**67 FLRA No. 140**

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
REGION VI
NEW ORLEANS, LOUISIANA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3506
(Union)

0-AR-4882

_____

DECISION

August 28, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

## I. Statement of the Case

Arbitrator J. E. (Jim) Nash found that the Agency violated procedures set forth in the parties' collective-bargaining agreement when: (1) it permitted an ineligible employee to apply for and receive a promotion, which resulted in another employee (the grievant) improperly being denied the promotion; and (2) a selecting official asked the grievant's supervisor and others about whether the grievant had all of the qualifications needed for promotion. As a remedy, the Arbitrator directed the Agency to retroactively promote the grievant to the position she had applied for and to pay her backpay. There are two substantive issues before us.

The first substantive issue is whether the direction to retroactively promote the grievant violates management's right to select a candidate under § 7106(a)(2)(C) of the Federal Service Labor-Management Relations Statute (the Statute).[1] Because the Agency fails to allege that the procedures enforced by the Arbitrator were not negotiated under § 7106(b)(2) of the Statute,[2] and the remedy is reasonably related to the violated contract provisions and the harm being remedied, the answer is no.

The second substantive issue is whether the award is deficient because the Arbitrator's finding of the second contractual violation noted above is based on a nonfact or fails to draw its essence from the parties' agreement. Because the finding of the first contractual violation is a separate and independent ground for the award, and the Agency has not demonstrated that this ground is deficient, the answer is no.

## II. Background and Arbitrator's Award

As relevant here, the Agency announced vacancies for senior case technician (SCT) positions. The Agency created best-qualified lists for the positions at both the general schedule (GS)-6 and the GS-7 levels. The grievant was the only individual who was considered the best qualified at both grade levels and was placed on both lists. The GS-7 list included three names, and the Agency selected one individual from that list. The GS-6 list also included three names, and the Agency selected two individuals from that list. The Agency did not select the grievant from either list.

The Union filed a grievance alleging that at least one selectee was ineligible for consideration. The Agency later determined that one of the selectees from the GS-6 list was ineligible, and demoted that selectee. But the Agency continued to argue that, regardless of that error, it would not have selected the grievant.

The grievance went to arbitration, where – absent a stipulation by the parties – the Arbitrator framed the issue as follows: "Did the [Agency] violate the [parties' collective-bargaining agreement] in its announcement, processing, and selection for the [SCT] position . . . ? If so, what should be the remedy?"[3]

At arbitration, the Union argued that the Agency committed various "procedural error[s]," in violation of Article 26, Sections 10.A., 10.B., and 10.E. of the agreement.[4] The Arbitrator quoted those provisions as stating, in pertinent part:

> A. The Agency will review applications to ensure that applicants meet the minimum qualifications of the position . . .
>
> B. . . . The rating will be applied consistently to all applicants.

[1] 5 U.S.C. § 7106(a)(2)(C).
[2] *Id.* § 7106(b).
[3] Award at 4.
[4] *Id.*

. . . .

> E. Promotion committee members will not contact applicants or solicit information from other sources regarding the applicants.[5]

According to the Union, the Agency's violations were "the direct – or at the very least the nexus – cause of the [g]rievant's [nonselection] for the SCT vacancy."[6] In this connection, the Union noted that the grievant was the only one of the three people on the GS-6 best-qualified list who was not selected, and that one of the selectees was later found ineligible. And the Union argued that, but for the selection of the unqualified selectee and the violations of the agreement, the grievant "certainly[] would have been among the successful candidates," based on her qualifications and job performance.[7] The Union requested that the grievant receive one of two alternative remedies: (1) retroactive promotion to the SCT position; or (2) priority consideration for that position.

Before the Arbitrator, the Agency argued that "selecting an employee for promotional opportunities is a managerial right."[8] The Agency "admitted that it neglected to confirm the validity of the [best-qualified list], and [that] the candidates had not been properly ranked and certified – resulting in the selection of an ineligible candidate for the [SCT] position."[9] But the Agency contended that, despite this "[p]rocedural slip-up . . . , the [Agency's] [s]electing [o]fficial felt justified in" not selecting the grievant, based on the grievant's relative qualifications and her job performance.[10]

Addressing the Agency's management-rights argument, the Arbitrator found that Article 26, Sections 10.A., 10.B., and 10.E. of the parties' agreement make "it clear that the [Agency] did not have the unencumbered right . . . to select the candidate to fill" the position.[11] Rather, the Arbitrator determined, "[t]hat right was contingent upon adherence to the procedural agreement for compiling" the best-qualified list,[12] and also "was constrained . . . by the requirement to rate, fairly and consistently, the candidates by the same criteria, and based on information gathered from the same sources."[13] The Arbitrator found that the Agency violated these "procedural" provisions.[14]

And the Arbitrator found it "apparent from the record that the [g]rievant would have been chosen – absent the [Agency's] procedural violation of" the agreement.[15] In this regard, the Arbitrator found "no credible evidence of record to justify the [g]rievant's [nonselection]."[16] Although the Arbitrator acknowledged testimony, by the selecting official, that negatively characterized the grievant's qualifications, the Arbitrator "found that testimony to be incongruent with testimony given by" the grievant's supervisor, "and other credible evidence of record."[17] Specifically, the Arbitrator found that the grievant's supervisor "corroborated the [g]rievant's testimony of expertise, knowledge, and familiarity with the duties and responsibilities of the job."[18] And although the Arbitrator noted that the supervisor "objected" to certain aspects of the grievant's performance, including untimeliness, the Arbitrator was "satisfied" that "the untimeliness issues were associated, largely, with poor communications" and with "inconsistent[] and unnecessary deadlines" that later were "slackened."[19] In addition, the Arbitrator found that the selecting official's testimony regarding "the [g]rievant's job performance and qualifications for the [SCT] position did not comport either with the [Agency's] . . . decision to assign the [g]rievant as mentor/trainer to lesser experienced employees, or with the [g]rievant's background, training, experience, and fully competent performance appraisals on prior, similar positions."[20] Further, the Arbitrator stated that "[i]f it is reasonable to assume that prior performance appraisals on similar jobs are valid criteria by which to predict future success where candidates are judged by the same standards, it is difficult to imagine the ineligible candidate with less experience – both in terms of [time in grade] as well as level of understanding of job duties, and practical experience on similar jobs – having been rated higher than the [g]rievant."[21] While finding it "apparent from the evidence that the [g]rievant was not a stellar employee in some areas,"[22] the Arbitrator found that "[t]hose deficiencies . . . did not blunt the force of the compelling evidence in support of the [g]rievant's claim."[23]

