66 FLRA No. 44

PATENT OFFICE
PROFESSIONAL ASSOCIATION
(Union)

and

UNITED STATES
DEPARTMENT OF COMMERCE
U.S. PATENT AND TRADEMARK OFFICE
(Agency)

0-AR-4456

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DECISION

September 30, 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

The matter is before the Authority on exceptions to an award of Arbitrator Michael Wolf 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 the Union's grievance alleging that the Agency violated the parties' agreement and certain federal laws and committed an unfair labor practice (ULP) under the Statute when it terminated bargaining and unilaterally implemented the Flat Goal Pilot Program (Flat Goal Program). Award at 4, 20-21.

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

II. Background and Arbitrator's Award

The Agency employs approximately 5,500 patent examiners. *Id.* at 5. The Agency's Inspector General (IG) reported that there was a lack of congruence between the Agency's production goals and the performance evaluation and award systems that govern these employees' pay, and recommended that the Agency re-evaluate these systems. *Id.* at 5-6. In response, the Agency developed plans for the Flat Goal Program, the purpose of which "was to test the efficacy of measuring examiner productivity by a fixed number of production units per quarter." *Id.* at 8. The program changed only the productivity element (Flat Goal productivity standard) of the conventional performance appraisal program (PAP). *Id.* at 11. Rather than having an examiner's productivity goals vary bi-weekly, this program "set for each examiner a fixed number of production units that would have to be achieved in a quarter[,] . . . based on certain assumptions regarding examining time, leave utilization, etc." *Id.* at 8.

The Agency gave the Union notice of its intent to implement the Flat Goal Program and an opportunity to bargain over the change. Specifically, the Agency advised the Union, among other things, that: (1) it intended to run the program for one year; (2) participation would be voluntary; and (3) a new performance appraisal plan would be developed for participants. *Id.*

The parties began negotiations over the program. The Union presented a twenty-five-page compendium of proposals. *Id.* at 70; *see also id.* at 15-16; Opp'n, Attachs., Agency Ex. 33, Agency's matrix of Union proposals titled "Flat Goal Pilot Program Negotiations," Union Ex. 29, Attach. 2, Union's proposals titled "Draft Agreement Between [the Union and the Agency] on the Voluntary Target Goal Pilot PAP Program."[1] At a meeting, the Agency noted that many of the Union's proposals related to the PAP for all examiners and were not limited to the Flat Goal Program. *See* Award at 15. The Union responded that it considered the Flat Goal negotiations "to encompass overall PAP negotiations." *Id.*

As negotiations progressed, the Agency identified Union proposals that it considered outside the scope of bargaining over the Flat Goal Program. *Id.* The Union reiterated that it "intended to bargain over two PAPs: one for Flat Goal employees and one for the rest of the bargaining unit." *Id.* at 16; *see also* Opp'n, Attachs., Agency Ex. 36, Agency matrix containing Union amended proposals titled "Voluntary Target Goal Pilot [PAP] and Patent Examiner [PAP]", Union Ex. 28, Attach. 4, "[Union] Proposals for a Voluntary Target Goal Pilot [PAP] and Patent Examiner [PAP]"; Award at 94 n.22; Tr. at 479 (Union witness testified "[h]ardly any" of the proposals "would apply only to the employees in the Flat Goal [Program]").

[1] The Union submitted 234 bargaining proposals. *See* Opp'n, Attach. A, Agency's Post-Hearing Brief at 7; *id.*, Attach. B, Union's Post-Hearing Brief at 21; Tr. at 475; *see also* Opp'n, Attach., Agency Ex. 55, Union's initial proposals. In the Agency's matrix, the proposals are numbered by related subjects.

After several meetings, the Agency noted that the Union continued to insist on bargaining over the two plans and "warned that it would implement its 'last best offer'" unless the Union agreed to limit bargaining to the Flat Goal Program and would not claim that bargaining over the program was permissive. Award at 18. The Agency later informed the Union that it would begin the implementation process. *Id.* at 19. The Agency stated that it was "willing to negotiate" over the PAP proposals "to the extent required by law" in separate negotiations, but that it believed that such matters were not appropriate in the Flat Goal setting. *Id.* (quoting Agency Ex. 45).

