

73 FLRA No. 5

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MEMPHIS, TENNESSEE

(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS #33
LOCAL 3731
(Union)

0-AR-5666

DECISION

May 26, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I. Statement of the Case

The Union filed a grievance alleging that the Agency unlawfully prevented female employees from staffing two correctional posts. Arbitrator Daniel M. Kininmonth issued an award finding that the grievance was procedurally arbitrable and that the Agency's policy of not assigning female employees to the two posts violated applicable law, Agency regulations, and the parties' collective-bargaining agreements. In its exceptions, the Agency challenges the Arbitrator's procedural-arbitrability determination on essence grounds and the merits determinations on contrary-to-law grounds. Because the Agency fails to demonstrate that award is deficient, we deny the exceptions.

II. Background and Arbitrator's Award

The Agency's facility in Memphis, Tennessee is an all-male, medium-security prison. Due to staffing shortages, the Agency often uses a process called

augmentation, through which it assigns non-correctional staff to vacant correctional posts and offers voluntary overtime assignments to those posts. Two correctional posts are "dry cell" and "suicide watch" (collectively, "the posts").¹ A "dry cell" post requires an employee to continuously observe an inmate suspected of ingesting or concealing contraband in a cell without plumbing "until the inmate has voided the contraband or until sufficient time has elapsed to preclude the possibility that the inmate is concealing contraband."² On March 9, 2018, a non-correctional female employee was offered the choice of a vacant correctional post, and the employee requested a "dry cell" post.³ The employee's supervisor rejected the request on the basis that the facility did not permit female employees to staff that post.

The Union filed a grievance, alleging that the Agency violated the parties' master collective-bargaining agreement (master agreement), an Agency program statement (PS), and a memorandum of understanding on augmentation (MOU). The grievance alleged that the MOU includes dry cell and suicide watch as available posts, and that PS 5324.12, section 115.15 states that "post assignments may not be restricted on the basis of gender."⁴ Additionally, the grievance alleged that when the Agency "bypasses female staff for overtime," it violates several provisions of the master agreement and various federal laws.⁵ The grievance also claimed that "overtime logs[] clearly illustrate[] that female staff are being bypassed for overtime hours," which "creates a discriminatory working environment for female staff," in violation of Article 22 of the master agreement (Article 22) and Title VII of the Civil Rights Act of 1964 (Title VII).⁶ The grievance alleged that the date of the occurrence was "March 9, 2018 dating back to 2003 and on going."⁷ As remedies, the grievance requested that the Agency comply with applicable law, the master agreement, and the MOU; "stop discriminating against female staff"; pay backpay "with interest [to] all female staff members who [were] bypassed for overtime"; and "pay compensatory damages . . . for every female impacted by the agency action."⁸

The grievance was unresolved and proceeded to arbitration. At arbitration, the Arbitrator framed a procedural-arbitrability issue concerning, in pertinent part, whether the Union complied with the specificity requirements in Blocks 5 and 6 of the grievance form. As relevant here, the parties stipulated that the merits issues were whether the Agency violated the MOU, PS 5424.12, Article 22, and the Federal Service Labor-Management Relations Statute (the Statute); and whether the facility's

¹ Award at 11.

² *Id.* at 14 (quoting Agency Program Statement No. 5521.06, § 552.12); *see also id.* at 11 n.1.

³ *Id.* at 11.

⁴ *Id.* at 11-12; *see also* Exceptions, Attach. E (Grievance) at 1.

⁵ Award at 12; Grievance at 1.

⁶ Award at 12; Grievance at 1.

⁷ Award at 12; Grievance at 1.

⁸ Award at 12; Grievance at 1.

