66 FLRA No. 43

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WAGE AND INVESTMENT DIVISION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4263

_____

DECISION

September 30, 2011

_____

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 Agency exceptions to an award of Arbitrator M. David Vaughn 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 concluded that the Agency violated the Statute and the parties' agreement by reducing the number of "inventory days" for certain Agency employees without providing the Union an opportunity to bargain over that reduction. For the reasons that follow, we dismiss one of the Agency's exceptions, grant one of the Agency's exceptions and modify the portion of the award concerning the amount of time the Union has to file a petition for attorney fees, and deny the remaining exceptions.

II. Background and Arbitrator's Award

The Agency employs Collection Representatives (representatives) in its Automated Collection Service (collection service) division. Award at 5. Representatives' duties primarily involve contacting taxpayers by telephone to discuss delinquent tax accounts. *Id.* Representatives also have inventory days. On inventory days, representatives do not call taxpayers; rather, they perform solely administrative duties, such as moving cases to other statuses and correcting addresses. *Id.* at 6. Although representatives can perform administrative duties on the days that they perform telephone duties, they have "little time" to do so. *Id.* at 5. Previously, the Agency gave representatives one "inventory day" every two weeks. *Id.* at 5-6.

The Agency implemented new technology that affected the work performed in the collection service division. *Id.* at 6. As a result, the Agency proposed reducing representatives' inventory days from one day every two weeks to one day every three weeks. *Id*. Under the proposal, representatives would have eight fewer inventory days a year. *Id.* at 7. The Agency implemented the reduction. *Id.* at 6-7.

The Union presented a grievance arguing that the Agency violated the Statute and the parties' agreement because the Agency did not bargain with the Union before it reduced the number of inventory days. *Id.* at 7. The Agency denied the Union's grievance, as well as its request to bargain over the reduction in inventory days, because the reduction "did not result in any negotiable impact on employees." *Id.* at 8. The Union invoked arbitration. *Id.* The parties stipulated to the following issues:

> 1) Is the grievance arbitrable?[1]
>
> 2) If the grievance is arbitrable, did the Agency violate Article 47, Sections 2 and 3,[2] of the [parties' agreement] when it failed to negotiate over a change in working conditions when it reduced the number of inventory days for [representatives] at [collection service] sites? If so, what is the appropriate remedy?
>
> 3) If the grievance is arbitrable, did the Agency violate 5 U.S.C. § 7116(a)(1) or (5) of the [Statute] by implementing a unilateral change when it reduced the number of inventory days for [representatives] at [collection service] sites? If so, what is the appropriate remedy?

Id. at 2.

[1] The Arbitrator concluded that the grievance was timely and, therefore, procedurally arbitrable. *See* Award at 20-21. The Agency does not challenge this conclusion; accordingly, we do not address it further.

[2] The relevant portions of these provisions are set forth in the appendix to this decision.

The Arbitrator concluded that the Agency violated the Statute and the parties' agreement by failing to bargain with the Union over the reduction in inventory days. *Id.* at 25. The Arbitrator stated that the Agency was required to bargain over the impact and implementation of the reduction if it was a change in conditions of employment that had more than a de minimis effect. *Id.* at 22. The Arbitrator further stated that, in addressing whether a change has more than a de minimis effect, the Authority "has identified a number of factors that must be considered."[3] *Id.* Relying on these factors, the Arbitrator found that the reduction "changed in a material and significant way" the types of duties representatives performed on eight days a year; the change was permanent; and the change affected 1,500 employees. *Id.* Moreover, the Arbitrator noted that neither party disputed that telephone work was generally more stressful than inventory work. *Id.* He also found that, although the Agency had a practice of occasionally canceling inventory days, that did not support a conclusion that the change was de minimis. *Id.* at 22-23. According to the Arbitrator, the Agency's previous ad hoc cancellations differed from this action, which permanently reduced the number of inventory days. *See id.* at 22-24. Accordingly, the Arbitrator concluded that the reduction in inventory days had more than a de minimis effect on conditions of employment. *Id.* at 24.

The Arbitrator sustained the grievance. *Id.* at 25. The Arbitrator denied the Union's request for status quo ante relief; however, he ordered the Agency to engage in impact and implementation bargaining with the Union over the reduction in inventory days. *Id.* at 25-26. At the hearing and in its post-hearing brief, the Union asserted that it needed certain information from the Agency to assist with bargaining. *Id.* at 13-14; Exceptions, Attach., Union's Post-Hearing Brief at 38-41. The Agency argued that the Union's request was "inappropriate" because the Union could have requested this information before the hearing. Award at 19; Exceptions, Attach., Agency's Post-Hearing Brief at 35-36. The Arbitrator nevertheless held that the Union was "entitled" to certain information under § 7114 of the Statute and the parties' agreement. Award at 27. Specifically, he directed the Agency to provide the Union with overtime data for affected representatives; documentation for all discretionary performance awards awarded during the relevant time frame; and performance evaluation scores for affected representatives. *Id.* at 26-27. The Arbitrator rejected the Agency's contention that the Union should not receive the information because the Union supposedly failed to comply with certain requirements under the parties' agreement. *See id.* He also disagreed with the Agency's assertion that "the remedy for its failure to respond to the Union's information request" required only a response rather than providing the actual information. *Id.* at 27. The Arbitrator, accordingly, directed the Agency to provide this information within sixty days of the award. *Id.* at 28-29.