The Union presented a grievance alleging violations of the parties' agreement and federal law, which was not resolved and was submitted to arbitration. As relevant here, the Arbitrator set forth the following issues:

1. Does the Flat Goal Program violate 5 U.S.C. § 4302(b)(1) (§ 4302(b)(1))?
2. Does the Flat Goal productivity standard impose an illegal quota?
3. Is the Flat Goal productivity standard illegal because the presumption of 80% examining time was not rational?
4. Is the Flat Goal productivity standard illegal because the goals are unattainable?
5. Did the Agency violate the Statute or contract when it implemented the Flat Goal Program?

See id. at 46, 48, 50, 54, 92.[2]

The Arbitrator first found that the Flat Goal Program did not violate § 4302(b)(1). *Id.* at 46-48. According to the Arbitrator, under § 4302(b)(1), a performance appraisal system must provide for "establish[ing] 'performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria.'" *Id.* at 46 (quoting § 4302(b)(1)). The Arbitrator stated that the question is whether the Flat Goal productivity standard is "so inaccurate in its presumptions that it is incapable of providing an accurate and objective measurement of productivity." *Id.* at 47. The Arbitrator found that the evidence did not support such a conclusion. *Id.* The Arbitrator found that the Union's evidence of inaccuracy in the "Flat Goal presumption of 80% examining time [was] very limited" and "ignore[d] the flexibility that [m]anagement built into the operation of the program." *Id.* The Arbitrator found that the program "account[ed] [for] leave and non-examining time," although "by a different methodology than the regular productivity standard." *Id.* at 47-48. The Arbitrator also found that the testimony of certain Union witnesses did not prove that "rigidity in the Flat Goal productivity standard was the cause of their performance problems." *Id.* at 48 n.11.

The Arbitrator next rejected the Union's assertion that the Flat Goal productivity standard imposes an illegal quota because the program did not use actual examining time to measure productivity and did not take into account use of leave and other factors. *Id.* at 48-50. As an initial matter, the Arbitrator rejected the Union's reliance on two cases -- *Williams v. Department of the Treasury*, 35 M.S.P.R. 432 (1987) (*Williams*) and *Miller v. Department of the Air Force*, 9 M.S.P.R. 102 (1981) (*Miller*).[3] Contrary to the Union's contention, the Arbitrator found that these decisions did not hold that a "performance standard setting quotas must be declared per se illegal prior to its application based on speculation about its ability to take account of employees' non-work time." *Id.* at 49. Rather, the Arbitrator found that the decisions "hold that the setting of quantitative production goals . . . must use a formula that reasonably takes account of other factors, such as the use of leave, that may affect productivity." *Id.* at 48. The Arbitrator found that the evidence in this case did not show that the program failed to take account of leave taken by examiners. *Id.* at 49. The Arbitrator further found that the program gave managers "flexibility to adjust productivity goals as unusual situations arose" and that "adjustments were indeed made on an ad hoc basis." *Id* at 50.

The Arbitrator also rejected the Union's contention that the Flat Goal productivity standard was illegal because the presumption of 80% examining time was not rational. *Id.* at 50; *see also id.* at 51-54. The Arbitrator concluded that, while the productivity standard "may have been difficult to satisfy[,] . . . a difficult standard is not automatically irrational or illegal under [§] 4302." *Id.* at 54 (citing *NTEU, Chapter 229*, 32 FLRA 826 (1988)). The Arbitrator further rejected the Union's contention that the standard was illegal because

[2] The Union states that its exceptions are limited to these issues, particularly the Arbitrator's rulings regarding: (1) whether the Flat Goal Program violated Title 5 U.S.C., Chapter 43; and (2) whether the Agency violated the Statute by implementing the Flat Goal Program. Exceptions at 2. Because the exceptions are limited to these issues, other issues addressed by the Arbitrator will not be mentioned further in this decision.

[3] The Arbitrator incorrectly cited *Miller* as 9 M.S.P.R. 454 (1981). The correct citation is 9 M.S.P.R. 102 (1981); 8 M.S.P.R. 454 (1981). *See* Award at 48.

the goals were unattainable. *Id.* at 54-56. The Arbitrator considered the testimony of two examiners who testified as to difficulties they had in meeting the productivity goals within the allotted hours, but found that this evidence did not prove that the standard "was illegal on its face." *Id.* at 55 (emphasis omitted).

The Arbitrator also found that the Agency did not violate § 7116(a)(1) and (5) of the Statute when it implemented the Flat Goal Program. *Id.* at 92-99. The Arbitrator found that the Agency was obligated to bargain only over the program's impact and implementation and that the Agency had "promptly offered such bargaining to the Union." *Id.* at 93. The Arbitrator rejected the Union's claim that the Agency was not permitted to force the Union to negotiate over only part of the bargaining unit, finding that the Union cited no support for this claim and that it was "baseless." *Id.* at 94.

