66 FLRA No. 119

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
LAREDO, TEXAS
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 149
(Union)

0-AR-4634

DECISION

April 30, 2012

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

I. Statement of the Case

The Agency filed exceptions to an award of Arbitrator Don B. Hays 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 violated its 2007 directive[1] concerning the processing of travelers at primary inspection stations when, in November 2007, it ordered customs agents working at such stations to query[2] only one traveler per vehicle and to cease performing vehicular hood and trunk inspections. Award at 30. The Arbitrator ordered the Agency to restore the status quo by returning to the local practice that was in place prior to November 2007. *Id.* For the reasons set forth below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

In response to the events that occurred on September 11, 2001, Congress promulgated the Homeland Security Act (Act), codified at 6 U.S.C. § 200. *Id.* at 2. As a result of the Act, a realignment occurred within the federal government, and functions that were assigned formerly to various agencies, including the United States Customs Service, were transferred to the Department of Homeland Security (DHS). *Id.*; *see also* 6 U.S.C. § 203. DHS tasked the United States Customs and Border Protection (CBP), newly formed as a result of the realignment, with various responsibilities related to border security. Award at 2-3. CBP developed various national directives including the 2007 directive, *id.* at 4, which "provide[s] instructions Agency-wide regarding how primary processing at a land border port of entry shall be handled[,]" Exceptions at 3. Pursuant to the 2007 directive, directors of field operations for ports of entry also may establish local, supplementary procedures. Award at 8.

Agency management established such local procedures to standardize the processing of travelers at primary inspection stations at the Port of Hidalgo/Pharr Texas (Port). *See id.* at 10. Prior to November 2007, the Agency's local practice required customs agents to query each traveler in a vehicle by either scanning each traveler's personal documents or entering each traveler's name into the Treasury Enforcement Communications System (TECS) database. *Id.* at 12. Also, the Agency's practice gave customs agents the discretion to conduct hood and trunk inspections whenever "the attendant circumstances made a vehicular search a reasonable and responsible part of [their] interrogation." *Id.* But, in November 2007, the Agency changed its local practice "by verbally directing 'local supervisors' to verbally order" customs agents to "conduct[] identity TECS queries on only one person per vehicle[] [a]nd to 'never conduct vehicular hood and trunk inspections.'" *Id.* at 16 (emphasis omitted); *see also id.* at 15.

The Union presented a grievance. *Id.* at 10. The matter was unresolved and was submitted to arbitration. The parties stipulated to the following issues: (1) "Did the [A]gency violate its policy directives and/or standard operating procedures regarding the processing of travelers in primary inspection beginning" in November 2007? (2) "If [so], what is the appropriate remedy?" *Id.* at 1.

The Arbitrator concluded that the Act, in concert with the 2007 directive, requires customs agents to balance two competing mandates: (1) ensuring that no undesirable traveler gains entry into the United States and (2) facilitating the efficient flow of incoming traffic. *Id.* at 13-14. Additionally, the Arbitrator determined that, prior to the Agency changing its local practice, customs agents successfully balanced these competing mandates. *Id.* at 14.

[1] Pertinent provisions of the 2007 directive are set forth in the appendix to this decision.
[2] The term "query" is a "term of art used to describe the function of inputting a traveler's biographical data into a computer system known as the Treasury Enforcement Communications System." Exceptions at 3.

The Arbitrator concluded that the 2007 directive allows the Agency to alter the directive's provisions, but only in rare circumstances and when such provisions are not "operationally feasible[] because of facilities and/or infrastructure constraints." *Id.* at 19 (emphasis omitted). The Arbitrator found that "there [was] neither a claim by [A]gency management, nor any supporting evidence that the situation at [the Port,] . . . in November 2007, represented a 'rare' and compelling change in local circumstances." *Id.* Also, the Arbitrator determined that the Agency did not provide evidence demonstrating that it was operationally infeasible for the Agency to follow the directive's provisions concerning 100 percent TECS queries and hood and trunk inspections, *e.g.*, *id.* at 19, 27-28, and that, as a result, the Agency's actions were arbitrary, *id.* at 28. Moreover, the Arbitrator found that the Agency failed to demonstrate that the conditions that existed at the Port in November 2007 prevented the Agency from ensuring the efficient flow of incoming traffic, *e.g.*, *id.* at 15-16, and that the change in local practice compromised the security of the borders, *see id.* 17-18, 28-29.

