65 FLRA No. 27

FEDERAL DEPOSIT
INSURANCE CORPORATION
DIVISION OF SUPERVISION
AND CONSUMER PROTECTION
SAN FRANCISCO REGION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 273
(Union)

0-AR-4139

_____

DECISION

September 29, 2010

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Claude Dawson Ames 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 found that the Agency failed to fairly and equitably process the grievant's nomination for a Corporate Success Award (CSA). As a remedy, the Arbitrator ordered the Agency to award the grievant a CSA, with appropriate backpay.

The questions presented here are whether the award impermissibly affects management's rights to assign work and direct employees under 5 U.S.C. § 7106(a)(2)(A) and (B), and whether the award fails to draw its essence from the parties' agreement.

This case provides the Authority an opportunity to reexamine the restrictions that the Authority has placed on arbitrators' remedial powers in rendering awards that affect management rights under § 7106(a) of the Statute. The revised approach that we formulate for this and future cases, discussed in § IV.C. of this decision, gives arbitrators the same scope of remedial authority in such management rights cases as they routinely exercise in rendering awards that do not affect management rights.

For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievance claims that the Agency violated various Agency procedures and agreements with the Union when the Agency denied the grievant a CSA. A CSA is an annual award that provides Agency employees recognized as "top contributors" with a three percent increase in basic pay. Award at 3-4 (citing "Compensation Agreement Between FDIC and NTEU for the Years 2003-2005" (Compensation Agreement), § II.C). The percentage of employees to be recognized as "top contributors" in 2004 for their work in 2003 was to be set by the Agency's Chairman at "no less than 33 1/3 percent" of bargaining unit employees. Compensation Agreement, § II.C.

The Agency's CSA procedures for identifying top contributors are set forth in the Agency's "Procedures for Processing [CSAs]" Memorandum (the Memorandum) and "FDIC Directive System Circular 2420.1," Ch. 11, § 5 (Circular 2420.1). Award at 5-9. Circular 2420.1 is incorporated by reference in a Memorandum of Understanding between the parties (MOU). [2]

The CSA procedures have a number of steps. After supervisors numerically rank all nominated employees under their supervision, they submit the ranked nominations to the Assistant Regional Director (ARD) for their territory. *Id.* at 5-6. The ARD consolidates the nominations for evaluation by a first-level review panel consisting primarily of ARDs (the ARD Panel). *Id.* at 6. The ARD Panel evaluates each nomination, prioritizes the top one-third by assigning a numerical ranking, and submits those rankings to a second-level review panel consisting primarily of Deputy Regional Directors (DRDs) (the DRD Panel). *Id.* The DRD Panel evaluates and/or re-ranks each nominee and submits

1. Chairman Pope's separate opinion, concurring in part, is set forth at the end of the decision.

2. The relevant provisions of the Compensation Agreement, the Memorandum, Circular 2420.1, and the MOU are set forth in the attached Appendix.

the results to the Regional Director (RD) for approval. *Id.* The RD reviews the recommendations and submits the results to the Division Director. *Id.* The Compensation Agreement, the Memorandum, Circular 2420.1, and the MOU all require that CSAs be processed and distributed in a fair and equitable manner.

The grievant was nominated for a CSA for his work in 2003. His nomination was forwarded to the DRD Panel by the ARD Panel. *Id.* at 9. However, the DRD Panel did not forward his nomination to the RD for further review. Instead, the DRD Panel substituted another employee in place of the grievant. The substituted employee was not nominated before the nominations were submitted to the DRD Panel. By doing this, the Agency eliminated the grievant from consideration for a CSA. *Id.*

When the grievant learned how his nomination had been processed, he filed a grievance claiming that the Agency violated Circular 2420.1, the parties' collective bargaining agreement (CBA), and the Compensation Agreement by failing to award him a CSA. The grievance was not resolved, and was submitted to arbitration.

With no agreement on the issues, the Arbitrator determined that he would address both parties' submissions. The Union proposed: "Did management violate Circular 2420.1 when it failed to award [the grievant] a CSA? If so, what is the remedy?" *Id.* at 3. The Agency proposed: "Did the [Agency] abuse its discretion and violate Chapter 11 of Circular 2420.1 or Section 1 of the [MOU] when it did not give a [CSA] to [the g]rievant in 2004 based on his contributions for 2003? If so, what is the appropriate remedy?" *Id.*

The Arbitrator sustained the grievance. The Arbitrator held that the Agency violated the agreed-upon CSA selection process outlined in Circular 2420.1 and deprived the grievant of fair and equitable consideration for receipt of a CSA. *Id.* at 14-17. In the Arbitrator's view, the DRD Panel erred when it substituted another individual for the grievant. The Arbitrator found no evidence that the negotiated CSA selection process provided for the initiation of new nominations or for the removal of existing nominees at that stage of the process. *Id.* at 16.

