on each employee’s work schedule.

The Union filed a grievance alleging that the Agency’s implementation of the memorandum violated several articles of the parties’ agreement, as well as § 7116(a)(1), (5), and (7) of the Statute.¹³ The Agency denied the grievance, and the parties proceeded to arbitration.

The parties did not stipulate an issue at arbitration. The Arbitrator framed the issue as “whether the Agency’s actions taken . . . to comply with the . . . [memorandum], and the effects thereof, violated . . . the parties’ [agreement] and/or federal statutes” and, if so, “what shall be the appropriate remedy?”¹⁴

At arbitration, the Union argued that the Agency’s implementation of the memorandum violated Article 2 of the parties’ agreement (Article 2), which pertinently provides:

Except as may be required by law, new or changed rules or regulations issued after the effective date of this [a]greement . . . which are in conflict with the provisions specifically contained in this [a]greement may not be made applicable to [employees] during the term of the [a]greement until the [p]arties have fulfilled their bargaining obligations. Should a provision of this [a]greement be nullified or otherwise affected by appropriate authority (i.e., by federal statute or [g]overnment-wide rules or regulations implementing 5 U.S.C. §[2302] after the effective date of this [a]greement, either [p]arty may reopen the specifically affected sections and all other provisions directly affected by those sections in accordance with Article 42 . . . of the [agreement (Article 42)].¹⁵

However, the Arbitrator rejected the Union’s argument “for a multitude of reasons.”¹⁶

First, the Arbitrator found that the Agency “was more of an indirect party to [the] elimination [of the

telework policy], as the Agency was acting under the direction of the [memorandum]” and related guidance provided by the Office of Personnel Management (the OPM guidance).¹⁷

Second, the Arbitrator addressed Article 12, Section 5.B. of the parties’ agreement (Article 12, Section 5.B.), which pertinently provides:

Should employees be required to return to the office by . . . [e]xecutive [o]rder, the [Agency] will include the Union in pre-decisional planning. At a minimum, this will include a meeting between the Executive Director . . . and the President of the Union prior to the implementation of such . . . [e]xecutive [o]rder.¹⁸

The Arbitrator found that this provision “specifically references potential circumstances where[] the telework policy that was in place could be eliminated by [e]xecutive [o]rder.”¹⁹ He further found that “[t]his reference should have made the Union aware that the adherence to the established [telework] policy was not feasible for [m]anagement to abide by, due to the fact that it was required to eliminate the policy” by the memorandum.²⁰ Additionally, he determined that it was “evident that [m]anagement complied” with Article 12, Section 5.B., which he found “requir[ed] the Agency to confer with the Union if employees are required to return to in-person work as a result of an executive order.”²¹ In this connection, the Arbitrator noted that the Agency met with the Union six times before March 6. He found that, although the Union might have disapproved of “[t]he substantive determinations of [those] meetings,” the meetings were not intended to involve “bargain[ing] over the effectual implementation of the return-to-work requirements, as the Agency had clear instructions” set forth in the memorandum and the OPM guidance.²²

Third, the Arbitrator addressed Article 16, Section 7 of the parties’ agreement (Article 16, Section 7), which pertinently provides:

Telework arrangements may be terminated by . . . management . . . by written notification . . . , except under emergency situations. Reasons for termination of a telework agreement may include . . . if the telework

¹² *Id.* at 7.

¹³ 5 U.S.C. § 7116(a)(1), (5), (7).

¹⁴ Award at 6.

¹⁵ Exceptions, Attach. 2, Collective-Bargaining Agreement (CBA) at 4. The pertinent wording of Article 42 is set forth below.

¹⁶ Award at 13.

¹⁷ *Id.*

¹⁸ CBA at 29.

¹⁹ Award at 16.

²⁰ *Id.*

²¹ *Id.* at 13.

