64 FLRA No. 67

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C.
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4284

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DECISION

January 28, 2010

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator M. David Vaughn filed by both the Agency and the Union 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, and the Agency filed an opposition to the Union's exception.

The Arbitrator concluded that the Agency failed to bargain in good faith in ground rule negotiations and improperly denied the Union information to which it was entitled.[1] The Arbitrator ordered various remedies, but rejected the Union's request that he reinstate the expired collective bargaining agreement for the period of time that the Agency had engaged in bad-faith bargaining.

For the reasons that follow, we deny the Union's exception and, on the basis of the Agency's exceptions, remand the award.

1. As no exceptions have been filed to procedural determinations of the Arbitrator, they are not addressed in this decision.

II. Background and Arbitrator's Award

The Union filed grievances alleging that the Agency failed to bargain in good faith over ground rules for a new term agreement. The grievances were not resolved and were submitted to arbitration, where the Arbitrator stated the merits issues, as follows:

> Does the totality of the Agency's conduct up until the date of hearing demonstrate that it violated law or the Agreement by failing to bargain in good faith with the Union over the ground rules for term bargaining negotiations, and/or do any of the alleged actions or failures to act by the Agency in (1) refusing to meet in face to face negotiations with the Union over its latest proposal; (2) denying the Union the right to appoint representatives of its choosing; (3) denying Union representatives official time and travel expenses; (4) withholding requested information that is reasonable and necessary to the Union's representational functioning; (5) offering and withdrawing proposals in an evasive manner; (6) presenting take it or leave it proposals; (7) refusing to discuss ground rules for negotiating formal ground rules; and/or (8) insisting on bargaining ground rules without having first provided the Union with specific proposals for the successor term agreement establish, either separately or in totality, that the Agency violated law or the Agreement by failing to bargain in good faith with the Union over the ground rules for term bargaining negotiations? If so, in each case, what shall be the remedy?

Award at 3.

At the outset, the Arbitrator noted that, after the Union filed its initial grievance, the Agency filed a request for assistance with the Federal Service Impasses Panel (the Panel) and that the request was pending at the time of the arbitration hearing. The Arbitrator also noted that, as a general matter, ground rules for negotiations affect conditions of employment and are a mandatory subject of bargaining. He stated that, in reviewing ground rules proposals, the Authority assesses whether the proposals are offered in good faith and whether they are designed to further the bargaining process. *Id.* at 47-48. He noted that insisting to impasse on an individual proposal that is a permissive subject of bargaining constitutes bad-faith bargaining in violation of the Statute. *Id.* at 49.

Under this framework, the Arbitrator addressed the Union's claim that the Agency violated the Statute "by demanding bargaining on ground rules to the point of impasse, even though it failed to provide the Union specific notice of the substantive changes it wished to make in the Agreement." *Id.* The Arbitrator found, in this regard, that "the Union inquired as to the areas in which the Agency contemplated change to the agreement[,] and the Agency responded 'every sentence[.]'" *Id.* The Arbitrator also found that the Agency refused to provide proposals or to give any guidance as to the changes that would be presented, while claiming an impasse in the ground rules bargaining. *Id.* at 49. He further found that the combination of the Agency's refusal to furnish sufficient information about the nature, scope, and number of its proposals for term bargaining and its insistence to impasse on a proposed 8-week bargaining schedule would not further the bargaining process. *Id.* at 51-52. The Arbitrator concluded that this conduct constituted bad-faith bargaining in violation of the Statute. *Id.* at 52. In addition, he concluded that the 8-week bargaining schedule proposal was not a mandatory subject of bargaining. In this regard, he reasoned that the proposal was inconsistent with § 7114 because, to satisfy the statutory obligation to bargain in good faith, bargaining must take "as long as it takes[.]" *Id.* at 54.

The Arbitrator also addressed the Agency's insistence to impasse on the following three proposals:

> Section 19: Agreements on individual items are tentative and must be committed to writing and signed by each Party's chairperson.
>
> Section 24: The agreement shall become effective 31 days from execution, or upon agency-head approval, whichever is earlier, and will expire upon the effective date of the successor agreement.
>
> Section 30: Either party may have observers or consultants present during negotiations and impasse proceedings.

Id. at 54-56.

As to Section 19, the Arbitrator found that the "proposal appears, on its face, to require the Parties to sign off—and not reopen—each Article as tentatively agreed" and that, as a result, the proposal is permissive because it precludes the Union from reopening articles to reflect changing circumstances. *Id.* at 54-55. The Arbitrator viewed Section 24 as relating to the effective date of the eventual term agreement and found the proposal permissive because "this determination is to be made in the substantive negotiations when the substance and other parameters of the dispute are known[.]" *Id.* at 55-56. The Arbitrator concluded that Section 30 is permissive because it would increase the size of the Agency's bargaining team while avoiding the Agency's obligation to provide official time to an equal number of union negotiators.

The Arbitrator also resolved the dispute over the Agency's denial of the Union request for "a complete copy of the data currently on [the Agency's] Intranet site as well as biweekly updates." *Id.* at 58. He found that the intranet contains much material that has no relationship to the Union's representational responsibilities and that, consequently, the Union's request "was overboard [sic]." *Id.* Applying § 7114 of the Statute, the Arbitrator concluded both that it was the Union's responsibility to narrow the scope of its request and the Agency's responsibility to state with specificity why it was denying the request, which "the Agency did not do[.]" *Id.* at 59. However, the Arbitrator found that, regardless of whether the Union established a right to the requested information under the Statute, "it has clearly established its entitlement to much of the requested information under Article 11, Section 8 [2] " of the parties' collective bargaining agreement. *Id.* (footnote added). He noted that the agreement "was asserted by the Union as a basis for its request and in support of its assertion that the Agency's conduct was improper." *Id.* at 59-60 (citing Article 11, Section 8). The Arbitrator found that the Agency violated Article 11 by failing to provide the requested information and that, "[u]nder either the statutory or contractual requirements" the Agency was required to provide the requested information. *Id.* at 61.