“policy of excluding female correctional officers” from the posts violates Title VII.⁹

Addressing the Agency’s procedural-arbitrability arguments, the Arbitrator found that the grievance alleged violations on behalf of all female staff, not just the one female employee referenced in the March 9 occurrence – similar to a class-action grievance – which sufficiently put the Agency on notice of the claims. Citing the grievance’s multiple references to “female staff,” “all female staff members,” “every female,” and claims of discrimination, the Arbitrator rejected the Agency’s argument that the Union had expanded the grievance without the Agency’s consent.¹⁰ Thus, the Arbitrator concluded that the grievance was procedurally arbitrable.¹¹

On the merits, the Arbitrator found that, based on the stipulated issues, the Agency conceded that it had a policy of excluding female employees from the posts at issue. And, the Arbitrator found that the policy was “facially discriminatory.”¹² The Arbitrator rejected the Agency’s argument that its assignment of posts was a permissible exercise of its right to assign work under § 7106(a)(2)(B) of the Statute¹³ because that right is subject to “applicable laws.”¹⁴ The Arbitrator found that the Agency’s exclusion of female employees from the posts violated Title VII.

In reaching this conclusion, the Arbitrator also rejected the Agency’s claim that the restriction was based on a business need. The Arbitrator explained that such a restriction is permissible under Title VII if it is based on a “bona fide occupational qualification” (BFOQ).¹⁵ Applying the criteria to establish a BFOQ, the Arbitrator found that: (1) the Agency “ha[d] not asserted a factual

basis that assigning female staff to [the posts] would undermine the prison’s operation,” (2) inmates in the posts’ cells are clothed and therefore there is no privacy violation, and (3) reasonable alternatives to the restriction on female employees existed to protect an inmate’s privacy.¹⁶ And more specifically, for dry-cell posts, the Arbitrator found, based on testimony and practices at other Agency facilities, that a reasonable alternative existed because a female employee could call for a male corrections officer to “tag out” when an inmate needed to perform bodily functions. And, for suicide-watch posts, the Arbitrator found that various methods could be used to provide privacy for the inmate.¹⁷

Next, the Arbitrator addressed the Agency’s argument that staffing the posts with female employees would violate 28 C.F.R. § 552.12(b) and PS 5521.06, Section 552.12.b, because the regulation and PS proscribe female staff from observing male inmates in “dry cell.”¹⁸ The Arbitrator found that the regulation and PS conflicted with a different PS, the master agreement, and the MOU.¹⁹

On this point, the Arbitrator found that PS 5324.12, an Agency regulation that “was negotiated with the Union at the national level,” addressed the Agency’s concerns about risks to female employees assigned to the posts and permitted female employees to staff the posts.²⁰ Based on the wording of PS 5324.12 and emails from the Agency’s General Counsel, the Arbitrator found that “female employee participation in ‘dry cell’ or ‘suicide watch’ does not violate [Section] 115.15(d) [of PS 5324.12] as long as the inmate stays clothed.”²¹ The Arbitrator also found that PS 5324.12, Section 115.15(b) requires the Agency to comply with Title VII and states

⁹ Award at 3.

¹⁰ *Id.* at 51. In reaching this conclusion, the Arbitrator also relied on the Agency’s stipulation to the merits issue concerning whether the policy excluding female staff from the posts was discriminatory. Specifically, the Arbitrator found that because “[t]he Agency’s stipulation of the issue covers sex discrimination against all female staff,” the Agency “cannot complain now that the Union has improperly expanded the issues in this case.” *Id.* at 52.

¹¹ The Arbitrator also found that the grievance alleged a continuing violation on behalf of all female staff, and that the grievance was timely filed based on the March 9 occurrence. The Agency does not challenge this finding.

¹² *Id.* at 57.

¹³ 5 U.S.C. § 7106(a)(2)(B).

¹⁴ Award at 67 n.13.

¹⁵ *Id.* at 58; *see also id.* at 69 (citing 42 U.S.C. § 2000e-2(6)).

¹⁶ *Id.* at 61.

¹⁷ *Id.* at 63. The Arbitrator credited testimony regarding practices at other Agency facilities and communications from Agency management.

¹⁸ *Id.* at 64; *see* Exceptions, Attach. B at 183-94, Agency Ex. 1 (PS 5521.06) at 6 (§ 552.12.b states that “[t]he supervising staff

member shall be the same sex as the inmate and shall maintain complete and constant visual supervision of the inmate”).

¹⁹ The Arbitrator also noted that the Agency admitted that a conflict existed. Award at 64.