The Arbitrator further held that, sixty days after the date that the Agency submitted all relevant information to the Union, the Union or an affected employee could submit "a claim for consideration and compensation in consequence of the [A]gency's unilateral implementation of the reduction in inventory days." *Id.* at 29. The Arbitrator stated that, among other things, the following items would be considered: lost opportunities for overtime, lowered performance appraisals, and disciplinary actions. *Id.* Finally, the Arbitrator gave the Union permission to file a petition demonstrating that it was entitled to attorney fees "under the Back Pay Act or other authority" within thirty days of the issuance of his award. *Id.* He stated that he would retain jurisdiction to consider the petition for 120 days from the issuance of the award. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

1. Exception to Arbitrator's conclusion that Agency violated the Statute and the parties' agreement

The Agency asserts that the Arbitrator's conclusion that the reduction in inventory days had more than a de minimis effect is contrary to law. According to the Agency, the Authority considers five factors to determine whether a change had a greater than de minimis effect. Exceptions at 9. Specifically, the Agency contends the Authority considers: (1) the nature of the change; (2) the duration and the frequency of the change; (3) the number of employees affected by the change; (4) the size of the bargaining unit; and (5) the extent to which the parties established, through negotiations or past practice, procedures and appropriate arrangements concerning analogous changes in the past. *Id.* (citing *Dep't of Health & Human Servs., SSA,* 24 FLRA 403 (1986) (*DHHS*)). The Agency avers that the Arbitrator improperly emphasized factors two and three, and "failed to give weight to the considerations to which the [A]uthority gives principal emphasis – the nature and extent of the effect of the change on conditions of employment." *Id.* at 10 (citing *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 45 FLRA 574 (1992)). Based on these arguments, the Agency contends the change had a de minimis effect because: (1) the Arbitrator did not properly consider "the precise nature of

[3] The Arbitrator does not identify these factors.

the change"; and (2) the Agency "frequently cancelled" inventory days in the past. *See id.* at 10-11. The Agency further asserts that the change was de minimis because the parties negotiated appropriate arrangements that allow representatives to continue performing some inventory day duties at the same level despite the reduction in inventory days. *See id.* at 11-12.

2. Exceptions to information request and claims process

The Agency also argues that the Arbitrator's decision to grant the Union's information request and establish the claims process is deficient for several reasons.

First, the Agency argues that the remedies relating to the Union's information request and the claims process are based on nonfacts. The Agency avers that the Arbitrator's decision to require the Agency to provide the Union with certain information is based "on his clearly erroneous conclusion that the Agency failed to respond to an information request," which was "the basis for the award of the remedies." *Id.* at 18. The Agency asserts that the Arbitrator took note of the information request and the Agency's alleged failure to respond to it. *See id.* at 18-19 (citing Award at 26, 27). The Agency contends, however, that the Union did not make an information request prior to the hearing and that an allegation that the Agency failed to respond to such a request was not "made or litigated at the hearing." *Id.* at 19 (citation omitted). The Agency also asserts that, because the Arbitrator's perception of the information request is based on a nonfact, the claims process is deficient because the Arbitrator would not have established the claims process in the absence of the information request. *See id.* at 20. Moreover, the Agency avers that the claims process is based on a nonfact because the Arbitrator never found that any employees suffered lost overtime, were denied performance awards, or received lowered evaluations before he established the claims period. *See id.* at 21.

Second, the Agency avers that the Arbitrator exceeded his authority by considering the Union's request for information. The Agency avers that the parties stipulated to the issue of whether the Agency violated § 7116(a)(1) and (5) of the Statute and Article 47, Sections 2 and 3 of the parties' agreement. *Id.* at 22-23. The Agency alleges that the parties did not agree to have the Arbitrator decide whether the Agency violated any sections of the Statute or the agreement that deal with information requests. *See id.* Thus, according to the Agency, the issue of whether the Agency failed to respond to the Union's request for information was not properly before the Arbitrator. *Id.* at 23.

Third, the Agency asserts that the Arbitrator's remedies requiring the Agency to provide the information requested, establish a claims process, and allow claims for lost overtime opportunities, miscalculations of performance awards, lowered performance appraisals, and correction of disciplinary actions as part of the claims process do not draw their essence from the parties' agreement. *See id.* at 12-13. The Agency contends that the parties' agreement states that the Arbitrator is required to follow laws, regulations, and precedent, *id.* at 12, but that the Arbitrator failed to abide by this requirement because these remedies conflict with various management rights under § 7106 of the Statute. *See id.* at 12-18.

Fourth, the Agency contends that the Arbitrator exceeded his authority by establishing the claims process. The Agency asserts that the Arbitrator's retention of jurisdiction is "beyond the scope" of authority granted to him under the parties' agreement. *Id.* at 24. According to the Agency, the Arbitrator could not consider claims for overtime, performance appraisals, and disciplinary actions because, under Article 43, Sections 1.B.2 and 1.B.3 of the parties' agreement, those claims may be heard only in certain types of arbitration. *See id.* at 25. Furthermore, the Agency asserts that the Arbitrator exceeded his authority by retaining "jurisdiction over deciding the claims submitted during the individual claims period." *Id.* at 26 (citing *AFGE*, 29 FLRA 1568 (1987) (*AFGE*), *recons. denied*, 30 FLRA 371 (1987)).

3. Exceptions to attorney fees

The Agency argues that the Arbitrator exceeded his authority by granting the Union thirty days to file a petition for attorney fees because the parties' agreement permits only twenty days. *Id.* at 26-27.

The Agency also asserts that the Arbitrator's direction allowing the Union the right to file a petition for attorney fees is contrary to the Back Pay Act (the Act). Specifically, the Agency contends that the Arbitrator failed to find a causal connection between the Agency's actions and "any potential withdrawal or reduction in pay, allowances or differentials" as required by the Act. *Id.* at 27.

