66 FLRA No. 35

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
ACCOUNTS MANAGEMENT
AND COMPLIANCE SERVICES
WAGE AND INVESTMENTS AND SMALL
BUSINESS/SELF EMPLOYED DIVISION
(Agency)

0-AR-4255

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DECISION

September 28, 2011

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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 Jerome H. Ross filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator denied a grievance alleging that the Agency violated the Statute and the parties' agreement when it unilaterally implemented changes to its Embedded Quality (EQ) Memorandum of Understanding (MOU) for certain offices. For the reasons that follow, we deny the essence and exceeds authority exceptions, grant the contrary to law exception in part and deny it in part, and set aside and remand the award in part, absent settlement, for resubmission to the Arbitrator.

II. Background and Arbitrator's Award

This case arises from negotiations over changes to the Agency's EQ program, an automated system of gathering data recorded by managers through observation of employee-taxpayer telephone conversations. Award at 1. EQ generates reports containing information about an employee's performance that is shared with the employee in a mid-year performance review and is used with other data to create the employee's annual performance appraisal and identify training needs. *Id.* at 1-2.

The parties entered into an MOU, which contained a reopener clause, concerning implementation of EQ as a pilot program for employees in certain offices within the Accounts Management and Compliance Service components (AM/CS) of the Agency. *Id.* at 3. Subsequently, after the Union requested to reopen the MOU and the pilot program ended, the parties bargained over extending the scope of the MOU beyond the pilot. *Id.* at 3-5. Later, the Agency notified the Union that it intended to implement EQ throughout AM/CS on the ground that all six sections of the Union's proposal that remained in dispute were either nonnegotiable or otherwise outside the duty to bargain. *Id.* at 5. The Union filed a grievance and invoked arbitration. *Id.*; Exceptions at 4.

The issues as stipulated by the parties were: (1) "Did the Agency violate the Statute and/or regulation by implementing the national rollout of [EQ] in [AM/CS] . . . ? If so, what shall be the remedy?"; and (2) "Did the Agency violate the [parties' agreement] by implementing the national rollout of [EQ] in [AM/CS] . . . ? If so, what shall be the remedy?" Award at 8.

The Arbitrator addressed the six disputed sections as follows.

First, the Arbitrator addressed Section 4G,[1] which provides: "An impacted employee will receive a copy of all their individual quality reviews." *Id.* at 14.

The Arbitrator noted that the Agency refused to bargain over Section 4G on the ground that the Union proposed it after the first day of negotiations and, as such, it was a "new" proposal barred by Article 47.1E of the parties' term agreement.[2] *Id.* at 12. The Arbitrator agreed with the Agency, finding the proposal barred as a "new" proposal. *Id.* at 15. In so doing, the Arbitrator discredited testimony by a Union witness that the parties' understanding was that Article 47.1E should be read narrowly. *Id* at 14-15. According to the Arbitrator, the witness "was not involved in the bargaining at issue and has no first[-]hand knowledge of the negotiations." *Id.* at 15.

Second, the Arbitrator addressed Section 5H, which provides: "Management has determined that

[1] This section is identified by the parties as 4G and 4I, interchangeably. We address it as 4G.

[2] Article 47.1E provides that "[u]nless otherwise agreed, no new proposals nor changes in the substance of the original proposals shall be submitted by either party after the first day of negotiations." Award at 7.

employees will be notified of the average number of reviews an employee can expect within a one month period. This number will serve as a guide and does not preclude an employee from receiving additional reviews." *Id*.

According to the Arbitrator, the Agency refused to bargain over Section 5H on the ground that the proposal was "covered by" Article 12 of the parties' term agreement. *Id*. at 15-16. The Arbitrator agreed with the Agency, finding that Section 5H is covered by Article 12.4Q, which contains requirements concerning written notice and issuance of monitoring results to an employee; Article 12.2D, which defines evaluation recordation; and Article 12.9A, which references the notice requirement in Article 12.4Q.[3] *Id.* at 17. The Arbitrator rejected as unsupported the Union's argument that the proposal was not "covered by" these provisions because neither party contemplated EQ at the time Article 12 was negotiated. *Id*. at 16-17.

Third, the Arbitrator addressed Section 5I, which provides: "The Data Collection Instrument [(DCI)] [shall] not be altered at the local level. Management has determined that each employee will be evaluated on all applicable attributes."[4] *Id.* at 17.