2. Article 11, Section 8 pertinently provides, as follows:

> B. The Employer will grant the Union access to the IRM [Internal Revenue Manual] and other resource materials regularly maintained by the Employer when such access is necessary . . . to prepare for or to conduct negotiations. In cases where the resource materials . . . are no longer maintained in a paper-based system, the Union will be allowed the same access to such material maintained in an automated data base, provided such access is not in violation of any applicable law or regulation.

Award at 9-10.

In regard to whether the Agency's conduct obstructed bargaining, the Arbitrator found that the Agency did not request negotiations between August 2005 and March 2006, when it presented its "last Best Offer" and stated that it would refuse to bargain further unless the Union scheduled a meeting. *Id.* at 65. He noted that the Agency stated on April 6, 2006, that it would be available to meet whenever the Union was available between April 6 and April 21, but that, subsequently, the Agency restricted any meeting to a teleconference on April 21. He further found that, when the Union refused to bargain in a teleconference and proposed meeting during the week of May 8, the Agency responded that it had decided not to participate in further bargaining sessions over ground rules. *Id.* In the Arbitrator's view, "[t]hese delays, refusals and restrictions fly in the face of the Agency's asserted desire to bargain in good faith[.]" *Id.*

Based on the foregoing, the Arbitrator concluded that the totality of the Agency's conduct established bad-faith bargaining and constituted an unfair labor practice (ULP). *Id.* at 68. The Arbitrator specified the following conduct as demonstrating bad faith:

> [T]he Agency's uninformative dismissal of the Union's inquiry into what aspects of the Agreement it wished to modify ("every sentence"); its failure to provide any indication to the Union of the number, nature and scope of the matters it wished to renegotiate; [and] its insistence on a bargaining timetable which is arbitrarily short in light of its broad assertion as to the number and scope of substantive issues it intends to change and its failure to advise the Union in advance of that proposal of those changes, its handling of meetings and proposals in ways which obstructed meaningful bargaining and its demanding to bargain to impasse on matters over which the Union had no obligation to bargain[.]

Id. at 66-67. As his award, the Arbitrator concluded, as follows:

> The Parties are not, and have not been, at impasse. The Agency's declaration of impasse and request for assistance from the Federal Service Impasses Panel was premature and improper. The Agency violated its obligation to bargain in good faith by specific acts described and by the totality of its conduct in the manner described in the Opinion. The Agency violated its obligation to bargain in good faith by bargaining to impasse without providing the Union with sufficient information about its proposals on the merits of the dispute as to allow the Union to bargain the ground rules. The Agency violated its obligations under the Statute and National Agreement when it failed and refused to provide the information identified in its November 15, 2006 request.

Id. at 71.

As a remedy, the Arbitrator ordered the Agency to bargain in good faith, to cease and desist from bargaining in bad faith, and to post a notice. *Id.* at 69. However, the Arbitrator rejected the Union's request that he retroactively reinstate the expired agreement for a period of no less than 10 months to allow bargaining to restart. He was not persuaded that the Agency's conduct was the reason the agreement expired and found that, in the circumstances of this case, the retroactive reinstatement of the agreement "would be disruptive and otherwise unjustified." *Id.* at 70.

III. The Panel's Decision in *Department of the Treasury, Internal Revenue Service, Washington, D.C.*, and the Authority's decision in *NTEU*

Following an investigation of the Agency's request for assistance, the Panel determined that the dispute should be resolved through an informal conference with two Panel members. After the Arbitrator issued his award, the Union requested that the Panel "relinquish jurisdiction" and direct the parties to return to the bargaining table consistent with the Arbitrator's award. *Dep't of the Treasury, Internal Revenue Serv., Wash., D.C.*, Case No. 07 FSIP 10 (2008) (*IRS*), decision at 16. The Union also filed a request with the Authority to issue a stay directing the Panel to defer conducting any proceedings or taking any action in *IRS*.

The Panel issued a decision and order "relinquish[ing] jurisdiction" over fifteen proposals in the Agency's twenty-three proposal package, including all four of the disputed proposals that the Arbitrator concluded pertained to permissive subjects of bargaining. *Id.* After the Panel issued its decision and order, the Authority dismissed as moot the Union's request to stay the Panel proceedings. *NTEU*, 63 FLRA 28 (2008).

IV. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to law, based on a nonfact, and in excess of the Arbitrator's authority. More specifically, and as set forth in more detail below, the Agency contends, as follows:

> 1. The Arbitrator's conclusion that the Agency was required to provide the Union with specific notice of the changes it intends to make to the term agreement is contrary to law. Exceptions at 13.
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> 2. The Arbitrator's conclusions that the Agency's proposal to engage in 8 weeks of unassisted bargaining was offered in bad faith and is not a mandatory subject of bargaining are based on a nonfact and are contrary to law. *Id.* at 16.
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> 3. The Arbitrator's conclusions that Sections 19, 24, and 30 are permissive subjects of bargaining are contrary to law. *Id.* at 36.
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> 4. The Arbitrator's conclusion that the Agency was obligated to provide information to the Union is contrary to law and exceeded the Arbitrator's authority. *Id.* at 27.
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> 5. The Arbitrator's conclusion that the Agency's actions obstructed meaningful bargaining is contrary to law. *Id.* at 42.
>
> 6. The Arbitrator's conclusion that the Agency engaged in bad-faith bargaining under the totality-of-the-circumstances standard is contrary to law. *Id.* at 41.