The Arbitrator similarly rejected the Union's argument that it "could use the Flat Goal bargaining as a vehicle for bringing corps-wide PAP issues to the table." *Id.* In this regard, the Arbitrator found that "many of the Union's proposals" were unrelated to the program and were "directed at revamping the PAP for non-Flat Goal employees [who] were beyond the parameters of the Flat Goal bargaining." *Id.* at 94-95 (citing Union Ex. 28, Attach. 4 at 7 (Proposal 13(3)),[4] 15 (Proposal 21(6))[5]); *see also id.* at 71 (finding that proposals on their face were not limited to the Flat Goal Program) (citing Agency Ex. 55 at 4, 5 (Proposals 8(16) and 8(27)); *see also* Opp'n, Attach., Agency Ex. 33 at 5, 6. The Arbitrator found that, when the Union insisted that it would not limit its proposals to the Flat Goal Program, it "exceeded the scope of its bargaining rights." Award at 94 (citing *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 59 FLRA 703 (2004) (*Customs Serv.*) (then-Member Pope concurring), *aff'd sub nom. NTEU v. FLRA*, 414 F.3d 50 (D.C. Cir. 2005)). The Arbitrator further found that the "Union's primary objective in negotiations was to kill the [Flat Goal Program] unless it could use it as a lever to jump-start . . . PAP negotiations." *Id.* at 96 (citing *Customs Serv.*); *see also id.* at 97-98.

The Arbitrator also rejected the Union's claim that the Agency acted in bad faith by refusing to address many of its proposals and by canceling certain bargaining sessions. *Id.* at 98. The Arbitrator found that the Agency properly refused to address proposals that were extraneous to the Flat Goal Program. *Id.* The Arbitrator further found that both parties requested adjournments of meetings and that evidence showed that the Agency's requests "were largely necessitated by the Union's insistence on discussing unrelated . . . proposals and by its injection of new arguments into the bargaining process." *Id.* Noting the parties' bargaining history, the Arbitrator found that the Union "was responsible for the breakdown in negotiations" and that the Union's arguments opposing the Agency's efforts to narrow the negotiations "were legally baseless." *Id.* at 99.

Accordingly, the Arbitrator denied the Union's grievance. *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union states that its exceptions are limited to the Arbitrator's rulings regarding: (1) whether the Flat Goal Program violated Title 5 U.S.C., Chapter 43; and (2) whether the Agency violated the Statute by implementing the Flat Goal Program. Exceptions at 2 (citing Award at 46-56, 92-99).

The Union contends that the Flat Goal Program violates § 4302(b)(1). *Id.* at 24. The Union states that § 4302 prohibits an agency "from replacing a performance standard that *accurately* measures an employee's productivity by taking into account the actual number of hours an employee has available to examine patents, with a standard that establishes a fixed productivity goal that is not adjusted for leave or other factors . . . that impact the amount of time an employee actually has available to examine patents." *Id.* at 25. The Union contends that, by replacing such a standard with a "less accurate measure," the Agency violated § 4302's requirement that it adopt performance standards that, "'to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria.'" *Id.* (quoting § 4302(b)(1)).

The Union asserts that, in rejecting its claim, the Arbitrator stated that the "'question for the Flat Goal productivity standard is whether it is so inaccurate in its presumptions that it is incapable of providing an accurate and objective measure of productivity.'" *Id.* at 25 (quoting Award at 47). The Union asserts that this

[4] The Arbitrator mistakenly cited this proposal as Proposal 13(1). The record shows that it is numbered as Proposal 13(3). *See* Opp'n, Attach. 36 at 18; *see also* Union Ex. 28, Attach. 4 at 7. Also, as to Proposal 13(3), the Arbitrator stated that, even if "one could construe [the] proposal as . . . relevant" to the impact of the Flat Goal Program on participants in that program, the Union's "insistence upon negotiating over adverse actions and removals for *non*-Flat Goal employees and for *non*-performance reasons went well beyond" the Flat Goal Program. Award at 95-96 (emphasis in original).

[5] As to Proposal 21(6), the Arbitrator found that, even if this proposal was relevant to Flat Goal employees, its application to non-Flat Goal examiners would fail to satisfy *U.S. Department of the Treasury, Customs Service, Washington, D.C.*, 59 FLRA 703 (2004) (then-Member Pope concurring), *aff'd sub nom. NTEU v. FLRA*, 414 F.3d 50 (D.C. Cir. 2005). Award at 95.

statement is incorrect because the question for the Arbitrator is whether such standard "permits the accurate evaluation of an examiner's productivity to the maximum extent feasible." *Id.* (emphasis omitted). The Union contends that the PAP "measures an examiner's productivity to the maximum extent feasible" and "is a more accurate standard . . . than the Flat Goal." *Id.* at 25-26.