According to the Arbitrator, the Agency refused to bargain over Section 5I on the ground that its second sentence excessively interferes with management's right to assign work under § 7106(a)(2)(B) of the Statute by establishing which attributes would be used to rate employees. *Id*. at 17-18. The Arbitrator found that the second sentence of Section 5I affected, and excessively interfered with, management's right to assign work by "controlling the attributes to be considered and requiring an employee's supervisor to rate all employees on all applicable criteria, regardless of individual employee differences." *Id*. at 18. Accordingly, the Arbitrator found that the proposal did not constitute an appropriate arrangement under § 7106(b)(3) of the Statute. *Id*. Further, the Arbitrator found that an Agency proposal "unequivocally state[d]" that the national DCI will be used, "thereby obviating any reasonable basis for" the first sentence of Section 5H. *Id*.

Fourth, the Arbitrator addressed Section 6B, which provides:

> On an annual basis, the Employer will provide to each impacted employee a report that lists the previous year's average national score and site score for each attribute measured on the DCI. The report will identify the range of score that is deemed above average, acceptable and unacceptable. A statistician will determine such ranges.

Id. at 19.

According to the Arbitrator, the Agency refused to bargain over Section 6B on the ground that it was a "new" proposal prohibited by Article 47.1E of the agreement. *Id*. The Arbitrator found that Section 6B fell "squarely" within the prohibition against new proposals in Article 47.1E and was, therefore, barred. *Id*. at 19-20.

Fifth, the Arbitrator addressed Section 6C, which provides: "Upon request, an impacted employee may submit their self-review on a DCI form." *Id*. at 20.

According to the Arbitrator, the Agency refused to bargain over Section 6C on the ground that it was "covered by" Article 12.4B.5 and 12.4P.1[5] of the parties' term agreement, which provides for written self-

[3] Article 12.4Q provides, in pertinent part, that:

> [W]hen the monitoring of an employee's performance . . . takes place without written notice . . . the results will be made known to the employee within three (3) workdays. However, if the employee has provided incorrect information to a taxpayer, the manager will inform the employee as soon as possible but no later than eight (8) work hours. . . .

Award at 6-7.

Article 12.2D defines "[e]valuation [r]ecordation," in pertinent part, as "a supervisor's record of indications of performance which forms the foundation for employee development, performance improvement, and/or a summary rating of record . . . . " *Id.*

Article 12.9A provides that "[t]elephone monitoring evaluation recordation will be conducted in accordance with subsection 4Q." *Id.*

[4] An "attribute" is an element of an employee-taxpayer telephone conversation, which a manager rates via the DCI as either correct or incorrect. For example, if a telephone call has several attributes, then an employee's score could be correct on some and incorrect on others. Award at 2. The ratings for the attributes are used in preparing employee evaluations. *Id*. at 17.

[5] Article 12.4B.5 provides, in pertinent part, that "[d]uring the final thirty (30) days of an employee's annual appraisal period . . . the employee may prepare a written self-assessment . . . ." Award at 6.

Article 12.4P.1 provides, in pertinent part:

> If the Employer determines that a journey level or above employee in at least the second year of his or her position would receive a Rating of Record for the current appraisal period identical to the Rating of Record received for the previous period, he/she may revalidate that the most recent Rating of Record is valid for performance in the current appraisal period. . . . In these instances, the employee may prepare a narrative summary or self-assessment as provided in 4B5 above . . . .

Id.

assessments. *Id*. The Arbitrator agreed with the Agency, rejecting the Union's argument that there was a substantial difference between the scopes of Section 6C (right to rebut comments on a DCI form) and Article 12.4B.5 and 12.4P.1 (right to submit a self-assessment for an annual evaluation). *Id*. According to the Arbitrator, "the primary subject addressed under 6C is an employee's ability to submit a written self-assessment, as opposed to the specific document for which the self-assessment is prepared." *Id.* Also according to the Arbitrator, "[b]oth a DCI and an annual evaluation address employee performance." *Id.*

Finally, the Arbitrator addressed Section 7F, which provides: "Prior to the 7114 meeting, all impacted chapters will receive training on the EQ system."[6] *Id*. at 21.