As to the first contention, the Agency claims that, in both *AFGE Local 12*, 61 FLRA 209 (2005) (Member Pope concurring in part and dissenting in part; Member Armendariz dissenting in part) and *AFGE Local 12*, 60 FLRA 533 (2004) (Member Armendariz concurring), the Authority concluded that ground rules proposals were within the duty to bargain without examining the scope of proposed changes to the term agreement. *Id.* at 13-14. In addition, citing *AFGE National Border Patrol Council v. FLRA*, 114 F.3d 1214 (D.C. Cir. 1997), and *United States Border Patrol Livermore Section, Dublin, California*, 58 FLRA 231 (2002), the Agency asserts that parties have an unqualified right to renegotiate the terms of an expired or expiring agreement. *Id.* at 16.

As to the second contention, the Agency claims that the Arbitrator's finding that the Agency's proposal provided for 8 weeks of bargaining from "start to finish" is deficient as a nonfact. *Id.* at 18 (quoting Award at 50). According to the Agency, the proposal "called for eight weeks of unassisted bargaining, followed by at least four weeks of mediation before [the Federal Mediation and Conciliation Service], and then impasse resolution procedures." *Id.* at 19. The Agency further claims that the Arbitrator's conclusions that the proposed 8 weeks of bargaining was not reasonable and constituted bad-faith bargaining are contrary to law because they are unsupported. In addition, the Agency claims that the award is contrary to law by failing to find that the proposed bargaining schedule was a ground rule within the mandatory duty to bargain. *Id.* at 22.

As to the third contention, the Agency claims that the award is contrary to law by concluding that Sections 19, 24, and 30 are permissive. *Id.* at 36. In regard to Section 19, the Agency claims that the proposal permits either party to reopen tentatively agreed-upon articles and that, interpreted correctly, the proposal is within the mandatory duty to bargain. *Id.* at 37-38. In regard to Section 24, the Agency claims that the proposal is limited to the duration of the ground rules agreement. *Id.* at 39. In regard to Section 30, the Agency maintains that the proposal is within the mandatory duty to bargain because it furthers the bargaining process, was not offered in bad faith, and does not require the Union to waive any statutory right. *Id.* at 40-41.

As to the fourth contention, the Agency asserts that the Arbitrator's conclusion that it was obligated under the Statute to provide the information requested by the Union is contrary to § 7114(b)(4) of the Statute. *Id.* at 29-30. The Agency argues that the Arbitrator's conclusion is inconsistent with his specific finding that the request was overbroad. *Id.* at 31. The Agency further asserts that the Arbitrator's conclusion that it was obligated to provide the requested information under the agreement is in excess of the Arbitrator's authority because that issue was never submitted to the Arbitrator for resolution and because the Union never requested the data pursuant to the agreement.

As to the fifth contention, the Agency argues that its cancellation of the April 21 meeting was reasonable. *Id.* at 46. The Agency further argues that the Arbitrator cited no other evidence to support his findings that its "delays, refusals and restrictions" and its

handling of bargaining sessions constituted bad-faith bargaining. *Id.* at 50 (quoting Award at 67). As such, the Agency contends that the Arbitrator's conclusion that it obstructed bargaining is contrary to law as unsupported by the evidence. *Id.*

Finally, as to the sixth contention, the Agency maintains that it has established that the findings on which the Arbitrator relied are deficient and that, consequently, the Arbitrator's conclusion that the totality of the circumstances established bad-faith bargaining is likewise deficient. *Id.*

B. Union's Opposition

As to the Agency's first contention, the Union claims that the Arbitrator properly concluded that the Union cannot be compelled to negotiate to impasse over ground rules until such time as the Agency provides the Union with specific notice of changes that it intends to make to the term agreement. The Union asserts that the Statute does not distinguish between term collective bargaining and bargaining over management-initiated changes during the term of an agreement. In particular, the Union argues that specific notice is required before a party can assert an impasse. Opp'n at 9 (citing *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983)).

As to the second contention, the Union argues that the Arbitrator's finding that the Agency's proposal provided for 8 weeks of bargaining "start to finish" is based on the terms of the proposal and is not based on a nonfact. *Id.* at 16. The Union also argues that the Arbitrator properly concluded that the Agency offered its bargaining schedule proposal in bad faith and that it was not a mandatory subject of bargaining. *Id.* at 17.

As to the third contention, the Union argues that, even if the Arbitrator misconstrued Section 19, he correctly concluded that the proposal constitutes a permissive subject of bargaining because it permits unlimited withdrawals of tentative agreements. *Id.* at 28 (citing *NLRB v. Am. Seating Co. of Miss.*, 424 F.2d 106 (5th Cir. 1970), *enforcing* 176 NLRB 850 (1969)). As to Section 24, the Union asserts that the Arbitrator correctly concluded that the proposal is permissive because the substantive issue of the termination date of the successor agreement is not a mandatory subject of bargaining in ground rules negotiations. *Id.* at 30. As to Section 30, the Union asserts that the Arbitrator correctly concluded that the proposal would require the Union to waive its right under the Statute to have the number of individuals representing the Union be equal to the number of individuals representing the Agency. *Id.* at 31-32.