Ultimately, the Arbitrator found that "there is nothing credible in our record to indicate exactly what prompted" the Agency action that was the subject of the grievance. *Id.* at 19.

The Arbitrator determined that, because the 2007 directive requires the Agency to provide *written* notice to all affected personnel when it alters, amends, or does not implement the directive's requirements, the Agency violated the directive by verbally announcing the change in local practice. *E.g.*, *id.* at 16-17. Because the Arbitrator concluded that the Agency violated the 2007 directive, he ordered the Agency to restore the status quo by returning to the local practice that was in place prior to November 2007. *Id.* at 30. Finally, the Arbitrator noted that the directive "was revised and republished in May[] 2008[]" (2008 directive) and that it "included no material changes [that were] particularly relevant to the resolution of the issues raised in [the] appeal."[3] *Id.* at 4 n.5.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is based on nonfacts. Exceptions at 11-20. Specifically, the Agency claims that the Arbitrator erroneously found that the Agency's longstanding policy and practice, prior to November 2007, was to always query 100 percent of travelers when conducting investigations. *Id.* at 12. According to the Agency, the Arbitrator's finding is erroneous because, among other things, pertinent provisions of the 2007 directive, namely 6.1.17 and 6.1.17.1, describe querying travelers as a permissive action. *Id.* at 13-14.

Also, the Agency maintains that the Arbitrator erroneously found that the Agency changed its local practice on a permanent basis. *Id.* at 17-20. According to the Agency, testimony presented at arbitration demonstrates that it merely changed the local procedures at that time to adapt to the changing conditions at the Port. *Id.* at 18-19. The Agency asserts that, "[b]ut for the Arbitrator's reliance on this erroneous" fact, the Arbitrator would not have found that its actions constituted a material change to the 2007 directive and would have determined that it made the change in order to "balanc[e] the 'tension' between the competing aspects of [its] mission." *Id.* at 19; *see also id.* at 20.

The Agency also claims that the award is contrary to law and regulation. *Id.* at 8-11. Specifically, the Agency argues that the award conflicts with 6 U.S.C. § 202.[4] *Id.* at 8-9. The Agency concedes that the Arbitrator recognized that § 202 requires the balancing of competing interests, *id.* at 8, and that "maximum security is a goal of both Congress and the Agency," *id.* at 9. But the Agency maintains that the Arbitrator erred in determining that the statute contains a congressional edict requiring maximum security. *Id.*

In addition, the Agency contends that the award conflicts with the 2007 directive. *Id.* at 10-11. Although the Agency does not contest the Union's contention or the Arbitrator's conclusion "that the general rule . . . require[s] 100 [percent] of [travelers] to be entered into the TECS computer system[,]" it argues that the Arbitrator ignored that the directive contemplates situations in which customs agents cannot query 100 percent of travelers. *Id.* at 10. According to the Agency, the 2007 directive requires it "to ensure that primary name queries are conducted on 100 [percent] of travelers 'to the extent this is operationally feasible,'" *id.* (emphasis omitted) (quoting Exceptions, Attach. D, 2007 directive, at 7), and states that the 100 percent query rule "is only to be implemented [in] accordance with local operating policy and procedure[,]" *id.* at 11. Moreover, the Agency claims that its interpretation of the 2007 directive is entitled to deference. *Id.* at 9, 10.

Furthermore, the Agency asserts that the remedy conflicts with the Agency's regulation currently in force (2008 directive). *Id.* at 21-28. The Agency maintains that "[i]mplementation of a status quo ante remedy would impose upon the Agency requirements that were specifically removed from the [2008] [d]irective." *Id.*

[3] Pertinent provisions of the 2008 directive are set forth in the appendix to this decision.

