74 FLRA No. 90

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

PROFESSIONAL AVIATION
SAFETY SPECIALISTS
(Union)

0-AR-6110

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DECISION

November 20, 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

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreements[1] by announcing that the Agency expected employees to return to full-time in-person work at Agency facilities and offices, regardless of existing telework or remote-work arrangements (the announcement). Arbitrator Robert Costello issued an award sustaining the grievance. As relevant here, the Arbitrator directed the Agency to rescind the announcement, resume compliance with the agreements, and restore telework and remote-work arrangements cancelled due to the announcement. The Agency filed exceptions arguing that the award is contrary to law, is based on a nonfact, and fails to draw its essence from the agreements. The Agency argues further that the Arbitrator exceeded his authority and denied the Agency a fair hearing. For the reasons discussed below, we partially dismiss and partially deny the exceptions.

II. Background and Arbitrator's Award

President Donald J. Trump issued a Presidential Memorandum entitled, "Return to In-Person Work,"[2] which states, in pertinent part,

> Heads of all departments and agencies in the executive branch . . . shall, as soon as practicable, take all necessary steps to terminate remote[-]work arrangements and require employees to return to work in-person . . . on a full-time basis, provided that the department and agency heads shall make exemptions they deem necessary.
>
> This memorandum shall be implemented consistent with applicable law.[3]

In turn, the Agency's Acting Administrator (the Administrator) sent a message to all employees saying that the Agency would align itself with the Presidential Memorandum (the alignment message), and the Administrator expected that

> this alignment will strengthen the public's trust and confidence in the [Agency's] mission and support: meaningful in-person engagement with both internal and external stakeholders, more effective managerial oversight of [Agency] operations, increased efficiency and accountability of [the Agency's] workforce, enhanced focus on service delivery, and the development of [the Agency's] workforce.[4]

The Agency then issued the announcement, which contained a timeline for returning all employees to full-time in-person work at Agency worksites, unless an exception was granted. The Union filed the grievance alleging violations of the telework and remote-work provisions of both bargaining units' agreements, and the Agency denied the grievance. The grievance advanced to arbitration.

At the start of the arbitration hearing, the Agency objected that the Union would be relying on messages from supervisors to employees that, according to the Agency, were hearsay. In response, the Arbitrator stated that "if [they are] hearsay, that[is] going to affect the

[1] The Union represents two bargaining units – each with its own collective-bargaining agreement.
[2] 90 Fed. Reg. 8251 (Jan. 20, 2025).
[3] *Id.*
[4] Award at 6.

weight" afforded them.[5] But he also noted that "if [they are] not in any way rebutted, [they] may stand."[6] The Arbitrator also added that, because the messages contained instructions rather than statements of fact, they did not appear to be hearsay.

In his award, the Arbitrator did not expressly frame the issues before him. Rather, he recited the Union's allegation that the Agency violated the agreements' provisions concerning telework and remote work. He also recounted the Agency's argument that the Administrator properly exercised his discretion over the Agency's telework policies, consistent with the agreements and the FAA Reauthorization Act of 2024 (the Reauthorization Act).[7]

The Reauthorization Act states, in relevant part, that the Administrator "may establish telework policies for employees . . . that the Administrator demonstrates increase[] efficiency and effectiveness of the [Agency], while requiring that any such policy" satisfy certain conditions related to the Agency's operations.[8] The Reauthorization Act also states that the Administrator "shall evaluate and address any telework policies in effect . . . to ensure that such policies meet" the Act's conditions.[9]

The Agency argued that Section 3 of both agreements' telework articles "recognized the Administrator's . . . authority [under the Reauthorization Act] to establish telework policies for the Agency."[10] In both agreements, Section 3 states that the "Administrator may set an agency-wide approach . . . regarding telework. Any application to [Union-represented] employees will be subject to the applicable terms of" the agreements.[11]

Concluding that the two agreements were substantively identical, the Arbitrator analyzed them together and found that Section 3's wording "does not provide much support for the Agency's position."[12] The Arbitrator determined that, although Section 3's first sentence recognizes the Administrator's power to change the Agency's telework approach on an Agency-wide basis, the second sentence requires that any change in approach "would still have to be in line with" the agreements.[13] In support of this interpretation, the Arbitrator noted that § 7116(a)(7) of the Federal Service Labor-Management Relations Statute (the Statute) provides an "important protection for unions and their members" against the enforcement of most rules or regulations that conflict with collective-bargaining agreements in effect before the rules or regulations were prescribed.[14] The Arbitrator stated that he "would not lightly find" the Union waived that protection.[15]

Next, the Arbitrator considered Sections 8 and 13 of the agreements. Section 8 provides that "the Agency will apply [Section 8's] criteria to grant or deny . . . specific [t]elework [arrangements]."[16] The criteria include, in pertinent part, reliance on "sound business practices, not arbitrary limitations"; the "reasonableness" and "workability" of the request; and the requirement that the "request would not have an adverse impact on any Agency operation or the mission of the [Agency]."[17] Section 13 states that the "[r]ationale for a denial, modification, or termination of a [t]elework [arrangement] shall be provided in writing and will include information about the criteria considered under Section 8, . . . and, if applicable, what actions the employee should take to improve their chance of approval."[18] The Arbitrator determined that, under Sections 8 and 13, "modification or termination of an existing [t]elework [arrangement] must be based upon a review of [the Section 8] criteria."[19]

In addition, the Arbitrator found that "the[se] provisions clearly require an individualized assessment by management of applicable factors when making any decisions relating to telework or remote[-]work requests, or existing telework or remote[-]work [arrangements]."[20] Further, he found that any decisions must be "based on the experience with telework at this Agency . . . [and] data specific to this Agency," and that the Agency must advise employees on "'actions the employee should take to improve' his or her chances of future approval for routine telework."[21] The Arbitrator noted that the Agency did "not claim[] that individualized assessments were done prior to . . . the terminations at issue here."[22] And the Arbitrator determined that the Administrator's alignment message