²⁰ *Id.* at 65; *see* Exceptions, Attach. B. at 110-71, Joint Ex. 6 (PS 5324.12) at 1 (providing “guidelines to address . . . prohibited and/or illegal sexually abusive behavior involving” various iterations of inmate and staff perpetrator and victim). PS 5324.12, § 1. PS 5324.12, § 115.15(d) requires each Agency facility to “implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell check.” *See also* Exceptions, Attach. B. at 172-81, Joint Ex. 7, Institutional Supplement to PS 5324.12 at 5 (stating in section 4(K) that “[e]xcept in exigent circumstances, opposite-gender staff will not be . . . the observer of an unclothed inmate who is on dry cell, suicide watch, medical observation, or other similar status”).

²¹ Award at 66-67.

that “[p]ost assignments may not be restricted on the basis of gender.”²²

As to the master agreement, the Arbitrator found that Article 3, Section b. states that the Agency agreed to be “governed by existing and future laws.”²³ The Arbitrator also found that Article 6, Section b.2, provides that employees are to be “free from discrimination based on their . . . sex” and that Article 22 “requires the parties to cooperate in providing equal employment opportunity and prohibits unlawful discrimination pursuant to federal anti-discrimination laws.”²⁴

Further, the Arbitrator found that the MOU included as available posts, without differentiating by gender, those “identified on the [c]orrectional [s]ervices roster, . . . and suicide watch or dry cell.”²⁵ The Arbitrator concluded that the Agency regulation did not control because the parties had supplanted the Agency regulations with the master agreement and MOU.

Based on these findings, the Arbitrator concluded that the Agency violated Title VII, the master agreement, and the MOU. As a remedy, the Arbitrator directed the Agency to “cease and desist from restricting qualified female staff” from staffing the posts.²⁶

The Agency filed exceptions to the award on April 6, 2020, and the Union filed an opposition on May 5, 2020.

III. Analysis and Conclusions

A. The Arbitrator’s procedural-arbitrability determination draws its essence from the master agreement.

According to the Agency, the Arbitrator’s finding that the grievance sufficiently raised claims on behalf of all female bargaining-unit employees does not represent a

plausible interpretation of, and thus fails to draw its essence from, the master agreement.²⁷ The Agency contends that the grievance named only one employee and occurrence, and the Arbitrator allowed the Union to expand the grievance’s scope without the Agency’s consent, as Article 32 of the master agreement requires.²⁸

The Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.²⁹

While the Agency disputes the Arbitrator’s conclusion that the grievance was sufficiently specific to allege claims on behalf of all female employees, this argument merely disagrees with the Arbitrator’s evaluation of the evidence. The Arbitrator found – and the Agency does not dispute – that the Agency stipulated to the issue as including discrimination against “all female staff.”³⁰ And contrary to the Agency’s argument, the grievance did not reference female staff only in the requested remedies section of the grievance form.³¹ As the Arbitrator found, the grievance included multiple references to “female staff,” “all female staff members,” and “every female” in regard to the claims of discrimination and specific contractual and statutory violations.³² On these bases, the Arbitrator concluded that the Union had not impermissibly expanded the scope of the grievance in violation of Article 32.³³ The Agency’s argument to the contrary does not demonstrate that the Arbitrator interpreted Article 32 in a way that is irrational, unfounded, implausible, or in manifest disregard of that provision.³⁴

²² *Id.* at 67.

²³ *Id.* at 69.

²⁴ *Id.* (stating that “the parties having opposed unlawful sex discrimination in the [m]aster [a]greement, cannot now be in favor of unlawful sex discrimination resulting from a facially discriminatory practice enshrined in an agency regulation”); *see also id.* at 6-7 (quoting Exceptions, Attach. B. at 1-100, Joint Ex. 1 (Master Agreement) at 55), 70 & n.14 (stating that where an agency regulation conflicts with a collective-bargaining agreement, the agreement controls).

²⁵ *Id.* at 68 n.13 (citing Exceptions, Attach. B at 107-09, Joint Ex. 5 (MOU) at 1).

²⁶ *Id.* at 71.

²⁷ Exceptions Br. at 10-15.

²⁸ *Id.* at 15. Article 32 states that “the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement.” Award at 8 (quoting Art. 32).

²⁹ *AFGE, Loc. 17*, 72 FLRA 162, 164 (2021) (citing *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014)).

³⁰ Award at 52.

