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103 LRP 34789

**United States Department of Defense,
Defense Logistics Agency, Defense
Distribution Depot, New Cumberland, PA
and American Federation of Government
Employees, Local 2004**

58 FLRA 750

Federal Labor Relations Authority

58 FLRA No. 178

0-AR-3627

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**47.89 Grievance Arbitration Awards, Clarification
Judge / Administrative Officer**

**Dale Cabaniss, Carol Waller Pope and Tony
Armendariz**

Appealed from 103 LRP 2497

Ruling

All but one of the agency's exceptions were denied. The FLRA decided the arbitration award failed to explain whether the staffing of a new area constituted a change in conditions of employment. That exception was resubmitted to the arbitrator for clarification.

Meaning

Under 5 USC 7116(a)(1) and (5), agencies are

required to bargain over the impact and implementation of a change in employees' conditions of employment if the change has more than a *de minimis* effect. The arbitrator's award failed to determine if the agency was required to bargain or if the effect was more than *de minimis*. Therefore, the FLRA was unable to resolve the exception.

Case Summary

The agency filed exceptions to an arbitration award, which found it violated a supplemental agreement by detailing employees. The agency was required to bargain its decisions to assign employees to its new active items area and hire temporary employees. The FLRA resubmitted the portion of the award, which involved assigning employees, to the arbitrator for clarification. The agency's remaining exceptions were denied.

The agency notified the union it would hire temporary employees to work Saturday and Sunday shifts. The agency refused the union's request to negotiate the appropriate arrangements of its decision. The agency then decided to rotate packing branch employees to staff the new active items area. The agency refused the union's request to bargain this decision. Although working conditions for employees would not be changed, the agency agreed to accept appropriate arrangement proposals. The union claimed employees were detailed in violation of the master agreement.

The union's grievance proceeded to arbitration. The agency claimed it was not obligated to bargain over the new area. There were no staffing changes associated with the creation of the area. Also, there was no adverse impact on any employees and the supplemental agreement did not obligate the agency to bargain that decision.

The award did not state whether the "staffing of that area constituted a change in conditions of employment" or if the effect, if any, was more than *de minimis* the FLRA opined. Therefore, the FLRA was unable to resolve this exception.

Full Text

Decision

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator John R. Stepp filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator sustained a grievance, finding that the Agency had a contractual obligation to bargain over § 7106(b)(1) matters and a statutory obligation to bargain over § 7106(b)(2) and (b)(3) matters relating to the Agency's decisions to (1) hire temporary employees, and (2) assign employees to its New Active Items Area. In addition, the Arbitrator found that the Agency violated the parties' agreement in detailing employees.

For the reasons that follow, we remand the portion of the award concluding that the Agency was obligated to bargain over § 7106(b)(2) and (3) matters involving the staffing of the New Actives Items Area to the parties for resubmission to the Arbitrator, absent settlement, for clarification. We deny the Agency's remaining exceptions.

II. Background

A. The Parties' Supplemental Agreement

In December 1994, the parties negotiated a Regional Supplemental Agreement (supplemental agreement), which provides, among numerous other things, for the parties to negotiate over § 7106(b)(1) matters in accordance with Executive Order 12871.¹ The supplemental agreement further provides that:

This supplement shall remain in effect for 3 years following the effective date and shall be automatically renewed for an additional 3 year period unless either party gives written notice to the other party of its desire to renegotiate this supplement between 60 to 90 calendar days prior to the end of the 3 year period. When renegotiation of this supplement is in progress, this supplement shall continue in full force and effect until a new supplement has been

negotiated.

Agency Exhibit 3, Supplemental Agreement, Article 45, Section 1.B. There is no dispute that, in accordance with this provision, the supplemental agreement was renewed for an additional 3-year period beginning in December 1997.

In February 1999, the parties commenced negotiations over a new supplemental agreement, which were not completed prior to December 2000, the end of the 3-year roll-over period. In October 1999, as part of the negotiations, the Agency informed the Union that it intended to cancel the supplemental agreement effective November 1, 1999. *See* Agency Exhibit A-3. The Agency proposed a nation-wide, as opposed to regional, supplemental agreement delegating authority to the local level to negotiate over certain details. In August 2001, also as a part of those negotiations, the Agency informed the Union that the Agency was no longer bound by Article 2, Section 3 and that it would not elect to negotiate over § 7106(b)(1) matters. *See* Agency Exhibit A-3, Bargaining History Memorandum dated August 15 and 16, 2001; December 5, 2001 letter.

B. Temporary Employees

In July 2001, the Agency informed the Union that it intended to hire temporary employees for Saturday and Sunday shifts. *See* Agency Exhibit A-4. The Union sought to negotiate "appropriate arrangements" relating to the Agency's decision to hire temporary employees and implement a Sunday shift and, in accordance with Article 2, Section 3 of the supplemental agreement, § 7106(b)(1) matters relating to those decisions. *Id.* at July 18, 2001 letter. The Agency declined to negotiate, claiming that § 7106(b)(1) matters were not implicated by the decision to hire the temporary employees and that the Union's alleged impact on the bargaining unit was not the result of the Agency's decision to hire temporary employees. *Id.* at November 9, 2001 letter.

C. The Unfair Labor Practice (ULP) Charge

In October 2001, the Union filed an ULP charge

alleging that the Agency negotiated in bad faith and failed to comply with an order of the Federal Service Impasses Panel (FSIP) concerning the separation of employees a year earlier. In support of its claim, the Union referenced the Agency decision to hire the temporary employees.² The charge was withdrawn in January 2003.