Having found that the Agency "compromise[d] the selection [p]rocess[,]" the Arbitrator addressed the remedy. *Id.* at 19. Determining that re-running the CSA selection process would be "too problematic" to monitor and manage, the Arbitrator ordered the Agency to grant the grievant a CSA for 2003 with appropriate backpay. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency presents two exceptions.[3] First, the Agency contends that the award is contrary to law because it impermissibly affects management's rights to assign work and to direct employees under 5 U.S.C. § 7106(a)(2)(A) and (B). Second, the Agency claims that the award fails to draw its essence from the Compensation Agreement.

The Agency argues in its first exception that the Arbitrator's award is deficient under the two-prong standard that has been used by the Authority to determine whether an award impermissibly affects management rights set forth in *United States Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*). The two *BEP* prongs are explained at § IV.A., below. The Agency only challenges the award under *BEP*'s second prong. The Agency contends that the award fails to satisfy *BEP* prong II because the award does not reflect a reconstruction of what the Agency would have done if it had not violated the agreed-upon CSA selection process. Exceptions at 11 n.9. According to the Agency, even assuming that the Arbitrator properly found that the Agency "violated the contract," he erroneously awarded the grievant a CSA pursuant to the Compensation Agreement without determining that the grievant actually deserved an award. *Id.* at 12-13. The Agency claims that, although there may have been a flaw in the application of the CSA selection process to the grievant, "management would still have had to determine whether the [g]rievant was in the top one-third of contributors" for the grievant to

3. The Agency argues that the Arbitrator exceeded his authority as a result of its exceptions claiming that: (1) the award impermissibly affects management's rights to assign work and to direct employees, and (2) the award fails to draw its essence from the agreement. An exception claiming that arbitrators have exceeded their authority requires a showing that they have failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, disregarded specific limitations on their authority, or awarded relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). As the Agency makes no specific argument to this effect, to the extent that this language was intended to constitute a separate exception, we find that the Agency has failed to establish that the Arbitrator exceeded his authority and deny the exception.

receive a CSA. *Id.* at 11. The Agency requests that the Authority modify the award to require the Agency only to reconsider the grievant for a CSA.

As its second exception, the Agency claims that the award fails to draw its essence from the Compensation Agreement. Noting that the grievant had not been determined to be a top contributor, the Agency claims that the award is inconsistent with the Compensation Agreement, which requires that CSAs be granted only to top contributors. *Id.* at 17. The Agency also claims that if it is required to award the grievant a CSA, more than one-third of bargaining unit employees would receive CSAs, in violation of the Compensation Agreement. *Id.* at 17-18. Because the award "does not represent a plausible interpretation of the agreement" and "evidences a manifest disregard of the agreement," *id.* at 17, the Agency argues it should be set aside.

B. Union's Opposition

The Union opposes the Agency's exceptions. First, regarding the Agency's *BEP* exception, the Union claims that the award correctly reconstructs what the Agency would have done if it had not violated CSA selection procedures by ordering the Agency to award the grievant a CSA. Among other things, the Union contends that evidence was presented at arbitration showing that the grievant was within the top twenty percent of employees nominated for a CSA before he was removed from consideration. Opp'n at 10-11.

Second, the Union contends that the award does not fail to draw its essence from the Compensation Agreement. In the Union's view, although the Compensation Agreement does not require the Agency to give CSAs to more than one-third of all bargaining unit employees, it also does not prohibit such action. *Id.* at 13. The Union argues that the Agency's exception should be denied because "[t]he question of the interpretation of the parties' agreement is a question solely for the arbitrator because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 14 (citing *Panama Canal Comm'n*, 54 FLRA 1316 (1998)). Additionally, the Union alleges that the award does not fail to draw its essence from the Compensation Agreement because the agreement does not limit the Arbitrator's authority to award a remedy. *Id.* at 15. To the contrary, the Union argues that the remedy is consistent with the parties' CBA, which specifically grants the Arbitrator "the authority to make an aggrieved employee whole to the extent such remedy is not limited by law." *Id.* (citing CBA, Article 48, Section 4).[4] Thus, the Union claims that the Arbitrator's award does not "evidence a manifest disregard of the CBA[.]" *Id.* at 16. The Union requests that, if the Authority determines that the Arbitrator's remedy does not reconstruct what management would have done if it had not violated the contractual provision, then the Authority should remand the award to the Arbitrator for clarification.

IV. Analysis and Conclusions

In this case, the Authority has decided to revisit the issue of arbitrators' remedial authority when it entertains exceptions alleging that an award or arbitral remedy impermissibly affects management rights under § 7106 of the Statute. Our focus is on the analysis that applies after the Authority has determined that an award provides a remedy for a violation of a contract provision that was negotiated pursuant to § 7106(b) of the Statute.

A. Current Case Law

The legal framework that the Authority currently applies when analyzing arbitrators' awards claimed to impermissibly affect management rights set forth in 5 U.S.C § 7106(a) is stated in *BEP*, 53 FLRA at 151-54. The framework set forth in that decision has two prongs, both of which must be satisfied for an award to be upheld.