As to the fourth contention, the Union asserts that the Arbitrator properly concluded that it was entitled to the information under both § 7114 and Article 11, Section 8 of the agreement and that the Arbitrator did not exceed his authority in addressing Article 11. *Id.* at 21. As to the fifth contention, the Union maintains that the Arbitrator did not rely on the Agency's conduct with respect to the April 21, 2006 meeting alone in concluding that the Agency's conduct exhibited bad-faith bargaining. Finally, as to the sixth contention, the Union asserts that the Arbitrator properly concluded that the Agency engaged in bad-faith bargaining under the totality of the circumstances. *Id.* at 34.

C. Union's Exception

The Union contends that the award is deficient by failing to reinstate the collective bargaining agreement for the period of time that the Agency engaged in bad-faith bargaining. Exception at 7. The Union argues that, to the extent that the Authority views such a remedy as "non-traditional," it satisfies the requisite standards. *Id.* at 11 (citing *F.E. Warren Air Force Base, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996)). The Union also cites a decision of the NLRB, ordering restoration and continuation of the terms of an expired collective bargaining agreement as a remedy for the employer's failure to bargain over a successor agreement. *Id.* (citing *Caldwell Mfg., Co.*, 346 NLRB 1159 (2006)).

D. Agency's Opposition

The Agency contends that the remedy requested by the Union is not required by law and that the Arbitrator's refusal to award it is not deficient. The Agency maintains that the Authority grants arbitrators broad discretion in fashioning remedies and will not disturb that discretion unless a specified remedy is required by law. Opp'n at 14. The Agency argues that the Union's reliance on *Caldwell Mfg.* is misplaced because, unlike this case, the remedy in *Caldwell Mfg.* was directly related to the employer's unilateral implementation of a new term agreement. *Id.* at 14 n.5.

V. Analysis and Conclusions

A. The Arbitrator's conclusion that the Union could not be compelled to negotiate to the point of impasse over ground rules until such time as the

> Agency provides the Union with specific notice of the changes it intends to make to the term agreement is contrary to the Statute.

When an exception challenges an award's consistency with law, the Authority reviews the question of law raised by the exception and the award *de novo*. *E.g., NTEU Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of *de novo* review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *E.g., NFFE Local 1437*, 53 FLRA 1703, 1710 (1998). In a grievance proceeding that alleges a ULP under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (ALJ). *NTEU*, 61 FLRA 729, 732 ((2006). Consequently, in resolving the grievance, the arbitrator must apply the same standards and burdens that are applied by ALJs under § 7118 of the Statute. *Id.* In a grievance that alleges a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *Nat'l Labor Relations Bd.*, 61 FLRA 197, 199 (2005) (*NLRB*). As in other arbitration cases, in determining whether the award is contrary to the Statute, the Authority defers to the arbitrator's findings of fact. *Id.* In addition, the Authority does not supplement those findings by engaging in its own factfinding. *AFGE Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1275 (1998) (Member Wasserman dissenting as to other matters).

Ground rules have long been held to be within the duty to bargain under the Statute. *Ass'n of Civilian Technicians v. FLRA*, 353 F.3d 46, 51 (D.C. Cir. 2004) (*ACT*); *AFGE Local 12*, 60 FLRA 533, 539 (2004) (citing *AFGE, AFL-CIO*, 15 FLRA 461 (1984)). In this regard, negotiating a ground rules agreement is an inherent aspect of the obligation to bargain in good faith. *E.g., Veterans Admin., Wash., D.C.*, 22 FLRA 612 (1986) (*VA*). More particularly, in performing their mutual obligation to bargain in good faith, parties ordinarily need to make certain preliminary arrangements. *AFGE*, 15 FLRA at 462. In this regard, "[a] proposed ground rule generally may encompass any guide for the conduct of . . . negotiations." *ACT*, 353 F.2d at 51; *AFGE Local 12*, 60 FLRA at 539 (quoting *ACT*, 353 F.3d at 51). Further, as the obligation to bargain over ground rules is inseparable from the obligation to bargain in good faith, a party may not insist on bargaining over ground rules that do not enable the parties to fulfill their mutual obligation. *U.S. Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524 (1990) (*AFLC*). In other words, "ground rules proposals must, at a minimum, be designed to further, not impede, the bargaining for which the ground rules are proposed." *Id.* at 533; *accord U.S. Dep't of Justice, Executive Office for Immigration Review, N.Y., N.Y.*, 61 FLRA 460, 471-72 (2006) (*DOJ*). Consequently, the Authority assesses the propriety of ground rules proposals by questioning whether they are offered in good faith and whether they are a guide for the conduct of negotiation and are designed to further the bargaining process. *ACT*, 353 F.3d at 51; *AFGE Local 12*, 60 FLRA at 539.

The Authority has never conditioned the obligation to bargain over ground rules on specific notice of the changes a party intended to propose to the term agreement. Furthermore, the Authority has specifically rejected that proposition in a case involving similar circumstances. In *Department of the Air Force, Griffiss Air Force Base, Rome, New York*, 25 FLRA 579 (1987), the Authority adopted the judge's conclusion that the agency's insistence that the union was required to provide specific notice as to what contract articles needed to be discussed before it would resume negotiations after a failed ratification vote was inconsistent with § 7114 of the Statute.