D. New Active Items Area and Details

In August 2001, the Agency announced that it intended to rotate certain employees who process "[a]ctive [i]tem[s]" in the Packing Branch to staff a newly created storage area. *See* Agency Exhibit A-1. The parties referred to this area as the "New Active Items [A]rea." In accordance with Article 2, Section 3 of the supplemental agreement, the Union sought to negotiate over § 7106(b)(1) matters as well as "procedures" and "appropriate arrangements" concerning the staffing of the New Active Items Area. *Id.* at September 5, 2001 letter. The Agency responded, asserting that there was no obligation to bargain over § 7106(b)(1) matters because it was not increasing the number of employees assigned to the New Active Items Area. *Id.* at October 1, 2001 letter. The Agency further stated that it did not anticipate any changes in working conditions for employees, but invited the Union to submit appropriate arrangement proposals. *Id.*

In ultimately staffing the New Active Items Area, the Agency detailed employees, which the Union asserted occurred without adhering to the requirements set forth in Article 29 of the parties' master agreement. *See* Agency Exhibit 3 for full text of Article 29.

E. The Grievance

In November 2001, the Union filed a grievance, which was later amended, alleging that the Agency: (1) violated Article 2, Section 3 of the parties' supplemental agreement in refusing to bargain over § 7106 (b)(1) matters involving the decision to hire the temporary employees; (2) failed to bargain over § 7106(b)(3) matters relating to that decision; (3) violated Article 2, Section 3 in failing to bargain over

§ 7106(b)(1) matters concerning the staffing of the New Action Items Area; and (3) violated Article 29 by failing to notify the Union of the decision to detail certain employees and in the manner in which those details were effectuated. *See* Agency Exhibit 2.

III. Arbitrator's Award

The grievance was unresolved and submitted to arbitration, where the issues were framed as:

1. Was the grievance ... timely?

2. [D]id the [Agency] violate the [c]ollective [bargaining [a]greement (CBA) by refusing to negotiate adverse impact on bargaining unit employees resulting from the hiring of 100 part-time, temporary employees?

3. [D]id [the Agency] violate the CBA related to details and assignment of bargaining unit employees?

4. [D]id [the Agency] violate the CBA by refusing to negotiate numbers, types, and grades of positions and changes in working conditions in the New Active Items Area as proposed by the [U]nion?

5. [D]id the [parties'] Supplement[al agreement] expire in December 2000 in accordance with the provisions of Article 45, Section 1.B. of the agreement?

Award at 2.

The Arbitrator found that the grievance was timely filed because the Union had repeatedly made good faith efforts to bargain and management failed to raise a timeliness issue until arbitration. The Arbitrator further found that the "alleged repeated abuse of details" constituted continuing violations, permitting the filing of a grievance at any time. *Id.* at 5.

In addition, the Arbitrator determined that "no basis exists for [the A]rbitrator to consider" the Agency's claim that the grievance, which was filed in November 2001, was barred by the ULP charge, which was filed in October 2001. *Id.* at 7. The Arbitrator based this determination on his finding that "[n]either argument nor evidence was introduced during the hearing to support such an allegation." *Id.*

The Arbitrator next addressed whether the Agency had a contractual obligation under Article 2, Section 3 to bargain over § 7106(b)(1) matters. In this regard, the Arbitrator considered the impact of Executive Order 13203.³ The Arbitrator found that, because Executive Order 13202 explicitly provides that it does not abrogate any agreement in effect on the date it was issued, and because the supplemental agreement was in effect when the Executive Order was issued in February 2001, that Order did not affect the Agency's contractual obligation to bargain over § 7106(b)(1) matters.

In concluding that the supplemental agreement was in effect in February 2001, the Arbitrator relied on the wording of Article 45, Section 1 B., and found that by its express terms, the agreement was renewed in December 1997 and again -- for a third three-year period -- in December 2000. The Arbitrator rejected the Agency's claim that it cancelled the supplemental agreement by its October 1999 letter to the Union. In this regard, the Arbitrator found that the agreement provided that the second three-year term extended through December 2000, and that any attempt to renegotiate the agreement required notice 60-90 days prior to December 2000. As the October 1999 letter was not within that 60-90 day time frame, the Arbitrator found that it did not constitute appropriate notice.

The Arbitrator also rejected the Agency's claim that the supplemental agreement was not intended to automatically renew for a second three-year term after its expiration in December 2000. In this regard, the Arbitrator found that by the express terms of Article 14, Section 1.B., the agreement provided for an automatic renewal unless either party provided notice within a particular time frame. Because he found that neither party provided notice prior to the supplement's expiration in December 2000, he concluded that the agreement was renewed for an additional three-year period ending in December 2003.