Under prong I, the Authority examines whether an award that affects management rights 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 pursuant to § 7106(b) of the Statute. *See BEP*, 53 FLRA at 152-53 (reexamining the Authority's precedent in light of the Supreme Court's decision in *Dep't of the Treasury, IRS v. FLRA*, 494 U.S. 922 (1990) (*IRS*)); *see also Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 313-14 (1990) (*Customs Service*). If the award does not provide such a remedy, then the

4. Article 48, Section 4.B of the CBA provides, in pertinent part:

> The arbitrator shall have no power to add to, subtract from, or modify the terms of this Agreement. The award will be limited to the issues presented at arbitration. The arbitrator's decision will be final and binding and the arbitrator will have the authority to make an aggrieved employee whole to the extent such remedy is not limited by law.

Opp'n, Ex. 3 at 126.

award is contrary to law and cannot be upheld. *U.S. Dep't of Veterans Affairs, Med. Ctr., Northampton, Mass.*, 53 FLRA 1743, 1746 (1998).

Prong I's companion requirement, the reconstruction prong or "prong II," focuses on whether the arbitrator's remedy reflects a reconstruction of what management would have done if management had not violated the law or the contractual provision at issue. *See BEP*, 53 FLRA at 154. As with prong I, awards that fail to satisfy the reconstruction prong are not sustained. Thus, awards that fail to satisfy either prong of the Authority's current legal framework will be set aside, modified, or remanded. *Id.*

B. Origins and Development of Current Case Law

The Authority has modified both parts of its legal framework from time to time to reflect its own evolving understanding of the Statute's requirements and the nature of arbitration as Congress intended it to function in federal sector labor-management relations. This was the case when, for example, the Authority in *BEP* determined that the legal framework referred to as prong I should be applied generally to arbitration awards claimed to affect management rights under § 7106(a). *See BEP*, 53 FLRA at 153.

Drawing on prior precedent dealing with management's right to discipline, the Authority held in *BEP* that there was no basis in the Statute for not applying the same approach when reviewing awards claimed to affect other management rights in § 7106(a). *Id.* (citing *U.S. Dep't of Veterans Affairs, Med. Ctr., Birmingham, Ala.*, 51 FLRA 270, 274 (1995) (*VA Birmingham*)). As the Authority explained in *Customs Service*, on which *VA Birmingham* relied,

> [w]e are committed to the Statute's provision for final and binding arbitration and its purpose of facilitating the resolution of disputes. These are best served by ensuring that the decision of an arbitrator, selected by both parties to interpret and apply their collective bargaining agreement, will not be overridden on management rights grounds in order to relieve one party from the unwelcome result of that purposeful choice.

Customs Service, 37 FLRA at 316.

This same commitment to Congress' determination to use final and binding arbitration to facilitate and encourage the resolution of disputes under the Statute is evident in the evolution of the reconstruction requirement of the Authority's legal framework, prong II. The reconstruction requirement is traceable to the Authority's decision in *Social Security Administration*, 30 FLRA 1156 (1988) (*SSA*). In *SSA*, the Authority reexamined the remedial authority of arbitrators, based on its understanding of "the functions that arbitrators perform, and that Congress intended that arbitrators perform, under the Statute." *Id.* at 1161 (quoting *Newark Air Force Station*, 30 FLRA 616, 635-36 (1987)).

In *SSA*, the Authority rejected previously established restrictions on arbitrators' remedial authority; i.e., that arbitrators may not substitute their judgment for that of management when arbitrators resolve grievances over performance appraisal matters. Finding such a restriction "not warranted," the Authority held that arbitrators could exercise broader remedial power, substituting their judgment for that of management, when an arbitrator's remedy reflected a reconstruction of what management would have done had it acted properly. *SSA*, 30 FLRA at 1160. In the Authority's view, exercising this broader remedial discretion

> would not require an arbitrator to do anything other than what arbitrators do routinely in resolving other disputes, including those involving . . . other management rights . . . . This is precisely one of the functions that arbitrators perform, . . . under the Statute. In requiring parties to negotiate grievance procedures that result in binding arbitration, and in broadly defining what grievances could encompass, Congress fully expected arbitrators to review a wide variety of actions, including actions taken by management pursuant to § 7106.

Id. at 1161 (quoting *Newark Air Force Station*, 30 FLRA at 635-36). The Authority concluded: "To the extent that the resolution of grievances by arbitrators in this manner conflicts with § 7106(a)(2)(A) or (B), that conflict results from implementation of congressionally mandated grievance and arbitration procedures." *Id.* at 1162.

The Authority subsequently extended its *SSA* reconstruction precedent to arbitrators' awards claimed to impermissibly interfere with management

rights other than those associated with performance appraisal matters. *VA Birmingham*, 51 FLRA at 274.

Continuing concerns about grievance arbitration's efficacy under the Statute have led to criticism of the Authority's reconstruction precedent. This criticism was expressed in *Social Security Administration, Boston Region (Region 1)*, 57 FLRA 264 (2001) (Member Wasserman, dissenting) (*SSA Boston*). In *SSA* Boston, the arbitrator found that a supervisor's search of the grievant's desk and related actions violated various contractual provisions.