²² *Id.* at 14.

agreement no longer benefits the organization A supervisor's decision to terminate an employee's [t]elework [a]greement will be based on operational work requirements.²³

The Arbitrator noted that the Agency's executive director testified that the Agency was in danger of losing its ability to stay in its headquarters building due to the lack of employee occupancy. The Arbitrator found that this testimony "was not effectively refuted during cross-examination."²⁴ "Thus," he found, "returning the employees to the office was seen as a necessary requirement and was supported by Article 16, Section 7."²⁵

Next, the Arbitrator addressed the Union's allegation that the Agency violated "Article 12, Sections 1-5" of the parties' agreement by "failing to adhere" to Article 12's "processes and procedures . . . pertaining to dynamic seating and office assignments."²⁶ In this regard, the Union argued that the Agency violated Article 12, Section 2 of the parties' agreement (Article 12, Section 2) by failing to assign "permanent offices" to exempted employees who were required to work in the office more than forty hours per pay period.²⁷ Article 12, Section 2 provides, in relevant part: "Assignment of [employees] to dedicated permanent office space will be in accordance with the provisions of this Article," and "[e]mployees who are scheduled to be in the office forty . . . hours or more per pay period[] will be assigned an office within their Program Office's floor."²⁸ The Arbitrator noted that the Agency could not assign exempted employees permanent offices because of space constraints, and instead provided those employees with dynamic seating arrangements by using an algorithm to assign them "office stations" for the days on which they reported to the office.²⁹ The Arbitrator found that Article 12, Section 2 did not require all employees be assigned a "perm[anent] work station," but only required that all employees be assigned to an office.³⁰ He concluded that the Agency complied with this requirement.

The Arbitrator also addressed the Union's arguments that the Agency violated Article 42 and Article 44 of the parties' agreement (Article 44) by failing to bargain in good faith over the telework changes. Article 42 states, in relevant part, that "[e]ither [p]arty may

propose changes in conditions of employment during the life of the [a]greement which are not already covered specifically by the [a]greement."³¹ Article 44 states, in relevant part, that "[t]he current [a]greement shall remain in effect until the new [a]greement is executed," and that "[c]hanges in [g]overnment-wide regulations requiring amendments to the [agreement] shall be made through mid-term negotiations in accordance with Article 42."³²

The Arbitrator noted that, "[d]espite the fact that [the] Agency met with the Union to discuss" the telework changes "on numerous occasions and even adopted some of the Union's proposals, the Agency was unable to acquiesce to a multitude of Union demands, as its hands were effectively tied because the [memorandum] called for the [abolition] of telework policies."³³ The Arbitrator further stated that "any changes that the Union sought that promoted the preservation of the [existing telework] policy would have caused the Agency to deviate from the [memorandum] and [the OPM g]uidance."³⁴ He concluded that the Agency's implementation of the memorandum "was not an issue that called for mid-term bargaining in the traditional sense," and that the Agency did not violate Article 42.³⁵

Regarding Article 44, the Arbitrator rejected the Union's argument that the "Agency should have abided by the prescribed requirements established in the [parties' agreement] until a new term agreement was established."³⁶ On this point, the Arbitrator found that the memorandum "required agencies to immediately proceed with the resolution of telework agreements," and the OPM guidance instructed agencies to implement the memorandum within thirty days of the OPM guidance's issuance.³⁷ Therefore, he found that the Agency did not violate Article 44.

Finally, the Arbitrator addressed the Union's arguments that the Agency violated § 7116(a)(1), (5), and (7) of the Statute by "failing to bargain over the policy implemented by the Agency."³⁸ He found that those arguments "presume[d] that the Agency actually had a choice as to whether the existing policy should remain in effect," when in fact the new policy "was implemented out of necessity; a necessity that was driven by the fear of losing the building due to occupancy levels as well as the mandate from the President."³⁹

²³ CBA at 46.

²⁴ Award at 14.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 8.

²⁸ CBA at 27.

²⁹ Award at 15.

³⁰ *Id.*

³¹ CBA at 122.

³² *Id.* at 126.

³³ Award at 16.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 17.