[4] The entire text of 6 U.S.C. § 202 is set forth in the appendix to this decision.

at 22 (emphasis omitted). According to the Agency, the 2008 directive differs from the 2007 directive because it specifically articulates querying 100 percent of travelers as a goal, defines the term "operationally feasible" to include traffic constraints, does not limit the Agency's ability to alter the provisions of the directive in only rare instances, and does not require the Agency to submit such alterations in writing to lower level personnel. *Id.* at 22-26. In addition, the Agency claims that, given the issuance of the 2008 directive, the remedy is moot. *Id.* at 26-28.

B. Union's Opposition

The Union argues that the Agency has not demonstrated "that the [a]ward is based on the asserted nonfact that the Agency always conducted 100 [percent] TECS queries prior to November . . . 2007." Opp'n at 23 (emphasis omitted). According to the Union, the Arbitrator did not find that, prior to November 2007, customs agents "always" queried travelers at primary inspection stations. *Id.* at 24-25. Moreover, the Union maintains that the alleged nonfact was disputed at arbitration. *Id.* at 24.

The Union also contends that the Agency has failed "to establish that the [a]ward is based on [the] alleged nonfact that the Agency permanently changed its [local] inspection [practice]." *Id.* at 27 (emphasis omitted). According to the Union, the Arbitrator did not find that the change to the Agency's local practice was permanent. *Id.* Additionally, the Union asserts that the alleged nonfact was disputed at arbitration and is not a central fact underlying the award. *Id.* at 31-32.

The Union maintains that the award is not contrary to 6 U.S.C. § 202. *Id.* at 13-16. The Union claims that the Arbitrator did not find "that the Agency acted contrary to an edict of Congress," but, rather, determined that the Agency's actions were arbitrary and capricious because the Agency failed to demonstrate that it was operationally necessary for it to alter the provisions of the 2007 directive. *Id.* at 15; *see also id.* at 14, 16. According to the Union, "neither the Arbitrator's statement concerning a [c]ongressional edict nor his conclusion that the Agency's actions . . . were arbitrary and/or capricious violate 6 U.S.C. § 202." *Id.* at 15.

In addition, the Union contends that the Agency has failed to demonstrate that the award conflicts with the 2007 directive. *Id.* at 16-22. The Union argues that the Arbitrator did not disregard the provisions of the 2007 directive because he found that operational infeasibility is an "exception to the 100 [percent] query rule." *Id.* at 19; *see also id.* at 20-21. The Union maintains that testimony presented at arbitration supports the Arbitrator's conclusion that the Agency violated the 2007 directive. *Id.* at 21-22. Moreover, the Union asserts that the Agency's interpretation of its directive is not entitled to deference because it was developed solely for litigation purposes. *Id.* at 21.

Furthermore, the Union argues that the remedy does not conflict with the 2008 directive. *Id.* at 32-35. According to the Union, the Agency has not cited language in the 2008 directive "which prevent[s] the Agency from instructing [customs agents] to return to the [practice] that [was] in place prior to November . . . 2007." *Id.* at 34. The Union claims that, like the prior directive, the 2008 directive contains "the policy goal of 100 [percent] TECS . . . queries . . . [and] utilize[s] 'operationally feasible' as [the] standard for conducting 100 [percent] TECS . . . queries." *Id.* Moreover, the Union contends that, although the 2008 directive does not compel "the Agency to issue written instructions to [customs agents] when changing the procedures in the . . . directive[,]" *id.*, the remedy does not order the Agency, in the future, to provide customs agents with written instructions, *id.* at 34-35.