In its decision, the Authority's majority acknowledged that the Authority's reconstruction requirement "ma[d]e it difficult [for the arbitrator] to construct meaningful remedies" in the case. *Id.* at 269. Nevertheless, finding the arbitrator's remedy "not a proper reconstruction," the majority set it aside, depriving the grievant of any make whole-type remedy for the contract violation the arbitrator found. *Id.*

Member Donald S. Wasserman, one of *BEP*'s two original authors, dissented.[5] The dissent found the majority's decision "bad law," and the reconstruction requirement "a framework that does not fit all cases and has no basis in the Statute." *SSA, Boston*, 57 FLRA at 270, 272 (Dissenting Opinion of Member Wasserman). Agreeing with the majority that reconstruction in the case was "not feasible," the dissent argued that "the requirement of reconstruction in all situations [i]s one that is not dictated by the Statute or the Supreme Court's decision in [*IRS*] . . . . [A]pplication of prong I of *BEP* properly and adequately protects management prerogatives under the Statute." *Id.* at 270. As for congressional intent, in the dissent's view, "when Congress authorized negotiations on matters covered in § 7106(b), that authorization included arbitration awards which give effect to those § 7106(b) matters the parties agree to negotiate. . . . In short, when Congress authorized bargaining on § 7106(b) matters, it also authorized arbitrators to issue awards to remedy violations of those provisions." *Id.* at 273.

The dissent in *SSA Boston* therefore disagreed with the majority's view "that the [reconstruction] standard is necessary to ensure that an agency's § 7106(a) rights are limited only to the extent bargained by the parties." *Id.* at 272. Rather, the dissent concluded, "it is by means of an essence challenge that impositions of contractual constraints never agreed to are addressed." *Id.*

Upon reexamination of the "reconstruction" standard reflected in *BEP*'s second prong, and as discussed in the following section, we determine that such a standard is not required by the Statute and, indeed, unduly limits the appropriate remedial authority of arbitrators. It is sufficient that an arbitrator's award that affects management rights under § 7106(a) of the Statute 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 pursuant to § 7106(b) of the Statute.

C. Approach To Be Followed With Respect To The Remedial Authority of Arbitrators -- Elimination of the Reconstruction Requirement

The Authority concludes that the restriction on arbitrators' remedial authority imposed by *BEP*'s reconstruction requirement is not warranted. Rather, subject to any specific limitations set forth in the pertinent contract and to the requirement that an award provide a remedy for a properly negotiated contract provision, an arbitrator enjoys broad discretion to remedy a meritorious grievance even if the remedy affects management rights under § 7106(a). Exercise of this broad remedial discretion effectuates § 7106(a)'s explicit direction that management rights set forth in § 7106(a) are "subject to" provisions bargained under § 7106(b), and that "nothing in" § 7106 shall preclude the parties from negotiating such provisions. 5 U.S.C. § 7106(b). This broad remedial discretion exists even if, due to insufficient record evidence or other reasons, the arbitrator does not "reconstruct" what management would have done but for the legal or contract violation.

This approach is more consistent with the Statute and better serves the Statute's purpose of facilitating and encouraging the settlement of disputes than *BEP*'s reconstruction requirement. Neither the Statute's language nor its structure mandates particular arbitral remedies. To the contrary, Congress gave arbitrators extensive authority. "In requiring parties to negotiate grievance procedures that result in binding arbitration and in broadly defining what grievances could encompass, Congress fully expected arbitrators to review a wide variety of actions, including actions taken by management pursuant to § 7106." *SSA*, 30 FLRA at 1161. This wide-ranging authority includes authority to render

5. In deciding *BEP*, only two Members participated, Chair Phyllis N. Segal and Member Donald S. Wasserman. The Authority's third Member's office was vacant.

meaningful remedies tailored to the circumstances of particular cases. We find no indication that Congress intended to limit arbitrators' discretion in ordering such meaningful remedies by mandating remedies that "reconstruct" what agency management would have done if the agency had not violated law or its agreement with the exclusive representative. Accordingly, Authority decisions that impose a reconstruction requirement will no longer be followed. *See, e.g., FDIC*, 61 FLRA 738 (2006) (Chairman Cabaniss, writing separately); *SSA*, 61 FLRA 315 (2005) (then-Member Pope, dissenting in part).

It is thus our intent to reaffirm the Statute's policy of giving deference to arbitrators' wide-ranging remedial authority. However, such remedial authority is not unfettered. Rather, an arbitrator's award must still be reasonably related to the negotiated provisions at issue and the harm being remedied.

This limitation on arbitral remedy is not intended to establish a new two-pronged analytical framework that will be recited in every case involving an award alleged to violate management rights. We include the point simply to underscore for the parties and the arbitral community the legal requirements that apply to such awards. As in other types of arbitration cases, such awards must still withstand challenges raised in exceptions that the award does not satisfy the standards Congress established in the Statute for the Authority's review of arbitrators' awards. Where such a challenge establishes that an award imposes a constraint on management rights that was not agreed to by the parties, whether on essence grounds or otherwise, the award will be set aside.