[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 6.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 7.
[12] *Id.*
[13] *Id.* at 7-8.
[14] *Id.* at 8.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 8-9.
[22] *Id.* at 9.
[23] *Id.*

And "[a]nother thing [that the] Arbitrator found[] somewhat[] bothersome was the [s]electing [o]fficial's admission that – after development of the [best-qualified list] – she entered into discussions with outside sources about the [g]rievant's qualifications."[24] The Arbitrator found that the parties' agreement prohibits such discussions.

The Arbitrator "took judicial not[ice] that the [Agency's] overall testimony was not sufficiently consistent either between its own witnesses, or between its witnesses and other credible evidence of record."[25] And, "[f]or that reason," the Arbitrator found that "the [Agency] lost substantial ground on credibility."[26]

As a remedy, the Arbitrator directed the Agency to retroactively promote the grievant and pay her backpay. The Arbitrator stated that, "[i]n fashioning this remedy, [he] was greatly influenced by the [Agency's] admission that it violated the procedural rule on which its right of selection rested; the weight and volume of evidence indicating [that] the [g]rievant would have been selected had the violation not occurred; the resultant harm to the [g]rievant; and the inconsistent and conflicting testimony between the [Agency's] witnesses and credible evidence of record."[27]

The Agency filed exceptions to the Arbitrator's award, and the Union filed an opposition to the Agency's exceptions.

## III. Preliminary Matters

### A. We deny the Union's motion to dismiss the Agency's exceptions.

In its opposition, the Union moves to dismiss the Agency's exceptions for "failure to follow the Authority's rules."[28] In this connection, the Union argues that: (1) the Agency sent a copy of its exceptions to the wrong Union address;[29] and (2) as a result, the Union did not have "adequate time . . . to respond to the exceptions."[30] In response, the Agency requested leave to file – and did file – a supplemental submission arguing that the Agency corrected its error and caused the Union no harm.[31]

Under § 2429.26 of the Authority's Regulations, the Authority "may in [its] discretion grant leave to file other documents as [it] deem[s] appropriate."[32] The Authority has granted such leave when the requesting party has not had a prior opportunity to respond to a claim,[33] such as a claim alleging that a party failed to serve exceptions on an opposing party.[34] Here, the Agency did not have a prior opportunity to respond to the Union's claim that the Agency's exceptions should be dismissed. Accordingly, we consider the Agency's supplemental submission.

In the supplemental submission, the Agency asserts that on October 10, 2012, it timely filed its exceptions with the Authority[35] and initially sent its exceptions to the Union by commercial delivery.[36] The Agency further asserts that it emailed its exceptions to the Union on October 12, when it realized that the initial attempt at service had failed.[37] The Union has not contradicted these claims, and has not asserted that email service was improper.[38] Based on the October 12 email service, the Union's opposition was due on November 13.[39]

A party filing timely exceptions with the Authority must serve a copy of its exceptions on the opposing party.[40] When an excepting party fails to serve a copy of its exceptions on the opposing party, and the opposing party moves to dismiss based on that failure, the Authority considers whether the failure harmed the opposing party.[41] Here, the Union argues that the Agency's failure to serve the Union with a copy of its exceptions resulted in the Union not having "adequate

[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 10.
[28] Opp'n at 4; *see also id.* at 2.
[29] *See id.* at 2-3.
[30] *Id.* at 4.
[31] Agency's Mot. for Leave Under 5 C.F.R. § 2429.26 to Submit Other Docs. Showing Service of Agency Exceptions on the Union at 1-3 (Agency's Motion).

[32] 5 C.F.R. § 2429.26.
[33] *See, e.g., Cong. Research Emps. Ass'n, IFPTE, Local 75*, 64 FLRA 486, 486 n.1 (2010).
[34] *See, e.g., U.S. Dep't of the Interior, U.S. Park Police*, 64 FLRA 763, 766 (2010).
[35] Agency's Motion at 2.
[36] *See id.*
[37] *See id.* at 3.
[38] *See* Opp'n at 2-4; *see also* 5 C.F.R. § 2429.27(b)(6) (a party may be served by email, but only when that party has agreed to be served by email).
[39] *See* 5 C.F.R. § 2429.21(a)(1) (when computing the due date for filing documents with the FLRA, first determine the triggering event that you are filing in response to); *id.* § 2429.21(a)(1)(iii) (first day of the filing period is the day after, not the day of, the triggering event); *id.* § 2425.3(b) (an opposition must be filed within thirty days after the date the exception is served on the opposing party); *id.* § 2429.21(a)(1)(v) (if the last day of the filing period falls on a Saturday, Sunday, or federal legal holiday, then the filing is due on the next day on the calendar that is not a Saturday, Sunday, or federal legal holiday).
[40] *See id.* § 2429.27.
[41] *See U.S. Dep't of Transp., FAA, Wash., D.C.*, 63 FLRA 492, 493 (2009) (*FAA*); *NAGE, Local R1-109*, 61 FLRA 593, 595 (2006).

time . . . to respond to the exceptions."[42] However, two days after the Agency's failed attempt at service, the Agency successfully served a copy of its exceptions on the Union, and the Union was able to file its opposition four days before it was due. This indicates that the Union was not harmed by the Agency's initial failure to serve the Union.[43] Accordingly, we deny the Union's motion.

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's essence exceptions and part of its management-rights exception.