The Union also asserts that the Merit Systems Protection Board (MSPB) has held that productivity quotas used as performance standards must be adjusted based on the actual number of hours an employee has available to perform the work being evaluated. *Id.* at 26 (citing *Williams*). The Union contends that the Flat Goal "is not adjusted to take into account the hours which examiners spend performing ancillary duties and therefore the standard is not an accurate measure of [their] productivity." *Id.* at 27; *see also id.* at 28.

The Union further contends that the Agency's failure to adjust the productivity standard for the "number of hours of leave actually taken by . . . examiners also invalidates the standard." *Id.* at 28 (citing *Miller*). The Union asserts that the Flat Goal productivity standard "is not adjusted for the amount of annual leave actually used." *Id.* at 29 (emphasis omitted). The Union also asserts that the Arbitrator's reasoning "conflicts" with Authority decisions holding that "unions may bring facial challenges to performance standards that are alleged to violate § 4302 prior to their application to particular employees." *Id.* at 30.

The Union also contends that the Arbitrator erred by finding that the Agency's implementation of the Flat Goal Program did not violate § 7116(a)(1) and (5) of the Statute. *Id.* at 31. The Union asserts that the Arbitrator erred when he ruled that the Union waived its right to bargain over the impact and implementation of the program because "it sought to negotiate . . . proposals that would also apply to examiners who remained" in the PAP. *Id.* The Union contends that, even if the Agency was not obligated to negotiate over such proposals, the Union "did not waive its right to complete negotiations over" proposals "directly related" to the Flat Goal Program because "it did not precondition negotiations" on unrelated proposals. *Id.* at 31-32.

The Union further argues that unions are not restricted to negotiating "'over only the exact change proposed by the other party' during impact and implementation negotiations." *Id.* at 33 (quoting *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 770, 784 (1990) (*Customs Serv. I*)). The Union asserts that, during negotiations, it explained that "a change in one performance element directly impacts other elements[,] and those in the [Flat Goal] [P]rogram and those who remain in the [PAP would] continue to have all but one performance element in common." *Id.* The Union also contends that "a union does not forfeit the right to negotiate over proposals that are related to changes in conditions of employment proposed by management, even if it has simultaneously made unrelated proposals." *Id.* at 34 (citing *U.S. Patent & Trademark Office*, 57 FLRA 185 (2001) (*PTO*); *Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 22 FLRA 502, 502-507 (1986) (*Wright-Patterson*)).

The Union also asserts that the Arbitrator "incorrectly applied" *Customs Serv. Id.* According to the Union, unlike the union in that case, it "never proposed that impact and implementation negotiations over the Flat Goal [P]rogram be delayed until negotiations over a new term agreement." *Id.* at 36. The Union asserts that it offered to withdraw the proposals that the Agency claimed were unrelated to the Flat Goal negotiations "in return" for an "assurance that they would be discussed during future term negotiations," but that the Agency refused. *Id.* Further, the Union contends that its proposals "were all related to the performance appraisal system" and that examiners, regardless of which system, compete for promotions and retention during reductions-in-force. *Id.* at 36-37. The Union also avers that the Agency "contributed to the failure" to reach an agreement by canceling bargaining sessions. *Id.* at 37.

B. Agency's Opposition

The Agency asserts that the Flat Goal Program is not facially invalid under § 4302. Opp'n at 13-27. The Agency first asserts that the Union's arguments are based on a misrepresentation of fact. *Id.* at 13-17. The Agency claims that the Union repeatedly contends that the Flat Goal Program establishes a fixed productivity goal that is not adjusted for leave or other factors. *Id.* (citing Exceptions at 25, 27, 28). However, the Agency claims, the Arbitrator "expressly" rejected this assertion. *Id.* at 14-15 (citing Award at 47-50, 58-60). Moreover, according to the Agency, the record shows that the Flat Goal Program "*does* adjust for leave usage." *Id.* at 15 (citing Agency Ex. 10, rules and regulations governing the program, at 3; Award at 9-10).