On a practical level, parties to a collective bargaining agreement understand that (absent an express exclusion of a particular matter from arbitration) a violation of a negotiated contract provision is subject to being remedied by an arbitrator exercising his broad authority to remedy such violations. If an agency is concerned that the arbitral remedy for violating a particular contract proposal would impermissibly affect management rights, the agency need not agree to the proposal. However, if an agency agrees to include in its collective bargaining agreement a provision negotiated under § 7106(b), and that provision is applied by an arbitrator in a way reasonably related to the provision and the harm being remedied, a subsequent challenge to such an award is likely to be rejected by the Authority. [6]

D. Application of the Revised Analytical Framework

Applying the analytical framework described above, we conclude that the award in this case is not contrary to law. We also conclude that the award does not fail to draw its essence from the parties' agreement. We therefore deny the Agency's exceptions.

1. The award is not contrary to law.

We reject the Agency's exception arguing that the award's remedy is contrary to law.[7] This exception is based entirely on the assertion that the remedy does not reflect a reconstruction of what the Agency would have done if it had not violated the agreed-upon CSA selection process. As explained above, such "reconstruction" is not the standard to be applied to the remedy directed by an arbitrator. Moreover, the Agency concedes that the award enforces a properly negotiated contract provision. *See* Exceptions at 11 n.9. Consequently, we conclude that the award does not impermissibly affect management rights by failing to reconstruct what the Agency would have done if it had not violated the contract, and we deny the Agency's contrary to law exception.

6. Our concurring colleague claims that, under the new approach that we outline today, arbitrators' remedies "no longer may be found deficient based on management rights[.]" Concurring Opinion of Chairman Pope at 17. However, our colleague does not identify where in our decision we have said this – and indeed, we have not. The approach that we set forth today remains true to the Statute – and deviates not at all from the *BEP*/prong two approach that we are discarding – in this fundamental way: An arbitral remedy that affects management rights and is challenged on that basis will not be upheld if it enforces a contractual restraint on management rights for which the parties did not bargain pursuant to § 7106.

7. Although the Agency's contrary to law arguments are sometimes presented as an "exceeds authority" exception, we construe them to be a "contrary to law" exception. *U.S. DOD, Def. Contract Mgmt. Agency*, 59 FLRA 396, 398 n.6 (2003) (agency's argument that the arbitration award affected management rights set forth as an "exceeded authority" exception construed to be a "contrary to law" exception).

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

We also reject the Agency's claim that the award fails to draw its essence from the parties' agreement. In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2). Under this standard, 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 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 U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*). The Authority and the courts defer to arbitrators in this context because it is the arbitrator's construction of the agreement for which the parties have bargained. *Id.* at 576.

The Agency argues that the remedy portion of the award fails to draw its essence from the Compensation Agreement and should be set aside for two reasons. First, according to the Agency, the award is inconsistent with the Compensation Agreement, which requires that CSAs be granted only to top contributors. The Agency points out that the grievant has not been determined to be a top contributor. Second, the Agency claims that, if it were required to award the grievant a CSA, more than one-third of bargaining unit employees would receive CSAs, assertedly in violation of the Compensation Agreement.

With regard to the Agency's first argument, the record shows that the grievant's performance was at least sufficient for him to be nominated for a CSA by his first level supervisor, second and third level reviewers, Field Supervisors, and the ARDs under the negotiated CSA nomination procedures. *See* Award at 9. Based on the facts in the record, the Agency has not demonstrated that the Arbitrator's 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 OSHA*, 34 FLRA at 575.

The Agency's second argument also lacks merit. The Compensation Agreement provides that "[t]he Chairman has sole discretion to set the percentage of bargaining unit employees who will be recognized as top contributors under the CSA program[,]" so long as that percentage is "no less than 33 1/3 percent." Award at 4. The Agreement's plain wording reflects that this is a minimum, and not a maximum, as argued by the Agency. *See FDIC*, 62 FLRA 356, 359 (2008) (*FDIC I*) (holding that the Compensation Agreement's 33 1/3 percent figure "is a minimum, not a maximum").

Thus, although the Compensation Agreement does not obligate the Agency to award CSAs to employees who are not in the top one-third of contributors, it also does not cap the number of bargaining unit employees eligible to receive CSAs at 33 1/3 percent. Consequently, awarding a CSA to the grievant does not necessarily preclude compliance with the requirements of the Compensation Agreement. *See id.*

Our conclusion on this point is not altered by the Compensation Agreement's language leaving it to the "sole discretion" of the Chairman to set the percentage of unit employees eligible to receive a CSA. Compensation Agreement at 2. The agreement includes other language mandating "fair and equitable treatment" for CSA candidates. *Id.* at 5. To the extent there is tension between these agreement provisions, we cannot say that the arbitrator's conclusion, that the grievant should receive a CSA, is not a plausible interpretation of the agreement as a whole.

For these reasons, the Agency has failed to demonstrate that the award fails to draw its essence from the Compensation Agreement. We therefore deny the Agency's exception.[8]

V. Decision

The Agency's exceptions are denied.

8. In reaching this conclusion, we are aware of our decision in *FDIC*, 64 FLRA 79 (2009) (Chairman Pope dissenting in part) (*FDIC II*), remanding on essence grounds an award arguably similar to the award in the instant case. To the extent that *FDIC II* is inconsistent with prior precedent represented by *FDIC I* and our reasoning in the instant case, *FDIC II* will no longer be followed.