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency asserts that the award is based on nonfacts. Exceptions at 11-20. Specifically, the Agency maintains that the Arbitrator erroneously found that, prior to November 2007, the Agency's longstanding policy and practice was to query 100 percent of travelers. *Id.* at 12. In addition, the Agency claims that the Arbitrator erroneously found that the Agency changed its local practice on a permanent basis. *Id.* at 17-20. To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *E.g., Soc. Sec. Admin., Dall. Region*, 65 FLRA 405, 407 (2010) (*SSA Dall.*). The Authority will not find an award deficient on the basis of the arbitrator's determination of any factual matter that the parties disputed at arbitration. *E.g.*, *Nat'l Ass'n of Gov't Emps., Serv. Emps. Int'l Union, Local R4-45*, 64 FLRA 245, 246 (2009).

The Agency's nonfact claims are without merit. The Union argues that the parties disputed at arbitration whether the Agency's practice, prior to November 2007, required customs agents to query 100 percent of travelers. Opp'n at 24. The Agency does not argue to the contrary. In addition, the record demonstrates that this issue was disputed at arbitration. *See* Award at 15; Opp'n, Attach. F, Union's Post-Hearing Brief, at 4, 7; *see also, e.g.*, Opp'n, Attach. D, Tr., at 34, 91. Because this alleged nonfact was disputed at arbitration, the Agency's arguments as to the accuracy of the fact are irrelevant. Similarly, the Union contends that the parties disputed

at arbitration whether the change to the Agency's local practice was permanent. Opp'n at 31. The Agency concedes that this issue was disputed below by citing to testimony in the transcript concerning the issue. Exceptions at 18-19; *see also AFGE, Local 648, Nat'l Council of Field Labor Locals*, 65 FLRA 704, 712 (2011) (finding that the union conceded that the issue alleged to be a nonfact was disputed at arbitration when the union stated that conflicting evidence was presented at arbitration regarding the issue). Moreover, the record demonstrates that this issue was disputed at arbitration. *See* Award at 21; *e.g.*, Opp'n, Attach. D, Tr., at 95, 139-40. Consequently, we find that the Agency's claims do not provide a basis for finding the award deficient. *See AFGE, Local 3701*, 66 FLRA 291, 293-94 (2011) (concluding that the union failed to demonstrate that the award was deficient as based on nonfacts because the record demonstrated that the issues alleged to be nonfacts were disputed at arbitration); *U.S. Dep't of Def., Def. Contract Mgmt. Agency*, 66 FLRA 53, 56 (2011) (denying the agency's nonfact exception when the union argued that the issue alleged to be a nonfact was disputed at arbitration and the agency did not argue to the contrary).

Accordingly, we deny the Agency's nonfact exceptions.

B. The award is not contrary to law or regulation.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. The award is not contrary to 6 U.S.C. § 202 and the 2007 directive.

The Agency claims that the award is contrary to 6 U.S.C. § 202. Exceptions at 8-9. According to the Agency, the Arbitrator erred in finding that the statute contains a congressional edict requiring "maximum security," and the Arbitrator ignored that the statute requires the Agency to balance competing responsibilities, namely securing the borders and "ensuring [the] speedy, orderly, and efficient flow of lawful traffic." *Id.* at 8; *see also id.* at 9.

We find that the Agency has not established that the award is contrary to § 202. Section 202 requires the Secretary of DHS "acting through the Under Secretary for Border and Transportation Security" to be accountable for various responsibilities including: "[s]ecuring the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States" and "ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce." 6 U.S.C. § 202. Although the Arbitrator found that § 202 contains a congressional edict requiring maximum security, *e.g.* Award at 29, the Arbitrator clearly recognized that the statute contains two competing mandates – securing the borders and ensuring the efficient flow of lawful traffic, *see id.* at 13-14, 28. The Arbitrator considered the statute's requirement that the Agency balance these competing mandates. *See id.* at 13-14; *see also* Exceptions at 8 (conceding that the Arbitrator found that these two "mandates necessarily require some balancing"). The Arbitrator made various factual findings, including that the Agency provided no evidence that there were traffic delays at the Port or that the Agency considered the weight to be accorded to these competing mandates prior to changing the local practice. *E.g.*, Award at 15-16, 28. The Arbitrator also found that the evidence demonstrated that the change in local practice compromised the security of the borders. *See id.* at 17-18. Relying on these findings, the Arbitrator concluded that the Agency improperly balanced these competing mandates when it ordered customs agents to query only one traveler per vehicle and to cease performing hood and trunk inspections. *See id.* at 14, 27-28.