The Agency contends that the Union also "misstates the Arbitrator's legal analysis." *Id.* at 16. The Agency avers that, contrary to the Union's assertion, the Arbitrator considered *Williams* and *Miller*. *Id.* (citing Award at 48-50). The Agency asserts that the record supports the Arbitrator's finding that the Union failed to show that the Flat Goal productivity standard violated § 4302 on its face. *Id.* at 17 (citing Award at 48, 50, 55, 60).

The Agency further contends that, contrary to the Union's assertions, "[n]othing in the plain language of [§ 4302] suggests that agencies, having implemented a valid performance standard, may not modify that standard or implement a new [one]." *Id.* at 19. The Agency also asserts that, under any of the MSPB standards, the program satisfies the requirements of § 4302(b). *Id.* at 19-21.

The Agency asserts that the Union "misinterprets MSPB case law," including *Williams* and *Miller*. *Id.* at 24-27 (emphasis omitted). The Agency contends that the Union relies on these cases for the proposition that the Flat Goal Program's performance standard is legally deficient because it fails to account for non-examining time and leave usage. *Id.* at 24. However, according to the Agency, the program "*does* adjust for non-examining time and leave usage, as well as . . . other activities." *Id.* (citing Award at 47-48, 49-50, 58, 59-60).

Also, the Agency contends the Union has failed to demonstrate that the Arbitrator erred in concluding that the Agency did not violate § 7116(a)(1) and (5) of the Statute. *Id.* at 27. The Agency asserts that the Union's claim is "based on the Union's uncredited version of 'facts,' which were not found by the Arbitrator." *Id.* at 28.

As an initial matter, the Agency contends, because the Union "made no reference" to *Customs Serv.* in its briefs to the Arbitrator, and made only passing reference to it in its opening statement," the Union is precluded by 5 C.F.R.§ 2429.5 (§ 2429.5) from raising this issue before the Authority. *Id.* at 31 n.8. The Agency also disputes the Union's claim that the Arbitrator incorrectly applied *Customs Serv.* *Id.* at 30-31. The Agency contends that the facts found by the Arbitrator demonstrate that, like the union in *Customs Serv.*, the Union here "raised barriers that prevented the parties from negotiating over the impact and implementation of the Flat Goal [Program]." *Id.* at 33; *see also id.* at 35-36 (citing Award at 72, 74-80, 94-97). The Agency argues that, because the Union "improperly conditioned bargaining" over the proposed program on "bargaining over . . . proposals outside the scope of the [Flat Goal Program], rejected the Agency's repeated attempts to limit negotiations . . ., and continued to condition bargaining . . . on unrelated matters," the Arbitrator did not err in finding that the Agency did not violate the Statute. *Id.* at 36-37. The Agency further claims that the Union's reliance on *Customs Serv.*, *PTO*, *Wright-Patterson*, and *Customs Serv. I* is misplaced. *Id.* at 37-39.

IV. Analysis and Conclusions

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 a ULP under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (ALJ). *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.*

A. The award is not contrary to 5 U.S.C. § 4302(b).

The Union contends that the Arbitrator erred in finding that the Agency's Flat Goal Program is not contrary to § 4302(b)(1).

Under § 4302(b)(1), each performance appraisal system must provide for establishing performance standards "which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria . . . related to the job in question for each employee or position under the system." 5 U.S.C. § 4302(b)(1); *see also Newark Air Force Station*, 30 FLRA 616, 628 (1987). The statutory terms "accurate evaluation," "objective criteria," and "to the maximum extent feasible," taken together, require that a performance standard be sufficiently precise and specific so as to invoke a general consensus as to its meaning and content, and provide a firm benchmark toward which the employee may aim his performance. *Wilson v. Dep't of HHS*, 770 F.2d 1048, 1052 (Fed. Cir. 1985) (*Wilson*); *Johnson v. Dep't of Interior*, 87 M.S.P.R. 359, 362 (2000), *overruled as to another matter by Jackson v. Dep't of Veterans Affairs*, 97 M.S.P.R. 13 (2004) (*Jackson*)). The MSPB further

explained that the "plain language of [§ 4302(b)(1)] . . . requires the use of 'objective' job-related criteria enabling the rating official to make an 'accurate evaluation of job performance' and requires that these criteria be set out 'to the maximum extent feasible' in the performance standards." *Jackson*, 97 M.S.P.R. at 18 (quoting § 4302(b)(1)).