The Arbitrator further found -- relying on the portion of Article 45, Section 1.B. providing that the agreement "shall continue in full force and effect until

a new supplement has been negotiated" -- that because the parties began negotiations over the new supplemental agreement in February 1999, but had not completed the negotiations when Executive Order 13202 was issued in February 2001, the supplemental agreement continued in "full force and effect" during the period at issue and was not affected by the issuance of the Order. *Id.*

Having concluded that the supplemental agreement was in effect when the events at issue took place in 2001, the Arbitrator found that the Agency was obligated to bargain over § 7106(b)(1) matters. The Arbitrator further found that the Agency was obligated to bargain over § 7106(b)(2) and (b)(3) matters related to staffing the New Active Items Area and the impact on unit employees resulting from the hiring of the temporary employees. Finally, the Arbitrator found that "[p]ersuasive evidence and testimony was introduced during the hearing that the Agency repeatedly violated Article 29 ... of the [supplemental agreement, and] [u]ncontested testimony was provided by Union witnesses that employees were frequently detailed involuntarily and without proper notice to the Union." *Id.*

To remedy the violations, the Arbitrator directed the Agency to: (1) negotiate over § 7106(b)(1) matters in accordance with Article 2, Section 3 and Article 45 of the supplemental agreement until a new supplement is negotiated; (2) negotiate over § 7106(b)(1), (b)(2), and (b)(3) matters relating to the hiring of temporary employees, the establishment of Sunday as a new shift, and the staffing of the New Active Items Area; and (3) rescind any actions taken by the Agency that violated Article 2, Section 3, Article 45, and Article 29, including the establishment of a Sunday shift for any permanent bargaining unit employees. *Id.* at 8.

IV. The Arbitrator's conclusion that the grievance was timely filed is not deficient

A. Positions of the Parties

The Agency asserts that the Arbitrator's conclusion that the grievance and its amendments

were timely filed fails to draw its essence from the parties' agreement and is based on a nonfact.

The Union asserts that the Arbitrator properly found that the grievance was timely filed based on his interpretation of the parties' agreement, which is within the Arbitrator's authority, and findings of fact. Opposition at 11-13.

B. Analysis and Conclusions

It is well-settled that an arbitrator's determination regarding the timeliness of a grievance under a collective bargaining agreement constitutes a procedural arbitrability determination, which may be found deficient only on grounds that do not challenge the determination itself. *NFFE, Local 422*, 56 FLRA 586, 587 (2000); *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995). The Authority has found that the grounds on which such an award may be found deficient include arbitrator bias or a finding that the arbitrator exceeded his/her authority.

The Agency's assertions that the Arbitrator's conclusion that the grievance was timely filed fails to draw its essence from the parties' agreement and is based on a nonfact directly challenge the Arbitrator's determination that the grievance was timely filed under the parties' agreement. Consistent with well-settled precedent, the Agency's claims do not provide a basis for finding the award deficient. *AFGE, Local 2172*, 57 FLRA 625, 627 (2001); *United States Dep't of Defense, Educ. Activity, Arlington, Va.*, 56 FLRA 887, 891 (2000) (*DOD*). Accordingly, we deny the Agency's exceptions.

V. The Arbitrator did not fail to conduct a fair hearing in concluding that there was no basis to consider the Agency's 5 U.S.C. § 7116(d) argument

A. Positions of the Parties

The Agency asserts that the Arbitrator's conclusion that the grievance was not barred under § 7116(d) of the Statute is deficient because the Arbitrator failed to conduct a fair hearing by not considering pertinent and material evidence.⁴ In this

regard, the Agency claims that it submitted evidence relating to the ULP charge, and that the Arbitrator erred in finding that the Agency offered no evidence or arguments in support of its claim that the grievance was barred and in requiring such evidence to be introduced only during the hearing. Exceptions at 10.

The Union asserts that there is no basis for finding that the Arbitrator failed to consider the evidence submitted by the Agency in support of its claim that the grievance was barred under § 7116(d). Opposition at 22-27. The Union further argues that the grievance could not be barred under § 7116(d) because the ULP charge arose as a result of a FSIP order that the Union was seeking to have enforced. *Id.* at 23.

B . Analysis and Conclusions

The Authority will find an award deficient on the ground that an arbitrator failed to conduct a fair hearing when it is demonstrated that an arbitrator's refusal to hear or consider pertinent and material evidence, or other actions in conducting the proceeding, prejudiced a party so as to affect the fairness of the proceeding as a whole. *United States Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md*, 57 FLRA 417, 421 (2001); *AFGE, Local 1668*, 50 FLRA 124, 126 (1995); *United States Dep't of the Air Force, Hill AFB, Ut.*, 39 FLRA 103, 105-07 (1991) (*Hill AFB*).

The Arbitrator did not state that no evidence at all was introduced at the hearing regarding the Agency's § 7116(d) claim.⁵ Instead, the Arbitrator stated that there was no evidence "introduced during the hearing to support" the Agency's claim. Award at 7 (emphasis added). This statement may reflect the Arbitrator's evaluation of the persuasiveness -- rather than the existence -- of the evidence presented.

In any event, even assuming that the Arbitrator improperly failed to consider the Agency's § 7116(d) argument, nothing in the record indicates that the Agency was prejudiced by the Arbitrator's failure to do so. *AFGE, Local 1668*, 50 FLRA at 127. In this connection, in order for a grievance to be barred from

consideration under § 7116(d) by an earlier-filed ULP charge, the ULP charge and the grievance must, among other things, arise from the same set of factual circumstances and set forth substantially similar legal theories. *United States Dep't of Health and Human Serv., Indian Health Serv., Alaska Area Native Health Serv., Anchorage, Ala.*, 56 FLRA 535, 538 (2000). Although both the ULP charge and the grievance reference the hiring of the 100 temporary part-time employees, the legal theories advanced in the ULP charge and the grievance are not substantially similar. The legal theory underlying the grievance is that the Agency failed to satisfy both its statutory and contractual obligations to bargain over the decision to hire temporary part-time employees. The legal theory underlying the ULP charge, while not entirely clear, appears to be that the Agency failed to bargain in good faith by not complying with an order of the FSIP.