The Union cites two Authority decisions in arguing that the Arbitrator correctly concluded that specific notice was required in this case. Opp'n at 9 (citing *U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79 (1997) (*Memphis Dist.*); *Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 41 FLRA 690 (1991) (*Hill AFB*)). However, each of these decisions involved situations where an agency was proposing to implement specific changes in conditions of employment. *Memphis Dist.*, 53 FLRA at 79; *Hill AFB*, 41 FLRA at 690. In this regard, the Authority has long held that the duty to bargain under the Statute requires an agency to meet its obligation to negotiate prior to making changes in established conditions of employment. *E.g., U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 60 FLRA 456, 457 (2004). However, an agency may implement changes in conditions of employment when a union fails to request bargaining within a reasonable period of time after receiving specific notice of proposed changes. *Id.* Thus, specific notice commences the statutory process for management-initiated changes and provides a means of assessing the union's response to such proposed changes.

The Union offers no case support for its claim that the same notice requirements that apply in management-initiated change cases apply to negotiating ground rules. Moreover, ground rules do not implicate the same requirements as bargaining over management-initiated

changes. In this regard, ground rules inherently precede changes in conditions of employment, which occur as a result of negotiation or renegotiation of a term agreement. For the same reason, *Stone Boat Yard*, 715 F.2d at 444, which involved "notice of specific proposals before allowing unilateral changes after an unwarranted delay in bargaining[,]" does not apply here.

For the foregoing reasons, we conclude that the Arbitrator's conclusion that the Agency was required to provide specific notice of changes it intended to propose to the term agreement is contrary to the Statute. *See U.S. Dep't of the Treasury, U.S. Customs Serv., Port of New York and Newark*, 57 FLRA 718, 721 (2002).

B. The Arbitrator's conclusions that the Agency's proposal to engage in 8 weeks of unassisted bargaining was offered in bad faith and was not a mandatory subject of bargaining are not based on a nonfact and are not contrary to law.

To establish that the award is based on a nonfact, the Agency must show that a central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different result. *E.g., U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). In concluding that the proposal provided for 8 weeks of bargaining from "start to finish," the Arbitrator found that the proposal effectively made 8 weeks the default because modification of the 8-week schedule requires mutual agreement. Award at 49. Because the Agency acknowledges that its proposal provides for 8 weeks of unassisted bargaining and requires mutual agreement for additional unassisted bargaining, the Agency fails to show that the Arbitrator's disputed finding is clearly erroneous. *See U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., U.S. Border Patrol, El Paso, Tex.*, 60 FLRA 883, 885 (2005) (Member Armendariz dissenting as to another matter) (no basis provided for concluding that the disputed finding was clearly erroneous). Consequently, we deny this exception.

In regard to the Arbitrator's conclusion that the Agency offered the proposal in bad faith, the obligation to bargain over ground rules is inseparable from the obligation to bargain in good faith. *AFLC*, 36 FLRA at 531, 533. Accordingly, a party's proposals must be designed to enable the parties to fulfill their mutual obligation and must not be an attempt to avoid bargaining. *Id.* Among the indicia of bad faith is insisting on reaching an agreement on ground rules proposals that indicate an intent to avoid the bargaining process. *U.S. Geological Survey, Caribbean Dist. Office, San Juan, P.R.*, 53 FLRA 1006, 1012 (1997).

In assessing the Agency's proposed bargaining schedule, the Arbitrator found that, to satisfy the requirements of good-faith bargaining, the time proposed for bargaining must afford the parties sufficient time to engage in the consideration of proposals. Award at 49-50. The Arbitrator further found that the Agency placed in issue "every sentence" of the 190-page, term agreement containing 54 articles and that the Agency refused to provide any specific information to allow the Union to respond to the proposed schedule. *Id.* at 50. He found that, in these circumstances, the proposed bargaining schedule constituted bad-faith bargaining in violation of the Statute. *Id.* at 52.

Although the Agency disputes the Arbitrator's legal conclusion, the Agency does not dispute the Arbitrator's factual findings that the Agency placed in issue the entire term agreement, failed to provide information about the changes it intended to propose, and insisted to impasse on a 8-week bargaining schedule. These undisputed factual findings support by a preponderance of the evidence that the Agency engaged in bad-faith bargaining in violation of the Statute. *See NTEU Chapter 90*, 58 FLRA 390, 393 (2003) (deferring to the arbitrator's factual findings, the Authority denied the exception to the arbitrator's conclusion of whether the agency violated § 7116(a) of the Statute); *AFLC*, 36 FLRA at 531, 533 (circumstances of the case supported the conclusion that respondent did not bargain in good faith). Moreover, the record before the Authority shows, and thereby rebuts the Agency's claim to the contrary, that the Union specifically alleged, and presented evidence to show, that the proposed schedule was unreasonable and constituted bad-faith bargaining. *See* Union's post-hearing brief at 24-26.

Accordingly, we deny this exception.