³⁹ *Id.*

In sum, the Arbitrator determined that the Agency did not violate the parties' agreement or the Statute as alleged. Therefore, he denied the grievance.

The Union filed exceptions to the award on March 26, 2026, and the Agency filed an opposition on April 27, 2026.

III. Analysis and Conclusions

A. The Union does not demonstrate that the award is based on nonfacts.

The Union contends that the award is based on nonfacts on three grounds.⁴⁰ 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.⁴¹ 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.⁴² Additionally, an arbitrator's contractual interpretations cannot be challenged as nonfacts.⁴³ Further, a challenge that fails to identify clearly erroneous factual findings does not demonstrate that an award is based on a nonfact.⁴⁴

First, the Union argues that the Arbitrator erred by finding "that the Agency terminated telework, in part, due to an operational need to increase occupancy at its headquarters to avoid losing the building due to underutilization."⁴⁵ However, the March 4 notice indicated that the Agency read the memorandum as being intended to address (among other things) "unused [federal] space,"⁴⁶ and the Arbitrator credited Agency witness testimony that "the Agency was in danger of losing the rights to the [headquarters] building due to a lack of employee occupancy" – testimony that the Arbitrator found "was not effectively refuted during cross-examination."⁴⁷ Although the Union alleges an

absence of "documentary evidence,"⁴⁸ the Union does not cite any authority prohibiting the Arbitrator's reliance on testimonial evidence to find an operational need to increase building occupancy.⁴⁹ To the extent that the Union challenges the Arbitrator's evaluation of the evidence, such a challenge does not provide a basis for finding the award is based on a nonfact.⁵⁰ The Union further contends without explanation that the Agency's underutilization assertion was a "post-hoc argument"⁵¹ – a claim that the Agency disputes.⁵² Even assuming that the Union intended thereby to suggest that the Agency's space utilization rationale was fabricated, it does not demonstrate that the Arbitrator's crediting of the Agency's uncontroverted testimony is clearly erroneous. Accordingly, that claim also does not provide a basis for finding that the award is based on a nonfact.⁵³

Second, the Union argues that the Arbitrator erred by finding that Article 12, Section 2 did not require the Agency to assign permanent offices for those employees mandated to work in the office more than forty hours per pay period.⁵⁴ This argument challenges the Arbitrator's interpretation of the parties' agreement, which cannot be challenged as a nonfact.⁵⁵

Third, the Union contends that Article 16 provides that "employees who telework are often more productive and generate better quality work," and "[t]he Agency failed to provide any evidence that telework was impacting Agency operations."⁵⁶ The Union does not, however, identify any clearly erroneous factual findings that the Arbitrator made, so this contention does not demonstrate that the award is based on a nonfact.⁵⁷ Moreover, to the extent that the Union is challenging the Arbitrator's interpretation of the parties' agreement, that challenge fails for the same reason as its argument regarding Article 12, Section 2.⁵⁸

We deny the Union's nonfact exception.

⁴⁰ Exceptions at 11, 19-23.

⁴¹ *NTEU, Chapter 46*, 73 FLRA 654, 655-56 (2023) (*Chapter 46*) (citing *AFGE, Loc. 4156*, 73 FLRA 588, 590 (2023)).

⁴² *Id.* (citing *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018)).

⁴³ *AFGE, Nat'l Council of Field Lab. Locs.*, 71 FLRA 1180, 1181 (2020) (*Field Labor Locs.*).

⁴⁴ *AFGE, Loc. 2338*, 73 FLRA 522, 523 (2023) (*Local 2338*) (citing *AFGE, Loc. 3254*, 70 FLRA 577, 580 (2018)).

⁴⁵ Exceptions at 20.

⁴⁶ March 4 Notice at 2.

⁴⁷ Award at 14.

⁴⁸ Exceptions at 21.

⁴⁹ See Award at 14 (crediting unrefuted testimony that "the Agency was in danger of losing the rights to . . . [its headquarters] building due to a lack of employee occupancy").