In this case, after acknowledging the legal requirement for performance standards, the Arbitrator rejected the Union's claim that the Flat Goal productivity standard was contrary to § 4302(b)(1). The Arbitrator found that this standard permitted an "accurate and objective measurement" of an employee's performance. Award at 47; *see also id.* at 48. The Arbitrator further found that the standard did not impose an illegal "quota," *id.* at 50, and was not irrational or unattainable, *id.* at 53, 54-56.

The Union asserts that, in rejecting its claim, the Arbitrator stated that the "'question for the Flat Goal productivity standard is whether it is so inaccurate in its presumptions that it is incapable of providing an accurate and objective measure of productivity.'" Exceptions at 25 (quoting Award at 47). The Union asserts that this statement is incorrect because the question for the Arbitrator is whether such standard "permits the accurate evaluation of an examiner's productivity *to the maximum extent feasible*," which the Union claims the PAP standard does. *Id.* For the following reasons, this claim provides no basis for finding the award is contrary to § 4302(b)(1).

First, the Union has pointed to nothing in the award that demonstrates the Arbitrator found the PAP standard was more accurate than the Flat Goal productivity standard. Rather, the record reveals that the Arbitrator noted that the Agency's IG had found a lack of congruence between the Agency's patent production goals and the performance evaluation and award systems that governed patent examiners' pay and recommended that the Agency reevaluate these systems. *See* Award at 5-6. In addition, the accuracy of the PAP productivity standard was not an issue that was before the Arbitrator. Rather, the issue before the Arbitrator concerned whether the Flat Goal Program violated § 4302(b)(1). *See id.* at 46. As set forth above, the Arbitrator evaluated the Flat Goal productivity standard based on the requirements of § 4302(b)(1) and determined that the standard satisfied the statute's requirements.

Second, to the extent that the Union's assertion suggests that the Flat Goal productivity standard is illegal because the PAP productivity standard is valid, the Union has pointed to nothing in the wording of § 4302(b)(1), nor cited any other authority, that indicates that an agency may not modify an existing performance standard or implement a new standard. In this regard, the statute permits agencies "latitude in crafting performance appraisal systems to fit their needs." *Guillebeau v. Dep't of the Navy*, 362 F.3d 1329, 1336-37 (Fed. Cir. 2004) (stating that "section 4302(b) permits government agencies 'great flexibility to choose or develop their own systems'" and that "'[a]gencies should determine what type of performance appraisal methods best suit their needs'" (quoting S. Rep. No. 95-969, at 42, *reprinted in* 1978 U.S.C.C.A.N. 2763, 2764)); *see also Wilson*, 770 F.2d at 1052 (same).

Further, in asserting that the Arbitrator erred in his application of § 4302(b)(1) to the Flat Goal productivity standard, the Union asserts that, because that standard is not adjusted to take into account the hours that examiners spend performing ancillary duties, the standard is not an accurate measure of productivity. Exceptions at 27, 28. However, the Arbitrator's factual findings show that the Arbitrator found that the Union's evidence of inaccuracy in the "Flat Goal presumption of 80% examining time [was] very limited" and "ignore[d] the flexibility that [m]anagement built into the operation of the [Flat Goal] Program." Award at 47. Moreover, the Arbitrator found that the program "account[ed] for leave and non-examining time," although "by a different methodology than the regular productivity standard." *Id.* at 47-48; *see also id.* at 9 (Flat Goal regulation provides that, "[i]n the event of unforeseen circumstances[,] the examiner's flat goal may be adjusted as appropriate"), 50 (Flat Goal Program gave managers "flexibility to adjust productivity goals as unusual situations arose," and "adjustments were indeed made on an ad hoc basis"), 59-60 (record did not establish that Flat Goal examiners' productivity ratings would be sacrificed if . . . sick leave rights were fully exercised); 69 ("no evidence in the record that any Flat Goal employee had his/her ability to meet production goals impaired because of technological problems"). Because these findings show that the Flat Goal Program permits adjustments in the Flat Goal productivity standard, and because the Authority defers to the Arbitrator's underlying factual findings, the Union has not demonstrated that the award is contrary to § 4302(b)(1) in this regard.[6]

The Union also relies on *Miller* and *Williams* to support its claim that the Agency's failure to adjust the Flat Goal productivity standard for the number of hours of leave actually taken by examiners or for ancillary duties invalidates the standard. Exceptions at 26-30. However, these cases do not provide a basis for finding the award deficient. In this regard, contrary to the Union's claim, Exceptions at 30, the Arbitrator did not decline to apply the holdings in these cases, but instead

[6] In so finding, we note that the Union does not allege that such findings are based on a nonfact.

found that the cases did not control the outcome of this case, Award at 48-49. Further, this case is distinguishable from *Miller* and *Williams* because the factual findings in this case show that the Flat Goal Program allows the productivity goal to be adjusted to account for leave and ancillary duties. *See* Award at 47-50, 59-60, 69.