The Agency separately contends that the award is contrary to law because the proposal as a proposed ground rule was a mandatory subject of bargaining. However, even assuming that the proposal was a guide for negotiations, the Authority, as noted above, assesses not only whether proposals are a guide for the conduct of negotiations, but also whether they are offered in good faith. If a ground rules proposal is offered in bad faith, then it is not within the duty to bargain. *See DOJ*, 61 FLRA at 466; *AFLC*, 36 FLRA at 534. As we have determined that the Arbitrator's conclusion that the bargaining schedule proposal was offered in bad faith is not deficient, we likewise determine that his conclusion that the bargaining schedule proposal was not a ground rule within the duty to bargain is not contrary to law. Accordingly, we deny this exception. In making this determination, we note that the Authority's assessment

is whether an arbitrator's legal conclusion is consistent with the applicable standard of law; we are not assessing the arbitrator's underlying reasoning. *E.g.*, *NTEU Chapter 137*, 60 FLRA 483, 487 n.11 (2004). [3]

C. The Arbitrator's conclusion that Section 19 constitutes a permissive subject of bargaining is contrary to law.

Section 19 provides that "[a]greements on individual items are tentative and must be committed to in writing and signed by each Party's chairperson." Award at 54. The Arbitrator concluded that the proposal is permissive because it precludes the Union from reopening articles tentatively agreed on to reflect changing circumstances. The Agency asserts that, properly interpreted, the proposal is within the mandatory duty to bargain because it is intended to permit parties to focus on remaining matters while allowing the parties to revisit tentatively agreed-upon items. Exceptions at 38.

In interpreting a disputed proposal, the Authority looks to its plain meaning and any statement of the intent of the proposing party. *E.g.*, *NEA*, *OEA*, *Fort Bragg Ass'n of Educators*, 53 FLRA 898, 907 (1997). If the proposing party's explanation is consistent with the plain wording, then the Authority adopts the explanation for the purposes of construing what the proposal means and determining whether it is within the duty to bargain. *Id.*

Applying the foregoing, the Agency's interpretation of Section 19 is consistent with its plain wording. In this regard, written confirmation of an expressly "tentative" agreement does not explicitly or implicitly preclude subsequent adjustment. Accordingly, we adopt the Agency's explanation for purposes of construing what the proposal means. Doing so, the proposal is within the duty to bargain because it is intended as a guide for the conduct of negotiations and to further the bargaining process. *See ACT*, 353 F.3d at 51; *AFGE Local 12*, 60 FLRA at 539. The proposal is a measure to provide for tentative agreement to individual items to allow the parties to focus on remaining items while acknowledging that nothing is final until negotiations are completed to allow for changing circumstances. *See AFGE Local 12*, 61 FLRA 209 (proposal 7) (proposed ground rules agreement, providing for tentative agreement on individual items pending agreement on entire contract, within the duty to bargain). Consequently, we find that the Arbitrator's conclusion that the proposal is permissive is deficient. [4]

D. The Arbitrator's conclusion that Section 24 constitutes a permissive subject of bargaining is contrary to law.

Section 24 provides that the "agreement shall become effective 31 days from execution or upon agency-head approval, whichever is earlier, and will expire upon the effective date of the successor agreement." Award at 55. The Arbitrator viewed Section 24 as establishing the expiration date of the eventual term agreement and concluded that this is a substantive matter that should not be part of ground rules negotiations. The Agency again asserts that the Arbitrator misinterpreted the proposal because the proposal establishes a termination date for a ground rules agreement only.

The Agency's expressed intent that Section 24 is limited to the effective date and expiration date of the ground rules agreement is consistent with the plain

3. Member Beck disagrees with the Majority in only one respect—to the extent the Majority concludes that the Agency bargained in bad faith with respect to its proposal for an eight-week limit on unassisted bargaining.

The Majority appears to be indulging in circular reasoning. On the one hand, the Majority agrees with the Arbitrator's conclusion that the Agency engaged in bad faith bargaining when it insisted to impasse on its proposal to limit bargaining to eight weeks, because that proposal related to a permissive subject of bargaining. On the other hand, the Majority reasons that the proposal for an eight-week limit was permissive *because* it was offered in bad faith. That is, the conclusion of bad faith depends on the finding of permissiveness, yet the conclusion of permissiveness depends on the finding of bad faith. Each conclusion cannot logically depend on the other; rather, one must precede the other, and the second must proceed from the first.

The Majority acknowledges that "ground rules have long been held to be within the duty to bargain under the Statute." *See supra* p. 9 (citing *ACT*, 353 F.3d at 51; *AFGE Local 12*, 60 FLRA 533, 539 (2004)). Further, in the cases cited by the Majority, the court and the Authority went on to reaffirm that a proposed ground rule "may encompass any 'guide for the conduct of … negotiations.'" *ACT*, 353 F.2d at 51 (citing *AFGE*, 16 FLRA 602, 613 (1984), *remanded on other grounds*, 784 F.2d 1131 (D.C. Cir. 1986), *and aff'd*, 21 FLRA 786 (1986); *AFGE Local 12*, 60 FLRA at 539 (citing same)). Consequently, the Agency's proposal for an eight-week limit would seem to be a mandatory subject of bargaining rather than a permissive subject.

Accordingly, Member Beck would grant the Agency's exception arguing that the Arbitrator's award is contrary to law insofar as it holds that the Agency bargained in bad faith with respect to its proposal for an eight-week limit on unassisted bargaining.

4. The Union asserts that, even if the Arbitrator misconstrued the proposal, the Authority should find that the proposal is permissive because it permits unlimited withdrawals of tentative agreements. Opp'n at 28. We reject the Union's assertion because the Arbitrator explicitly recognized that the proposal does have limits: "The fact that agreements . . . are tentative . . . does not mean that one Party may withdraw its agreement . . . with absolute impunity." Award at 55.

wording of the proposal. In this regard, contrary to the Arbitrator's construction, the plain wording of the proposal does not explicitly or implicitly provide that the expiration provision pertains to the eventual term agreement, rather than the ground rules agreement. Accordingly, we adopt the Agency's explanation for purposes of construing what the proposal means. Consistent with this explanation, the proposal is within the duty to bargain because, by specifying the expiration date of the ground rules agreement, the proposal is clearly designed as a guide for the negotiations and furthers the bargaining process. *See Davis-Monthan Air Force Base, Tucson, Ariz.*, 53 FLRA 445, 454 (1997) (recognizing that ground rules agreements typically address their duration). Consequently, we find that the Arbitrator's conclusion that the proposal is permissive is deficient.