[5] Opp'n, Attach., Tr. (Tr.) at 31.
[6] *Id.* at 32.
[7] Pub. L. No. 118-63, § 221, 138 Stat. 1025, 1058-59, *reprinted in* 49 U.S.C. § 106 note (FAA Telework).
[8] *Id.* § 221(a)(1), 138 Stat. at 1058, *reprinted in* 49 U.S.C. § 106 note. The conditions are discussed in Part IV.C.1. below.
[9] *Id.* § 221(a)(4), 138 Stat. at 1059, *reprinted in* 49 U.S.C. § 106 note.
[10] Award at 9.
[11] *Id.* at 5 (quoting Section 3).
[12] *Id.* at 12.
[13] *Id.* at 5, 12; *see also id.* at 11 ("[T]he Administrator is free to adopt whatever Agency-wide approach to telework that the Administrator deems appropriate. However, whatever approach is adopted it cannot be applied to these bargaining units in a manner that is inconsistent with the telework [a]rticles . . . .").
[14] *Id.* at 12 (citing 5 U.S.C. § 7116(a)(7)).
[15] *Id.*
[16] *Id.* at 4 (quoting Section 8).
[17] *Id.* (quoting Section 8).
[18] *Id.* (quoting Section 13).
[19] *Id.*
[20] *Id.* at 10-11.
[21] *Id.* at 12 (quoting Section 13).
[22] *Id.* at 11.

fell "short of the requirement that management advise affected employees of the factors considered in the decision in their particular case,"[23] and the actions that could improve their future chances for approval.

The Arbitrator cited messages from supervisors to employees that he found "gave clear notice of the Agency's intention to terminate existing" routine-telework and remote-work arrangements.[24] In addition, he relied on testimony from a management witness (the management witness) "that certain a[rrangements] were terminated or modified"[25] to find that the witness "was aware that [r]outine[-t]elework [arrangements] were terminated or modified."[26]

"Considering the record as a whole," the Arbitrator found that the Union "ha[d] established, at minimum, a prima facie case that employees were affected by the change in policy."[27] As a result, the Arbitrator held that "the burden shifted to the Agency to produce evidence" that the announcement was not actually put into effect for unit employees.[28] Finding that the Agency "offered no evidence in that regard,"[29] he concluded that the Agency violated the telework and remote-work provisions of the agreements, and he sustained the grievance. But he also noted that nothing in his award "requires that the Agency grant any telework or remote[-]work requests, or maintain any [t]elework or [r]emote[-w]ork" arrangements.[30] Rather, the Arbitrator characterized his award as "simply holding the Administrator to the procedures and arrangements . . . in the parties' agreements."[31] He added that "[n]o argument ha[d] been raised . . . that the procedures and arrangements were not compliant with the Reauthorization Act," such that he could not enforce them.[32]

Concerning remedies, before the Arbitrator, the Union requested that "if any telework or remote[-]work [arrangements were] canceled or modified in violation of the [agreements], they must be reinstated."[33] In addition, the Union requested that the Arbitrator direct the Agency to "cease and desist in terminating, canceling, or denying telework and remote[-]work . . . arrangements without applying the [agreements]"; "officially rescind the [announcement]"; and "apply and follow the terms of the [agreements]."[34] The Arbitrator awarded these remedies.[35]

On March 17, 2026, the Agency filed exceptions to the award, and, on April 15, 2026, the Union filed an opposition to the Agency's exceptions. Each party also filed a supplemental submission and a motion for leave to file that submission.

III. Preliminary Matters

A. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's management-rights challenges.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, as relevant here, an exception may not rely on "any . . . arguments . . . or challenges to an awarded remedy that could have been, but were not, presented" to the arbitrator.[36]

The Agency argues that the awarded remedies violate the Agency's management rights to determine its organization under § 7106(a)(1),[37] and to assign work under § 7106(a)(2) of the Statute.[38] But the Union requested all of the awarded remedies at arbitration.[39] And the Agency did not argue to the Arbitrator that granting those remedies would violate the Agency's rights to determine its organization or to assign work. Consequently, §§ 2425.4(c) and 2429.5 bar the Agency's management-rights challenge,[40] and we dismiss it.

[23] *Id.*
[24] *Id.* at 14-15.
[25] Tr. at 288.
[26] Award at 15.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 14.
[31] *Id.*
[32] *Id.*
[33] Tr. at 25.
[34] Opp'n, Attach., Union's Post-Hr'g Br. (Union's Post-Hr'g Br.) at 30.
[35] *See* Award at 17 (directing Agency to "[i]mmediately rescind" the announcement; "resume compliance" with the telework and remote-work articles of the agreements; and "[i]mmediately rescind all terminations of telework and remote[-]work [arrangements] made pursuant to [the announcement]").
[36] 5 C.F.R. §§ 2425.4(c), 2429.5.
[37] Exceptions Br. at 14.
[38] *Id.* at 13.
[39] *Compare* Tr. at 25 (Agency acknowledging in opening statement that Union requested reinstatement of cancelled telework and remote-work agreements), *and* Union's Post-Hr'g Br. at 30 (Union requesting that Arbitrator direct Agency to cease and desist changing telework and remote-work arrangements without complying with the agreements, rescind the announcement, and follow the agreements), *with* Award at 17 (directing Agency to "[i]mmediately rescind" the announcement; "resume compliance" with the telework and remote-work articles of the agreements; and "[i]mmediately rescind all terminations of telework and remote[-]work [arrangements] made pursuant to [the announcement]").
[40] *See U.S. Dep't of the Treasury, IRS*, 68 FLRA 329, 331 (2015) (*IRS*) ("The Authority applies §§ 2425.4(c) and 2429.5 to bar challenges to a remedy if the remedy was requested by one of the parties and not objected to by the other.").