According to the Arbitrator, the Agency refused to bargain over Section 7F on the ground that it was a new proposal barred by Article 47.1E of the parties' agreement. *Id*. The Arbitrator found that Section 7F was a new proposal and was, therefore, barred. *Id.*

In sum, the Arbitrator found that all six disputed sections of the Union's proposal were either nonnegotiable or otherwise outside the duty to bargain and that, therefore, the Agency did not violate the Statute or the parties' agreement by implementing EQ throughout AM/CS. *Id*. at 21-22.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the award fails to draw its essence from the parties' agreement and is contrary to law. Exceptions at 3. For these reasons, according to the Union, the Arbitrator exceeded his authority. *Id*. at 6.

With regard to Sections 4G, 6B, and 7F, the Union contends that the award fails to draw its essence from the agreement because the Arbitrator erred when he relied on the plain language of Article 47.1E, and disregarded the Union's argument that there was a mutual understanding and past practice by the parties of considering new proposals that were "relevant to the conversation." *Id*. at 8. Further, the Union contends that the Arbitrator's interpretation of Article 47.1E is inconsistent with Authority case law permitting parties to modify proposals "so as to foster meaningful collective bargaining." *Id*. In this regard, the Union contends that Section 4G is a modification of a previously existing proposal, Proposal 2. *Id*. at 9.

With regard to Sections 5H and 6C, the Union contends that the Arbitrator did not apply the correct legal standard when he determined that the subject matters of these sections are covered by the parties' agreement. *Id*. at 11. In this regard, citing the Authority's decision in *Department of the Navy, Marine Corps Logistics Base, Albany, Georgia*, 39 FLRA 1060, 1065 (1991) (*Marine Corps I*), the Union contends that the "covered by" defense is not available unless the contract "specifically addresses" the subject matter of the proposal. Exceptions at 11. The Union also contends that nothing in the parties' bargaining history indicates that EQ was contemplated when the agreement was negotiated. *Id*. at 12-13. With respect to Section 5H, the Union contends that nothing in Article 12 specifically addresses prior notification to employees as to how many performance reviews they can expect within a given period of time. *Id*. With respect to Section 6C, the Union contends that while both that section and Article 12 cover employee self-assessments, Article 12 concerns annual appraisals and Section 6C relates to manager comments on a DCI form. *Id*. at 17-18.

As for Section 5I, the Union contends that the second sentence does not affect management's right to assign work. In the alternative, the Union argues that Section 5I is an appropriate arrangement under § 7106(b)(3) of the Statute because it would ensure that all employees performing the same job are treated fairly and equally and would prevent favoritism. *Id*. at 14-15. In addition, the Union contends that the Arbitrator, when he found that the need for the first sentence in Section 5I was obviated by an Agency proposal, was inappropriately addressing the merits of the proposals. *Id*. at 14.

B. Agency's Opposition

The Agency contends that the Arbitrator's findings that Sections 4G, 6B, and 7F were "new" proposals barred by Article 47.1E draw their essence from the plain language of the parties' agreement. Opp'n at 6-7. In this regard, the Agency contends that the Arbitrator properly disregarded the testimony of a Union official who had no first-hand knowledge of the negotiations over Article 47. *Id*. at 8-9. With regard to the Union's contention that the Arbitrator's interpretation of Article 47.1E is inconsistent with Authority case law permitting parties to modify proposals in furtherance of good faith negotiations, the Agency asserts that this case law is inapplicable because Sections 4G, 6B, and 7F are new proposals, not mere modifications to proposals. *Id*. at 9. Further, the Agency characterizes the Union's argument that the Arbitrator exceeded his authority as a reiteration of its essence argument. *Id*. at 11-12.

With regard to the Union's contrary to law exception, the Agency contends that the Arbitrator

[6] The meaning of "7114 meeting" is not explained in the record.

applied the correct legal standards in finding that Sections 5H and 6C were "covered by" the parties' agreement. *Id*. at 13-17. In this regard, the Agency contends that adoption of the Union's argument that the "covered by" doctrine does not apply because EQ was not contemplated when the parties' agreement was negotiated would essentially nullify the doctrine because it is impossible to contemplate all future initiatives. *Id*. at 17.