³¹ Exceptions Br. at 11; *but see* Grievance at 1 (stating that the Agency violated the parties’ agreement and various laws when it “bypass[ed] female staff for overtime”); *id.* (stating that the “overtime log clearly illustrates that female staff are being bypassed for overtime hours . . .”); *id.* (stating that the Agency violated the parties’ agreement when it “fails to treat female staff as the most valuable resource of the Agency”).

³² Award at 52.

³³ *Id.* at 52, 57; *see also* Grievance at 1.

³⁴ *AFGE, Loc. 3342*, 72 FLRA 91, 92 (2021) (citing *AFGE, Loc. 3354*, 64 FLRA 330, 333 (2009) (“disagreement with an arbitrator’s factual finding does not provide a basis for concluding that an award fails to draw its essence from an agreement”)).

Therefore, we deny the Agency's essence exception.

B. The award is not contrary to management's rights.

The Agency argues that the award is contrary to law in several respects, which we address separately below. The Authority reviews questions of law raised by the exceptions de novo.³⁵ In applying the standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law.³⁶ In making this assessment, the Authority defers to the arbitrator's factual findings unless the excepting party establishes that they are nonfacts.³⁷

First, the Agency asserts that the award is contrary to management's rights to assign work under § 7106(a)(2)(B) and to determine the Agency's internal-security practices under § 7106(a)(1) of the Statute.³⁸ The Authority will apply the three-part framework established in *U.S. DOJ, Federal BOP*³⁹ (*DOJ*) to evaluate such claims, but only in "cases where the awards or remedies affect[] a management right."⁴⁰ When applying the three-question test established in *DOJ*, the first question is whether the arbitrator has found a violation of a contract provision; if the answer to that question is yes, then the second question is whether the arbitrator's remedy reasonably and proportionally relates to that violation.⁴¹ If the answer to the second question is yes, then the third question is whether the award excessively interferes with the § 7106(a) management right.⁴² If the answer to this question is yes, then the award is contrary to law and must be set aside.⁴³

1. The award does not violate management's right to assign work.

The Agency asserts that the remedy directing the Agency to "cease and desist from restricting qualified female staff" from staffing the dry cell and suicide watch posts violates management's right to assign work because the Agency "can no longer freely make a decision as to who to assign to cover" those two posts.⁴⁴ The Agency concedes that the award satisfies the first two parts of the *DOJ* framework by providing a remedy for a contractual violation.⁴⁵ However, here the award provides a remedy for not only a contractual violation, but also a violation of applicable law – namely, Title VII.⁴⁶ While the Agency concedes that it violated Title VII, it asserts that "violation does not render the cease and desist order acceptable" because the remedy violates the Statute.⁴⁷

However, the Statute does not provide the Agency with an unfettered right to assign work. Rather, it provides that the exercise of that right is subject to "applicable laws."⁴⁸ Thus, in evaluating an exception arguing that an arbitration award conflicts with the right to assign work, the Authority has held that it "need not reach an analysis under" the three-part *DOJ* framework where the award enforces an "applicable law" within the meaning of § 7106(a)(2) of the Statute.⁴⁹

The Authority has held that an arbitrator may lawfully award a remedy directing relief that is provided for by Title VII, irrespective of whether such a remedy affects a management right.⁵⁰ Title VII provides for victims of discrimination to receive "corrective, curative or preventive action . . . or measures adopted, to ensure that violations of the law similar to those found will not

³⁵ *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

³⁶ *Id.* at 306-07 (citing *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998)).

³⁷ *NTEU*, 72 FLRA 182, 186 (2021) (*NTEU*) (citing *AFGE, Nat'l INS Council*, 69 FLRA 549, 552 (2016)).

³⁸ Exceptions Br. at 16-21; 5 U.S.C. § 7106(a)(1).

³⁹ 70 FLRA 398, 405 (2018) (then-Member DuBester dissenting). Chairman DuBester notes that, for reasons he has explained before, *id.* at 409-12, he continues to disagree with the test established in *DOJ*. He also notes that the test articulated in *DOJ* only applies to remedies awarded for contractual violations and does not consider whether an award provides a remedy for a violation of an applicable law. Compare *id.* at 405 with *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Louisville Dist., Louisville, Ky.*, 66 FLRA 426, 428 (2012) (citing *U.S. EPA*, 65 FLRA 113, 115 (2010)) (explaining that if an award affects a management right, the Authority then examines whether the award provides a remedy for a violation of either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision that was negotiated under § 7106(b)).