In these circumstances, there is no basis for finding that the grievance was barred under § 7116(d) of the Statute. As such, the Agency was not prejudiced by any failure of the Arbitrator to consider the argument. *Compare AFGE, Local 1668*, 50 FLRA at 127 (finding that even assuming that the arbitrator erred in accepting post-hearing brief, nothing established that party was prejudiced by error), with *Hill AFB*, 39 FLRA at 105-07 (1991) (finding award deficient where party prejudiced by failure to consider relevant evidence and meritorious arguments). We note in this connection, that insofar as the Arbitrator was imposing a requirement on the parties to submit all evidence and arguments during the hearing, the Authority has consistently held that an arbitrator has considerable latitude in conducting a hearing, provided that it does not affect the fairness of the arbitration proceeding as a whole. *GSA, Reg. 9, L.A., Cal.*, 56 FLRA 978, 979 (2000); *United States Dep't of the Air Force, Air Force Flight Test Ctr., Edwards AFB, Cal.*, 48 FLRA 74, 81 (1993).

Based on the foregoing, even assuming that the Arbitrator failed to consider the Agency's § 7116(d) argument, the Agency was not prejudiced by the

Arbitrator's failure to do so. Therefore, we deny the exception.

VI. The Arbitrator's conclusion that the supplemental agreement did not expire does not fail to draw its essence from the parties' agreement

A. Positions of the Parties

The Agency asserts that the Arbitrator's conclusion that the supplemental agreement did not expire upon the completion of the second three-year period in December 2000 fails to draw its essence from the parties' agreement. In this regard, the Agency argues that the agreement provides for only one rollover renewal, which occurred in December 1997. Exceptions at 3. In addition, the Agency asserts that the supplemental agreement remains in effect during renegotiations only where one of the parties has provided notice of their desire to renegotiate its terms within the 60-90 day period prior to the agreement's expiration.

The Union argues that the Arbitrator properly found that the agreement rolled over for a third three-year term, and that negotiations over the new supplement were not completed prior to December 2000. Opposition at 8-10.

B. Analysis and Conclusions

The Authority will find an award deficient as failing 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 collective bargaining 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. *See United States Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority has consistently held that its review of an arbitrator's interpretation of contract provisions is deferential because it was the arbitrator's interpretation for which the parties bargained. *See*

United States Dep't of the Air Force, Seymour Johnson Air Force Base, N.C., 56 FLRA 249, 251 (2000) (citing *Dep't of Health and Human Servs., SSA*, 32 FLRA 79, 88 (1988)).

The Arbitrator interpreted and applied the terms of Article 45, Section 1 B., finding that the supplemental agreement provides for an "automatic renewal for an additional three year period" unless either party gives notice that they want to re-negotiate the agreement within a particular time frame. Award at 6. The Arbitrator concluded that because neither party provided such notice 60 to 90 days prior to the supplemental agreement's expiration in December 2000, the agreement "rolled over for another three years" in December 2000. *Id.* In addition, the Arbitrator found, relying on the second sentence of that section, that so long as the parties were renegotiating the terms of the supplement, it remained in effect without regard to its expiration date.

In interpreting Article 45, Section 1.B., the Arbitrator expressly rejected the arguments the Agency makes now in support of its essence claim. In this regard, the Arbitrator found that the Agency's claim that Article 45, Section 1.B. did not provide for renewals beyond the second-three year period to be "unwarranted" based on the wording of that section and that it provided that the agreement stay in "full force and effect" during negotiations over a new supplemental agreement. *Id.* at 7. In addition, the Arbitrator found the Agency's claim that the requirement that the agreement stay in effect only applied during the 60 to 90-day period prior to the agreement's expiration "illogical." *Id.* at 7.

Nothing in the wording of the supplemental agreement or the Agency's arguments compels a conclusion that the Arbitrator's construction of Article 45, section 1.B. is implausible, irrational, or unconnected to the wording and purpose of the agreement. *AFGE, Local 3911*, 58 FLRA 101, 105-06 (2002). Accordingly, we deny the exception.

VII. The award concerning the New Actives Items Area and the decision to

hire temporary employees is not contrary to 5 U.S.C. § 7105(a)(2)(E)

A. Positions of the Parties

The Agency asserts that the award is deficient because the Arbitrator resolved a "negotiability dispute" that may only be resolved through a negotiability appeal. The Agency argues that 5 U.S.C. § 7105(a)(2)(E) provides that only the Authority can resolve issues relating to the negotiability or make negotiability determinations. Exceptions at 5-7.

The Union asserts that the award is not contrary to 5 U.S.C. § 7105 because the Arbitrator did not make a determination regarding the negotiability of any proposals or order the parties to adopt a specific provision. Opposition at 18-21.