The Agency bases its essence exception on Article 26, Section 14 of the parties' agreement. The Agency asserts that the Arbitrator's retroactive-promotion remedy fails to draw its essence from the parties' agreement because, according to the Agency, the "appropriate remedy for [nonselection] under Article 26[, Section 14] is priority consideration – not promotion."[44] In addition, as part of a claim that the Arbitrator's chosen remedy violates management rights (discussed further below), the Agency argues that the parties' only negotiated limitation on management rights is a priority-consideration remedy, and that the parties did not negotiate a retroactive-promotion remedy.[45]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any challenge to an awarded remedy that could have been, but was not, presented to the arbitrator.[46]

At arbitration, the Union requested that the grievant receive one of two alternative remedies: (1) retroactive promotion to the SCT position; or (2) priority consideration for that position.[47] In its post-hearing brief to the Arbitrator, the Agency argued at length as to why the grievant was not eligible for priority consideration.[48] But the Agency did not argue that Article 26, Section 14 precludes retroactive promotion.[49] Because the Union expressly requested a retroactive-promotion remedy before the Arbitrator, the Agency could have argued to the Arbitrator that awarding the remedy would violate Article 26, Section 14. Because the Agency did not do so, we dismiss the essence exception, and the related part of its management-rights exception, under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.

The dissent contends that the Arbitrator "awarded a remedy that is not provided for in the current agreement."[50] But the record does not support that contention. To begin, the Arbitrator did not set forth the wording of Article 26, Section 14 in the award,[51] which is not surprising since, as discussed above, there is no evidence that the Agency argued that Article 26, Section 14 limited the Arbitrator's remedial authority in any way. Moreover, the Agency does not include a copy of Article 26, Section 14 in its exceptions.[52] Nevertheless, the Agency purports to quote a part of Section 14 defining "[p]riority [c]onsideration"[53] as follows:

> For the purpose of this [a]rticle, a priority consideration is the genuine consideration for non-competitive selection given to an employee as the result of a previous failure to properly consider the employee for selection because of procedural, regulatory[,] or program violation. Employees will receive one priority consideration for each instance of improper consideration. A priority consideration does not give the employee a right or a guarantee to be selected for any vacancy.[54]

Assuming that the Agency has accurately quoted this provision, it does not provide a basis for setting aside the award (as the dissent would do). In this connection, the Union disputes the Agency's interpretation of the provision,[55] which, as noted above, was not addressed by the Arbitrator (because it was not raised to the Arbitrator). Moreover, the provision does not provide that priority consideration is the "only" remedy available here; it likewise does not unambiguously preclude an award of a retroactive promotion in the circumstances of

[42] Opp'n at 4.
[43] *Cf. FAA*, 63 FLRA at 493 (no prejudice apparent; party was able to file opposition early); *NAGE, Local R1-109*, 61 FLRA at 595 (defective service cured; no evidence opposing party harmed).
[44] Exceptions at 8; *see also id.* at 11-13.
[45] *Id.* at 13.
[46] 5 C.F.R. §§ 2425.4(c), 2429.5.
[47] Award at 6.
[48] Exceptions, Attach. D, Agency's Post-Hr'g Br. at 12.
[49] *See id.* at 12-13.
[50] Dissent at 17.
[51] *See* Award at 4 (setting forth only wording of Article 26, Sections 10.A., 10.B., and 10.E.).
[52] *See* Exceptions, Attach. C (portions of 2005 collective-bargaining agreement, not including Article 26, Section 14).
[53] Exceptions at 3.
[54] *Id.*
[55] Opp'n at 5 ("There is nothing in the [current] [a]greement that puts any limits on relief that can be granted in a grievance.").

this case.[56] In any event, the parties jointly chose the Arbitrator – not us – to interpret their agreement.[57] And the Authority has stated that "where it appears that [an] agreement and [an] award are inconsistent," and an arbitrator has not interpreted the relevant contract provision, the appropriate course of action is to remand because it "permits the arbitrator, who was the parties' choice to interpret and apply their agreement, to interpret in the first instance the provision that may be dispositive."[58] Consistent with these principles, even if the Agency's arguments were properly before us (which they are not), and even if the award appeared to be inconsistent with the agreement (which it does not), the appropriate course of action would be to remand to give the Arbitrator the opportunity to interpret Article 26, Section 14 – not to set aside the award.

## IV. Analysis and Conclusions

### A. The Agency has not demonstrated that the award is contrary to management's right to select a candidate under § 7106(a)(2)(C) of the Statute.

The Agency asserts that the award is contrary to law.[59] When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[60] 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.[61] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[62]

According to the Agency, the award conflicts with management's right to select a candidate under § 7106(a)(2)(C) of the Statute.[63] Although the Agency "concedes that [certain] *procedural* violations occurred,"[64] it claims that the Arbitrator erred in finding that, as a result of these violations, the Agency "forfeited its 'unfettered right'" to select.[65] In this regard, the Agency contends that the Arbitrator cited "no authority for his premise that a *procedural* violation of the [agreement] revokes the Agency's right to select candidates best qualified for a position, or, conversely, to refuse to select candidates not well[]suited for a position."[66] The Agency concedes that, under Authority precedent, the Authority will not find an arbitration award contrary to management rights "[a]bsent a claim that an award enforces a contract provision that was not negotiated under [§] 7106(b)."[67] In this regard, the Agency sets forth the Authority's existing test for determining whether arbitrators have enforced appropriate arrangements under § 7106(b)(3) of the Statute.[68] Further, the Agency notes that, in *AFGE, Local 2505* (*Local 2505*),[69] the Authority "affirmed [an] arbitrator's decision to issue no award to [a] grievant even though the [a]gency admittedly violated" the agreement at issue there.[70]

When a party alleges that an arbitrator's award is contrary to § 7106(a) of the Statute, the Authority first assesses whether the award affects the exercise of the asserted right.[71] If the award affects the right, then the Authority examines, as relevant here, whether the award provides a remedy for a contract provision negotiated under § 7106(b).[72] In conducting this examination, the Authority relies on the excepting party's claims to frame the issue that the Authority must decide. Under the Authority's case law, an award enforcing a contract provision will not be found deficient absent a claim that the contract provision was not negotiated under § 7106(b) of the Statute.[73] And, as the Authority stated in *FDIC, Division of Supervision & Consumer Protection, San Francisco Region* (*FDIC*),[74] an arbitrator should apply a provision negotiated under § 7106(b) "in a way reasonably related to the provision and the harm being remedied."[75]

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[56] *Cf. SSA, Woodlawn, Md.*, 54 FLRA 1570, 1574 n.3, 1579-80 (1998) (award of retroactive promotion did not fail to draw essence from contract provision that stated, in pertinent part, "Where the erroneous selection was allowed to stand, those employees who were not properly considered . . . because of the violation will receive priority consideration.").