Because the Agency has not established that the Arbitrator's factual findings concerning the evidence presented at arbitration are based on a nonfact, we defer to those findings. *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 63 FLRA 502, 504 (2009). We also find that the Arbitrator's factual findings support his legal conclusion that the Agency improperly balanced the two competing congressional mandates when it changed the local practice. *See Soc. Sec. Admin.*, 66 FLRA 6, 8 (2011) (*SSA*).

In addition, the Agency asserts that the award is contrary to the 2007 directive because the Arbitrator ignored that the directive contemplates situations in which customs agents cannot query 100 percent of travelers. Exceptions at 10-11. Moreover, the Agency contends that its interpretation of the 2007 directive is entitled to deference. *Id.* at 9, 10.

For purposes of determining whether an award is contrary to law, rule, or regulation under § 7122(a)(1)

of the Statute, the term "regulation" includes governing agency regulations. *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 64 FLRA 680, 683 (2010) (*FAA*); *U.S. Dep't of Agric, Farm Serv. Agency*, 63 FLRA 658, 659 (2009). The Authority has found that directives constitute agency-wide regulations. *See Dep't of Def., Dependents Sch.*, 54 FLRA 259, 266 (1998) (indicating that the Authority has, on numerous occasions, defined the term "regulation" as encompassing directives); *U.S. Dep't of Def., Office of Dependents Sch., Ger. Region*, 48 FLRA 979, 985 (1993) (finding that a directive constituted a governing agency-wide regulation).

We find that, even assuming the Agency's interpretation of the 2007 directive is entitled to deference, the Agency has not established that the award is contrary to that interpretation. An award is deficient if it is inconsistent with a "governing" agency regulation. *E.g.*, *U.S. Dep't of Veterans Affairs, Cent. Tex. Veterans Health Care Sys., Waco Integrated Clinical Facility*, 55 FLRA 626, 629 (1999) (*VA*); *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 192 (1990) (*Fort Campbell*). Although collective bargaining agreements, rather than agency-wide regulations, govern the disposition of matters to which they both apply, *e.g.*, *VA*, 55 FLRA at 629, there is no contention that the parties' agreement governs this dispute.

Here, as the Agency concedes, the Arbitrator properly concluded that the 2007 directive generally requires that 100 percent of travelers be queried. Award at 8; Exceptions at 10. Although the Agency asserts that the Arbitrator disregarded exceptions to the 100 percent query rule, namely that the 2007 directive only requires it to conduct 100 percent TECS queries when it is operationally feasible to do so and when it is in "accordance with local operating policy and procedure[,]" Exceptions at 11; *see also id.* at 10, the Arbitrator did in fact consider those exceptions. Specifically, he determined that the 2007 directive requires that 100 percent of travelers be queried to the extent that it is operationally feasible to do so, Award at 8-9, and found that the Agency failed to provide any evidence demonstrating that it was operationally infeasible for it to follow the 100 percent query rule, *e.g., id.* at 15-16, 27-28. Also, the Arbitrator did not fail to consider that the 2007 directive requires that the 100 percent query rule should be applied consistent with local practice. Specifically, he found that, in accordance with the 2007 directive, the Agency has the ability to establish local, supplementary procedures, *id.* at 8, and that the Agency's procedures may alter the 100 percent query rule when it is "determined not to be operationally feasible," *id.* at 19 (emphasis omitted). But he found that, by failing to demonstrate operational infeasibility, the Agency improperly altered local policy and practice and, thus, violated the 2007 directive. *See id.*