E. The Arbitrator's conclusion that Section 30 constitutes a permissive subject of bargaining is contrary to law.

Section 30 provides that either party may have "observers or consultants present during negotiation and impasse proceedings." The Arbitrator found that the proposal is permissive because it would permit the Agency to increase the size of its bargaining team while avoiding its obligation to provide official time to an equal number of union negotiators.

Although the Arbitrator did not identify the source of the statutory right on which he relied, we assume that the Arbitrator relied on § 7131(a) of the Statute, which provides that any employee representing a union in negotiating a collective bargaining agreement shall be provided official time and that the "number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes." However, a proposal concerning agency observers who are not designated as agency negotiators does not implicate § 7131(a). *See FEMTC of Charleston*, 36 FLRA 148, 151 (1990). The Agency expressed no intent that the proposed observers and consultants would be designated as negotiators, and the proposal does not provide for such designation. Thus, consistent with its plain wording, Section 30 does not require the Union to waive a statutory right, and the Arbitrator's conclusion that the proposal pertained to a permissive matter is contrary to the Statute.[5] *See id.*

Consequently, we find that the Arbitrator's conclusion that the proposal is permissive is deficient.

F. The Arbitrator's conclusion that the Agency was obligated to provide information to the Union is not deficient.

As to the Union's request for information, the Arbitrator concluded, as follows: "Under either the statutory or contractual requirements, the Agency was required to provide the information requested by the Union, narrowed as is clear in the body of the Union's request." Award at 61. The Agency contends that the Arbitrator's conclusion that it was obligated to provide the information under the agreement is in excess of the Arbitrator's authority because the issue of the denial of the information under the agreement was never raised or submitted to the Arbitrator for resolution.

Arbitrators exceed their authority when, among other things, they resolve an issue not submitted to arbitration. *E.g., AFGE Local 1547*, 59 FLRA 149, 150 (2003). In cases in which the parties do not stipulate the issues for resolution, the Authority accords the arbitrator's formulation of the issue to be decided the same substantial deference that the Authority accords an arbitrator's interpretation and application of a collective bargaining agreement. *E.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Ashland, Ky.*, 58 FLRA 137, 139 (2002). When the Authority defers to an arbitrator's formulation of the issue for resolution, the Authority will not find that the arbitrator exceeded his or her authority when the award is confined to the issues as the arbitrator framed them. *See AFGE Local 1547*, 59 FLRA at 150-51.

In this case, the parties did not stipulate the issues for resolution, and the Arbitrator framed the issues to include whether the Agency's conduct in withholding information requested by the Union violated the parties' collective bargaining agreement. Award at 3. In this regard, the Arbitrator specifically found that Article 11, Section 8 "was asserted by the Union as a basis for its request and in support of its assertion that the Agency's conduct was improper." *Id.* at 59-60. Because the agreement was asserted by the Union as a basis for its

5. We note that, regardless of the status of the proposed observers and consultants, both the Arbitrator and the Union misconstrue the Statute as *requiring* that the number of agency and union negotiators be equal. The Authority rejected this view of the Statute in *AFGE, AFL-CIO*, 15 FLRA 461, 463 (1984), holding that, although § 7131(a) *entitles* union negotiators to official time in a number that does not exceed the number designated by management, a proposal seeking more negotiators was within the mandatory duty to bargain. *Accord AFGE, AFL-CIO, Council 214*, 21 FLRA 575, 578 (1986).

request, we defer to the Arbitrator's formulation of the issues to encompass whether the Agency was obligated to provide the requested information under the agreement. *See AFGE Local 3134*, 56 FLRA 1055, 1056 (2001). As the Arbitrator's conclusion that the Agency was obligated to provide the information under the agreement is directly responsive to the issues as the Arbitrator framed them, the Agency fails to establish that the Arbitrator exceeded his authority. *See AFGE Local 1547*, 59 FLRA at 151; *AFGE Local 3134*, 56 FLRA at 1056. The Agency's reliance on the issues raised in the grievances is misplaced because, when the parties fail to stipulate the issues for resolution, the fact that the formulated issues differ from the issues presented in the grievance provides no basis for finding that the award was in excess of the arbitrator's authority. *AFGE Local 1547*, 59 FLRA at 151.

Accordingly, we deny this exception.

The Agency also contends that, to the extent that the Arbitrator concluded that the Agency was obligated to provide the information under the Statute, the award is contrary to § 7114. The Authority has repeatedly and consistently held that, when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds relied on are deficient in order for the award to be deficient. *E.g., U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007); *U.S. Dep't of the Treasury, Internal Revenue Serv., Oxon Hill, Md.*, 56 FLRA 292, 299 (2000). When the Authority denies the exceptions to one of the independent grounds, the Authority denies all other exceptions to separate grounds on which the arbitrator relied because these exceptions can provide no basis for finding the award deficient. *U.S. Dep't of Labor, Wash., D.C.*, 55 FLRA 1019, 1023 (1999) (*DOL*).