B. Analysis and Conclusions

The Authority reviews questions of law raised by exceptions to an arbitrator's award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

Section 7105(a)(2)(E) of the Statute authorizes the Authority to "resolve issues relating to duty to bargain in good faith." Under that section, the Authority is authorized to determine whether a matter proposed for bargaining is inconsistent with law and Government-wide regulation under section 7117(a)(1) of the Statute. *United States Dep't of the Interior, BIA, Wapato Irrigation Project*, 55 FLRA 152, 157 (1999); *see also* 5 U.S.C. § 7117(c). The Authority has held that, consistent with § 7105(a)(2), negotiability disputes that arise under § 7117(c) may be resolved only by the Authority under § 7105(a)(2)(E). *GSA*, 54 FLRA 1582, 1588 (1988) (quoting *Louis A. Johnson Veterans Admin. Med. Ctr., Clarksburg, W.Va.*, 15 FLRA 347 (1984) (*Veterans*)). It is well settled,

however, that "disputes relating to the meaning and application of provisions of the parties' collective bargaining agreement, including provisions therein dealing with the obligation to bargain, are subject to resolution under the negotiated grievance procedure and a negotiability appeal is not the proper forum in which to resolve such disputes." *Veterans*, 15 FLRA at 350. Accordingly, grievance arbitrators may consider "the collateral issue of the obligation to bargain" in the course of resolving a grievance as long as their conclusions are "consistent with the Statute and relevant decisions of the Authority[.]" *Id.* at 351.

In this case, the Union alleged, and the Arbitrator found, that the Agency was obligated to bargain over § 7106(b)(1), (b)(2), and (b)(3) matters relating to the Agency's decision to hire temporary employees and to staff the New Active Items Area. In resolving those issues, the Arbitrator did not make a determination that any specific proposals or proposed contract language was within the Agency's duty to bargain. In this regard, nothing in the award addresses a negotiability dispute that would otherwise arise under § 7117(c) of the Statute. In addition, we note, unlike here, the cases relied on by the Agency in support of its exception -- *FCI, Texarcana, Tx., Fed. Prison Sys.*, 19 FLRA 238 (1985); *Dep't of the Air Force, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 18 FLRA 710 (1985) -- involved interest arbitration awards where the arbitrator directed the parties to include certain provisions in their agreements despite the agencies' claims that the provisions were not negotiable. Accordingly, we conclude that the award is not contrary to 5 U.S.C. § 7105 (a) (2) (e).

VIII. We are unable to determine whether the award finding that the Agency violated the Statute by failing to bargain concerning the New Active Items Area is deficient; the award finding the Agency violated the parties' agreement is not deficient

A. Positions of the Parties

The Agency asserts that the Arbitrator's conclusion that the Agency violated the Statute and the parties' agreement by failing to negotiate over § 7106(b)(1), (b)(2), and (b)(3) matters involving the staffing of the New Active Items Area is based on a nonfact, fails to draw its essence from the parties' agreement, and is contrary to law. In this regard, the Agency asserts that it was not obligated to bargain over the New Active Items Area because there were no staffing changes as a result of the creation of the Area. The Agency further argues that the Union failed to demonstrate, and the Arbitrator failed to find, that there was any adverse impact on employees, or that any provision in the parties' agreement supported a conclusion that the Agency had an obligation to bargain over the New Actives Items Area.

The Union asserts that the Agency's claims that the award fails to draw its essence from the agreement and is based on a nonfact are without merit. Opposition at 10, 16. The Union argues that as a result of the creation of the New Actives Items Area, employees were required "to work different, less favorable shifts, and [were] depriv[ed] of opportunities for premium pay," and therefore, the agency had changed the working conditions of employees. *Id.* at 15. The Union further asserts that the effect of the change on employees was more than de minimis and, accordingly, the Agency was obligated under the Statute to bargain over § 7106(b)(2) and (b)(3) matters related to the change. *Id.* at 14. In addition, the Union argues that the Agency was obligated under the parties' agreement to bargain over § 7106(b)(1) matters relating to the change.

B. Analysis and Conclusions

1. Contrary to Law

The Agency's exception raises a question of law, which the Authority reviews de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).

The basis of the Agency's contrary to law argument is its claim that it was not obligated to

bargain over the New Active Items Area under § 7106(b)(1), (b)(2) or (b)(3). We construe this exception as an assertion that the Arbitrator erred in finding that the Agency "refuse[d] to consult or negotiate in good faith" with the Union, in violation of § 7116(a)(1) and (5).

a. We are unable to determine whether the award finding that the Agency violated the Statute is contrary to law

Under § 7116(a)(1) and (5), an agency is obligated to bargain over the impact and implementation of a change in unit employees' conditions of employment provided that the change has more than a de minimis effect. *SSA, Malden Dist. Office, Malden, Mass.*, 54 FLRA 531, 536 (1998) (*SAA, Malden*). In assessing whether the effect of a decision on conditions of employment is more than de minimis, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change. *Id.*; *Dep't of HHS, SSA*, 24 FLRA 403, 408 (1986) (*SSA*). Equitable considerations are also taken into account in balancing the various interests involved. *SSA*, 24 FLRA at 408. The Authority will not find that an agency's failure to bargain over a matter violated § 7116(a)(1) and (5) where that matter is "covered by" the parties' collective bargaining agreement. *United States Dep't of HHS, SSA, Bait., Md.*, 47 FLRA 1004, 1018-21 (1993). *See, e.g., NTEU, Chapter 168*, 55 FLRA at 242 (1999) (arbitration award not contrary to § 7116(a)(1) and (5) because change was "covered by" parties' agreement).