⁵⁰ *Chapter 46*, 73 FLRA at 656; see also *U.S. Small Bus. Admin., Birmingham, Ala.*, 72 FLRA 106, 107 (2021) (Chairman DuBester concurring) (finding argument that no evidence supported arbitrator's finding did not demonstrate award was based on a nonfact).

⁵¹ Exceptions at 20-21.

⁵² Opp'n at 13.

⁵³ *NAIL, Loc. 11*, 73 FLRA 328, 329 (2022) (rejecting nonfact argument that did not demonstrate that a central fact underlying the award was clearly erroneous, but for which the arbitrator would have reached a different result).

⁵⁴ Exceptions at 21-22.

⁵⁵ See *Field Labor Locs.*, 71 FLRA at 1182 (denying nonfact exception challenging arbitrator's contractual interpretation).

⁵⁶ Exceptions at 23.

⁵⁷ *Local 2338*, 73 FLRA at 523.

⁵⁸ See *Field Labor Locs.*, 71 FLRA at 1182 (denying nonfact exception challenging arbitrator's contractual interpretation).

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

The Authority will find that an arbitration award fails to draw its essence from a collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.⁵⁹ Mere disagreement with an arbitrator's interpretation does not establish that an award fails to draw its essence from the agreement.⁶⁰ Moreover, challenges to an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, do not demonstrate that an award fails to draw its essence from an agreement.⁶¹

The Union argues that the award fails to draw its essence from the parties' agreement in two respects.⁶² First, it reiterates its claim that the Arbitrator erred by finding that Article 12 did not require the Agency to assign permanent offices to employees working in the office more than forty hours per pay period.⁶³ According to the Union, Article 12, Section 2 is entitled "*Permanent Office Space*" and "specifically states [that] the items [that it lists] are about '*permanent office space*.'"⁶⁴ The Union also argues that other wording in Article 12 supports a conclusion that Article 12, Section 2 involves permanent office space.⁶⁵ Specifically, the Union argues that Article 12, Section 2 refers to "assignment" of offices, which is "an agency-directed process," whereas Article 12, Section 3 of the parties' agreement (Article 12, Section 3)⁶⁶ – which concerns "dynamic seating/hoteling" – is "an employee-driven process whereby employees may log in to an electronic reservation system and *reserve* offices."⁶⁷ According to the Union, if Article 12, Section 2 "somehow

applies to reservations and not permanent offices, the [A]gency would be in violation of Article 12, [S]ection 2(4), which provides that '[t]he Union will be provided a list of employees with office type and grade who are assigned an office.'"⁶⁸

As noted previously, Article 12, Section 2 provides, in relevant part, that "[a]ssignment of [employees] to dedicated permanent office space will be in accordance with the provisions of this [a]rticle."⁶⁹ It further provides criteria for identifying the locations where offices will be assigned, including that "[e]mployees who are scheduled to be in the office forty (40) hours or more per pay period[] will be assigned an office within their Program Office's floor."⁷⁰ However, Article 12, Section 2 does not unequivocally mandate that the Agency assign any employee a permanent office.⁷¹ Rather, the plain language could be read as merely setting out criteria for office assignment – including office location – once management has made the decision to assign an employee a permanent office.⁷² The latter is the interpretation the Arbitrator adopted – that Article 12 "does not state that all employees must be assigned a perm[anent] work station; it simply requires that all employees be assigned to an office."⁷³ Thus, the Union does not demonstrate that the Arbitrator's finding is irrational, implausible, unfounded, or in manifest disregard of Article 12.⁷⁴

Second, the Union notes that Article 16, Section 2 "memorializes the parties' understanding that telework can provide efficiencies," and argues that the Agency "failed to provide any evidence that telework was impacting Agency operations."⁷⁵ However, as discussed above, the Arbitrator credited witness testimony that the Agency was in danger of losing its headquarters space, and we have denied the Union's nonfact challenge to that credibility finding. As such, the Union's evidentiary challenge provides no basis for finding the award deficient

⁵⁹ *U.S. DHS, U.S. CBP*, 74 FLRA 403, 409 (2026) (*CBP*) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 73 FLRA 620, 622 (2023)).