The Agency further contends that the award is contrary to the Act because the Arbitrator would not have sufficient information to resolve the Union's petition within the time frame he established in his award. *See id.* The Agency states that the Arbitrator held that he would retain jurisdiction for 120 days to resolve the Union's petition for attorney fees; however, according to the Agency, the Arbitrator also held that he would let employees submit claims for lost pay within that same 120-day time frame. *See id.* at 27-28. Accordingly, the

Agency contends that the Arbitrator will be required to resolve whether the Union is entitled to attorney fees before he fully resolves whether employees are entitled to backpay. *See id.* at 28.

B. Union's Opposition

1. Response to Agency's exception concerning Arbitrator's conclusion that Agency violated the Statute and the parties' agreement

The Union contends that the Arbitrator correctly applied the de minimis standard. Opp'n at 6. The Union asserts that the Arbitrator did consider the "nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees." *Id.* at 8 (quoting Award at 22) (internal quotation marks omitted). Specifically, the Union avers that the Arbitrator took into consideration that the reduction in inventory days permanently changed the types of work representatives perform eight days a year; 1,500 employees were affected; and telephone work is more stressful. *Id.* at 8, 10. According to the Union, the Arbitrator's conclusion is consistent with Authority precedent. *See id.* at 8-10 (citations omitted).

2. Response to Agency's exceptions to the information request and the claims process

The Union disagrees with the Agency's assertion that the Arbitrator's remedies requiring the Agency to turn over information and establishing the claims process were based on nonfacts. The Union argues that the Arbitrator did not order the Agency to turn over certain information on the basis that the Agency failed to respond to an information request; rather, it contends he ordered this remedy "to help facilitate the negotiation process." *Id.* at 14-15. The Union contends the Arbitrator based this decision on the Agency's failure to negotiate. *See id.* at 15. The Union also argues that the establishment of the claims process was proper. *See id.*

The Union argues that the Arbitrator did not exceed his authority by addressing the Union's request for information. According to the Union, the Arbitrator explained that the information request was raised by the Union at the hearing and in its post-hearing brief, and that the information was appropriate relief for the Agency's failure to bargain. *See id.* at 16. The Union avers that the Arbitrator acted "well within his authority." *Id.*

The Union also disputes the Agency's argument that the claims process fails to draw its essence from the parties' agreement. According to the Union, the Agency has not argued the proper framework for ascertaining whether an award draws its essence from the parties' agreement. *See id.* at 11-12. Moreover, the Union contends that the award rationally derives from the parties' agreement and that the Arbitrator properly reconstructed what would have happened in the absence of the Agency's violations. *See id.* at 12-14.

The Union rejects the Agency's assertion that the Arbitrator exceeded his authority by establishing the claims process. *See id.* at 16-17. According to the Union, the Arbitrator has done nothing more than provide the parties "a vehicle" for them to resolve claims and redress harm caused by the Agency's violations. *Id.* at 17. The Union asserts that the Arbitrator is not retaining jurisdiction to "resolve thousands of individual grievances." *Id.*

3. Response to Agency's exceptions to attorney fees

The Union agrees with the Agency's assertion that the time frame established by the Arbitrator for the Union to submit a petition for attorney fees should be modified. *See id.* at 18. However, the Union contends that the modification should be limited to allowing the Arbitrator more time to determine whether attorney fees are appropriate under the Act. *See id.* Alternatively, the Union also agrees that the award should be modified to conform to the requirement in the parties' agreement that a petition for attorney fees must be filed within twenty days of an award becoming final. *See id.*

IV. Preliminary Issue

In an Order to Show Cause (Order), the Authority directed the Agency to explain why its exceptions should not be dismissed as interlocutory.[4] Order at 1. The Authority noted that the Arbitrator ordered the Agency to provide certain information to enable the Union to determine whether employees had been adversely affected by the reduction in inventory days. *See id.* at 2. The Authority further noted that the Arbitrator established a time frame to allow affected employees the opportunity to submit claims "for consideration and compensation," and that any disagreement would be submitted to him "for resolution." *Id.* at 2-3. Based on these statements, the Authority stated it was unclear whether the award resolved all

[4] The Union was informed that it had the option to file a response to the Agency's Response to Order. *See* Order at 3. The Union did not file a response.

issues submitted to arbitration. *Id.* at 3 (citations omitted).

The Agency argues that its exceptions are not interlocutory "because the Arbitrator made a complete determination of the issues submitted to arbitration." Agency Response to Order at 3. The Agency contends that the Arbitrator resolved all three issues submitted to arbitration and provided the Union with a remedy. *See id.* at 3-5. Although the Agency acknowledges that the Arbitrator retained jurisdiction to allow the Agency to provide information and the Union to submit claims, the Agency avers that the Arbitrator did so merely to resolve any disputes over implementation of the remedy. *See id.* at 5. The Agency argues that, under Authority precedent, an arbitrator is permitted to retain jurisdiction to assist with the implementation of remedies, even when affected employees have not yet been identified. *See id.* (citations omitted). Moreover, the Agency asserts that its exceptions were premised on its belief that the Arbitrator had rendered a final award. *See id.* at 6.

Alternatively, the Agency argues that, even if the exceptions are interlocutory, extraordinary circumstances warrant their review because: (1) the information request issue was not before the Arbitrator, *id.* at 8; (2) the Arbitrator impermissibly ruled on an issue that was not properly before him, *id.*; and (3) reviewing the exceptions would advance the ultimate disposition of this matter, *id*.