[57] *U.S. DOL (OSHA)*, 34 FLRA 573, 576 (1990) ("The question of the interpretation of the collective[-]bargaining agreement is a question solely for the arbitrator because it is the arbitrator's construction of the agreement for which the parties have bargained.") (citations omitted).

[58] *AFGE, Council 220*, 54 FLRA 156, 160 (1998).

[59] Exceptions at 9.

[60] *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)).

[61] *E.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 770 (2006).

[62] *E.g., U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012) (*Marshals Serv.*).

[63] *See* Exceptions at 12-13.

[64] *Id.* at 8 (emphasis added).

[65] *Id.* at 11.

[66] *Id.* (emphasis added).

[67] *Id.* at 10.

[68] *Id.* at 12-13.

[69] 64 FLRA 689 (2010).

[70] Exceptions at 11.

[71] *U.S. EPA*, 65 FLRA 113, 115 (2010) (*EPA*) (Member Beck concurring).

[72] *Id.*

[73] *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 107 (2010) (Chairman Pope concurring).

[74] 65 FLRA 102.

[75] *Id.* at 107.

The Authority places the burden on the party arguing that the award is contrary to management rights to allege not only that the award affects a right under § 7106(a), but also that the agreement provision that the arbitrator has enforced is not the type of contract provision that falls within § 7106(b) of the Statute.[76] This practice is consistent with the plain wording of, and the policies underlying, the Statute. As an initial matter, it is well established that an arbitrator's award is not contrary to law merely because the award affects a management right under § 7106(a) of the Statute.[77] In this regard, under the plain wording of § 7106, the management rights set forth in § 7106(a) are expressly "[s]ubject to" the provisions set forth in § 7106(b) of the Statute.[78] Therefore, an arbitrator's award that enforces a contract provision that falls within one of the subsections of § 7106(b) cannot be contrary to law on management-rights grounds, even if the award affects a management right under § 7106(a)[79] (unless the remedy is not reasonably related to the contract provision or the harm being remedied,[80] as discussed below).

The Statute is silent regarding which party has the burden of alleging that an arbitrator has enforced a contract provision that falls within one of the subsections of § 7106(b). But, for two reasons, important policies underlying the Statute support placing this burden on the party that is arguing that the award is deficient.

First, Congress intended that the arbitration process be final, and that the Authority engage in only limited review of arbitration awards. In this connection, pertinent legislative history provides that "the Authority [is] authorized to review the award of the arbitrator on *very narrow grounds*."[81] As a result, the Authority has long held that Congress "provid[ed] that the scope of review of arbitration awards would be very narrow,"[82] and intended to promote the "primacy and finality" of the arbitration process "by *limited*, expeditious review by the Authority."[83] Of particular relevance in the context of management rights, the Authority has stated that

> the Statute's provision for final and binding arbitration and its purpose of facilitating the resolution of disputes . . . are best served by assuring that the decision of an arbitrator, selected by both parties to interpret and apply their collective[-]bargaining agreement, will not be overridden on management[-]rights grounds in order to relieve one party from the unwelcome result of that purposeful choice.[84]

These policies support placing the burden on excepting parties to allege that arbitrators' awards are deficient.

Second, Congress intended to foster contractual stability and repose. In this regard, courts and the Authority have held that the Statute embodies policies of "promoting collective bargaining and the negotiation of collective[-]bargaining agreements," and "enabling parties to rely on the agreements that they reach, once they have reached them."[85] Consistent with these policies, the Authority has stated that "Congress fully expected arbitrators to enforce the collective[-]bargaining agreements of [f]ederal[-]sector parties."[86] These policies support placing the burden on excepting parties to allege that, as interpreted and applied by arbitrators, their collective-bargaining agreements are unenforceable.

Consistent with the foregoing, we reaffirm that, in order to demonstrate that an arbitrator's award is deficient on management-rights grounds, an excepting party must, as a threshold matter, allege both that the award affects a management right under § 7106(a), and that the disputed contract provision – as interpreted and applied by the arbitrator – does not fall within one of the subsections of § 7106(b). And while this approach is perhaps not as old as England's Exchequer Court of Pleas, it certainly is not being adopted "abruptly" here,[87] as evidenced by the Authority's repeated application of it

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[76] *E.g.*, *U.S. DHS, U.S. CBP*, 66 FLRA 634, 638 (2012) (*CBP*) (without an allegation that the contract provision was not negotiated under § 7106(b), "management-rights exceptions fail as a matter of law").

[77] *See, e.g.*, *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Louisville Dist., Louisville, Ky.*, 66 FLRA 426, 428 (2012) (*Army Corps Louisville*).

[78] 5 U.S.C. § 7106(a).

[79] *See, e.g.*, *CBP*, 66 FLRA at 638.

[80] *FDIC*, 65 FLRA at 107.

[81] S. Rep. No. 95-1272, 95th Cong., 2d Sess. 153 (1978).

[82] *Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 315 (1990) (*Customs Serv.*).

[83] *U.S. Dep't of HUD*, 27 FLRA 852, 853 (1987) (emphasis added). *See also U.S. GPO, Wash., D.C.*, 59 FLRA 273, 275 (2003) (Chairman Cabaniss dissenting) (noting "Congress' preference for final and binding arbitration"); *AFGE, Local 507*, 58 FLRA 378, 380 (2003) (Chairman Cabaniss dissenting) (noting "Congress' intent that arbitration awards be final").

[84] *Customs Serv.*, 37 FLRA at 316.