Because the Union has not supported its assertions and because the Arbitrator's factual findings show that the Arbitrator evaluated the Flat Goal productivity standard consistent with the requirements of § 4302(b)(1), the Union has not demonstrated that the Arbitrator erred in finding that the Agency's Flat Goal Program is not contrary to § 4302(b)(1).

Accordingly, we deny this exception.

B. The award is not contrary to § 7116(a)(1) and (5) of the Statute.

1. Preliminary Matter

The Agency contends that the Union did not make any "reference to *Customs Serv*[.] in its . . . briefs to the Arbitrator, and made only passing reference to it in its opening statement." Opp'n at 31 n.8. Citing § 2429.5, the Agency asserts that any issues raised by the Union concerning this case should not be considered by the Authority. *Id.*

Under § 2429.5, the Authority generally will not consider evidence or arguments that could have been, but were not, presented to the arbitrator.[7] The Union filed briefs with the Arbitrator, including a post-hearing reply brief (reply brief). *See id.*, Attach. D, Reply Brief; Award at 31. In the reply brief, the Union specifically addressed *Customs Serv.* *See* Reply Brief at 9-11. Additionally, at the hearing, the Union's representative raised arguments concerning the application of *Customs Serv.* *See* Tr. (Day 1) at 57-62. Therefore, the record shows that the Union raised arguments before the Arbitrator concerning the application of this case.

Accordingly, we deny the Agency's request.

2. § 7116(a)(1) and (5) of the Statute

It is well established that, prior to implementing a change in conditions of employment, an agency is required to 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 if the change will have more than a de minimis effect on conditions of employment. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 870, 872 (2011) (citing *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr. Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173 (2009) (Member Beck concurring in part on other grounds); *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 89 (2009)).

Where such a change to conditions of employment constitutes the exercise of a management right under § 7106 of the Statute, the agency is nevertheless obligated to notify the exclusive representative and negotiate over the impact and implementation of the change.[8] *See id.* at 872-73 (citing *U.S. Dep't of the Treasury, IRS*, 62 FLRA 411, 414 (2008)). However, the Authority has held that, during such bargaining, an agency is obligated to bargain only over proposals that are reasonably related to the proposed change in conditions of employment. *See id.* at 873 and cases cited therein. An agency, therefore, is not required to bargain over proposals that go beyond the scope of a proposed change or over a matter that is conditioned on an agency bargaining over proposals that are outside the scope of an agency's impact and implementation bargaining obligation. *See id.* (citing *FLRA v. U.S. Dep't of Justice*, 994 F.2d 868, 871-72 (D.C. Cir. 1993); *Wright-Patterson*, 22 FLRA at 506); *Customs Serv.*, 59 FLRA at 708-11.

The Union asserts that the Arbitrator erred when he ruled that the Union waived its right to bargain over the impact and implementation of the Flat Goal Program because "it sought to negotiate . . . proposals that would also apply to examiners who remained in the" PAP. Exceptions at 31. The Union contends that, even if the Agency was not obligated to negotiate over such proposals, the Union "did not waive its right to complete negotiations over . . . proposals . . . directly related [to the Flat Goal Program] because it did not precondition negotiations" on unrelated proposals. *Id.* at 32.

The Union's assertions are not supported by the record. In this regard, the Arbitrator's factual findings show that the Agency informed the Union that the Flat Goal Program did not involve any changes to the PAP, but was limited to the performance plan for the

[7] The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations - including § 2429.5 - were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). Because the exceptions and opposition in this case were filed before the effective date of the revised Regulations, we apply the prior version of the Regulations.

[8] We note that the Union does not challenge the Arbitrator's finding that the Agency was not obligated to bargain over the substance of the proposed Flat Goal Program.