Under § 2429.11 of the Authority's Regulations, the Authority "ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11. Thus, the Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 603, 605 (2011). Exceptions to an award are not interlocutory, however, where an arbitrator has retained jurisdiction solely to assist the parties in the implementation of awarded remedies, including the specific amount of monetary relief awarded. *See, e.g., U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 158-59 (2009).

The Agency's exceptions are not interlocutory. The Arbitrator required the Agency to provide the Union with certain information and held that, once the Union had an opportunity to review that information, employees would be able to submit individual claims for consideration. Award at 28-29. The Arbitrator stated that he would retain jurisdiction to resolve any disputes arising from this process. *Id.* at 30. Although the Agency argues that the remedies the Arbitrator awarded are improper, it nevertheless asserts that they are final. Agency Response to Order at 6. The Agency contends that the Arbitrator did nothing more than retain jurisdiction to assist the parties with the implementation of the remedies he awarded. *Id.* at 5. The Union has not challenged the Agency's position. Accordingly, we find that the Arbitrator retained jurisdiction solely to assist with the implementation of his awarded remedies and that the exceptions, therefore, are not interlocutory. *See, e.g., U.S. Dep't of Def., Dep't of Def. Dependents Sch., Europe*, 65 FLRA 580, 581 (2011) (citing *AFGE, Nat'l Council of EEOC Locals No. 216*, 65 FLRA 252, 253-54 (2010)) (award was final because arbitrator retained jurisdiction solely to assist with implementation of remedies).

V. Analysis and Conclusions

A. The Arbitrator properly concluded that the change in conditions of employment had more than a de minimis effect.

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*.

Furthermore, when resolving a grievance that alleges an unfair labor practice (ULP) under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (ALJ). *E.g., U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 431 (2010). Consequently, in resolving the grievance, the arbitrator must apply the same standards and burdens that are applied by ALJs under § 7118 of the Statute. *Id.* In a grievance that alleges a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *Id.* As in other arbitration cases, in determining whether the award is contrary to the Statute, the Authority defers to the arbitrator's findings of fact. *Id*.

Prior to changing unit employees' conditions of employment, an agency must provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain under the Statute. *E.g., U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715

(1999). As relevant here, an agency is not required to bargain over the impact and implementation of a change if the change has a de minimis effect. *E.g., U.S. Dep't of the Treasury, IRS*, 56 FLRA 906, 913 (2000). In assessing whether the effect of a change is more than de minimis, the Authority "looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment." *Id*.; *U.S. Dep't of the Air Force, Air Force Materiel Command*, 54 FLRA 914, 919 (1998).

The Agency claims that the Authority considers five factors when it ascertains whether a change had a more than de minimis effect. *See* Exceptions at 9-10. However, the Authority no longer applies that approach; rather, it utilizes the framework set forth above. *See DHHS*, 24 FLRA at 407-08 (Authority stated it would look to effects or reasonably foreseeable effects of a change rather than the five factors). Accordingly, we do not apply the five factor analysis to our review of the Arbitrator's conclusion. *See Veterans Admin., W. L.A. Med. Ctr., L.A., Cal.*, 24 FLRA 714, 717-18 (1986).

The record supports the Arbitrator's conclusion that the reduction in inventory days had more than a de minimis effect. Representatives lost eight inventory days a year due to the Agency's decision to reduce the number of inventory days. Award at 7. Although representatives previously had twenty-six inventory days per year, they now have eighteen inventory days per year. Consequently, representatives have 31% fewer days each year in which they are able to focus solely on inventory-related duties. Although representatives can perform inventory duties on days they perform telephone duties, the Agency does not dispute the Arbitrator's conclusion that representatives have "little time" to do so. *Id.* at 5. Accordingly, the Agency's reduction of inventory days has reduced the representatives' ability to spend time on inventory duties. This, in turn, supports a conclusion that the reduction in inventory days had more than a de minimis effect. *See, e.g., Soc. Sec. Admin., Gilroy Branch Office, Gilroy, Cal.*, 53 FLRA 1358, 1369 (1998) (employees' reduced time to perform certain duties supported a conclusion that change had more than a de minimis effect).

The reduction in inventory days also increased the duties that representatives must now perform. Specifically, the Agency does not dispute that, as a result of the reduction in inventory days, representatives must now spend eight additional days a year performing primarily telephone duties. Consequently, the Agency has increased permanently the representatives' telephone duties. An increase in duties supports a conclusion that a change had more than a de minimis effect. *See, e.g., id*.

The Agency contends the Arbitrator erred because he failed to consider that the Agency "frequently cancelled" inventory days in the past. Exceptions at 11. The Agency does not explain how frequent those cancellations were. Moreover, as the Arbitrator noted, Award at 23-24, the Agency's previous practice of canceling inventory days differs from the change at issue here because the Agency's previous changes to the inventory schedule were made on an ad hoc basis, the change at issue here was permanent. *See id*.

The Agency also argues that the change was de minimis because the parties negotiated appropriate arrangements that allow representatives to continue performing some inventory duties at the same level despite the reduction of inventory days. *See* Exceptions at 11-12. This argument relates to one of the factors that the Authority previously considered in its de minimis analysis, namely, whether parties had negotiated appropriate arrangements for analogous changes. *See DHHS*, 24 FLRA at 407. Because the Authority no longer utilizes this analysis, the Agency's argument is misplaced.