[85] *EPA*, 65 FLRA at 118 (quoting *NTEU*, 64 FLRA 156, 158 (2009) (Member Beck dissenting)); *see also Dep't of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992) (holding that "[a] primary purpose of the Statute is to promote collective bargaining and the negotiation of collective[-]bargaining agreements," and that "[i]mplicit in this statutory purpose is the need to provide the parties to such an agreement with stability and repose with respect to matters reduced to writing in the agreement").

[86] *Customs Serv.*, 37 FLRA at 315.

[87] Dissent at 16.

in previous cases[88] and the Agency's express acknowledgment of its existence.[89]

As discussed above, the Agency sets forth the Authority's existing test for determining whether an arbitrator has enforced an "appropriate arrangement" within the meaning of § 7106(b)(3).[90] But § 7106(b)(3) is not the only exception to management rights under § 7106(a). There are also exceptions in § 7106(b)(1), and, as particularly relevant here, § 7106(b)(2). In the latter regard, § 7106(b)(2) of the Statute allows for the enforcement of "procedures which management officials of the agency will observe in exercising any authority under" § 7106.[91] Here, the Arbitrator repeatedly found that the contract provisions he enforced were "procedural,"[92] which we interpret as findings that the provisions are procedures within the meaning of § 7106(b)(2) of the Statute. Indeed, the Agency itself repeatedly characterizes those provisions as "procedural."[93] Yet the Agency does not allege that those provisions, as interpreted and enforced by the Arbitrator, are not "procedures" within the meaning of § 7106(b)(2).[94] Because the Agency does not allege that the provisions are not procedures within the meaning of § 7106(b)(2), the Agency's attempt to demonstrate that the provisions are unenforceable on management-rights grounds fails.

The dissent argues that we place the Agency in a "proverbial catch-22" situation because we uphold the award based on the Arbitrator's enforcement of a procedural provision that is contained only in an expired agreement.[95] In so doing, the dissent repeats an Agency argument. But that is all it is: an *argument*. And the argument lacks evidentiary support. In this connection, as the Union notes,[96] the Agency has not provided us with what it contends is the current, applicable contractual wording.[97] Unlike the dissent, we are unwilling to treat an unsupported argument (by an agency or a union) as proving a fact. Moreover, the Agency's complaint about alleged reliance on an expired agreement is confined to one arbitral finding – that the selecting official improperly discussed the grievant's qualifications with the grievant's supervisor.[98] But the Arbitrator found that several other Agency violations occurred during the selection process, and the Agency expressly "concedes that procedural violations occurred" including: (1) the selections were not made from properly ranked and certified candidates, and (2) the Agency did not ensure that all applicants met minimum qualifications.[99] Thus, the Agency's unsupported claim, on which the dissent so heavily relies, provides no basis for finding the award deficient.

To the extent that the Agency is separately claiming that the Arbitrator's chosen *remedy* is contrary to management's right to select, we find the Agency's claim unpersuasive. In *FDIC*,[100] and as mentioned previously, the Authority held that "if an agency agrees to include in its collective[-]bargaining agreement a provision negotiated under § 7106(b), and that provision is applied by an arbitrator in a way reasonably related to the provision and the harm being remedied, a subsequent challenge to such an award is likely to be rejected by the Authority."[101]

Here, the Arbitrator found that the Agency violated Article 26, Sections 10.A., 10.B., and 10.E., and that, but for the violations of those procedural provisions, the grievant would have been promoted.[102] Given this finding, and that the award, the provisions, and the harm the grievant suffered all involve promotion issues, we find that the Arbitrator's remedy of retroactive promotion is reasonably related to the violated contract provisions and the harm being remedied. Thus, consistent with *FDIC*, we find that the Arbitrator's remedy is not deficient on management-rights grounds.[103]

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[88] *See U.S. Dep't of Transp., FAA, Miami, Fla.*, 66 FLRA 876, 878 (2012); *CBP*, 66 FLRA at 638; *Army Corps Louisville*, 66 FLRA at 428; *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 242 (2011).
[89] Exceptions at 10.
[90] *Id.* at 12-13.
[91] 5 U.S.C. § 7106(b)(2).
[92] Award at 7, 8, 10.
[93] Exceptions at 8, 9, 10, 11, 12, 13.
[94] 5 U.S.C. § 7106(b)(2).
[95] Dissent at 19.
[96] Opp'n at 6.
[97] *See* Exceptions, Attach. C (portions of 2005 collective-bargaining agreement, not including Article 26, Section 10.A., 10.B., or 10.E.).
[98] *See* Exceptions at 4-10.
[99] *Id.* at 10-11.
[100] 65 FLRA 102.
[101] *Id.* at 107.
[102] Award at 8, 10.
[103] *Cf. U.S. Dep't of the Army, Army Tank-Automotive Command*, 67 FLRA 14, 16-17 (2012) (*Army Tank*) (finding that a remedy was not contrary to management rights without analyzing whether the remedy was reasonably related to the contract provision violated and the harm being remedied). To the extent that *Army Tank* implies that the "reasonably related" standard is not an appropriate standard to apply to resolve management-rights challenges to an arbitral remedy, it will no longer be followed.

For the reasons set forth in her concurring opinion in *FDIC*, *see* 65 FLRA at 112, Chairman Pope fully agrees with how the "reasonable relation" standard is applied in this case, and she would apply that standard in all cases where an arbitral remedy is challenged on management-rights grounds. In addition, Chairman Pope notes that, in *Army Tank*, she agreed with the pertinent analysis solely to avoid an impasse in the resolution of the case. *See* 67 FLRA at 17 n.4.