As will be discussed in more detail in Part IV.C.1. below, the Agency asserts that it has sole and exclusive discretion under the Reauthorization Act to change telework policies, and, consequently, the Arbitrator lacked jurisdiction to resolve the grievance.[41] The Union argues that §§ 2425.4(c) and 2429.5 bar this sole-and-exclusive-discretion argument because the Agency did not raise it below.[42] In fact, the Arbitrator stated that "[n]o argument ha[d] been raised . . . that the [agreements'] procedures and arrangements were not compliant with the Reauthorization Act," such that he could not enforce them.[43] However, the Authority has held that, when an agency possesses sole and exclusive discretion, arbitrators lack jurisdiction to "second guess[]" the agency's exercise of that discretion.[44] And the Authority will not apply §§ 2425.4(c) and 2429.5 to bar arguments regarding an arbitrator's statutory jurisdiction, regardless of whether those arguments were raised below.[45] Because the Agency alleges the Arbitrator lacked jurisdiction due to the Reauthorization Act,[46] and the Authority has found similar arguments jurisdictional,[47] we will consider this argument in Part IV.C.[48]

B. We dismiss an exception that fails to raise a recognized ground for review.

Under § 2425.6(e)(1) of the Authority's Regulations, an exception "may be subject to dismissal . . . if . . . [t]he excepting party fails to raise" a recognized ground for review listed in § 2425.6(a)-(c) of the Authority's Regulations or "otherwise fails to demonstrate a legally recognized basis for setting aside the award."[49] The Agency asserts in a standalone exception that the awarded remedies are overbroad and not tailored to any proven violation.[50] This assertion does not raise a recognized ground for review listed in § 2425.6(a)-(c) of the Authority's Regulations,[51] nor does it otherwise demonstrate a legally recognized basis for setting aside the award.[52] Accordingly, we dismiss this exception.[53]

C. The supplemental submissions do not affect our decision.

Each party filed a supplemental submission and, consistent with § 2429.26 of the Authority's Regulations, moved for leave to file that submission.[54] Even assuming those submissions are properly before us, they do not affect our decision for the following reasons.[55] The Agency argues in its submission that the Union's opposition did not contest the Agency's impossible-to-implement exception.[56] According to the Agency, the Union has, therefore, agreed the award is impossible to implement.[57] The Union's supplemental submission merely opposes the Agency's submission.[58] The Agency's assertion is meritless because filing an opposition to contest an impossible-to-implement exception is completely optional,[59] and the Authority has denied such exceptions in cases where no opposition was filed.[60] Accordingly, we evaluate the Agency's impossible-to-implement exception – as we would have done even absent the parties' supplemental submissions – in Part IV.E. below.

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[41] Exceptions Br. at 6-13.
[42] Opp'n Br. at 8-10.
[43] Award at 14.
[44] *U.S. Agency for Glob. Media*, 72 FLRA 447, 448 (2021) (*Glob. Media*) (Chairman DuBester dissenting) ("[B]ecause agencies have the delegated sole and exclusive discretion to determine whether an employee is at fault, [5 U.S.C.] § 5884 prohibits an arbitrator from second guessing such an agency determination through the negotiated grievance process."); *see also U.S. Dep't of Energy, W. Area Power Admin.*, 71 FLRA 111, 112 & n.13 (2019) (*Energy*) (Member DuBester dissenting) ("If an agency's discretion over a matter is 'sole and exclusive,' then the exercise of that discretion is not subject to negotiation *or* grievances and arbitration." (citing *U.S. DOD, Nat'l Imagery & Mapping Agency, St. Louis, Mo.*, 57 FLRA 837, 841-43 (2002) (Member Pope dissenting), *overruled by NTEU, Chapter 302*, 65 FLRA 746, 750 (2011) (Member Beck dissenting), *overruled by Energy*, 71 FLRA at 112)).
[45] *E.g.*, *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 514 (2018) (*Navy*) (Member DuBester dissenting).
[46] Exceptions Br. at 13.
[47] *See Glob. Media*, 72 FLRA at 448.
[48] *See Navy*, 70 FLRA at 514.
[49] 5 C.F.R. § 2425.6(e)(1); *see also AFGE, Loc. 446*, 72 FLRA 54, 55 & n.21 (2021) (*Loc. 446*) (Chairman Kiko concurring) (citing *AFGE, Loc. 2272*, 67 FLRA 335, 335 n.2 (2014)).
[50] *See* Exceptions Br. at 28-30.
[51] *See* 5 C.F.R. § 2425.6(a)-(c).
[52] *See id.* § 2425.6(e)(1).
[53] *See Loc. 446*, 72 FLRA at 55 (dismissing exceptions that did not raise recognized grounds for review).
[54] *See* 5 C.F.R. § 2429.26(a).
[55] *See NTEU*, 72 FLRA 469, 469 n.5 (2021) (Member Abbott concurring on other grounds) (assuming, without deciding, supplemental submission was properly before Authority under § 2429.26 because considering supplemental submission would not alter Authority's decision).
[56] Agency's Mot. at 2.
[57] *Id.*
[58] *See* Union's Mot. at 2-4.
[59] *See* Review of Arbitration Awards; Miscellaneous & General Requirements, 75 Fed. Reg. 42283, 42285 (July 21, 2010) (explaining that Authority did not "impose specific, mandatory filing requirements" for oppositions to arbitration exceptions because "oppositions are entirely optional").
[60] *See, e.g.*, *AFGE, Loc. 2338*, 71 FLRA 371, 372 (2019) (denying impossible-to-implement exception where no opposition was filed); *U.S. Dep't of the Interior, Bureau of Reclamation, Great Plains Region, Colo./Wyo. Area Off.*, 68 FLRA 992, 993, 996-97 (2015) (Member Pizzella dissenting on other grounds) (same); *U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs.*, 60 FLRA 437, 437, 443 (2004) (Member Pope dissenting on other grounds) (same).