APPENDIX

COMPENSATION AGREEMENT BETWEEN FDIC AND NTEU FOR THE YEARS 2003-2005

II. ANNUAL PAY

. . . .

C. Annual Pay Adjustment

Year 2003

Effective 2003, the Employer will provide an increase in basic pay of 3.2 percent for all employees who received a rating of "meets expectations" during the prior year's rating period. In addition, 2003 shall be a transition year for the Corporate Success Award, which is described below. . . .

Years 2004 and 2005

. . . .

A Corporate Success Award (CSA) will be established which provides that an additional 3.0 percent increase be made in basic pay for those employees recognized as top contributors. The Chairman has sole discretion to set the percentage of bargaining unit employees who will be recognized as top contributors under the CSA program. However, the percentage of bargaining unit employees to receive the CSA shall be no less than 33 1/3 percent. These awards shall be made on an annual basis.

. . . .

Opp'n, Attach. 4, Compensation Agreement Between FDIC and NTEU for the Years 2003-2005 at 1-2.

MEMORANDUM: PROCEDURES FOR PROCESSING CORPORATE SUCCESS AWARDS (November 17, 2003)

In order to ensure a fair and equitable distribution of the CSAs within the division, DSC will implement the following procedures for nominating employees.

Regional Office CSA Nomination Procedures

1. The supervisor prepares written CSA nominations for eligible employees.

2. The supervisor prioritizes and assigns a numerical ranking for all nominated employees within their span on control.

3. The supervisor submits the CSA nomination forms with numerical rankings to the Regional Office Assistant Regional Director, Administration (RO ARD-Admin).

. . . .

4. The RO ARD-Admin consolidates and prepares the CSA nomination forms for evaluation by first-level review panel consisting of the Assistant Regional Directors and the Deputy Regional Director – Compliance.

5. The first-level review panel evaluates each CSA recommendation and prioritizes the top-one third by assigning a numerical ranking.

6. The first-level review panel forwards their numerically ranked CSA recommendations to the second-level review panel consisting of the Deputy Regional Directors and Area Directors.

7. The second-level review panel evaluates and/or re-ranks each CSA recommendation and submits to the Regional Director for approval.

8. The Regional Director reviews the CSA recommendations, signs the appropriate justification forms, and submits the final Regional CSA recommendations to the Division Director.

. . . .

Opp'n, Attach. 7, Memorandum Regarding Procedures for Processing Corporate Success Awards (Zamorski Memorandum) at 1-2.

FDIC DIRECTIVE SYSTEM CIRCULAR 2420.1 (July 21, 2003)

CHAPTER 11
CORPORATE SUCCESS AWARDS

. . . .

11-2. Eligibility

All non-executive employees who have current performance ratings of record from the FDIC of "Meets Expectations" are eligible. . . .

. . . .

11-4. Criteria

The criteria below are intended to be achievable by any eligible employee in any position. Nominations for the award effecting in 2004 must be based on contributions made between January 1, 2003 and December 31, 2003. . . .

Nominations will be evaluated based on one or more of the following criteria. These are the only criteria permitted under the Corporate Success Award Program. Nominations will provide specific statements of the contributions by the employee that meet the identified criteria. Meeting one or more of these criteria does not entitle employees to be nominated to receive the Corporate Success Award.

A. Business Results: Consistently displays a high level of initiative, creativity, and innovation to produce results that reflect important contributions to the Corporation and/or its organizational components.

B. Competency: Demonstrates an exceptional degree of competency within his/her position, and is frequently relied upon by others for advice, assistance, and/or judgment that reflect important contributions to the Corporation and/or its organizational components.

C. Working Relationships: Builds extremely productive working relationships with co-workers, other Divisions/Offices, or other public or private sector agencies based on mutual respect that reflect important contributions to the Corporation and/or its organizational components.

D. Learning and Development: Takes an active part in developing personal skills and competencies and applies newly acquired skills and competencies that reflect important contributions to the Corporation and/or its organizational components.

11-5. Procedures

. . . .

B. Supervisors will nominate their top contributors by preparing form FDIC 2420/21, Corporate Success Award Nomination. Forms must be submitted to the designated reviewing official within 15 calendar days after the end of the consideration cycle. Employees may provide input to the appropriate supervisors for other employees to be considered for a [CSA].

C. Reviewing Officials, as designated in the Division/Office delegation of authority, will ensure the consistent application of Corporate Success Award criteria and the fair and equitable treatment of employees. The reviewing official shall sign the nomination form and forward it to the Division/Office Director within 30 calendar days after the end of the consideration cycle.

D. Each Division/Office Director or his/her designee will serve as the approving official for all Corporate Success Awards within their Division /Office. Directors are responsible for ensuring that the percentage of bargaining unit and non-bargaining unit employees recognized under the Corporate Success Award program equals the percentage identified by the Chairman. The Director, or his/her designee, will sign the nomination forms and forward them to their administrative officer for coordination with the Division of Administration, Human Resources Branch.

. . . .