In making this finding, we note the Agency's claim that it has the right "to refuse to select candidates not well[]suited for a position,"[104] as well as the dissent's characterization of the grievant's qualifications as "subpar."[105] To the extent that the Agency and the dissent are challenging the Arbitrator's express finding that the grievant was qualified for the position[106] and that, but for the violations of the negotiated procedures, the Agency would have selected the grievant for the position,[107] there is no basis for adopting the Agency's and the dissent's position here. In this regard, the Agency has not filed nonfact exceptions to these arbitral findings, and, as discussed previously, in applying de novo review to an arbitrator's legal conclusions, the Authority defers to an arbitrator's factual findings, unless the excepting party demonstrates that those findings are nonfacts.[108] Thus, as the Agency has not excepted to these arbitral findings on nonfact grounds, we defer to those findings, and the Agency's claim provides no basis for finding the award deficient. Moreover, we note that, to support his statements regarding the grievant's qualifications, the dissent cites only unsupported Agency arguments and discredited witness testimony, not any findings in the Arbitrator's award.[109] By so doing, the dissent ignores that the parties have jointly chosen the Arbitrator, not the Authority, to find facts.[110]

And as for the Agency's reliance on *Local 2505*,[111] in the arbitration award on review in that case, the arbitrator found that the agency violated the agreement at issue there, but did not direct a remedy.[112] In response to the union's essence exception, the Authority found no contract provision that required the arbitrator to award remedies.[113] *Local 2505* is not relevant to this case. Therefore, the Agency's reliance on *Local 2505* provides no basis for finding the award deficient.

B. The Agency's remaining exceptions do not demonstrate that the award is deficient.

The Agency claims that one of the Arbitrator's findings – that the selecting official violated the parties' agreement by asking the grievant's supervisor and others about the grievant's qualifications – is based on a nonfact and fails to draw its essence from the parties' agreement.[114] As set forth above, the Arbitrator based his award on findings of two contractual violations: (1) the "procedural" violation that occurred when the Agency considered and promoted an ineligible employee;[115] and (2) the violation that occurred when the selecting official asked the grievant's supervisor and others about the grievant's qualifications.[116] These distinct violations are separate and independent grounds for the award.[117] But the Agency's nonfact and essence exceptions address only the second, and not the first, ground. Under Authority precedent, when an arbitrator bases his or her award on separate and independent grounds, an excepting party must establish that all of the grounds are deficient in order to demonstrate that the award is deficient.[118] Because the nonfact and essence exceptions address only the second ground, and the Agency has not otherwise demonstrated that the first ground is deficient, the first ground provides a sufficient basis for the award, and the exceptions do not demonstrate that the award is deficient.

## V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[104] Exceptions at 9.
[105] Dissent at 17 (citation omitted).
[106] Award at 8-9.
[107] *Id.* at 8, 10.
[108] *E.g.*, *Marshals Serv.*, 67 FLRA at 22.
[109] Dissent at 15.
[110] *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (quoting, with approval, the U.S. Supreme Court's holding in *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 45 (1987), that "[t]he parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them").
[111] 64 FLRA 689.
[112] *Id.* at 689-90.
[113] *Id.* at 690-91.
[114] Exceptions at 4, 7-9.
[115] Award at 7.
[116] *Id.* at 9.
[117] *See AFGE, Local 3428*, 66 FLRA 156, 158 (2011) (arbitrator's additional rationales constituted separate and independent grounds for award).
[118] *E.g.*, *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000).

**Member Pizzella, dissenting:**

In 1842, Judge Baron Rolfe, of the Exchequer Court of Pleas in England, wisely opined that:

> This is one of those unfortunate cases in which . . . it is, no doubt, *a hardship upon the plaintiff to be without a remedy*, but *by that consideration we ought not to be influenced*. Hard cases, it has been frequently observed, are apt to introduce *bad law*.[1]

In 1904, Oliver Wendell Holmes, Jr. similarly cautioned jurists against making "bad law" by focusing on the "accident of immediate overwhelming interest which appeals to the *feelings* and distorts the *judgment*."[2]

This case is riddled with *bad facts*. An "ineligible" candidate[3] was placed "inadvertent[ly]" on a selection register and ultimately selected along with two other candidates; [4] the grievant (a "subpar" candidate with a spotty performance record but who still met the technical requirements of the vacancy announcement)[5] was not selected; and the Arbitrator found that the Agency committed a "procedural violation"[6] of an "obsolete" provision from an expired collective-bargaining agreement and awarded the grievant a retroactive promotion[7] (a remedy not permitted by the agreement in effect at the time these selections were made).[8]

For the reasons discussed below, I would conclude that the Arbitrator's award is contrary to law and does not draw its essence from the applicable agreement – the collective-bargaining agreement that the parties executed in 2005 (2005 agreement).

This case necessarily questions the manner in which the Authority addresses exceptions that challenge the remedial authority of arbitrators. In 2010, the Authority established a new "[a]pproach [t]o [b]e [f]ollowed [w]ith [r]espect [t]o [t]he [r]emedial [a]uthority [o]f [a]rbitrators"[9] and in so doing abandoned the previously applied "reconstruction requirement."[10] (The "reconstruction requirement" was part of a "framework" that had been adopted by the Authority in *U.S. Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.* (*BEP*)[11] and then was followed for thirteen years.)

In changing the manner in which the Authority from then on would "analyz[e] arbitrators' awards claimed to impermissibly affect management rights set forth in 5 U.S.C. § 7106(a),"[12] the Authority emphasized that, even though arbitrators enjoy "broad discretion" to fashion remedies for contractual violations that "affect[] management rights under § 7106(a),"[13] their authority is not without limits and is "subject to any *specific limitations* set forth in the *pertinent* contract" and by the remedies included in "a *properly negotiated* contract provision."[14] As almost an afterthought, the Authority noted that the "management rights set forth in § 7106(a) are 'subject to' provisions bargained under § 7106(b), and that 'nothing in' § 7106 shall preclude the parties from negotiating such provisions."[15]

With today's decision, however, my colleagues effectively jettison the flexibility that they embraced in *FDIC, Division of Supervision & Consumer Protection, San Francisco Region* (*FDIC*)[16] and *U.S. EPA* (*EPA*)[17] and abruptly transmute that inherent flexibility into a new, rigid two-step framework. Now, in order to argue that an arbitral award is contrary to § 7106(a), an agency must first "allege *not only* that the award affects a right under § 7106(a), *but also* that the agreement that the arbitrator has enforced is not the type of contract provision that falls *within § 7106(b) of the Statute*,"[18] and must do so in every case, no matter how inconsistent or illegal is the arbitrator's award or where, as here, the arbitrator fails to apply provisions from a "pertinent" agreement[19] and awards a remedy that is not even provided for in that agreement. As discussed below, my colleagues cannot agree on how exactly a party must demonstrate whether an award is contrary to law or the parties' agreement.