⁶⁰ *Id.* (citing *Fed. Educ. Ass'n, Stateside Region*, 73 FLRA 747, 750 (2023)).

⁶¹ *Id.* (citing *AFGE, Loc. 3911*, 69 FLRA 233, 236 (2016) (*Local 3911*)).

⁶² Exceptions at 21-23.

⁶³ *Id.* at 21-22.

⁶⁴ *Id.* at 21 (emphasis added).

⁶⁵ *Id.* at 22.

⁶⁶ Article 12, Section 3 provides that "employees not assigned permanent office space will use non-dedicated, non-permanent workspaces assigned for use by the Dynamic Seating/Hoteling Reservation System on an as-needed basis." CBA at 27.

⁶⁷ Exceptions at 22.

⁶⁸ *Id.* (quoting CBA at 27).

⁶⁹ CBA at 27.

⁷⁰ *Id.*

⁷¹ Compare *id.* ("Assignment of [employees] to dedicated permanent office space will be in accordance with the provisions of this Article." (emphasis added)), with *id.* ("Employees who are scheduled to be in the office forty (40) hours or more per pay period[] will be assigned an office within their Program Office's floor." (emphasis added)).

⁷² *Id.* ("When offices are assigned, every effort will be made to assign an office near the employee's Senior Leadership (SL) and Senior Executive Service (SES)." (emphasis added)).

⁷³ Award at 15.

⁷⁴ See, e.g., *CBP*, 74 FLRA at 410 (denying essence exception where excepting party did not demonstrate that arbitrator's findings were irrational, unfounded, implausible, or in manifest disregard of the agreement).

⁷⁵ Exceptions at 23 (arguing Arbitrator "ignore[d] the core principles of the [parties' agreement], including the telework provision").

on essence grounds.⁷⁶ Moreover, nothing in Article 16, Section 2's plain wording mandates the granting of telework in any particular circumstance or precluded the Arbitrator from finding that the potential loss of headquarters constituted an operational requirement supporting the Agency's actions under Article 16, Section 7.⁷⁷ Accordingly, the Union's argument does not demonstrate that the award is irrational, implausible, unfounded, or in manifest disregard of Article 16.⁷⁸

We deny the Union's essence exception.

C. The Union does not demonstrate that the award is contrary to law.

The Union argues that the award is contrary to law in several respects.⁷⁹ The Authority reviews questions of law raised by exceptions to an arbitrator's award de novo.⁸⁰ In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions – not an arbitrator's underlying reasoning – are consistent with the applicable standard of law.⁸¹ In making that determination, the Authority defers to the arbitrator's underlying findings of fact unless the excepting party establishes they are based on nonfacts,⁸² and defers to the arbitrator's interpretation of the parties' agreement unless the award fails to draw its essence from the agreement.⁸³ When resolving a grievance that alleges an unfair labor practice (ULP) under § 7116 of the Statute, an arbitrator must apply the same standards and burdens that the Authority applies in a ULP proceeding under § 7118 of the Statute.⁸⁴

First, the Union contends⁸⁵ that the award is contrary to § 7116(a)(7) of the Statute, which makes it a ULP for an agency “to enforce any rule or regulation . . . which is in conflict with any applicable collective[-]bargaining agreement if the agreement was in effect before the date the rule or regulation was

prescribed.”⁸⁶ According to the Union, the Arbitrator erred as a matter of law by finding that the memorandum and the OPM guidance “supersede[d]” the parties' agreement and required the Agency to terminate the parties' existing telework program.⁸⁷ Relatedly, the Union argues that the memorandum applies only to “remote work” and, thus, does not apply to “telework” under Article 16 of the parties' agreement.⁸⁸ Even assuming that the memorandum applies to Article 16, the Union notes that the memorandum “explicitly states that [a]gencies must implement its requirements ‘consistent with applicable law’” – including § 7116(a)(7) of the Statute.⁸⁹