With regard to Section 5I, the Agency contends that the Arbitrator properly found that an Agency proposal obviated the need for the section's first sentence because both had the same meaning. *Id*. at 18. In this regard, the Agency argues that the Arbitrator did not address the merits of the Union's proposal but, instead, determined that the Agency had met its obligation to negotiate. *Id*. As for the second sentence of Section 5I, the Agency contends that the Arbitrator properly found that it excessively interfered with the Agency's right to assign work. *Id*. at 19-20.

IV. Analysis and Conclusions

A. The award draws 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); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). 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).

The Arbitrator found that Sections 4G, 6B, and 7F constituted "new" proposals within the meaning of Article 47.1E, which prohibits the submission of new proposals after the first day of negotiations. In so finding, the Arbitrator discredited the testimony of a Union witness that the parties had an understanding that they could submit proposals after negotiations began if they were relevant to the negotiations. The Union's exception is, in essence, an argument that the Arbitrator failed to consider parol evidence, which does not provide a basis for finding an award deficient. *See, e.g.*, *NTEU*, 63 FLRA 299, 300 (2009). Moreover, the Union has not shown that the Arbitrator's interpretation of the parties' agreement is unfounded, implausible, irrational, or in manifest disregard of that agreement. Accordingly, we deny this exception.

B. The award, in part, is contrary to law.

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 contrary to law as to Sections 5H and 6C.

The "covered by" doctrine is a defense to a claim that an agency failed to provide a union with notice and an opportunity to bargain over changes in conditions of employment. *See U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 53 (2000). The doctrine excuses parties from bargaining on the ground that they have already bargained and reached agreement concerning the matter at issue. *See U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1015 (1993) (*SSA*).

Under the first prong of the doctrine, a subject matter is "covered by" an agreement if the matter is "expressly contained" in the agreement. *SSA*, 47 FLRA at 1018. Under Authority precedent, the subject matter of proposals has been found "covered by" an agreement under the first prong where the proposals would have modified and/or conflicted with the express terms of a contract provision. *See, e.g., U.S. Dep't of the Treasury, IRS, Denver, Colo.*, 60 FLRA 572, 573-74 (2005) (Chairman Cabaniss concurring) (*IRS Denver*) (proposal permitting employees to transfer approved leave to other employees without regard to whether other, more senior employees were seeking leave for the same time would have "circumvent[ed]" contract provision stating that management would resolve leave request conflicts on basis of seniority).

If the agreement does not expressly contain the matter, then, under the second prong of the doctrine, the Authority will determine whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement. *SSA*, 47 FLRA at 1018. In this regard, the Authority will determine whether the subject matter of the proposal is so

commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining. *Id.*

Moreover, informing application of the "covered by" doctrine generally, the Authority will examine pertinent record evidence, such as bargaining history. *Id.* at 1019. Where a matter does not deal with a subject that should have been contemplated as within the intended scope of the relevant provision, the Authority will not find that the matter is covered by that provision. *Id.*

At the outset, we reject the Union's claim, set forth above, that the "covered by" defense is not available unless the contract "specifically addresses" the subject matter of the proposal. Exceptions at 11 (citing *Marine Corps I*). In this regard, *Marine Corps I* was reversed by the U.S. Court of Appeals for the D.C. Circuit, which found that a specificity requirement contravenes the policies of the Statute. *See Dep't of the Navy, Marine Corps Logistics Base, Albany, Ga.*, 962 F.2d 48 (D.C. Cir. 1992) (*Marine Corps II*). In accordance with *Marine Corps II*, the Authority, when establishing the two-prong "covered by test," agreed with the court that "an exact congruence between a provision of a contract and a proposal offered by a union" is not required for the "covered by" doctrine to apply. *SSA*, 47 FLRA at 1017.

Applying the foregoing, Section 5H provides that management will notify employees of "the average number of reviews an employee can expect within a one month period." Award at 15. Article 12.9A provides that "[t]elephone monitoring evaluative recordation will be conducted in accordance with [Article 12.]4Q." *Id.* at 7. In turn, Article 12.4Q provides that "when the monitoring of an employee's performance while communicating with a taxpayer takes place without written notice to the employee at least eight (8) work hours in advance, the results will be made known to the employee within three (3) workdays." *Id.*

Examination of Section 5H and Article 12 in context demonstrates that, although, as the Arbitrator found, both concern aspects of performance monitoring, the subject of Section 5H is not "covered by" Article 12. With regard to prong I, Section 5H's requirement that the Agency give employees advance notification of the anticipated frequency of performance monitoring is a subject not expressly contained in Article 12. Article 12 sets standards for the Agency to follow in determining how promptly to give employees feedback once monitoring has occurred. Because of this lack of any functional connection between Section 5H and Article 12, implementing Section 5H's advance notification requirements would not "circumvent" the time standard for post-monitoring employee feedback set forth in Article 12. *See IRS Denver*, 60 FLRA at 574. In particular, Section 5H has no bearing whatsoever on the three-workday time frame for the Agency to provide feedback to employees provided for in Article 12.