The Arbitrator properly concluded that the Agency violated the Statute by failing to bargain over the impact and implementation of the reduction in inventory days. However, even if the Arbitrator's analysis of the legal issue were deficient, the Agency's exception does not provide a basis for finding the award deficient because the Arbitrator also found that the Agency's actions violated the parties' contractual obligation to bargain -- a finding that the Agency does not challenge. When a grievance involves a dispute regarding a bargaining obligation as defined by the parties' agreement, "'the issue of whether the parties have complied with the agreement becomes a matter of contract interpretation for the arbitrator.'" *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010) (quoting *Soc. Sec. Admin., Md., Balt.*, 55 FLRA 1063, 1068 (1999)). The Agency relies solely on statutory arguments to challenge the Arbitrator's conclusion that the Agency had a duty to bargain; however, those arguments do not address the Arbitrator's conclusion that the Agency violated the parties' agreement, which was solely a matter of contract interpretation. Thus, the Agency's arguments provide no basis for finding the Arbitrator's conclusion regarding the

contractual violation deficient.[5] *See id.* (finding that agency's arguments concerning statutory duty to bargain provided no basis for concluding that arbitrator's determination that agency violated contractual duty to bargain was deficient).

We conclude that the Agency has not established that the Arbitrator's determination that the Agency violated the Statute and the parties' agreement by failing to bargain is deficient.

B. The Union's information request and the claims process are not contrary to management rights.

The Agency argues that the award fails to draw its essence from the parties' agreement because the parties' agreement requires an arbitrator to "follow laws, binding Government-wide regulations, and applicable precedent." Exceptions at 12. Specifically the Agency contends the Arbitrator did not follow law because his remedies requiring the Agency to provide the information requested, establish a claims process, and allow claims for lost overtime opportunities, miscalculations of performance awards, lowered performance appraisals, and correction of disciplinary actions as part of the claims process are contrary to various management rights under § 7106 of the Statute. *See id.* at 12-18. We construe the Agency's arguments as claims that the award is contrary to law.

The Authority revised the analysis that it applies when reviewing management rights exceptions to arbitration awards.[6] *See U.S. Envtl. Prot. Agency*, 65 FLRA 113, 115 (2010) (*EPA*) (Member Beck concurring); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102 (2010) (*FDIC, S.F. Region*) (Chairman Pope concurring). Under the revised analysis, the Authority assesses whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b). *Id.* Also, under the revised analysis, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *See id.* at 116-18. In concluding that it would apply an abrogation standard, the Authority rejected continued application of an excessive-interference standard. *Id.* at 118. Furthermore, in setting forth the revised analysis, the Authority rejected the continued application of the "reconstruction" requirement set forth in *United States Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.*, 53 FLRA 146, 153-54 (1997) (*BEP*). The Agency challenges the Arbitrator's decision to allow claims "for lost overtime opportunities, miscalculation of performance awards, lowered performance appraisals [,and] inappropriate disciplinary action[s]." Exceptions at 14.

1. The Arbitrator's orders concerning the Union's information request and the establishment of the claims process

The Agency challenges the Arbitrator's remedies requiring the Agency to provide the Union with certain information and establishing a claims process to allow the Union an opportunity to submit claims for harm caused by the Agency's actions. The Agency asserts that these remedies do not reconstruct what the Agency would have done had it not violated its duty to bargain under Article 47, Sections 2 and 3 of the parties' agreement. *See* Exceptions at 13. Based on this supposed failure, the Agency avers that these remedies conflict with "management's rights under § 7106." *Id.* Although the Agency asserts that the award in these two respects is contrary to management's rights, it does not cite a management right under § 7106(a).[7] Accordingly, we deny the claim that the award affects management's rights as a bare assertion. *See, e.g., Soc. Sec. Admin., Office of Disability Adjudication & Review*, 65 FLRA

[5] The Authority has held that, where a contract provision restates a provision of the Statute, the Authority "must exercise care" to ensure that an arbitral interpretation of the contract provision is consistent with the Authority precedent interpreting the statutory provision. *Gen. Servs. Admin., Region 9, L.A., Cal.*, 56 FLRA 683, 685 (2000) (quoting *U.S. Dep't of Def., Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, 43 FLRA 147, 153 (1991)). The Agency does not assert that the contractual provisions in dispute here mirror the Statute.

[6] For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the contract provision is an appropriate arrangement or whether it abrogates a § 7106(a) right. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *See EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck); *FDIC, S.F. Region*, 65 FLRA at 107; *SSA, Dallas Region*, 65 FLRA 405, 408 n.5 (2010); *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 n.7 (2010); *U.S. Dep't of Health & Human Servs., Office of Medicare Hearings & Appeals*, 65 FLRA 175, 177 n.3 (2010); *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 173 n.5 (2010).

[7] As addressed below, the Agency does cite management rights in connection with its exceptions to particular aspects of the claims process.

477, 481 (2011) (citing *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 558 n.3 (1999)) (rejecting unsupported management right argument as a bare assertion). Additionally, with regard to the Agency's claim that the award fails to satisfy the second prong of *BEP*, as stated above, the Authority no longer applies a reconstruction standard. *See FDIC, S.F. Region*, 65 FLRA at 106-07. Thus the Agency's claims do not demonstrate that the award is deficient.

2. Overtime compensation

The Agency argues that the Arbitrator's decision to permit claims for overtime as part of the claims process affects its right to assign work because it would interfere with its ability "to determine situations in which certain work will be performed on overtime." *Id.* (citing *NFFE, Council of Consol. Soc. Sec. Admin. Locals*, 13 FLRA 422 (1983)). The Agency's argument is misplaced. The Arbitrator's award concerns retroactive remedies relating to overtime, not whether certain work may be performed in overtime situations. Accordingly, we find that this portion of the claims process does not affect management's right to assign work and deny the Agency's exception.[8]

3. Performance appraisals and performance awards

The Agency avers that the Arbitrator's remedy concerning performance appraisals, and awards arising from them, affects management's rights to direct employees and assign work. *See* Exceptions at 14 (citing *BEP*, 53 FLRA at 146). The Union does not dispute these assertions. Accordingly, we assume the award affects these management rights. *See, e.g., SSA*, 65 FLRA 339, 341 (2010) (*SSA*).