F. The Chairman has sole discretion to set the percentage of bargaining unit and non-bargaining employees who will be recognized as top contributors under the Corporate Success Award (CSA) program . . . . However, the percentage of bargaining unit employees to receive the CSA will be no less than 33 1/3 percent.

Opp'n, Attach. 6, FDIC Circular 2420.1, Chapter 11 at 5-7.

MEMORANDUM OF UNDERSTANDING BETWEEN FDIC & NTEU
[March 13, 2003]

> 1. CSAs will be distributed to employees in a fair and equitable manner, and in accordance with the terms of the MOU and FDIC Circular 2420.1.

Opp'n, Attach. 5, Memorandum of Understanding Between FDIC & NTEU at 1.

Opinion of Chairman Pope, concurring in part:

The majority has decided that arbitral remedies may be challenged on private sector grounds only; remedies no longer may be found deficient based on management rights under § 7106 of the Statute. The majority's decision is flatly contrary to the Statute. Accordingly, although I agree with the ultimate conclusion to deny the Agency's exception in this case, I write separately.[1]

Section 7106(a) provides that "*Subject to subsection (b) . . . , nothing in this chapter shall affect"* the exercise of the management rights set forth therein. 5 U.S.C. § 7106(a) (emphasis added). An agency's authority to exercise the particular rights set forth in § 7106(a)(2) are constrained also by "applicable laws."[2] The Supreme Court has instructed that the words "nothing in this chapter" mean "nothing in the entire" Statute, including grievance arbitration under § 7121 of the Statute. *Dep't of the Treasury, IRS v. FLRA*, 494 U.S. 922, 928 (1990) (*IRS*). Accordingly, as relevant here, only those constraints on management rights properly negotiated under § 7106(b) are enforceable in arbitration. Put differently, "nothing" means "nothing outside § 7106(b)."

Consistent with the Statute and the Court's decision in *IRS*, the Authority established the two-pronged test set forth in *United States Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*).[3] The first prong of *BEP* asks, if raised in an exception, whether an arbitration award provides a remedy for a violation of "a contract provision that was negotiated pursuant to the exceptions to section 7106(a) that are set forth in section 7106(b)."[4] *Id.* at 153. The second prong of that test -- which the majority eliminates -- inquires, if raised in an exception, whether the awarded remedy constitutes a reconstruction of what management would have done had it complied with the relevant contract provision. *Id.* at 154.

It may well be that the term "reconstruction" was inartful in conveying the concept it embodies. However, whatever term is used, the Authority has made clear that the purpose of the second prong is to "ensure that an agency's section 7106(a) rights are limited only to the extent the parties bargained for." *SSA, Boston Region (Region 1), Lowell Dist. Office, Lowell, Mass.*, 57 FLRA 264, 270 (2001) (Member Wasserman dissenting in part) (*SSA, Boston*). Inquiring whether an award is based on an enforceable contractual provision is not enough; it is also necessary to inquire whether a remedy for violating that provision is properly based on that provision. Unless the term "nothing" in § 7106(a) means "nothing except arbitral remedies" -- an interpretation that the plain wording does not permit -- the latter inquiry is compelled by the Statute.[5]

In finding that an arbitrator's remedy may no longer be found deficient based on management rights, the majority draws a sharp line between a remedy and the remainder of an award. This line does not exist in the wording of the Statute or the

1. I agree that the award does not fail to draw its essence from the parties' agreement.

2. As the "applicable laws" provision is not relevant in this decision, I will not reference it further.

3. As set forth in *BEP*, the two-prong test was merely an extension of a similar limitation established years earlier with regard to awards resolving disputes over awards raising employees' performance ratings. 53 FLRA at 151 (citing *U.S. Dep't of HHS, SSA*, 34 FLRA 323 (1990)). Moreover, since at least 1984, the Authority has held that, consistent with management's right to select under § 7106(a)(2)(C), an arbitrator may not award a promotion absent a finding that "but for" the agency's contract violation, the grievant would have been selected for promotion. *AFGE, Local 12*, 15 FLRA 543 (1984). I note that, since *BEP*, twenty-four awards have been found deficient based on the second prong, including one award that was set aside over my dissent. *U.S. Dep't of Def., Tex. Nat'l Guard, Austin, Tex.*, 59 FLRA 437 (2003) (then-Member Pope dissenting).

4. By decision issued today in *United States Environmental Protection Agency*, 65 FLRA 113, 116-18 (2010) (Member Beck concurring), the Authority has modified its approach for resolving exceptions alleging that a contract provision is not enforceable under § 7106(b) and, as a result, an award is deficient under the first prong of *BEP*. In particular, the Authority has decided, consistent with the framework established 20 years ago in *Department of the Treasury, United States Customs Service*, 37 FLRA 309 (1990), that a provision is enforceable under § 7106(b) unless it abrogates a disputed management right. As the majority notes, the first prong of *BEP* is not in dispute in this case. Majority Op. at 4.