That is simply *bad law*, and it is not consistent with the rationale that was articulated by my colleagues just four years ago in *FDIC* and *EPA*. I was not a

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[1] *Winterbottom v. Wright*, 20 Meeson & Welsby 109, 116 (Court of Exchequer (England) 1842) (Opinion of Rolfe, B.) (emphases added).
[2] *Ne. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., concurring) (emphases added).
[3] The candidate was "ineligible" because she failed to meet the fifty-two week time-in-grade requirement. Award at 4.
[4] *Id.* at 6.
[5] *Id*.
[6] *Id*. at 8.
[7] Exceptions at 4,7,8.
[8] *Id.* at 8.
[9] *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106 (2010) (*FDIC*) (Chairman Pope concurring).
[10] *Id*.
[11] 53 FLRA 146 (1997).
[12] *FDIC*, 65 FLRA at 104.
[13] *Id*. at 106.
[14] *Id*. (emphases added).
[15] *Id*. (quoting 5 U.S.C. § 7106(b)).
[16] 65 FLRA 102.
[17] 65 FLRA 113 (2010) (Member Beck concurring).
[18] Majority at 9 (emphases added) (citation omitted).
[19] *See FDIC*, 65 FLRA at 106.

Member of the Authority when my colleagues adopted this new approach, but the majority then instructed that it was "*not* intend[ing] to *establish a new* two-pronged analytical framework that *will be recited in every case* involving an award alleged to violate management rights."[20] In fact, my colleagues held, quite simply, that when an agency "establishes that an award imposes a constraint on management rights that was not agreed to by the parties . . . the award will be set aside."[21] The Authority explained further that "*if* the award affects [a management] right, *then*, under the applicable legal framework, *the Authority examines*, as relevant here, whether the award provides a remedy for a contract provision negotiated under § 7106(b)."[22] In two later cases, *U.S. Department of the Treasury, IRS, Wage & Investment Division* (*IRS*) [23] and *U.S. Department of HHS., Substance Abuse & Mental Health Services Administration*,[24] the Authority found that an agency may "concede[]" that a provision was "properly negotiated" under § 7106(b), and, in his concurring opinion in *EPA*, Member Beck noted that the agency had "*concede[d]*" that the provision enforced by the arbitrator was a "permissible limitation" on the agency's § 7106(a) rights by "*agreeing to include* in its [agreement] a provision that affects" those rights.[25]

But there simply is no mention in any of these cases that an agency must *first* allege that the provision "is not the type of contract provision that falls within § 7106(b) of the Statute,"[26] before it may argue that an award constrains a management right. To the contrary, *FDIC* and *EPA* only require a party to "*contend*[] that [the] award is contrary to a management right under § 7106(a) of the Statute."[27] Then, according to *EPA*, the Authority "assesses whether the award affects the exercise of the asserted [management right]"[28] and "examines . . . whether the award provides a remedy for a contract provision negotiated under § 7106(b) of the Statute."[29]

In fact, my colleagues have been unable to agree (for four years) exactly how the Authority should determine whether an arbitrator's remedy is contrary to law or the parties' agreement. In *FDIC*, the majority held that an award will be invalidated only if it "imposes a constraint on management rights that was not agreed to by the parties, whether on essence grounds or otherwise."[30] Chairman Pope disagreed with that approach and noted, in her concurring opinion, that the new approach "creates [a] confusion that will promote litigation."[31] Later, in a two-Member decision, my colleagues again could not agree whether the Authority should continue with the framework adopted in *FDIC* or adopt the analysis preferred by Chairman Pope – "whether the [a]rbitrator's remedy has a '*reasonable relation*' to the violated contract provisions" – but decided to apply *FDIC* in order "to resolve th[at] case without delay."[32] And now, today, my colleagues still do not agree.[33]

Consequently, I do not agree that an agency is required, in all circumstances, to "allege" that a contract provision applied by an arbitrator "is not the type of contract provision that falls within § 7106(b) of the Statute" [34] in order to argue that an award is contrary to law or fails to draw its essence from the parties' agreement. Such a prerequisite, as noted above, is not established by our precedent and is simply not flexible enough to accommodate all of the contexts in which an Agency may be forced to argue that an arbitral award is contrary to law, especially where, as here, the Arbitrator applied provisions from an expired contract and awarded a remedy that was not permitted under the current agreement.

In this case, a vacancy announcement to fill multiple vacancies was announced in July 2009;[35] applications were received, and a list of qualified candidates[36] was established (that included the ineligible employee) from which the selecting official made three selections.[37] The selecting official did not select the grievant,[38] whom she described as "subpar"[39] and "would not have selected [the g]rievant even if [the ineligible employee] had been properly excluded from consideration."[40]

The Arbitrator found that the Agency violated two contractual provisions. One when it improperly

[20] *Id.* at 107 (emphases added).
[21] *Id*; *see also id.* at 115 n.6.
[22] *EPA*, 65 FLRA at 115 (emphases added).
[23] 66 FLRA 235, 242 (2011).
[24] 65 FLRA 568, 571 (2011).
[25] *EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck) (emphasis added).
[26] Majority at 9.
[27] *EPA*, 65 FLRA at 115 (citing *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 5 (2007) (emphasis added).
[28] *Id*.
[29] *Id*. (citing *FDIC*, 65 FLRA at 104-05; *Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 313-14 (1990).
[30] *FDIC*, 65 FLRA at 107
[31] *Id*. at 112 n.8 (Concurring Opinion of Chairman Pope) (emphasis added).
[32] *U.S. Dep't of the Army, Army Tank-Automotive Command*, 67 FLRA 14, 17 n.4 (2012) (emphasis added).
[33] *See* Majority at 12 n.103.
[34] *Id.* at 9 (erroneously citing *U.S. DHS, U.S. CBP*, 66 FLRA 634, 638 (2012)).
[35] Exceptions, Attach. D (Agency's Closing Br.) at 2.
[36] Award at 7.
[37] Agency's Closing Br. at 3.
[38] Award at 3; *see also* Agency's Closing Br. at 3-4.
[39] Award at 6.
[40] Agency's Closing Brief at 8 (quoting Tr. at 142).