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency asserts that the award is based on a nonfact.[61] To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[62] But 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.[63] The Authority also rejects nonfact arguments that challenge alleged findings that an arbitrator did not actually make.[64]

According to the Agency, "[t]he [a]ward rests on a central factual premise that routine[-]telework a[rrangements] were terminated."[65] The Agency asserts that this premise is clearly erroneous,[66] and the Arbitrator relied on insufficient evidence to support the award.[67] In addition, the Agency claims that the Arbitrator mischaracterized the management witness's testimony, because he testified only that "*certain*" routine-telework arrangements were terminated – not that "routine telework [arrangements] as a *category* were terminated."[68]

To the extent that the Agency is arguing that the Arbitrator erroneously found that the Agency terminated every individual routine-telework arrangement, the Arbitrator did not make such a finding. Rather, he merely relied on the management witness's testimony "that certain [arrangements] were terminated or modified"[69] to find that the witness "was aware that [r]outine[-t]elework [arrangements] were terminated or modified."[70] As the Agency's argument challenges an alleged finding that the Arbitrator did not actually make, it does not provide a basis for finding that the award is based on a nonfact.[71] Further, the Agency's arguments challenging the Arbitrator's evaluation of the evidence before him also fail to establish the award is based on a nonfact.[72] Accordingly, we deny the nonfact exception.

B. The Arbitrator did not exceed his authority.

The Agency argues that some of the awarded remedies exceeded the Arbitrator's authority because they would apply to employees outside the Union's bargaining units.[73] As relevant here, arbitrators exceed their authority when they award relief to those not encompassed within the grievance.[74]

As discussed in connection with the Agency's management-rights challenge, the Union requested all of the awarded remedies,[75] and it does not appear that the Agency asserted at arbitration that the requested remedies would award relief to employees outside the bargaining units. Nevertheless, even assuming that this argument is properly before us, we find it moot for the following reasons.[76]

When an opposing party agrees to interpret an award so as to avoid a deficiency alleged by an excepting party, the Authority has recognized the agreed-to interpretation of the award as binding, and has dismissed, as moot, any objections to the award based on a different interpretation.[77] Here, the Union agrees to interpret the award as applying only to bargaining-unit employees,[78]

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[61] Exceptions Br. at 18-20.
[62] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 501 (2023) (*VA*) (citing *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022)).
[63] *NTEU, Chapter 46*, 73 FLRA 654, 656 (2023) (citing *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018)).
[64] *Ass'n of Admin. L. Judges, IFPTE*, 74 FLRA 325, 331 (2026) (*AALJ*) (Member Arrington concurring on other grounds).
[65] Exceptions Br. at 18.
[66] *Id.*
[67] *See id.* at 19 (claiming "the record affirmatively lacks evidence" to support the award).
[68] *Id.* at 18 (emphasis added).
[69] Tr. at 288.
[70] Award at 15.
[71] *AALJ*, 74 FLRA at 331.
[72] *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, 387 (2026) (Chairman Kiko concurring on other grounds) (contention that arbitrator misstated "specific record evidence" did not establish nonfact); *AALJ*, 74 FLRA at 331 (allegation that arbitrator improperly discounted one party's evidence does not establish nonfact); *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 914, 916 (2024) (Chairman Grundmann concurring on other grounds) (challenge to arbitrator's conclusion based on the evaluation of testimony does not establish nonfact); *U.S. Dep't of VA, Veterans Health Admin.*, 73 FLRA 855, 857-58 (2024) (assertion that arbitrator "failed to credit . . . uncontradicted testimony" does not establish nonfact).
[73] Exceptions Br. at 24-25.
[74] *E.g.*, *AFGE, Loc. 2258*, 70 FLRA 210, 213 (2017).
[75] *See* note 39.
[76] *See, e.g.*, *Laborers Int'l Union of N. Am., Loc. 1776*, 73 FLRA 591, 593 n.30 (2023) (then-Member Kiko concurring) (assuming, without deciding, non-meritorious argument was properly raised on exceptions).
[77] *VA*, 73 FLRA at 500.
[78] Opp'n Br. at 33-34 ("[The Union] readily acknowledges that the scope of the [a]ward only pertains to employees in the [Union's] bargaining units.").

and we recognize that interpretation as binding.[79] Therefore, we dismiss the Agency's exceeded-authority exception – which is based on a different interpretation of the award – as moot.[80]

C. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any questions of law raised by the exception and the award de novo.[81] In applying the de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[82] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[83]

1. The Reauthorization Act does not grant the Agency sole and exclusive discretion over telework policies.

The Agency argues that the Reauthorization Act grants the Administrator sole and exclusive discretion over telework policies.[84] Consequently, according to the Agency, the telework provisions of the agreements are unenforceable, and the Arbitrator lacked jurisdiction over the grievance.[85] In analyzing claims of sole and exclusive discretion, the Authority looks at the plain wording and the legislative history of the statute in question.[86] While unfettered discretion is typically indicated by such phrases as "notwithstanding any law" or "without regard to the provisions of other laws," such a signal is not required, and the statute must be considered in its entirety.[87] In the absence of any indication that Congress intended an agency's discretion to be sole and exclusive, the exercise of discretion through collective bargaining is consistent with law.[88]

To support its argument, the Agency compares the Telework Enhancement Act of 2010 (Enhancement Act), which does not apply to the Agency, and the Reauthorization Act, which does.[89] The Authority has held that the Enhancement Act does not grant agency heads sole and exclusive discretion over their agencies' telework policies.[90] But the Agency argues that the Reauthorization Act confers sole and exclusive discretion upon the Administrator because it is "unusually detailed"[91] about how telework must complement the Agency's mission; protect the safety and efficiency of the national airspace system; and ensure adequate training, public availability, and secure networking capacity for teleworkers.[92] Further, the Agency argues that the Reauthorization Act "explicitly authorizes *the Administrator*" alone to conform the Agency's telework policies to the Reauthorization Act's requirements.[93]