The Agency further contends that this portion of the award is deficient because the Arbitrator failed to reconstruct what actions the Agency would have taken but for its contractual violations. *See* Exceptions at 15-16. As noted above, the Authority no longer requires that an arbitrator's remedy reconstruct what management would have done had it not violated the contract. *See FDIC*, 65 FLRA 179, 181 (2010). Moreover, the Agency has not asserted that Article 47, Sections 2 and 3 are not properly negotiated contract provisions. Consequently, the Agency has implicitly conceded that these sections are properly negotiated contract provisions. *See, e.g., U.S. Dep't of Health & Human Servs., Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 571 (2011) (*DHHS, Substance Abuse*) (citations omitted). The Arbitrator's award enforces those provisions. Accordingly, we find that the award is not contrary to management's rights by failing to reconstruct what the Agency would have done had it not violated the contract.[9] *See, e.g., U.S. Dep't of the Army, Def. Language Inst., Monterey, Cal.*, 65 FLRA 668, 671 (2011) (*USDA*) (citations omitted).

4. Disciplinary actions

Finally, the Agency asserts that the portion of the claims process that allows challenges to disciplinary actions affects management's right to discipline. *See* Exceptions at 14-15 (citing *U.S. Dep't of Veterans Affairs, Med. Ctr., Birmingham, Ala.*, 51 FLRA 270 (1995)). The Union does not dispute this assertion. Accordingly, we assume that the award affects that right. *See SSA*, 65 FLRA at 341.

As with the other portions of the claims process, the Agency avers that the Arbitrator failed to reconstruct what would have happened in the absence of the Agency's contractual violation. *See* Exceptions at 15, 17. However, the Agency does not assert that Article 47, Sections 2 and 3 were not negotiated under § 7106(b) of the Statute. *See DHHS, Substance Abuse*, 65 FLRA at 571. Because the award enforces properly negotiated contract provisions, this portion of the award is not deficient.[10] *See USDA*, 65 FLRA at 671.

C. The award is not based on nonfacts

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. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient

[8] The Agency contends that the award concerning overtime is also contrary to law because the Arbitrator could not award overtime without first determining that there was an actual loss of overtime. Exceptions at 17-18. The Agency's argument is misplaced because overtime itself has not yet been provided, only the ability to request overtime.

[9] The Agency argues that the Arbitrator's remedy concerning performance appraisals is inappropriate because he failed to find that the Agency improperly applied its performance standards. *See* Exceptions at 16. According to the Agency, an arbitrator must find that an agency misapplied an applicable law or contract provision that affected a performance appraisal before an arbitrator can cancel that rating. *See id.* (citations omitted). The Agency's argument is misplaced because the Arbitrator has not ordered the cancellation of any performance appraisals, only the reconsideration of such appraisals.

[10] As with its assertion regarding performance appraisals, the Agency alleges the award concerning disciplinary actions is deficient because the Arbitrator did not find that the Agency misapplied any applicable law or contract provision. *See* Exceptions at 16-17. The Arbitrator ordered only the reconsideration of these actions; thus, the Agency's argument is flawed.

on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.*

The Agency's assertion that the Arbitrator relied on a nonfact to decide that the Agency was required to provide the Union with information is inaccurate. The Agency contends that the Arbitrator based his decision solely on the Agency's failure to respond to the Union's information request, an event that never actually occurred. *See* Exceptions at 19-20. Whether the Agency failed to respond to an information request is immaterial because, even if true, it is not a central fact underlying the award that would have resulted in a different outcome had the Arbitrator decided that fact differently. The Arbitrator did not rely on the Agency's alleged non-response to award the Union information; rather, he stated that he was requiring the Agency to turn over the information because it would "assist" the Union when it bargained with the Agency. Award at 26. Although the Arbitrator discussed the Agency's supposed failure to respond to an information request, he did so to address, and reject, the Agency's assertions as to why it believed it did not have to provide the Union the information. *See id.* at 26-27. Thus, the Arbitrator based his decision on the bargaining remedy he awarded, not on the facts cited by the Agency. Therefore, we find that the Arbitrator's remedy that the Agency provide information was not based on a nonfact. *See, e.g., AFGE, Local 3979, Council of Prisons Locals*, 61 FLRA 810, 815 (2006) (because alleged nonfacts were not central to award, Authority concluded that award was not deficient).

The Agency's contention that the claims process is based on a nonfact is similarly inaccurate. The Agency first argues that the claims process is based on the information request. Because the information request remedy is supposedly based on a nonfact, the Agency asserts that the claims process is deficient. We have concluded that the Arbitrator's remedy regarding the information request was not based on a nonfact; thus, the Agency's contention does not provide a basis for finding the claims process deficient. The Agency next avers that the claims process is deficient because the Arbitrator failed to determine whether any employee actually suffered any losses before he established the process. *See* Exceptions at 21. The Agency offers no explanation as to how the Arbitrator's failure to make such a determination, even if true, would render the claims process deficient. Indeed, the very purpose of the claims process was to determine whether the employees had suffered any losses. Accordingly, we deny this exception.