The Arbitrator made various statements indicating that he believed that the memorandum and the OPM guidance required the Agency to terminate the existing telework policy. However, he also found that the parties' agreement *permitted* the Agency to do so. Specifically, he found that Article 16 allows the Agency to terminate telework agreements when it has “operational needs” to do so, which he found to include the potential loss of the Agency's headquarters.⁹⁰ He also found that Article 12, Section 5.B. contemplated the Agency terminating telework when required to do so by an executive order, and that the Agency complied with that provision when requiring employees to return to in-person work consistent with the memorandum.⁹¹ Because the Union does not demonstrate that these findings are deficient on essence grounds, we defer to them in assessing whether the award is contrary to law.⁹² These findings are consistent with Authority precedent that allows parties to supplant the default legal rule espoused in § 7116(a)(7) by contractual agreement⁹³ – i.e. Article 12, Section 5.B, which allows subsequently issued executive orders to override the telework provisions of the parties' agreement.⁹⁴ Further, these findings provide a basis – separate and independent from the Arbitrator's statements that the Union challenges – for the Arbitrator's conclusion that the Agency was permitted to make the changes at

⁷⁶ *CBP*, 74 FLRA at 410 (citing *Local 3911*, 69 FLRA at 236) (denying essence exception challenging arbitrator's evaluation of the evidence); *U.S. Dep't of HHS, Food & Drug Admin., S.D., Cal.*, 67 FLRA 255, 256 (2014) (denying essence exception premised on party's previously rejected nonfact argument).

⁷⁷ Award at 10, 12, 14.

⁷⁸ See, e.g., *CBP*, 74 FLRA at 410 (denying essence exception where excepting party did not demonstrate award was irrational, implausible, unfounded, or in manifest disregard of the agreement).

⁷⁹ Exceptions at 11-19.

⁸⁰ *NTEU, Chapter 172*, 74 FLRA 80, 84 (2024) (*Chapter 172*) (citing *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021) (*Local 1953*)).

⁸¹ *Ass'n of Admin. L. Judges, IFPTE*, 74 FLRA 325, 327 (2026) (*AALJ*) (Member Arrington concurring on other grounds).

⁸² *Id.*

⁸³ *Consumer Fin. Prot. Bureau*, 73 FLRA 670, 679 (2023) (*CFPB*).

⁸⁴ *Chapter 172*, 74 FLRA at 86 (citing *AFGE, Loc. 3954*, 72 FLRA 403, 404 (2021) (Member Abbott concurring)).

⁸⁵ Exceptions at 11-15, 17-18.

⁸⁶ 5 U.S.C. § 7116(a)(7).

⁸⁷ Exceptions at 11, 12.

⁸⁸ *Id.* at 17.

⁸⁹ *Id.*

⁹⁰ Award at 14.

⁹¹ *Id.* at 13.

⁹² *CFPB*, 73 FLRA at 679.

⁹³ *U.S. Dep't of Lab.*, 74 FLRA 604, 608 (2026) (Member Wagner dissenting on other grounds) (citing *U.S. DOD, Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C.*, 37 FLRA 1066, 1069 (1990), *deciding exception to award on remand*, 42 FLRA 674, 678-79 (1991)).

⁹⁴ See CBA at 29 (“Should employees be required to return to the office by . . . [e]xecutive [o]rder, the [Agency] will include the Union in pre-decisional planning.”).

issue. When an arbitrator bases an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient before the Authority will set the award aside.⁹⁵ As such, because the Union has not shown that the Arbitrator's findings regarding Article 16 and Article 12, Section 5.B are deficient, the Union's arguments regarding § 7116(a)(7) do not provide a basis for setting aside the award. For these reasons, we reject the Union's first contrary-to-law argument.