When a grievance under § 7121 of the Statute involves an alleged ULP, the arbitrator must apply the same standards and burdens that would be applied by an administrative law judge in a ULP proceeding under § 7118. *AFGE, Local 3529*, 57 FLRA 464, 465 (2001); *NTEU, Chapter 168*, 55 FLRA 237, 241 (1999); *AFGE, Local 940*, 52 FLRA 1429, 1436-40 (1997). In a grievance alleging a ULP by an agency, a union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *AFGE, Local 3529*, 57 FLRA at 465. As in other

arbitration cases, the Authority defers to arbitral findings of fact. *Id.*

In this case, the issue before the Arbitrator included whether the Agency was obligated to bargain over the impact and implementation of the Agency's decision to staff the New Active Items Area. The award under review does not, however, contain a determination as to whether the staffing of that area constituted a change in conditions of employment -- which the parties disputed before the Arbitrator -- and, if so, whether the effect of that change on unit employees' conditions of employment was more than de minimis. In addition, the Arbitrator did not make findings of fact on either issue -- which are both in dispute on review -- on which the Authority could base such a determination. In fact, with the exception of his conclusion that certain employees were involuntarily detailed to the New Active Items area, the Arbitrator made no factual findings regarding the New Active Items Area. *See Award 7*. Moreover, nothing in the record provides a basis for the Authority to determine whether there was a change in conditions of employment and, if so, what, if any, effect there was as a result.

Consistent with the foregoing, we are unable to resolve the exception. In these circumstances, the Authority will remand the case to the parties absent settlement, to clarify the basis for the award. *United States Dep't of Commerce, PTO*, 52 FLRA 358, 374 (1996); *cf. NTEU, Chapter 168*, 55 FLRA at 242 (concluding that a remand was not appropriate because the arbitrator's interpretation of the agreement supported a conclusion that the change at issue was "covered by"). Accordingly, we remand the portion of the award concluding that the Agency had an obligation to bargain over § 7106(b)(2) and (3) matters involving the staffing of the New Active Items Area to the parties for resubmission to the Arbitrator, absent settlement.

b. The award finding the Agency violated the parties' agreement is not contrary to law

To the extent that the Agency argues that the award as it involves § 7106 (b)(1) matters is contrary to law, we note that the Authority has held that determining whether there has been a contractual election to bargain over matters covered under § 7106(b)(1) is a matter of contract interpretation. *United States Dept' of the Treasury, IRS, Wash., D.C.*, 56 FLRA 393, 395 (2000) (*IRS*). A contractual election to bargain over § 7106(b)(1) matters is enforceable through grievance arbitration. *Id.* (citing *SSA, Bait., Md.*, 55 FLRA 1063, 1068 (1999) (*SSA*)). Accordingly, whether there has been bargaining and agreement on any matters covered under § 7106(b)(1) rests entirely on the arbitrator's construction of the agreement. *SSA*, 55 FLRA at 1068. A finding of a violation of a contract provision requiring bargaining over § 7106(b)(1) matters is not, itself, a statutory violation unless the issue presented is whether a party has repudiated an agreement to bargain over § 7106(b)(1) matters in violation of § 7116(a)(1) and (5) of the Statute. *See SSA, Bait., Md.*, 55 FLRA 1122 (1999); *SSA*, 55 FLRA 1063.

In this case, the Arbitrator concluded that the Agency elected to bargain over § 7106(b)(1) matters under Article 2, Section 2 of the parties' supplemental agreement, and that the agreement was in effect. Based on that finding, the Arbitrator concluded that the Agency violated the supplemental agreement by failing to bargain over § 7106(b)(1) matters concerning the staffing of the New Active Items Area. As the Arbitrator in this case was enforcing a contractual election to bargain, there is no basis for concluding that the award is contrary to the Statute. *See IRS*, 56 FLRA at 396; *SSA*, 55 FLRA at 1069. Accordingly, we deny the Agency's exception.

2. The award does not fail to draw its essence from the parties' agreement

As discussed above, the Arbitrator's conclusion that the Agency was obligated to bargain over § 7106(b)(1) matters is based upon his interpretation of Article 2, Section 3 of the supplemental agreement. Although the exceptions contain a claim that the award fails to draw its essence from the agreement,

see exceptions at 7, nothing in the Agency's essence arguments challenge the Arbitrator's interpretation of the agreement or his conclusion that the agreement obligated the agency to bargain over § 7106(b)(1). As the Agency's claim is not supported by any further arguments or explanation, it is a bare assertion that provides no basis for finding the award deficient. *See SSA, Bait., Md.*, 57 FLRA.690, 694 n.9 (2002). Accordingly, we deny the exception.

3. The award is not based on a nonfact

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *United States Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry*). The Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at hearing. *Id.* at 594 (citing *Nat'l Post Office Mailhandlers v. United States Postal Serv.*, 751 F.2d 834, 843 (6th Cir. 1985)). Further, a party may not challenge the arbitrator's interpretation and application of a collective bargaining agreement as a nonfact. *See United States Dep't of the Air Force, Warner Robins Air Legist. Ctr., Robins AFB, Ga.*, 56 FLRA 498, 501 (2000) (*Robins AFB*); *NFFE, Local 561*, 52 FLRA 207, 210-11 (1996); *NLRB*, 50 FLRA 88, 92 (1995).

The Arbitrator determined that the Agency had an obligation under the parties' supplemental agreement to bargain over § 7106(b)(1) matters related to staffing the New Active Items Area. The Arbitrator's conclusion in this regard is not a "fact" underlying the award, but is a matter of contract interpretation. Accordingly, the Agency's claim does not provide a basis for finding the award deficient, and we deny the exception. *See Robins AFB*, 56 FLRA at 501-02.