Although the Reauthorization Act identifies requirements for the Agency's telework policies in greater detail than the Enhancement Act does for other federal agencies, the substance of these two statutory regimes is not meaningfully different. The Reauthorization Act authorizes "the Administrator" to take certain actions regarding telework,[94] and the Enhancement Act authorizes "the head of each executive agency" to take similar actions.[95] The Reauthorization Act identifies goals for the Agency's telework policies – like reducing office footprint and expenses, increasing workforce retention, and increasing efficiency and effectiveness[96] – but the legislative history for the Enhancement Act shows that Congress likewise intended that law to further the same

[79] *See VA*, 73 FLRA at 500.
[80] *See id.*
[81] *E.g., U.S. Dep't of Transp., FAA*, 74 FLRA 437, 438 (2026).
[82] *E.g., id.*
[83] *E.g., id.*
[84] Exceptions Br. at 6-13.
[85] *Id.* at 12-13.
[86] *NAGE, Loc. R5-136*, 56 FLRA 346, 348 (2000); *see also Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1402 (D.C. Cir. 1988) (where statute provided agency head was required to grant compensatory time for overtime work instead of overtime pay, and to prescribe duty hours for employees "notwithstanding any other provision of law," court found agency head had sole and exclusive discretion); *Ass'n of Civilian Technicians, Mile High Chapter*, 53 FLRA 1408, 1412 (1998) (finding that legislative history could demonstrate that Congress intended agency to possess sole and exclusive discretion).
[87] *U.S. Dep't of the Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F.3d 957, 961-63 (D.C. Cir. 2016) (finding Congress is not required to use a specific phrase to grant an agency unfettered discretion).
[88] *See POPA*, 53 FLRA 625, 648 (1997); *IAMAW, Franklin Lodge No. 2135*, 50 FLRA 677, 692 (1995) (*IAMAW*); *NAGE*, 43 FLRA 1008, 1009-10 (1992).
[89] Exceptions Br. at 9 n.19.
[90] *NTEU*, 71 FLRA 703, 704-06 (2020) (*NTEU*) (Member DuBester dissenting in part on other grounds) ("Congress clearly delegated to each [a]gency head the role of determining telework policy; however, we could not find – nor did the [a]gency identify – a particular word or phrase that evoked unfettered discretion."), *vacated in part & remanded in part on other grounds sub nom. NTEU v. FLRA*, 1 F.4th 1120, 1128 & n.14 (D.C. Cir. 2021) ("[T]he FLRA's determination that the Telework Enhancement Act of 2010 does not provide the [agency] with sole and exclusive discretion to establish telework frequency is not before us.").
[91] Exceptions Br. at 9.
[92] *Id.* at 8-9.
[93] *Id.* at 8.
[94] Pub. L. No. 118-63, § 221, 138 Stat. at 1058-59, *reprinted in* 49 U.S.C. § 106 note.
[95] 5 U.S.C. § 6502(a)(1).
[96] Pub. L. No. 118-63, § 221(a)(1), 138 Stat. at 1058, *reprinted in* 49 U.S.C. § 106 note.

goals.[97] The explicit statutory requirements for the Agency's telework policies under the Reauthorization Act are more granular than those under the Enhancement Act. For example, as the Agency notes, the Reauthorization Act requires that telework arrangements ensure "safety or efficiency of the national airspace system";[98] "provide[] for on-the-job training opportunities";[99] "optimize[] the work status of . . . personnel performing safety-related functions";[100] make public-facing personnel "routinely available on a predictable basis for in-person and virtual communications with external persons";[101] and "provide[] opportunities for in-person dialogue, collaboration, and ideation for all employees."[102] But all of these Reauthorization Act requirements merely elaborate upon the Enhancement Act's more general command that an agency's telework policy may "not diminish employee performance or agency operations."[103] In all these respects, the Reauthorization Act is substantively similar to the Enhancement Act, which does not confer sole and exclusive discretion.[104]

The Agency asserts that the Reauthorization Act directs the Agency to "consult with" unions if telework arrangements must be changed because, according to the Agency, Congress wanted to remove telework-policy changes from the Agency's bargaining obligations.[105] But this assertion is flawed for two reasons. First, consultation with an exclusive representative is part of the Statute's definition of "collective bargaining," so a consultation requirement could not, standing alone, signal the complete extinguishment of the Agency's collective-bargaining obligations.[106] Second, "repeals by implication are not favored" in statutory interpretation.[107] Thus, the Reauthorization Act's reiteration of the Agency's consultation responsibilities should not be construed to terminate the Agency's other preexisting collective-bargaining obligations, such as the obligations to negotiate and honor agreements that result from negotiations.[108]

In addition, the legislative history of the Reauthorization Act does not indicate that Congress intended to grant the Administrator sole and exclusive discretion over telework-policy changes, because the sparse discussion does not address the Administrator's authority, or the Agency's bargaining obligations, at all.[109]

For all the foregoing reasons, the Agency does not establish that the Reauthorization Act relieves the Agency of the obligation to exercise its discretion over telework policies through collective bargaining.[110]

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[97] H.R. REP. 111-474, at 7 (2010), *as reprinted in* 2010 U.S.C.C.A.N. 1214, 1215 ("BACKGROUND AND NEED FOR LEGISLATION[:] Telework provides a number of benefits including reduced energy consumption and traffic congestion, competitive hiring and retention, cost savings, and emergency preparedness.").

[98] Pub. L. No. 118-63, § 221(a)(1)(B), 138 Stat. at 1058, *reprinted in* 49 U.S.C. § 106 note.

[99] *Id.* § 221(a)(1)(D).

[100] *Id.* § 221(a)(1)(F).