Similarly, with regard to prong II of the "covered by" doctrine, Section 5H's advance notification requirements regarding the anticipated frequency of performance monitoring is not inseparably bound up with, and thus plainly an aspect of, a subject covered by Article 12. In this connection, Section 5H's prospective monitoring notification requirements and Article 12's time standard for post-monitoring feedback have purposes so unrelated as to preclude Section 5H from being "commonly considered to be an aspect of" Article 12. *See SSA*, 47 FLRA at 1018.

Analysis of the relationship between Section 6C and Article 12 warrants a comparable conclusion. Section 6C provides that "[u]pon request, an impacted employee may submit their self-review" on a DCI form. Award at 20. Article 12.4B.5 provides that "[d]uring the final thirty (30) days of an employee's annual appraisal period (or as otherwise agreed upon), the employee may prepare a written self-assessment." *Id.* at 6.

Examination of Section 6C and Article 12 demonstrates that, although, as the Arbitrator found, Section 6C and Article 12 both provide employees an opportunity to submit comments about their performance, the subject of Section 6C is not "covered by" Article 12. As for prong I, Section 6C's establishment of an employee's opportunity to respond to performance feedback on DCI forms is a subject not expressly contained in Article 12. In this regard, section 6C enables employees to respond to DCI forms as he or she receives them throughout the year. In contrast, Article 12 enables an employee to submit an annual self-assessment during the final thirty days of the employee's appraisal period. Because the subjects that Section 6C and Article 12 address are completely different, Section 6C's opportunity for employees to respond to DCI forms would not "circumvent" the annual self-assessment process set forth in Article 12. *See IRS Denver*, 60 FLRA at 574. In particular, Section 6C would not require management to accept employee self-assessments submitted in anticipation of their annual appraisals under a different schedule from that set forth in Article 12.

Likewise, with regard to prong II of the "covered by" doctrine, Section 6C's employee opportunity to respond to DCI form comments is not inseparably bound up with, and thus, plainly an aspect of, a subject covered by Article 12. Section 6C's focus on particular, recurring aspects of employees' performance distinguishes it from Article 12's provisions relating only to the annual performance appraisal process to the extent that Section 6C cannot "commonly be considered to be an aspect of" Article 12. *See SSA*, 47 FLRA at 1018. As the Arbitrator acknowledged, Section 6C, unlike

Article 12, does not contemplate self-assessments for purposes of evaluating an entire year of an employee's work. Award at 20.

Moreover, when the Agency's "covered-by" claim is analyzed in the context of the parties' bargaining history, the above conclusion that Sections 5H and 6C are not covered by Article 12 is reinforced. There is no indication in the record that the parties contemplated the Agency's institution of the EQ program when they negotiated Article 12. Furthermore, the disputed proposals are specifically keyed to that program. It is therefore reasonable to conclude that the subjects addressed by the disputed proposals are not ones that should have been contemplated as within the intended scope of Article 12. *See, e.g., Navy Resale Activity, Naval Station, Charleston, S.C.*, 49 FLRA 994, 1002 (1994).

Thus, the Arbitrator's conclusion that the subject matter of Section 6C is "covered by" Article 12 is contrary to law. Accordingly, we set aside the award as to Sections 5H and 6C and we remand the issue to the parties for resubmission to the Arbitrator, absent settlement. On remand, the Arbitrator should determine the remedy for the Agency's violation of the Statute and the parties' term agreement.

2. The award is not contrary to law as to Section 5I.

The Union contends that the Arbitrator erred when he found that the second sentence of Section 5I excessively interferes with the Agency's right to assign work.