Because the Agency has not established that the Arbitrator's factual findings concerning operational feasibility are based on a nonfact, we defer to those findings. *See AFGE, Local 2382*, 64 FLRA at 124 n.4. Additionally, the Arbitrator's factual findings support his conclusion that the Agency violated the directive when it ordered its customs agents not to comply with the 100 percent query rule. *See SSA*, 66 FLRA at 8. Therefore, the Agency's exception does not demonstrate that the award is deficient as contrary to the 2007 directive. *See, e.g.*, *FAA*, 64 FLRA at 684 (denying the agency's contrary to law exception because the agency failed to demonstrate that the award was contrary to an agency-wide regulation); *U.S. Dep't of Agric., Farm Serv. Agency, Okla. State Office, Stillwater, Okla.*, 56 FLRA 679, 680-81 (2000) (*Dep't of Agric.*) (same); *VA*, 55 FLRA at 629 (concluding that the award was not deficient as contrary to law when the agency failed to establish that the award was in any manner contrary to the agency-wide regulation on which it relied).

Accordingly, we deny the Agency's exception.

2. The remedy is not contrary to the 2008 directive and is not moot.

The Agency argues that the remedy – ordering the Agency to restore the status quo by returning to the local practice that was in place prior to November 2007 – conflicts with the 2008 directive because the remedy improperly requires it to comply with outdated requirements in the 2007 directive that were not included in the 2008 directive. Exceptions at 21-26. As noted above, an award is deficient if it is inconsistent with a "governing" agency regulation. *See VA*, 55 FLRA at 629; *Fort Campbell*, 37 FLRA at 192.

While the Agency asserts that significant changes were made in the 2008 directive, Exceptions at 21-22, the Agency does not cite a single change that would create an inconsistency between the remedy and the directive. In contrast to the 2007 directive that was enforced by the Arbitrator, Section 5.5 of the 2008 directive does not contain the term "rare instances," and Section 5.5.1 does not require written notice of alterations to the directive's provisions. Exceptions, Attach. E, 2008 directive, at 7. But the Arbitrator's remedy is not inconsistent with the 2008 directive because it does not limit the Agency's ability to alter provisions of that directive in rare instances and does not require the Agency to submit alterations of such provisions in writing to lower level personnel. Award at 30. Also, while Section 5.7.7 of the 2008 directive specifically includes traffic volume as a factor to consider when

determining operational feasibility, Exceptions, Attach. E, 2008 directive, at 8, the Arbitrator did not find that the Agency could not consider traffic volume when determining operational feasibility. Rather, in concluding that the Agency failed to demonstrate operational infeasibility, the Arbitrator determined that the Agency did not provide any evidence that traffic volume was an issue in November 2007. *E.g.*, Award at 15-16.

Moreover, the remedy, which requires customs agents to resume querying 100 percent of travelers if operationally feasible, does not conflict with Section 6.1.4 of the 2008 directive. *Id.* at 30 (ordering customs agents to reinstitute querying 100 percent of travelers depending on operational requirements). That Section specifically articulates querying 100 percent of travelers as a goal and "utilize[s] 'operationally feasible' as a standard for conducting [fewer than] 100 [percent] TECS . . . queries." Opp'n at 34; *see also* Exceptions, Attach. E, 2008 directive, at 10. Because the Arbitrator found that the Agency failed to provide any evidence of operational infeasibility, the Agency has not shown that the remedy is inconsistent with Section 6.1.4. Thus, we find that, because the Agency has not shown that the remedy is inconsistent with the 2008 directive, the Agency has failed to demonstrate that the remedy is deficient as contrary to the directive. *See U.S. Dep't of Def., Educ. Activity, Arlington, Va.*, 60 FLRA 24, 26-27 (2004) (determining that the remedy was not contrary to law when the agency failed to demonstrate that the remedy was inconsistent with a directive); *U.S. Dep't of Agric.*, 56 FLRA at 681 (denying the agency's exception challenging the remedy because the agency did not demonstrate that the remedy was inconsistent with agency regulation).