proposed program. *See* Award at 71-76; Opp'n, Attach., Agency Ex. 34 at 1-4 (bargaining notes summarizing parties' negotiations on the Flat Goal Program). Also, his findings show that, despite the Agency's attempt to limit the Union to bargaining over proposals related to the Flat Goal Program, the Union refused and continued to "insist[] that it would not limit its negotiating proposals to the Flat Goal . . . Program" and "[r]equir[ed] the Agency to enter into comprehensive PAP negotiations as a condition of bargaining" over the Flat Goal Program. Award at 94, 96; *see also id.* at 72 (quoting Agency Ex. 34 (bargaining notes noting, among other things, Union witness's statement that: "We intend to discuss all of our proposals. We don't recognize the scope as stated by [m]anagement. . . . It's our opportunity to discuss a PAP."), 74 (quoting Agency Ex. 37 (bargaining notes noting, among other things, management's statement that: "We're only negotiating on the Flat Goal here as we don't have the authority to negotiate anything else," and Union witness's response that "We're negotiating two PAPs.")), 93-94. Moreover, the Arbitrator found that the evidence demonstrated that the "Union's primary objective in negotiations was to kill the [Flat Goal] Program unless it could use it as a lever to jump-start comprehensive PAP negotiations." *Id.* at 96.

Accordingly, based on the Arbitrator's factual findings, to which the Authority defers, and the record evidence, the Union has failed to demonstrate that the Arbitrator erred by finding that the Union conditioned bargaining over the Flat Goal Program on bargaining over unrelated proposals concerning the PAP.[9] By insisting that the Agency bargain over proposals in connection with the PAP, the Union sought to require the Agency to bargain over matters outside the required scope of bargaining. *See, e.g., Customs Serv.*, 59 FLRA at 710 (ground rule proposal that conditioned negotiations over the impact and implementation of management's revised assignment policy on first bargaining over the expired master collective bargaining agreement did not constitute a matter falling within the scope of § 7106(b)(2) or (b)(3) and was a permissive subject on which the agency could have elected, but was not obligated, to bargain). Additionally, because the Union has failed to demonstrate that the Arbitrator erred by finding that the Union conditioned bargaining over the Flat Goal Program on bargaining over unrelated proposals concerning the PAP, the Union's claim that the Arbitrator incorrectly applied *Customs Serv.* provides no basis for finding the award is contrary to the Statute.

Further, contrary to the Union's claim, *PTO*, *Customs Serv. I*, and *Wright-Patterson* provide no basis for finding that the Arbitrator erred in concluding that the Agency did not violate the Statute. In *PTO*, the Authority found that an agency's refusal to bargain over union-initiated proposals violated § 7116(a)(1) and (5) of the Statute. 57 FLRA at 191-92. The issue in that case did not concern whether the proposals were related or unrelated to a proposed change, but, rather, concerned whether the agency was required to bargain over union-initiated proposals. Moreover, unlike that case, the Arbitrator's factual findings here show that the Agency informed the Union that it was "willing to negotiate over . . . PAP process proposals to the extent required by law in separate appropriate negotiations." Award at 19 (quoting Agency Ex. 45) (internal quotation marks omitted). Similarly, *Customs Serv. I* provides no support for the Union's claim as the Authority in that case found that the proposals at issue "were all related" to the proposed change. 38 FLRA at 783. Finally, *Wright-Patterson* differs from this case as well because, unlike this case, there was no finding that the union in that case conditioned bargaining on any unrelated proposals.

Additionally, the Union's contention that the Agency "contributed to the failure to reach a prompt agreement" by canceling bargaining sessions provides no basis for finding that the Arbitrator erred in concluding that the Agency did not violate the Statute. Exceptions at 37. In this regard, the Arbitrator found that the "record show[ed] that both the Union and [the Agency] representatives requested adjournments of meetings." Award at 98. The Arbitrator further found that evidence also showed that the Agency's requests for postponements "were largely necessitated by the Union's insistence on discussing unrelated contract proposals and by its injection of new arguments into the bargaining process." *Id.* The Union has not established that the Arbitrator's evaluation of the evidence and his legal conclusions based thereon are improper. Because the Authority defers to the Arbitrator's factual findings, the Union has not demonstrated that the award is contrary to § 7116(a)(1) and (5) of the Statute.

Accordingly, we find that the Arbitrator's legal conclusion that the Agency did not violate the Statute when it implemented the Flat Goal Program is not contrary to § 7116(a)(1) and (5) of the Statute.

V. Decision

The Union's exceptions are denied.

[9] In so finding, we note that the Union does not allege that such findings are based on a nonfact.

APPENDIX

5 U.S.C. § 4302 provides, in pertinent part, as follows:

> § 4302. Establishment of performance appraisal systems
>
> (a) Each agency shall develop one or more performance appraisal systems which--
>
> (1) provide for periodic appraisals of job performance of employees;
>
> (2) encourage employee participation in establishing performance standards; and
>
> (3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.
>
> (b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for--
>
> (1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria . . . related to the job in question for each employee or position under the system.