It is clear in this case that the Arbitrator's conclusion that the Agency was obligated to provide the requested information is separately and independently based on the Statute and the agreement. Award at 61. As we have denied the Agency's only exception to the agreement basis of the award, we also deny this exception as it provides no basis for finding the award deficient. *Id.*

G. The Arbitrator's conclusion that the Agency's actions obstructed meaningful bargaining is not contrary to law.

In determining whether the disputed conclusion is deficient, we defer to the Arbitrator's factual findings. *NLRB*, 61 FLRA at 199. In assessing whether the Agency's conduct obstructed bargaining, the Arbitrator found that the Agency never requested negotiations between August 2005 and March 2006, when it presented its "last Best Offer[.]" Award at 65. He further found that the Agency stated on April 6, 2006, that it would be available to meet whenever the Union was available, but, subsequently, restricted any meeting to a teleconference on April 21. *Id.* He also found that, when the Union refused to bargain in a teleconference and proposed meeting during the week of May 8, the Agency responded that it would not participate in further bargaining sessions over ground rules. *Id.* On this basis, the Arbitrator found that the Agency "avoided meetings more often than not and failed to use FMCS mediation" and that "[t]hese delays, refusals and restrictions fly in the face of the Agency's asserted desire to bargain in good faith[.]" *Id.* Accordingly, the Arbitrator concluded that that the Agency's conduct with respect to bargaining sessions "was not sufficient to meet [its] bargaining obligation" and that its handling of bargaining sessions obstructed meaningful bargaining. *Id.* at 65, 67.

The Arbitrator's factual findings support by a preponderance of the evidence that the Agency's conduct with respect to bargaining sessions was obstructive and failed to meet its bargaining obligation. *See NTEU Chapter 90*, 58 FLRA at 393 (deferring to the arbitrator's factual findings, the Authority denied the exception to the arbitrator's conclusion of whether the agency violated § 7116(a)). Accordingly, we deny this exception.

H. The award must be remanded.

In determining whether a party has fulfilled its bargaining obligation, the totality of the circumstances is considered. *DOJ*, 61 FLRA at 471. The Agency argues that, even if it acted in bad faith with respect to the April 21 meeting, there is no support for the conclusion that its overall conduct exhibited bad-faith bargaining. Exceptions at 50.

In explaining his conclusion that the totality of the circumstances established bad-faith bargaining, the Arbitrator identified the following as demonstrating bad faith:

> [T]he Agency's uninformative dismissal of the Union's inquiry into what aspects of the Agreement it wished to modify ("every sentence"); its failure to provide any indication to the Union of the number, nature and scope of the matters it wished to renegotiate; [and] its insistence on a

> bargaining timetable which is arbitrarily short in light of its broad assertion as to the number and scope of substantive issues it intends to change and its failure to advise the Union in advance of that proposal of those changes, its handling of meetings and proposals in ways which obstructed meaningful bargaining and its demanding to bargain to impasse on matters over which the Union had no obligation to bargain[.]

Award at 67.

We have found deficient the Arbitrator's conclusions that the Agency was required to provide specific notice of the changes it intended to propose to the term agreement and that Sections 19, 24, and 30 are permissive, on which the Arbitrator relied in making his determination on the totality of the circumstances. As has been noted, in a grievance preceding that alleges a ULP, the arbitrator functions as the trier of fact, and the Authority does not supplement those findings. *AFGE Nat'l Council of HUD Locals 222*, 54 FLRA at 1275. Accordingly, the award must be remanded to the Arbitrator to assess whether his remaining findings establish bad-faith bargaining by the Agency. *See NTEU*, 61 FLRA 729 (2006) (award remanded to the arbitrator to resolve the alleged violation of 7116(a) of the Statute).

I. The Arbitrator's refusal to award the requested remedy of reinstatement of the term agreement is not deficient.

As noted above, in ULP grievance cases where the arbitrator finds that a ULP was committed, the Authority defers to the judgment and discretion of the arbitrator in the determination of remedy. *NTEU*, 48 FLRA 566, 571 (1993). Unless a particular remedy is compelled by the Statute, the Authority reviews the remedy determinations of arbitrators in ULP grievance cases just as the Authority's remedies in ULP cases are reviewed by the federal courts of appeals. *Id.* at 571-72. More specifically, the Authority upholds the arbitrator's remedy determination unless the determination is "a *patent attempt* to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]." *Id.* at 572 (quoting *NTEU v. FLRA*, 910 F.2d 964, 968 (D.C. Cir. 1990) (*en banc*) (emphasis original)). The Authority emphasizes that this "is a heavy burden indeed." *Id.* (quoting *NTEU v. FLRA*, 910 F.2d at 968)).

In rejecting the remedy of reinstatement of the expired term agreement, the Arbitrator specifically found that there was no causal connection between the expiration of the agreement and the Agency's conduct and that reinstatement of the agreement would be disruptive. Award at 70. The Union does not challenge these findings. Defering to these factual findings, we conclude that the Union fails to establish that reinstatement of the expired term agreement is compelled by the Statute or that the Arbitrator's rejection of reinstatement was a patent attempt to achieve ends other than those to effectuate the policies of the Statute. *See NTEU*, 48 FLRA at 572.

Accordingly, we deny the Union's exception.

VI. Decision

The Union's exception is denied, and the award is remanded to the parties for resubmission, absent settlement, to the Arbitrator to assess whether his findings that have not been found deficient establish bad-faith bargaining by the Agency.