[101] *Id.* § 221(a)(1)(G)(i), 138 Stat. at 1059, *reprinted in* 49 U.S.C. § 106 note.

[102] *Id.* § 221(a)(1)(H).

[103] 5 U.S.C. § 6502(b)(1). Both Acts address the adequacy of information and security protections for information and information systems used while teleworking. *See* Pub. L. No. 118-63, § 221(a)(3), 138 Stat. at 1059, *reprinted in* 49 U.S.C. § 106 note; 5 U.S.C. § 6504(c).

[104] *See NTEU*, 71 FLRA at 704-06.

[105] Exceptions Br. at 9-10 (quoting Pub. L. No. 118-63, § 221(c), 138 Stat. at 1059, *reprinted in* 49 U.S.C. § 106 note).

[106] 5 U.S.C. § 7103(a)(12) ("'[C]ollective bargaining' means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to *consult* and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . ." (emphasis added)).

[107] *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 315 (2020) (quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974)).

[108] *See Pugin v. Garland*, 599 U.S. 600, 609 (2023) ("'[R]edundancies are common in statutory drafting – sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication.' As a result, 'the better overall reading of the statute' sometimes 'contains some redundancy.'" (citation omitted) (quoting *Barton v. Barr*, 590 U.S. 222, 239 (2020))).

[109] *See* H.R. REP. 118-138, at 336 (2023), *as reprinted in* 2024 U.S.C.C.A.N. 128, 258 ("This section puts in place requirements for [Agency] telework policies, requiring that telework policies be based on job functions, duties, and level of management to ensure the mission of the [A]gency can be accomplished effectively. This section requires that telework policies cannot inhibit site visits, inspections, in-person collaboration, on-the-job training, and operations of the [Agency]. Lastly, this section requires the consideration of telework status and duty station when determining pay rates for employees."). *Compare IAMAW*, 50 FLRA at 692 (declining to find sole and exclusive discretion where "[n]othing in the . . . legislative history [of the applicable statutory provision] demonstrate[d] that the [a]gency's discretion . . . [wa]s intended to be sole and exclusive"), *with AFGE, Loc. 3295*, 47 FLRA 884, 895-96 (1993) (finding legislative history supported sole and exclusive discretion where House report stated that agency head "shall perform the duties . . . and exercise the powers of the office with the degree of autonomy equal to that of the Comptroller of the Currency," and the Comptroller exercised relevant authority "without regard to the provisions of any other law").

[110] *See NTEU*, 71 FLRA at 705 ("In the absence of any indication that Congress intended the agency's discretion to be sole and exclusive, the exercise of discretion through collective bargaining is consistent with law.").

Accordingly, we deny the Agency's claim to the contrary.[111]

2. The Arbitrator did not find a violation of § 7116(a)(7) of the Statute.

The Agency argues that, to the extent the Arbitrator found that the Agency violated § 7116(a)(7) of the Statute, the award is contrary to law.[112] With an exception not relevant here, § 7116(a)(7) makes it an unfair labor practice 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."[113] However, the Arbitrator cited § 7116(a)(7) merely to bolster his interpretation of Section 3.[114] Noting that § 7116(a)(7) provides an "important protection for unions and their members," the Arbitrator stated that he "would not lightly find" the Union "waived" that protection in Section 3.[115] Further, the Arbitrator explicitly found only contract violations.[116] Thus, he did not find a violation of § 7116(a)(7), and the Agency's argument provides no basis for finding the award contrary to law.

Accordingly, except for the dismissed management-rights claim discussed above,[117] we deny the Agency's contrary-to-law exception.

D. The award draws its essence from Sections 3, 8, and 13 of the parties' agreements.

The Agency argues that the award fails to draw its essence from Sections 3, 8, and 13 of the parties' agreements.[118] The Authority will find that an arbitration award fails to draw its essence from a collective-bargaining agreement when the excepting party establishes the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[119]

The Agency argues the award fails to draw its essence from Section 3, which states that the "Administrator may set an agency-wide approach . . . regarding telework. Any application to [Union-represented] employees will be subject to the applicable terms of" the agreements.[120] According to the Agency, the Arbitrator misinterpreted Section 3 because its first sentence allows the Administrator to change the Agency's telework approach without any limitations, and the second sentence applies only to individualized supervisory determinations about how to apply that approach to their employees.[121] However, the Arbitrator rejected this interpretation, finding that Section 3's wording "does not provide much support for the Agency's position."[122] As the Arbitrator interpreted and applied it, Section 3 recognizes the Administrator's authority under the Reauthorization Act by allowing the Administrator to change the Agency-wide approach to telework, but also requires that any such changes be applied to Union-represented employees consistent with the agreements.[123] Particularly because Section 3's second sentence does not contain any wording that limits its application to individual supervisors, the Agency does not demonstrate that the Arbitrator's finding is irrational, unfounded, implausible, or in manifest disregard of Section 3.[124]

Additionally, the Agency asserts that Section 8 does not limit the Administrator's discretion under Section 3, and that Section 8 does not require "data or empirical findings" to support telework changes.[125] Section 8 states, in pertinent part:

> When an employee makes a request to telework, the Agency will apply the following criteria to grant or deny the specific . . . request in a fair, objective, and equitable manner and based on sound business practices, not arbitrary limitations:

[111] *See id.* at 706 (denying sole-and-exclusive-discretion claim based on the Enhancement Act).
[112] Exceptions Br. at 17.
[113] 5 U.S.C. § 7116(a)(7).
[114] *See* Award at 12.
[115] *Id.*
[116] *Id.* at 16-17 ("For the foregoing reasons, I find that the Agency violated [the agreements] by adopting a policy which required all bargaining[-]unit employees to return to in-office work on a full-time basis.").
[117] *See* Part III.A.
[118] Exceptions Br. at 20-23.
[119] *SSA*, 73 FLRA 708, 713 (2023).
[120] Award at 5 (quoting Section 3).
[121] Exceptions Br. at 20-21.
[122] Award at 12.
[123] *See id.* at 5, 11-12.
[124] *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Elkton, Ohio*, 74 FLRA 29, 31 (2024) (denying essence argument). *But see SSA, Off. of Gen. Couns.*, 72 FLRA 554, 555 (2021) (granting essence exception where arbitrator's interpretation conflicted with the plain wording of the parties' agreement).
[125] Exceptions Br. at 21.