5. The majority's premise that an arbitrator's exercise of remedial authority effectuates the Statute's mandate that "nothing" shall preclude negotiation over subjects set forth in § 7106(b), Majority Op. at 8, does not hold water. *IRS* is crystal clear that "nothing" includes the entire Statute, including its grievance and arbitration provisions. 494 U.S. at 928.

extensive precedent interpreting it. Moreover, it is entirely artificial. In this regard, few parties (not to mention grievants) would find it meaningful. Indeed, management rights disputes in arbitration nearly always involve what the awards require agencies *to do (or stop doing)*: the remedy.[6] In addition, that the majority would (continue to) find remedies deficient on the other grounds set forth in § 7122 of the Statute is of no moment because, consistent with *IRS*, § 7106(a) provides an independent limitation on an arbitrator's remedial authority, and this limitation cannot be ignored.[7]

The majority states that an award must "be reasonably related to the negotiated provisions at issue and the harm being remedied." Majority Op. at 9. I agree that this is a legally permissible formulation of what I believe is a connection required by the Statute between a remedy disputed under § 7106(a) and the relevant contract provision. That is, I find that a "reasonable relation" standard, properly applied, is consistent with the Statute. Further, I would find that the remedy in this case is reasonably related to the contract provision and the harm remedied.

Applying the "reasonable relation" standard here, I agree with the majority that the award is not deficient. Regrettably, however, I part company with the majority on the reasoning used to reach this conclusion. Put simply, the majority is unwilling to adopt or apply "reasonable relation" as a standard for assessing whether a remedy is deficient based on management rights. Instead, only exceptions to remedies based on the "private sector grounds" set forth in § 7122(a)(2) of the Statute may be granted.[8] As the Statute requires *some* standard and the majority is unwilling to apply *any*, I am unable to bridge the gap.

For the foregoing reasons, I concur that the award is not deficient.[9]

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6. To illustrate this point, I note but a few examples of the twenty four awards found deficient under the second prong of *BEP*. In *United States Department of Defense, Defense Contract Management Agency*, 59 FLRA 396 (2003) (then-Member Pope dissenting in part on other grounds) the arbitrator found that the agency failed to properly administer its incentive awards committee and, as a remedy, directed the agency to replace its performance appraisal system. In *United States Department of Defense, Departments of the Army and the Air Force, Alabama National Guard, Northport, Alabama*, 55 FLRA 37 (1998), the arbitrator found that two grievants had not been properly considered for one vacancy and, as a remedy, ordered both grievants promoted.

7. In this regard, the majority puts great stock in the policy that arbitrators have broad authority to fashion remedies. I do, too. However, there are other policies in play, including the policy decisions underlying the Congressional decision to enact § 7106(a). Despite my reluctance to overturn arbitral awards, I believe that scrutiny of remedies under § 7106(a) is required by the Statute and, if such scrutiny is to be eliminated, it must be done through legislative change. *See, e.g., United States v. Hopkins*, 427 U.S. 123, 125 (1976) (Court noted effect of application of statutory wording and stated that "'it is up to Congress to remedy this apparent harsh result[.]'" (quoting *Keetz v. United States*, 168 Ct. Cl. 205, 207 (1964)).

8. The majority's statement that its revised approach "deviates not at all . . . from the approach that [it is] discarding" undoubtedly creates confusion that will promote litigation to clarify the matter. Majority Op. at 10 n.6. In fact, it is quite clear that the revised approach discards the second prong of *BEP* and, as such, deviates completely from the prior approach. Moreover, although the majority disputes my claim that, under the revised approach, remedies will be found deficient based on private sector grounds only, *see id.*, the majority states repeatedly that a remedy will not be found deficient based on management rights alone. *See id.* at 2 (revised approach "gives arbitrators the same scope of remedial authority in . . . management rights cases as they . . . exercise in rendering awards that do not affect management rights"); 8 (under revised approach "[i]t is sufficient that an . . . award that affects management rights . . . provides a remedy for a violation of . . . an applicable law . . . or a contract provision . . . negotiated pursuant to § 7106(b) of the Statute"); 9 (awards alleged to violate management rights must withstand the same challenges "[a]s in other types of arbitration cases").

9. I note that the Authority has addressed awards of CSAs in several previous cases. In *FDIC*, 61 FLRA 735 (2006) (*FDIC I*) and *FDIC*, 61 FLRA 738 (2006) (*FDIC II*), the Authority sustained Agency exceptions based on the second prong of *BEP* to awards of CSAs and modified the awards to require the Agency to consider the grievants for CSAs. The Agency did not raise management rights in *FDIC*, 62 FLRA 356 (2008) (*FDIC III*), where the Authority denied the Agency's essence and exceeded-authority exceptions. In addition, the Union did not dispute the Agency's management rights claim in *FDIC I*, *FDIC II*, or here. In *FDIC*, 64 FLRA 79, 81 (2009) (Chairman Pope dissenting) (*FDIC IV*), where the Union did dispute the Agency's management rights exception, the Authority denied that exception. However, the majority (over my dissent) remanded the award in *FDIC IV* on essence grounds, *id.* at 82, a conclusion it now disavows. Majority Op. at 11 n.8. My understanding of the effect of today's decision is that *FDIC I* and *FDIC II* will no longer be followed with regard to management rights and the (majority) decision in *FDIC IV* will no longer be followed with regard to essence.