⁴⁰ *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 323, 325 (2021) (Chairman DuBester concurring) (quoting *U.S. Dep't of the Treasury, Off. of the Comptroller of the Currency*, 71 FLRA 387, 390 (2019) (then-Member DuBester dissenting in part)).

⁴¹ *DOJ*, 70 FLRA at 405.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Exceptions Br. at 20.

⁴⁵ *Id.* at 19-20.

⁴⁶ Award at 69 (citing 42 U.S.C. § 2000e-2(a)(1)(2)).

⁴⁷ Exceptions Br. at 20 n.3.

⁴⁸ 5 U.S.C. § 7106(a)(2)(B).

⁴⁹ *AFGE, Loc. 1633*, 71 FLRA 211, 213 (2019) (Member Abbott concurring; then-Member DuBester concurring in part and dissenting in part).

⁵⁰ *U.S. DOJ, Fed. BOP, Metro. Det. Ctr. Guaynabo, P.R.*, 59 FLRA 787, 792 (2004) (*BOP Guaynabo*) (finding that in cases finding violations of Title VII, the appropriate inquiry is "whether the remedy is provided for by the relevant applicable law," not whether the remedy affects management rights under § 7106(a)(2) of the Statute).

recur [.]”⁵¹ As the Arbitrator explained, various reasonable alternatives existed – and had been used at other facilities – to allow the Agency to assign female employees to the posts.⁵² Aside from generally asserting that the remedy affects its right to assign work, the Agency does not explain how requiring it to exercise that right in a manner that is not discriminatory, as required by Title VII and the Statute, excessively interferes with that right. Therefore, we deny this exception.

2. The award does not violate management’s right to determine internal security.

The Agency argues that the award violates its right to determine internal security.⁵³ The right to determine internal-security practices includes the authority to determine the policies and practices that are part of an agency’s plan to secure or safeguard its personnel, physical property, or operations against internal or external risks.⁵⁴ If an agency fails to demonstrate a reasonable connection between a disputed practice and the agency’s security objective, the Authority will find that management’s right to determine its internal-security practices is not affected.⁵⁵

Here, the Agency argues that its security decisions are entitled to a “higher standard of deference,” and that the Arbitrator should have deferred to the Agency’s decision to prohibit female employees from staffing the two posts.⁵⁶ According to the Agency, by requiring the Agency to allow female employees to staff the posts, the award prevents the Agency from using “what it deems the best way to proceed with securing prisoners and locating contraband in ‘dry cell’ situations or in providing appropriate oversight on ‘suicide watch’ posts.”⁵⁷ The Agency asserts that allowing female employees to staff the posts would put them in a situation “where they can then allege a hostile work environment”

due to male inmates attempting to “prey” on the employees or needing restraint while unclothed.⁵⁸

However, the Arbitrator determined, as a factual matter, that the risk of female employees seeing nude inmates in the posts was low, and that female employees could “tag out” with a male employee when an inmate in dry cell needed to eliminate bodily waste.⁵⁹ Further, the Arbitrator found that the facility failed to reconcile its restriction on female employees with the inclusion of the posts in the MOU, PS 5324.12, and the practices in place at other facilities.⁶⁰ And the Arbitrator found that the Agency failed to demonstrate that it had a BFOQ that required restricting female employees from staffing the posts.⁶¹ Because the Agency does not challenge these findings, we defer to them.⁶² Consequently, the Agency has failed to establish a reasonable connection between its restriction on female employees and the Agency’s alleged security objective.

Accordingly, we deny this exception.⁶³

- C. The award does not violate 28 C.F.R. § 552.12.