> a. The reasonableness of the request, to include consideration of work activities that are portable . . . , and consideration of the employee's ability to effectively engage in-person and virtually as appropriate;
>
> b. The workability of the request, to include the availability of adequate technology for offsite work, and the appropriateness of virtual management oversight; or
>
> c. The request would not have an adverse impact on any Agency operation or the mission of the FAA . . . .[126]

Section 13 states that the "[r]ationale for a denial, modification, or termination of a [t]elework [arrangement] shall be provided in writing and will include information about the criteria considered under Section 8, . . . and, if applicable, what actions the employee should take to improve their chance of approval."[127] Reading Section 8 and Section 13 together, the Arbitrator found the provisions require that "management's approval or denial of a request for telework, as well as any modification or termination of an existing [t]elework [arrangement], must be based upon a review of [the Section 8] criteria."[128] The Arbitrator found that if the Agency chose to apply an Agency-wide change in telework approach to Union-represented employees, then that change "must be in some way tied to the criteria listed in Section 8 and must be based on the experience with telework at th[e] Agency, with decisions based on data specific to th[e] Agency."[129]

The Agency's first assertion regarding Section 8 – that it does not limit the Administrator's discretion under Section 3 – essentially reiterates the Agency's argument that Section 3 allows the Administrator to change the Agency's telework approach without any limitations from the agreements. As we have already rejected that argument as a basis for finding that the award fails to draw its essence from Section 3, we reject it in the context of Section 8 as well.

As for the assertion that Section 8 does not require data or empirical findings, the Arbitrator found that decisions regarding telework under Section 8 must be based on individualized employee assessments.[130] The Agency concedes this point in its exceptions,[131] and did not assert at arbitration that any individualized assessments were performed.[132] The Arbitrator further found that an *individualized* employee assessment under Section 8 required the Agency to rely on its own experience and data[133] – that is, experience and data regarding the individual Agency employee whose telework request is being evaluated. The Agency does not explain how it could conduct an individualized employee assessment except by considering its own experience and data concerning the individual employee.

Alternatively, the Agency argues that the award fails to draw its essence from Section 8 because the Administrator's alignment message addressed the Section 8 criteria.[134] But the Agency did not argue at arbitration that the alignment message provided individualized assessments for the affected employees.[135] And even if the alignment message mentioned the Section 8 criteria, the Agency does not establish a deficiency in the Arbitrator's finding that merely mentioning those criteria is not an individualized assessment, as Section 8 requires.[136] Thus, the Agency does not show that the award fails to draw its essence from Section 8.[137]

The Agency also argues the award fails to draw its essence from Section 13. Section 13 provides that the "[r]ationale for a denial, modification, or termination of a [t]elework [arrangement] shall be provided in writing and will include . . . , if applicable, what actions the employee should take to improve their chance of approval."[138] The Arbitrator found that the Agency failed to comply with this section because the telework-termination notices in evidence did not apprise the employees of what actions they should take to improve their chances of approval for routine telework in the future.[139] The Agency challenges

[126] Award at 4 (quoting Section 8).
[127] *Id.* (quoting Section 13).
[128] *Id.*
[129] *Id.* at 12.
[130] *Id.* at 10.
[131] Exceptions Br. at 21 ("The only requirement is that supervisors follow the Section 8 criteria on an individualized basis.").
[132] Award at 11.
[133] *See id.* at 12.
[134] Exceptions Br. at 22-23.
[135] *See* Award at 11 ("[T]he Agency has not claimed that individualized assessments were done prior to any of the terminations at issue here.").
[136] *See id.* ("[T]he reasons for termination stated in [the alignment message] . . . fall[] short of the requirement that management advise affected employees of the factors considered in the decision in their particular case.").
[137] *See, e.g., SSA*, 73 FLRA at 713 (denying essence argument where party failed to demonstrate an inconsistency between the award and contractual requirements).
[138] Award at 4 (quoting Section 13).
[139] *Id.* at 11.

this finding because "routine telework was eliminated except for specified exceptions, [so] the [Agency] had no obligation to inform employees how they could improve their chances of receiving it."[140]

Assuming there are "specified exceptions" that allow for routine telework,[141] the Arbitrator's finding of a Section 13 violation is supported by his finding that the Agency did not inform employees how they could improve their chances of obtaining an "exception[]"[142] that would permit routine telework – even if the exceptions were limited in nature.[143] Consequently, the Agency does not show that the Arbitrator's conclusion that the Agency violated Section 13 is irrational, unfounded, implausible, or in manifest disregard of Section 13.[144]

For all these reasons, we deny the essence exception.