Second, the Union argues that the award is contrary to § 7116(a)(5) of the Statute because the Agency failed to negotiate in good faith over its termination of telework agreements and implementation of the Chairman's exemption, as required by the Statute and the parties' agreement.⁹⁶ The Authority has held that, under the Statute, prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain if the change will have more than a de minimis effect on conditions of employment.⁹⁷ However, under the Authority's covered-by doctrine, if parties have already bargained and reached agreement concerning a matter, then they have no statutory duty to bargain further over that matter during the term of the agreement.⁹⁸ For a matter to be "covered by" an agreement under that doctrine, there need not be an "exact congruence" between the matter and a provision of the agreement, so long as the agreement expressly or implicitly indicates the parties reached a negotiated agreement on the subject.⁹⁹ In assessing whether a matter is "covered by" a collective-bargaining agreement, the Authority applies a two-prong test that considers whether (1) the subject matter is "expressly contained in" the agreement; or (2) the subject matter is "inseparably bound up with and thus is plainly an aspect of a subject expressly covered by the contract."¹⁰⁰ The covered-by doctrine is a

defense to a statutory duty to bargain; it does not apply as a defense to a contractual obligation to bargain.¹⁰¹

Although the Arbitrator acknowledged that the Agency made a covered-by argument below,¹⁰² he did not expressly set forth or apply the two-prong covered-by test. Nevertheless, as noted above, in assessing whether an arbitration award is contrary to law, the Authority assesses whether the arbitrator's legal conclusions – not the arbitrator's underlying reasoning – are consistent with the applicable standard of law.¹⁰³ And, as discussed above, the Arbitrator found that: (1) Article 16 allows the elimination of telework agreements when required by an operational need, and (2) Article 12, Section 5.B. contemplates the termination of telework agreements when required by an executive action such as the memorandum.¹⁰⁴ These findings support a conclusion that the Agency's telework changes are "expressly contained in" – or, at a minimum, "plainly an aspect of a subject expressly covered by" – the parties' agreement, as the Arbitrator interpreted it.¹⁰⁵ Therefore, the matter of the Agency's telework changes is covered by the parties' agreement, and the Agency had no statutory duty to bargain further over those matters.¹⁰⁶

In the context of its § 7116(a)(5) claims, the Union also argues that the Agency violated Articles 2 and 42 by failing to bargain.¹⁰⁷ However, to the extent that

⁹⁵ *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 901, 903 (2024).

⁹⁶ Exceptions at 15-18.

⁹⁷ See *NTEU*, 74 FLRA 486, 488 (2026) (*NTEU I*); *SSA, Balt., Md.*, 74 FLRA 441, 443-45 (2026) (Member Wagner concurring in part and dissenting in part) (applying de minimis doctrine to assess unilateral-change ULP allegation); *U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79, 81-82 (1997) (unilaterally changing conditions of employment violates § 7116(a)(1) and (5)).

⁹⁸ *AFGE, Loc. 3972*, 74 FLRA 252, 254 (2025) (*Local 3972*) (citing *Chapter 172*, 74 FLRA at 80 n.3).

⁹⁹ *Id.* (citation modified).

¹⁰⁰ *Id.* (citation modified).

¹⁰¹ *U.S. Dep't of HUD*, 66 FLRA 106, 109 (2011).

¹⁰² Award at 11 (summarizing the Agency's covered-by arguments).

¹⁰³ *AALJ*, 74 FLRA at 327.

¹⁰⁴ Cf. *NTEU*, 74 FLRA 424, 429 (2026) (*NTEU II*) (Member Wagner concurring in part and dissenting in part) (discussing authorities giving executive orders and presidential memoranda "equal legal stature"). Consistent with her position in *NTEU II*, Member Wagner reserves judgment on whether presidential memoranda should be treated the same as executive orders in this context. See *id.* at 432 n.12. Nevertheless, the Arbitrator treated the memorandum as equivalent to an executive order for purposes of Article 12, Section 5.B., and the Union has not demonstrated that the award fails to draw its essence from the parties' agreement. Accordingly, she believes that it is appropriate to treat the memorandum as equivalent to an executive order for purposes of this case.