IX. The award concerning the Agency's obligation to bargain over § 7106(b)(1) matters related to the decision to hire

temporary employees is not deficient

A. Positions of the Parties

The Agency challenges the Arbitrator's conclusion with respect to the Agency's decision to hire temporary employees on two grounds. First, the Agency argues that the Arbitrator's conclusion that the Agency failed to negotiate over § 7106(b)(1) matters concerning its decision to hire temporary employees is based on a nonfact. Exceptions at 9. Second, the Agency argues that the Arbitrator exceeded his authority in directing the Agency to bargain over § 7106(b)(1) matters relating to that decision because the Union never requested bargaining over § 7106(b)(1) matters and, therefore, the issue was not before the Arbitrator. *Id.*

The Union asserts that, contrary to the Agency's claim, the Union sought to bargain over § 7106(b)(1) matters relating to the decision to hire temporary employees. Opposition at 15. In addition, the Union asserts that the Arbitrator did not exceed his authority, as the issues as framed and resolved by the Arbitrator clearly included whether the Agency violated the parties' supplemental agreement -- which requires the Agency to bargain over § 7106(b)(1) matters -- by failing to bargain over matters related to the hiring of temporary employees. *Id.* at 21-22.

B. Analysis and Conclusions

1. The award is not based on a nonfact

As discussed above, a party may not challenge the arbitrator's interpretation and application of a collective bargaining agreement as a nonfact. *See Robins AFB*, 56 FLRA at 501. The Arbitrator determined that with respect to its decision to hire temporary employees, the Agency violated the parties' agreement by failing to bargain over § 7106(b)(1) matters. The Arbitrator's conclusion in this regard is not a "fact" underlying the award, but is a matter of contract interpretation. As such, the Agency's claim does not provide a basis for finding the award deficient. *See NFFE, Local 561*, 52 FLRA at 210-11; *NLRB*, 50 FLRA at 92. Moreover, to the extent that the Agency is asserting that the Arbitrator's

determination was based on the erroneous conclusion that the Union sought to bargain over § 7106(b)(1) matters, the exception does not provide a basis for finding the award deficient because that issue was disputed before the Arbitrator. *See SSA*, 57 FLRA 530, 536 (2001); *Lowry*, 48 FLRA at 594. Accordingly, we deny the exception.

2. The arbitrator did not exceed his authority

An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed within the grievance. *DOD*, 56 FLRA at 891; *NAGE, Local R1-100*, 51 FLRA 1500, 1502 (1996). In the absence of a stipulation by the parties, arbitrators are accorded substantial deference in the formulation of issues to be resolved in an arbitration proceeding. *AFGE, Local 1637*, 49 FLRA 125, 130 (1994).

Contrary to the Agency's assertion, the issue of whether the Agency was obligated to bargain over § 7106(b)(1) matters pertaining to the hiring of those employees was clearly presented and disputed before the Arbitrator. *See Union's Post Hearing Brief* at 1; *Agency's Post Hearing Brief* at 4-5. Accordingly, there is no basis for concluding that the Arbitrator exceeded his authority, and we deny the Agency's exception.

X. The award concerning details is not deficient

A. Positions of the Parties

The Agency claims that the Arbitrator's conclusion that the Agency violated the parties' agreement in detailing employees fails to draw its essence from Article 36, Section 8 of the parties' Master Agreement. In this regard, the Agency claims that Section 8 provides that grievances must include the aggrieved employee's name, and the Arbitrator admitted evidence concerning employees not named in the grievance and concluded that those employees

were detailed in violation of the agreement. Exceptions at 10. In addition, the Agency argues that the Arbitrator failed to conduct a fair hearing by considering evidence related to irrelevant details. *Id.* The Agency further argues that the Arbitrator's finding that the employees named in the grievance were involuntarily detailed is based on a nonfact because the undisputed evidence established that those named in the grievance were voluntarily assigned. *Id.*

The Union asserts that the Agency's essence, fair hearing, and nonfact claims do not demonstrate that the award is deficient. Opposition at 11, 17, 27. In addition, the Union claims that the Agency's assertion that the Arbitrator was required to make specific factual findings is contrary to Authority precedent because arbitrators are not required to specify or discuss the evidence they considered or based their award upon. *Id.* at 17.

B. Analysis and Conclusions

1. The award does not fail to draw its essence from the parties' agreement

Contrary to the Agency's claim, nothing in the award demonstrates that the Arbitrator made findings regarding details of employees who were not encompassed in the grievance. In this regard, the grievance alleges that the Agency violated Article 29 of the parties' agreement in detailing a number of named grievants. *See* Agency Exhibit 2, Grievance at 5-6. Without naming any particular employees, the Arbitrator found that the Agency repeatedly violated Article 29 in detailing employees and directed the Agency to rescind any actions that constituted a violation of that Article. Award at 7-8. The award does not set forth any findings or provide any relief with regard to any particular employees. As such, there is no basis for concluding that the award concerns employees not named in the grievance and therefore, fails to draw its essence from Article 36, Section 8 of the agreement. *AFGE, Local 3911*, 58 FLRA 101, 105-06 (2002); *see United States Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990).

Accordingly, we deny the exception.