E. The award is not contradictory so as to make implementation impossible.

The Agency argues that the award is contradictory so as to make implementation impossible because the Arbitrator both stated that "nothing in this decision requires that the Agency . . . maintain any [t]elework or [r]emote[-]work [arrangements],"[145] *and* directed the Agency to "rescind all terminations of telework and remote[-]work [arrangements]."[146] But these statements are not contradictory. The Arbitrator explained that he was "simply holding the Administrator to the procedures and arrangements . . . in the parties' [a]greements."[147] Thus, the Agency must reinstate the arrangements that it terminated *in violation* of the agreements, but the Arbitrator did not prohibit the Agency from terminating any arrangements in a manner that *complies* with the agreements. As such, the award is not so contradictory as to make implementation impossible, and we deny this exception.[148]

F. The Arbitrator did not deny the Agency a fair hearing.

The Agency argues that the Arbitrator's treatment of the supervisor-to-employee messages about terminating telework arrangements denied the Agency a fair hearing.[149] An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.[150]

According to the Agency, the Arbitrator responded to its evidentiary objection at arbitration by providing an assurance that, "if the [supervisor-to-employee messages] . . . were not developed through testimony, he would not give them significant weight."[151] The Agency contends that, despite the supposed assurance, the Arbitrator wrongly relied on the messages to find that the Union established a prima facie case, and then shifted the evidentiary burden to the Agency.[152]

The Agency's contentions are based on a mischaracterization of the Arbitrator's statements about this objection. The Arbitrator did not promise to discount the messages unless they were developed through testimony. Initially, we note that the Arbitrator stated the messages did not even appear to *be* hearsay.[153] But as to hearsay, he said that if "not in any way rebutted, [the messages] may stand."[154] And in his award, he found the Agency failed to rebut the messages.[155] Thus, the Arbitrator's finding that these messages established the Union's "prima facie case" was entirely consistent with his statements at the hearing,[156] because a prima facie case is the "establishment of a . . . rebuttable presumption."[157] The Arbitrator examined the Agency's evidence to see if

[140] Exceptions Br. at 23.
[141] *Id.* at 23.
[142] *Id.*
[143] *See* Award at 11 (finding that inviting employees to apply for *situational* telework did not inform the employees how they could improve their chances of future approval for *routine* telework).
[144] *See, e.g.*, *SSA*, 73 FLRA at 713 (denying essence argument where party failed to demonstrate an inconsistency between the award and contractual requirements).
[145] Exceptions Br. at 16 (omission in original) (quoting Award at 14).
[146] *Id.* (quoting Award at 17).
[147] Award at 14.
[148] *See NATCA*, 55 FLRA 1025, 1027 (1999) (Member Wasserman dissenting on other grounds) (denying exception where award was not contradictory so as to make implementation impossible); *NAGE, Loc. R4-45*, 55 FLRA 784, 787-88 (1999) (same).
[149] Exceptions Br. at 26-28.
[150] *AFGE, Loc. 4156*, 73 FLRA 588, 589 (2023) (*Loc. 4156*); *VA*, 73 FLRA at 503.
[151] Exceptions Br. at 26.
[152] *Id.* at 27-28.
[153] *See* Tr. at 32.
[154] *Id.*
[155] Award at 15 (finding "Agency offered no evidence" that the announcement "was not actually put into effect for unit employees").
[156] *Id.*
[157] *Prima Facie Case*, BLACK'S LAW DICTIONARY (12th ed. 2024).

it had rebutted the messages, and he found the Agency had not.[158]

The Agency does not demonstrate that the Arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. Therefore, we deny this exception.[159]

V. Decision

We partially dismiss and partially deny the Agency's exceptions.

[158] *See* Award at 15.

[159] *See, e.g.*, *Loc. 4156*, 73 FLRA at 589-90 (denying fair-hearing exception where party failed to demonstrate arbitrator refused to hear or consider pertinent and material evidence); *VA*, 73 FLRA at 503-04 (denying fair-hearing exception where party did not demonstrate arbitrator's actions in conducting the proceeding so prejudiced the party as to affect the fairness of the proceeding as a whole).

Member Wagner, concurring in part and dissenting in part:

I agree with the decision in all respects but one. Specifically, for the following reasons, I do not agree that the Agency's sole-and-exclusive-discretion claim is properly before us.

As the majority acknowledges,[160] under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, an exception to an arbitration award may not rely on any arguments "that could have been, but were not, presented" to the Arbitrator.[161] I previously have agreed that there is a narrow exception to this rule for claims that an arbitrator lacked jurisdiction over a matter that was "mandatorily excluded, by law, from the scope of negotiated grievance procedures."[162] However, for the reasons that a majority of the Authority fully articulated in *NTEU, Chapter 302*,[163] I believe that "sole and exclusive discretion to establish certain conditions of employment does not preclude grievances over individual applications of those conditions of employment, once established."[164] As such, I do not believe that sole-and-exclusive-discretion claims are akin to claims regarding statutory bars to arbitral jurisdiction.

Rather, in my view, an arbitrator may exercise jurisdiction to determine whether: (1) a statute gives an agency sole and exclusive discretion over a matter; (2) an agency has exercised that discretion by agreeing to a contract provision involving a matter within the scope of that discretion; and (3) the agency has complied with such a contract provision. As such, I would find that sole-and-exclusive-discretion claims are the types of claims that must be raised to an arbitrator before they may be raised to the Authority on exceptions. Because the Agency did not make its sole-and-exclusive-discretion claim regarding the FAA Reauthorization Act of 2024 before the Arbitrator, but could have done so, I would find it barred here.

Accordingly, I concur in part and dissent in part.

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[160] Majority at 5.

[161] 5 C.F.R. §§ 2425.4(c), 2429.5.

[162] *U.S. Dep't of VA, W. Palm Beach VA Med. Ctr., W. Palm Beach, Fla.*, 74 FLRA 121, 122 (2024) (then-Member Kiko concurring on other grounds).

[163] 65 FLRA 746 (2011) (*Chapter 302*) (Member Beck dissenting), *overruled by U.S. Dep't of Energy, W. Area Power Admin.*, 71 FLRA 111, 112 (2019) (*DOE*) (Member DuBester dissenting).

[164] *Chapter 302*, 65 FLRA at 750; *see also id.* at 747-50 (explaining reasoning); *DOE*, 71 FLRA at 113-14 (Dissenting Opinion of Member DuBester); *U.S. DOD, Nat'l Imagery & Mapping Agency, St. Louis, Mo.*, 57 FLRA 837, 845-46 (2002) (Dissenting Opinion of Member Pope).