The Agency argues that the award is contrary to 28 C.F.R. § 552.12 because that regulation states that for “dry cell” postings, “[t]he supervising staff member shall be the same sex as the inmate . . .”⁶⁴ The Authority will find an award deficient if it is inconsistent with a governing agency regulation.⁶⁵ However, when both a collective-bargaining agreement and an agency-specific — as opposed to government-wide — rule or regulation apply to a matter, the negotiated agreement governs the matter’s disposition.⁶⁶

The Agency asserts that the Arbitrator found that the regulation did not apply because it was implemented without public comment, and therefore does not have the

⁵¹ 29 C.F.R. § 1614.501(a)(2); see *BOP Guaynabo*, 59 FLRA at 792.

⁵² Award at 61-62.

⁵³ Exceptions Br. at 16-18, 21-22.

⁵⁴ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 443-44 (2018) (then-Member DuBester concurring) (citing *SSA, Balt., Md.*, 55 FLRA 498, 502 (1999)).

⁵⁵ *U.S. Dep’t of Transp., FAA*, 68 FLRA 402, 404 (2015) (*FAA*) (citing *AFGE, Loc. 2076*, 47 FLRA 1379, 1381-82 (1993); *NFFE, Loc. 2050*, 36 FLRA 618, 639-40 (1990)).

⁵⁶ Exceptions Br. at 18 (quoting *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Fed. Satellite Low, La Tuna, Tex.*, 59 FLRA 374, 377 (2003) (Member Pope concurring)).

⁵⁷ *Id.* at 22.

⁵⁸ *Id.* at 21 n.4.

⁵⁹ Award at 63.

⁶⁰ *Id.* at 63-64.

⁶¹ *Id.* at 61.

⁶² *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Petersburg, Va.*, 72 FLRA 477, 479 (2021) (Chairman DuBester concurring; Member Abbott concurring) (citing *NTEU*, 72 FLRA at 186).

⁶³ See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Tallahassee, Fla.*, 71 FLRA 622, 623-24 (2020) (then-Member DuBester concurring) (award did not interfere with management’s right to determine internal-security practices where the agency did not challenge the arbitrator’s dispositive factual finding as a nonfact); *FAA*, 68 FLRA at 404-05 (same).

⁶⁴ Exceptions Br. at 23-24 (quoting 28 C.F.R. § 552(b)).

⁶⁵ *AFGE, Loc. 3254*, 70 FLRA 577, 581 (2018) (citing *U.S. Dep’t of the Air Force, Joint Base Elmendorf-Richardson*, 69 FLRA 541, 546 (2016)).

⁶⁶ *NAGE*, 71 FLRA 775, 775-76 (2020) (*NAGE*) (citing *U.S. Dep’t of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017); *AFGE, Loc. 200*, 68 FLRA 549, 550 (2015) (*Local 200*); *U.S. Dep’t of the Treasury, IRS*, 68 FLRA 145, 147 (2014) (*IRS*)).

“force of law.”⁶⁷ This argument misses the point. Contrary to the Agency’s argument, the Arbitrator examined the MOU and the master agreement and found that there was a conflict between the regulation and the parties’ agreements.⁶⁸ The Arbitrator concluded that, consistent with Authority precedent, the parties’ agreements controlled.⁶⁹ The Agency does not challenge this finding. Therefore, the Agency’s argument does not demonstrate that the award is contrary to law.⁷⁰

Consequently, we deny this exception.

IV. Decision

We deny the Agency’s exceptions.

⁶⁷ Exceptions Br. at 25 (quoting Award at 66 n.11).

⁶⁸ Award at 64-67.

⁶⁹ *Id.* at 69 & 70 n.14 (finding specifically that the MOU “set aside” PS 5521.06, Section 552.b and 28 C.F.R. § 552.12(b)).

⁷⁰ *E.g.*, *NAGE*, 71 FLRA at 776 (finding that arbitrator’s application of parties’ agreement over conflicting agency regulation was consistent with law); *Local 200*, 68 FLRA at 550 (where agency regulation and parties’ agreement both apply, the parties’ agreement governs the dispute); *IRS*, 68 FLRA at 147 (finding that where agency negotiates agreement that conflicts with internal regulation, agency is bound by the agreement); *U.S. Dep’t of Transp., FAA*, 61 FLRA 750, 752 (2006) (“Because the agreement controls the matter even if it is inconsistent with the [a]gency’s regulations, the [a]gency’s argument that the award is inconsistent with its personnel regulations provides no basis for finding the award deficient.”).