The Agency also argues that the status quo ante remedy is moot. Exceptions at 26-28. In this regard, the Agency argues that the remedy is unnecessary based on the Authority's decision in *United States Department of the Treasury, Internal Revenue Service, Washington, District of Columbia*, 61 FLRA 352 (2005) (*IRS*). Exceptions at 27. However, the Authority's decision in *IRS* is inapposite. The Authority, in *IRS*, denied the Union's motion for reconsideration of its decision in 60 FLRA 966 (2005). In the underlying decision, the Authority concluded that, because the underlying claim was moot, the status quo ante remedy was also moot. *Id.* at 967. The Agency here does not argue that the underlying claim – that it violated the 2007 directive – is moot. Rather, the Agency simply argues that the issuance of the 2008 "directive has rendered a return to the status quo unnecessary." Exceptions at 27. The Agency's reliance on *IRS* is thus unavailing. Accordingly, the Agency has failed to demonstrate that the remedy is unnecessary.

Also, the Agency contends that, given the issuance of the 2008 directive, the remedy is meaningless. Exceptions at 27-28. This contention is similarly without merit. The Authority has found that a status quo ante remedy is meaningless in limited contexts, namely when a party already has reinstated the status quo or when the status quo would require it to impossibly recreate a past event. *See, e.g. U.S. Dep't of Labor, Occupational Safety & Health Admin.*, 24 FLRA 743, 746 (1986) (concluding that a status quo remedy would be meaningless when the activity suspended its practice that violated the Statute before the hearing); *see also Dep't of Veterans Affairs, Med. Ctr., Asheville, N.C.*, 51 FLRA 1572, 1580-81 (1996) (finding that, because it was impossible to recreate past events, namely to provide employees with administrative leave for past birthdays, a status quo ante remedy would be meaningless). Here, the Agency does not argue that the 2008 directive reinstitutes the status quo. In addition, the Agency has not established that it is impossible to recreate the status quo. In this regard, the remedy does not require the Agency to comply with the outdated 2007 directive instead of the 2008 directive, which is currently in effect. Rather, the remedy merely directs the Agency to restore the status quo by returning to the local practice in place prior to November 2007, which required officers to query 100 percent of travelers if operationally feasible. *See* Award at 30. Because, as discussed above, the remedy does not conflict with the 2008 directive, it is not impossible to recreate the status quo. Furthermore, the Arbitrator had broad discretion in fashioning this remedy, which he deemed to be appropriate in order to correct the Agency's violation. *See Nat'l Ass'n of Air Traffic Specialists, NAGE, SEIU*, 61 FLRA 558, 559 (2006) (concluding that arbitrators have broad discretion to fashion remedies). Consequently, based on the facts of this case, the Agency has not shown that the remedy is meaningless.

Accordingly, we deny the Agency's exception.

V. Decision

The Agency's exceptions are denied.

APPENDIX

6 U.S.C. § 202 states:

> The Secretary, acting through the Under Secretary for Border and Transportation Security, shall be responsible for the following:
>
> (1) Preventing the entry of terrorists and the instruments of terrorism into the United States.
>
> (2) Securing the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States, including managing and coordinating those functions transferred to the Department at ports of entry.
>
> (3) Carrying out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before the date on which the transfer of functions specified under section 251 of this title takes effect.
>
> (4) Establishing and administering rules, in accordance with section 236 of this title, governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States.
>
> (5) Establishing national immigration enforcement policies and priorities.
>
> (6) Except as provided in part C of this subchapter, administering the customs laws of the United States.
>
> (7) Conducting the inspection and related administrative functions of the Department of Agriculture transferred to the Secretary of Homeland Security under section 231 of this title.
>
> (8) In carrying out the foregoing responsibilities, ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce.