D. 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. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *See U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999). Moreover, the Authority grants the arbitrator broad discretion to fashion a remedy that the arbitrator considers to be appropriate. *See U.S. Dep't of the Interior, U.S. Geological Survey, Nat'l Mapping Div., Mapping Applications Ctr.*, 55 FLRA 30, 33 (1998).

1. The Arbitrator did not exceed his authority by considering the Union's information request.

The Arbitrator did not exceed his authority by resolving the Union's information request. The stipulated issues included whether the Agency violated the Statute and the parties' agreement by failing to bargain impact and implementation before it reduced the number of inventory days and, if so, what was the appropriate remedy. *See* Award at 2. In direct response to these issues, and after finding a violation of the Statute and the agreement, the Arbitrator ordered the parties to bargain as part of his remedy. *See id.* at 26. The Arbitrator further ordered the Agency to turn over certain information "to assist" with that bargaining. *Id.* Thus, although the Arbitrator found that the Union was entitled to certain information under § 7114 of the Statute and the parties' agreement, he merely did so in order to facilitate the bargaining remedy he provided the parties. Stated differently, the Arbitrator did nothing more than fashion a remedy that was directly responsive to the issues before him. Accordingly, we find that the Arbitrator did not exceed his authority. *See, e.g., U.S. Dep't of the Air Force, 72ND Mission Support Grp., Tinker Air Force Base, Okla.*, 60 FLRA 432, 434-35 (2004) (citations omitted) (arbitrator did not exceed his authority because he awarded a remedy that was directly responsive to the stipulated issues before him).

2. The Arbitrator did not exceed his authority under the parties' agreement by establishing the claims process.

The Agency argues that the Arbitrator exceeded his authority under the parties' agreement by impermissibly altering it in violation of Article 43,

Section 4.A.18. Exceptions at 25. Specifically, the Agency contends that, under Article 43, Section 1.B.2, discipline and performance appraisal issues must be litigated in the expedited grievance procedure. *Id.* Moreover, it asserts that, under Article 43, Section 1.B.3, overtime issues must be litigated in a "streamlined" grievance procedure. *Id.* By considering claims regarding discipline, performance appraisals, and overtime, the Agency contends that the Arbitrator altered the agreement. However, the Agency cites nothing in the parties' agreement that prevents the consideration of these claims as part of a remedy awarded in the type of arbitration utilized by the parties. Additionally, the Agency has cited nothing in the award that suggests that the parties would be submitting disputed claims to the Arbitrator for resolution rather than resolving the disputes themselves. *See* Award at 29 (generally stating that employees could submit claims for consideration and compensation). Indeed, even the Agency acknowledges that the Union will "submit claims to the Agency." Exceptions at 12. Moreover, even if the Arbitrator were the one resolving disputed claims, there is no indication in his award that he would be resolving any underlying grievances. Rather, he would be doing nothing more than determining "whether individual employees have been adversely affected by the Agency's unilateral change in any actionable way." *Id.* at 27. Thus, the Arbitrator would solely be determining whether certain harms were a result of the Agency's actions. Accordingly, we find that the Agency has failed to establish that the Arbitrator exceeded his authority under the parties' agreement. *See, e.g., AFGE, Local 3267*, 64 FLRA 547, 550 (2010) (party failed to establish that arbitrator exceeded his authority under parties' agreement because it did not prove that arbitrator's actions were prohibited by agreement).

Relying on the Authority's decision in *AFGE*, the Agency asserts that the Arbitrator exceeded his authority by retaining "jurisdiction over deciding the claims submitted during the individual claims period." Exceptions at 26 (citing *AFGE*, 29 FLRA at 1578-80). In *AFGE*, the arbitrator ordered the agency to cease and desist from filing grievances over official time and mandated that all union grievances concerning official time and related issues would be heard by him for the duration of the parties' agreement. *See AFGE*, 29 FLRA at 1577-78. The Authority found this portion of the award deficient. *See id.* at 1578-80. The Arbitrator's actions in this matter are distinguishable from those of the arbitrator in *AFGE*. As stated above, nothing in the award suggests that the parties will be submitting disputed claims to the Arbitrator for resolution rather than resolving these claims themselves. Again, the Agency acknowledges that the Union will "submit claims to the Agency." Exceptions at 12. Moreover, even if the Arbitrator were to resolve these claims, there is no indication in the award that he would be resolving any underlying grievances. Rather, he would be doing nothing more than determining "whether individual employees have been adversely affected by the Agency's unilateral change in any actionable way." Award at 27. Thus, the Arbitrator would be determining solely whether certain harms were a result of the Agency's actions. Finally, contrary to the arbitrator in *AFGE*, the Arbitrator here did not retain indefinite jurisdiction or prohibit either party from selecting other arbitrators to resolve related grievances after his jurisdiction expired. *AFGE* is thus inapposite. Accordingly, we deny the Agency's claim.

E. The Arbitrator's award regarding attorney fees is deficient in part.

1. The Arbitrator exceeded his authority by granting the Union thirty days to file its petition for attorney fees.

The Agency argues that the Arbitrator exceeded his authority under the parties' agreement by giving the Union thirty days to file its petition for attorney fees because the agreement permits only twenty days to file. *See* Exceptions at 26-27. The Union agrees that the Union only has twenty days to file a petition and, as a result, urges that the Agency's exception be upheld. *See* Opp'n at 18. Because the Union has conceded that the Arbitrator erred by granting the Union thirty days to file its petition for attorney fees, we find this part of the award deficient and set it aside. *See, e.g., U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 300 (2000) (finding that arbitrator's award of punitive damages was deficient after union conceded it was contrary to law). Accordingly, we modify this portion of the award to permit the Union twenty days after the award becomes final to file any petition for attorney fees.