2. The Arbitrator did not fail to conduct a fair hearing

As stated earlier, the Authority will find an award deficient on the ground that an arbitrator failed to conduct a fair hearing when it is demonstrated 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. *AFGE, Local 1668*, 50 FLRA 124, 126 (1995). It is well established that an arbitrator has considerable latitude in conducting a hearing, and the fact that an arbitrator conducts a hearing in a manner that a party finds objectionable does not, by itself, provide a basis for finding an award deficient. *GSA, Reg. 9, L.A., Cal.*, 56 FLRA 978, 979 (2000).

The Agency claims that the Arbitrator considered evidence concerning details that was not relevant to the grievance. The Authority has held that "the liberal admission by arbitrators of testimony and evidence is a permissible practice." *AFGE, Local 4044, Council of Prison Locals 33*, 57 FLRA 98, 100 (2001); *United States DOD, Def. Mapping Ag., Hydrographic/Topographic Ctr.*, 44 FLRA 103, 109 (1992) (*citing Veterans Admin, and VA Med. Ctr. Register Office*, 34 FLRA 734, 738 (1990)). Consistent with this precedent, the fact that the Arbitrator admitted and considered evidence concerning details that the Agency alleged was not relevant does not provide a basis for concluding that the Arbitrator failed to conduct a fair hearing. Accordingly, we deny the exception.

3. The award is not based on a nonfact

As discussed above, the Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at hearing. *United States Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 594 (1993) (*Lowry*) (*citing Nat'l Post Office Mailhandlers v. United States Postal Serv.*, 751 F.2d 834, 843 (6th Cir. 1985)). The Agency's nonfact

claim alleges that there is no evidence establishing that the individuals named in the grievance were detailed. The issue of whether the individual employees named in the grievance were detailed was clearly disputed before the Arbitrator. *See* Agency's Post Hearing Brief at 6-9. Accordingly, the Agency's claim does not establish that the award is deficient because it is based on a nonfact, and we deny the exception. *See SSA, 57 FLRA 530, 536 (2001); Lowry, 48 FLRA at 594.*

XI. Decision

Consistent with the foregoing, we remand the portion of the award concluding that the Agency was obligated to bargain over § 7106(b)(2) and (3) matters involving the staffing of the New Actives Items Area to the parties for resubmission to the Arbitrator, absent settlement, for clarification. The Agency's remaining exceptions are denied.

¹Article 2, Section 3 of the supplemental agreement provides, in part, that "[t]he parties agree that in accordance with the provisions of Executive Order 12871 ... and in the spirit of Partnership, each AFGE Local President or his/her designee is allowed to bargain over 5 U.S.C. Section 7106(b)(1), 'Management Rights'. In the event that the Executive Order is no longer in effect, the parties hereby agree to maintain and uphold the original intent of the Executive Order."

²The charge asserted that the Agency violated § 7116(a)(1), (5), (7) and (8) and contained the following claim:

[The Agency] committed an[] unfair labor practice by negotiating in bad faith. [The Agency] is in blatant non-compliance with the FSIP order that implemented the [Agency] Staffing Plan. Prior to any staffing needs created by the recent acts of terrorism, [the Agency] embarked on a campaign to hire ... temporary employees. Clearly, the continual backlogs of routine workload caused [the Agency] to realize that the [Agency] Staff Plan implemented by the FSIP was inadequate.

Although the Agency attempted to negotiate

appropriate arrangements on the above, the FSIP violation has a disparate impact on the Bargaining Unit Employees.

In addition, [the Agency] negotiated with [the Union] to involuntarily move current senior employees to less preferred shifts (second and weekend) just two days before notifying the [Union] of the initiative to hire Part time temporary employees on weekend shift.

Agency Exhibit A-11.

³Executive Order 13203, dated February 17, 2001, Section 4, provides that "nothing in this order shall abrogate any collective bargaining agreements in effect on the date of this order (February 17, 2001)."

⁴As relevant here, § 7116(d) provides that "[i]ssues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. ... [I]ssues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures."

⁵The record reflects that the ULP complaint was submitted to the Arbitrator, and that the Agency argued in its Post Hearing Brief that the grievance was barred under § 7116(d) of the Statute. Agency's Post Hearing Brief at 2.

Statutes Cited

5 USC 7122(a)
 5 USC 7106(b)(1)
 5 USC 7106(b)(2)
 5 USC 7106(b)(3)
 5 USC 7116(a)(1)
 5 USC 7116(a)(5)
 5 USC 7116(a)(7)
 5 USC 7116(a)(8)
 5 USC 7105(a)(2)(E)

Cases Cited

56 FLRA 586
 50 FLRA 184
 57 FLRA 625
 56 FLRA 887

57 FLRA 417
50 FLRA 124
39 FLRA 103
56 FLRA 535
56 FLRA 978
48 FLRA 74
34 FLRA 573
56 FLRA 249
32 FLRA 79
58 FLRA 101
50 FLRA 330
43 F.3d 682
53 FLRA 1703
55 FLRA 152
54 FLRA 1582
15 FLRA 347
19 FLRA 238
18 FLRA 710
54 FLRA 531
24 FLRA 403
47 FLRA 1004
57 FLRA 464
55 FLRA 237
52 FLRA 1429
52 FLRA 358
56 FLRA 393
55 FLRA 1063
57 FLRA.690
48 FLRA 589
751 F.2d 834
56 FLRA 498
52 FLRA 207
50 FLRA 88
57 FLRA 530
51 FLRA 1500
49 FLRA 125
57 FLRA 98
44 FLRA 103
34 FLRA 734