The 2007 directive states, in pertinent part:

> 5.5 Directors, Field Operations, are authorized in rare instances where Directive procedures are not operationally feasible due to facilities and/or infrastructure constrains, to adapt requirements herein for ports of entry that are under his or her supervision.
>
> 5.5.1 Where the requirements of this Directive are altered, amended, or will not be implemented, Directors, Field Operations, must provide written direction to all affected CBP personnel, including Port Directors, Supervisory CBP Officers and CBP Officers.
>
> . . . .
>
> 5.7.6 Primary name queries are conducted on 100 [percent] of travelers, with or without a machine readable document, in vehicle primary, pedestrian primary and I-94 issuance (US Arrival) to the extent that this is operationally feasible.
>
> . . . .
>
> 6.1.17 If the CBP Officer determines that further primary inspection is warranted, in addition to completing the mentioned required steps of a primary inspection, the CBP officer may initiate additional inspectional actions. Additional inspectional actions will be determined by the CBP Officer based on the totality of the inspection, including assessment of the traveler's response to the initial questions, the CBP Officer's training, experience and expertise. The inspection should continue until the inspecting CBP Officer is satisfied that no violation exists and the traveler is allowed to enter or determines that a secondary exam is necessary. Available infrastructure, traffic constraints, and other items may impact the type of additional steps the CBP Officer selects. The CBP Officer may select from, but is not limited to, the following items:

> 6.1.17.1 IBIS/TECS primary query of at least one occupant per vehicle. This procedure may be facilitated through the use of document scanners. To the maximum extent possible and in accordance with local operating policy and guidance, 100 [percent] of vehicle occupants shall be queried.
>
> . . . .
>
> 6.1.17.5 Perform trunk or hood examination, commensurate with the safety procedures enumerated in Directive 5290-007A, *Land Border Inspectional Safety Policy*, and record in IBIS/TECS.

Exceptions, Attach. D, 2007 directive, at 6, 7, 12.

The 2008 directive states, in pertinent part:

> 5.5 Directors, Field Operations, are authorized to adapt requirements herein for ports of entry that are under his or her supervision when directive procedures are not operationally feasible due to facilities and/or infrastructure constraints, traffic volume, enforcement concerns, staffing, or significant cross-border events.
>
> 5.5.1 Where the requirements of this directive are altered, amended, or will not be implemented, Directors, Field Operations, will notify all affected CBP personnel, including Port Directors, supervisory CBP officers and CBP officers.
>
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> 5.7.7 Primary name queries are conducted on travelers, with or without a machine readable document, in vehicle and pedestrian primary, to the extent that it is operationally feasible, as determined by local CBP management. When determining operational feasibility, factors that should be considered, but not limited to, are facility constraints, traffic volume, enforcement concerns, staffing, and significant cross-border events. The ultimate goal is absolute screening of all travelers entering the United States.
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> 6.1.4 CBP officers should perform primary name queries to the extent that it is operationally feasible, as directed by local CBP management. Generally, primary name queries should be performed on travelers presenting a machine readable document. Where the technology is available, an automated name query will be performed on all compatible RFID travel documents. This procedure may be facilitated through the use of document readers or RFID-reading devices. The ultimate goal is absolute screening of all travelers entering the United States.
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> 6.1.18 If the CBP officer determines that further primary inspection is warranted, in addition to completing the mentioned required steps of a primary inspection, the CBP officer may initiate additional inspectional actions. Additional inspectional actions will be determined by the CBP officer based on the totality of the inspection, including assessment of the traveler's response to the initial questions, the CBP officer's training, experience, and expertise. If additional actions seem appropriate, but may be more thoroughly completed in a secondary environment, the CBP officer may elect to refer the vehicle immediately. The inspection should continue until the inspecting CBP officer determines that a secondary exam is necessary or is satisfied that no violation exists and the traveler is allowed to enter. Available infrastructure, traffic constraints, officer safety and other items may impact the type of additional steps the CBP officer selects. The CBP officer may select from, but is not limited to, the following actions:
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> 6.1.18.3 Perform trunk or hood examination, commensurate with the safety procedures enumerated in Directive 5290-007A, *Land Border Inspectional Safety Policy*, and record in the available primary system.

Exceptions, Attach. E, 2008 directive, at 7, 8, 10, 14, 15.