2. The award regarding attorney fees is not contrary to the Act.

The Agency argues that the Arbitrator's award regarding attorney fees is contrary to the Act because the Arbitrator did not find that the Agency's actions caused any employees to suffer a withdrawal or reduction in pay, allowances, or differentials. The Agency's exception is premature. The Agency's exception addresses whether the award satisfies the requirements of the Act. The Arbitrator, however, did not award the Union any attorney fees. Rather, he granted the Union the right to file a petition "demonstrating that it is entitled" to attorney fees and the Agency an opportunity to respond to that petition. Award at 28. Thus, the Arbitrator merely permitted the Union to argue why it could receive attorney fees, not that it should receive attorney fees. Because the Arbitrator has not addressed the merits of a

potential award of attorney fees, the Agency's exception in that regard is premature. Accordingly, we dismiss this exception without prejudice. *See, e.g., AFGE, Local 1156*, 56 FLRA 1024, 1026 (2000) (*AFGE*) (citing *U.S. Dep't of Veterans Affairs, Med. Ctr., Coatesville, Pa.*, 53 FLRA 1426, 1431-32 (1998)) (exception challenging arbitrator's determination regarding attorney fees was premature, and therefore dismissed without prejudice, because arbitrator had yet to address merits of union's request for attorney fees).

The Agency also argues that the award is contrary to the Act because the Arbitrator would not have sufficient information to resolve the Union's petition for fees within the time frame he established in his award. *See* Exceptions at 27. The Agency states that the Arbitrator held that he would retain jurisdiction for 120 days to resolve the Union's petition for attorney fees; however, according to the Agency, the Arbitrator also held that he would let employees submit claims for lost pay within that same 120-day time frame. *See id.* Accordingly, the Agency contends that the Arbitrator will be required to resolve whether the Union is entitled to attorney fees before the issue of whether employees are entitled to backpay is fully resolved. *See id.* at 27-28.

The Agency's argument is misplaced. The Agency offers nothing more than speculation that the backpay issue will not be resolved by the time the Arbitrator resolves the Union's request for attorney fees. Moreover, as stated above, the Arbitrator has not yet considered the merits of a request of attorney fees; consequently, the Agency's challenge remains premature. *See AFGE*, 56 FLRA at 1026. Accordingly, we dismiss this exception without prejudice.

VI. Decision

The Agency's exception concerning the thirty-day time limit for filing a petition for attorney fees is granted, and the relevant portion of the award is modified to grant the Union twenty days after the award becomes final. The Agency's exception that the award concerning attorney fees is contrary to the Act is dismissed without prejudice. The remaining exceptions are denied.

APPENDIX

Article 43, "Arbitration," Section 4.A.18, provides:

> The jurisdiction, authority, and expressed opinions of the chosen arbitrator will be confined exclusively to the interpretation of the expressed provision or provisions of this Agreement at issue between the parties. The arbitrator will have no authority to add to, subtract from, alter, amend, or modify any provision of this Agreement, or impose on either the [Agency] or the Union any limitation or obligation not specifically provided for under the terms of this Agreement. The parties reserve the right to take exceptions to any award to the Federal Labor Relations Authority. Awards may not include the assessment of expenses against either party other than as specified to in this Agreement.

Exceptions, Joint Ex. 2 at 140.

Article 44, "Attorneys Fees," Section 2, provides:

> Upon issuance of an award, the arbitrator shall retain jurisdiction to determine the entitlement to attorney fees, if any. The Union may request attorney fees within twenty (20) days of the date the award is final and all appeals have been exhausted. Such a [requested] shall be accompanied by documentation, legal argument and citation sufficient to enable the arbitrator to decide. The Union's request shall be simultaneously served on the [Agency]. Within twenty (20) days of receipt of the Union's request, the [Agency] shall submit its response. Such response shall be accompanied by sufficient documentation, legal argument and citation. The [Agency's] response shall be simultaneously served on the Union. The arbitrator shall decide whether to accept further rebuttal briefs.

Id. at 142.

Article 47, "National [B]argaining," Section 2, provides, in relevant part:

> A. Where either party proposes changes in conditions of employment that are Service-wide in nature (to include those matters that affect employees in one (1) or more Divisions in multiple geographic areas), it will consolidate those changes and serve notice thereof on a quarterly basis. Such

> notice will be due to the Union within five (5) workdays of April 1, July 1, October 1, and January 1, of each year, respectively.
>
> B. These notification requirements may be modified when a shorter implementation schedule is necessary due to circumstances beyond the control of the [Agency], for example, changes required by law or Government-wide rule or regulation, or implementation schedules determined by procurement contract award. Additionally, the parties may treat any single issue as an exception to the above by mutual agreement.
>
> C. Within fifteen (15) calendar days of receipt of such notice, the appropriate party will either request to negotiate or request a briefing.
>
> D. Within fifteen (15) calendar days of a submission of a request to negotiate, or the date of a briefing (whichever is later), the Union will submit its proposals[.]

Award at 4-5.

Article 47, Section 3, "Mid-Term Bargaining Below the National Level," provides, in relevant part:

> L. The right of either party to initiate bargaining below the national level pursuant to this section does not extend to matters that are Service-wide in nature (to include those matters that affect employees in more than one (1) SCR and are in one (1) or more Divisions in multiple geographical areas) or that involve changes implemented locally but on a varied basis because local management officials are given discretion in that regard. "Pilot", "prototype", or "test" programs for National matters, unless otherwise specifically provided in this Agreement or by the parties at the national level, must be negotiated nationally.

Id. at 5.