¹⁰⁵ *Local 3972*, 74 FLRA at 254-55.

¹⁰⁶ *Id.* (upholding finding that agency had no statutory duty to bargain over procedures for changing telework agreements where provisions of parties' agreement "specifically covered [t]he procedures for changing telework arrangement" (citation modified)).

¹⁰⁷ Exceptions at 16-17.

those articles are intended to “mirror” the Statute,¹⁰⁸ we have found that the Agency had no statutory duty to bargain – and, thus, there would be no duty to bargain under Articles 2 and 42. To the extent that these articles are *not* intended to mirror the Statute, the Authority has held that where a grievance involves a contractual bargaining obligation, “the issue of whether the parties have complied with the agreement becomes a matter of contract interpretation for the [a]rbitrator.”¹⁰⁹ In that situation, the Authority applies the essence standard.¹¹⁰ But the Union does not argue – let alone demonstrate – that the Arbitrator’s interpretation or application of Article 2 or Article 42 is deficient on essence grounds. Therefore, the Union’s reliance on those articles does not provide a basis for finding the award contrary to law.¹¹¹

Third, the Union argues that the award is contrary to § 7116 of the Statute “(in all aspects)” because the Arbitrator should have found that the Agency repudiated Article 16.¹¹² However, unless there is a breach of an agreement, there can be no repudiation of that agreement in violation of the Statute.¹¹³ The Arbitrator found that the Agency did not breach the parties’ agreement,¹¹⁴ and because the Union does not demonstrate that the award is deficient on essence grounds, we defer to that conclusion.¹¹⁵ Because the Union has not demonstrated that there was a contractual breach, the Union does not demonstrate that the Arbitrator erred as a matter of law by finding no repudiation.

We deny the Union’s contrary-to-law exception.

IV. Decision

We deny the Union’s exceptions.

¹⁰⁸ The Authority has applied statutory standards in assessing the application of contractual provisions that “mirror,” or are intended to be interpreted in the same manner as, the Statute. *NTEU I*, 74 FLRA at 489 (factors for whether to apply statutory standards include whether the contractual provision clearly incorporates the Statute either by reference or by use of similar or identical wording; whether the arbitrator interpreted the parties’ agreement as incorporating statutory requirements; and whether the parties agree – or do not dispute – that the wording was intended to have the same meaning); *U.S. Dep’t of Transp., FAA*, 74 FLRA 433, 434 (2026) (*FAA*) (citing *AFGE, Loc. 2338*, 73 FLRA 845, 847-48 (2024) (Chairman Grundmann concurring)).

¹⁰⁹ *U.S. DHS, U.S. ICE*, 65 FLRA 792, 795 (2011) (quoting *Broad. Bd. of Governors, Off. of Cuba Broad.*, 64 FLRA 888, 891 (2010)); see also *U.S. Dep’t of the Navy, Marine Corps, Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 546 (2014) (*Marine Corps*) (Member Pizzella dissenting on other grounds) (applying essence standard to review arbitrator’s findings regarding a contractual duty to bargain).

¹¹⁰ *Marine Corps*, 67 FLRA at 546.

¹¹¹ *FAA*, 74 FLRA at 435 (agency failed to demonstrate arbitrator was required to apply statutory standards to determine the parties’ bargaining obligations); *Local 3972*, 74 FLRA at 256 (rejecting excepting party’s challenge to arbitrator’s finding of no contractual duty to bargain).

¹¹² Exceptions at 16-17.

¹¹³ *NTEU*, 73 FLRA 816, 820 (2024) (*NTEU III*) (Chairman Grundmann concurring on other grounds) (finding no repudiation where no breach of agreement).

¹¹⁴ Award at 15-16; see *id.* at 13-14, 17.

¹¹⁵ *NTEU III*, 73 FLRA at 820; *CFPB*, 73 FLRA at 679.