The establishment of critical elements and performance standards constitutes an exercise of management's right to assign work. *AFGE, Local 1164*, 49 FLRA 1408, 1414 (1994). The Authority has held that proposals requiring management to change or adjust performance expectations in light of specified factors affect management's right to assign work. *See AFGE, Local 3529*, 56 FLRA 1049, 1051 (2001) (proposal that management take into account exit performance evaluations in preparing overall performance appraisals affected right to assign work); *AFGE, Local 1164*, 49 FLRA at 1414-16 (proposal restricting weight given reception duties of claims adjusters affected right to assign work). Consistent with this precedent, Section 5I, which establishes particular factors – "attributes" – to be used in evaluating employees, affects management's right to assign work. *See AFGE, Local 1164*, 49 FLRA at 1414 (proposals that restrict an agency's authority to determine the content of performance standards affect management's right to direct employees and assign work).

In determining whether a proposal is an appropriate arrangement, the Authority applies the analysis set forth in *National Association of Government Employees, Local R14-87*, 21 FLRA 24 (1986) (*KANG*). The Authority first determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. *See AFGE, Local 1900*, 51 FLRA 133, 141 (1995). The claimed arrangement must be sufficiently "tailored" to compensate employees suffering adverse effects attributable to such exercise. *See NTEU, Chapter 243*, 49 FLRA 176, 184 (1994). To establish that a proposal is an arrangement, a union must identify the effects or reasonably foreseeable effects on employees that flow from the exercise of management's rights and how those effects are adverse. *See KANG*, 21 FLRA at 31. If a proposal is determined to be an arrangement pertaining to the exercise of management's rights, then the Authority weighs the benefits the proposal affords to employees against the burden on management's rights. *Id.* at 31-33.

The Arbitrator found "unpersuasive" the Union's claim that the second sentence of Section 5I was an appropriate arrangement because it ensured that all employees would be treated "equally." Award at 18. In this regard, as set forth above, the Arbitrator interpreted the sentence as "controlling the attributes to be considered and requiring an employee's supervisor to rate all employees on all applicable criteria, regardless of individual employee differences." *Id.* Based on that interpretation, the Arbitrator determined that the proposal excessively interfered with management's right to assign work and, as a result, did not constitute an appropriate arrangement. *Id.*

The Union contends that the second sentence of Section 5I is an appropriate arrangement because it would mitigate any favoritism or inequality that would flow from management's right to evaluate employees. However, the Union does not dispute the Arbitrator's interpretation of the proposal as requiring the Agency to evaluate employees "regardless of individual employee differences." *Id.* The Union also does not explain how, consistent with the Arbitrator's interpretation, requiring the Agency to evaluate employees *without regard to their differences* promotes fairness and equality or provides other benefits. *See* Exceptions at 15-16. As such, and as this aspect of the proposal imposes a significant burden on the exercise of management's right, we find that the Arbitrator's determinations that Section 5I excessively interferes with management's right to assign work and is not an appropriate arrangement are not contrary to law.[7] *See AFGE, Local 3529*, 56 FLRA at 1051 (requirement that supervisors rely on exit performance evaluations in preparing annual performance appraisals not an

[7] Accordingly, the Authority need not address whether Section 5I constitutes an arrangement.

appropriate arrangement); *NFFE, Local 1214*, 49 FLRA 215, 221 (1994) (provision that bans an agency from basing performance appraisals on certain considerations not an appropriate arrangement). Accordingly, we deny the exception.

C. The Arbitrator did not exceed his authority.

Arbitrators exceed their authority when "they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance." *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). Here, the Union contends that the Arbitrator exceeded his authority by addressing the first sentence of Section 5I on the "merits." Exceptions at 14. However, that is not what the Arbitrator did. In particular, the Arbitrator did not rule that the Agency's proposal should be adopted over the Union's proposal. Instead, he made a determination that, as to the subject matter of the Union's proposal, the Agency met its obligation to negotiate. Therefore, contrary to the Union's contention, the Arbitrator did not resolve an issue not submitted to arbitration, and we deny this exception.

In addition, the Union contends that the Arbitrator exceeded his authority because the award fails to draw its essence from the parties' agreement and is contrary to law. However, based on our findings that the award is not deficient on those grounds, we deny this exception as well.

V. Decision

The Union's essence and exceeds authority exceptions are denied. The Union's contrary to law exception is granted, in part, and denied, in part. The portions of the award involving Sections 5H and 6C are set aside and remanded to the parties, absent settlement, for resubmission to the Arbitrator consistent with this decision.