compiled a list of qualified candidates,[41] and a second when the selecting official discussed the grievant's qualifications and past work history with the grievant's prior supervisors[42] (a finding that, as discussed below, relies entirely on an obsolete provision from an expired agreement). In other words, the Arbitrator found that the Agency violated a provision that had not existed for over four years and ordered a remedy – retroactive promotion – that is not permitted by the parties' current agreement.[43]

The majority attempts to thoroughly obfuscate these facts by asserting that "the record does not support" the Agency's claim that the Arbitrator relied on an expired contract provision.[44] But my colleagues are simply wrong on that presumption. There has never been any dispute, at any time in these proceedings, concerning the wording of Article 26, Section 14. The entire 2005 agreement, *including Article 26*, was introduced into the record by both the Union and the Agency as a *joint* exhibit;[45] the Agency quoted from that provision in its closing brief to the Arbitrator;[46] and the Agency cited to the provision in its exceptions.[47] Therefore, the Union effectively concedes that the Agency's recitation of that provision is accurate because it never disputed the Agency's wording at any stage of these proceedings.[48] The Agency also introduced the expired 2000 agreement into the record and advised the Arbitrator that the Union's request for retroactive promotion was founded on the expired 2000 agreement.[49]

In any event, as I noted in *U.S. Department of the Air Force, Space and Missile Systems Center, Los Angeles Air Force Base, El Segundo, California*[50] and *AFGE, Local 2198*,[51] I do not believe that the Authority should go out of its way to catch parties in technical trapfalls and summarily dismiss otherwise meritorious arguments.[52] To do so, most certainly does not "utilize the Statute to create positive working relationships and resolve good-faith disputes" or to promote "the effective conduct of government business."[53] The United States Circuit Court of Appeals for the District of Columbia Circuit apparently shares the same sentiment. In a recent decision, the Court criticized the Authority for arguing that the union had "waived" an argument simply because the union failed to use the right combination of words in the exceptions it had previously filed with the Authority.[54] The Court noted that "a party is not required to invoke 'magic words' in order to adequately raise an argument before the Authority. Instead, an argument is preserved if the party has *fairly brought* the argument 'to the Authority's attention.'"[55]

Under these circumstances, the Agency is trapped in a proverbial catch-22. On the one hand, the Agency cannot argue that an expired provision (no contact with grievant's supervisors) "is not the type of contract provision that falls within § 7106(b) of the Statute,"[56] because that provision was part of the expired 2000 agreement; but, on the other hand, neither can it argue that the provision *is* the type of contract provision negotiated under § 7106(b) because it never was included in the 2005 agreement.

In *FDIC*, the Authority determined that an arbitrator's remedial authority is limited by provisions that are "properly negotiated" and "set forth in a pertinent contract."[57] It seems obvious to me that provisions from an expired contract – that were not included in the current agreement – are neither "properly negotiated"[58] nor

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[41] Award at 7.
[42] *Id.* at 9.
[43] Exceptions at 8; Agency's Closing Br. at 13.
[44] Majority at 7.
[45] Award at 2. Despite arguing for the application of provisions from the expired 2000 agreement, the Union introduced only provisions from the 2005 agreement. *See* Opp'n, Attach. 3.
[46] Agency's Closing Br. at 13
[47] Exceptions at 3.
[48] *See* Opp'n; Opp'n, Attach. 2; *see also NTEU, Chapter 160*, 67 FLRA 482, 485 (2014) (the wording of a provision is effectively conceded when a party "does not dispute" asserted wording).
[49] Agency's Closing Br. at 13.
[50] 67 FLRA 566, 573 (2014) (Dissenting Opinion of Member Pizzella).
[51] 67 FLRA 498, 500 (2014) (Concurring Opinion of Member Pizzella).
[52] *See AFGE, Local 1897*, 67 FLRA 239, 240 (2014) (Member Pizzella concurring) (*Local 1897*) (Authority finding that union's exception that asserts "using the '*Douglas* [f]actors as guidance . . . the Agency's five[-]day suspension of [the grievant] is excessive" does not state a contrary to law claim; *AFGE, Local 1738*, 65 FLRA 975, 977 (2011) (Member Beck concurring) (Authority finding that union's exception that asserts an award is "contrary to the plain language of the negotiated agreement" does not establish an essence exception); *AFGE, Local 3955, Council of Prison Local 33*, 65 FLRA 887, 889 (2011) (Member Beck concurring) (Authority finding that union's exception that asserts arbitrator erred by "relying on article 32 of the parties' agreement" and "citing [*AFGE, Fed. Prison*] *Council 33*, 51 FLRA 1112, in support of his award" does not establish an essence or contrary to law exception).
[53] *U.S. DHS, CBP*, 67 FLRA 107, 113 (2013) (Concurring Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1)(B)).
[54] *NTEU v. FLRA*, 754 F.3d 1031, 1039 (D.C. Cir. 2014).
[55] *Id.* (emphasis added) (quoting *U.S. Dep't of Commerce v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993)).
[56] Majority at 9.
[57] *FDIC*, 65 FLRA at 106 (arbitrator's remedial authority is "*subject to* any specific limitations set forth in the *pertinent* contract and to the requirement that an award provide a remedy for a *properly negotiated* contract provision" (emphases added)).
[58] *Id.*; *see also EPA*, 65 FLRA at 115.

"pertinent."[59] To the extent the Arbitrator relied on expired provisions, that are not included in the 2005 agreement, and awarded a remedy that is not provided for in the 2005 agreement, his award is deficient and contrary to law.

Even if I were to presume, as do my colleagues, that our precedent establishes a prerequisite (to assert that a contract provision "is not the type . . . that falls within § 7106(b)),"[60] I do not agree that the Agency failed to do so in this case. In its exceptions, the Agency specifically acknowledges that "the Authority examines whether the award provides a remedy for a violation of . . . a contract provision that was negotiated *under [§] 7106(b)*"[61] and then asserts that Article 26 (in the 2005 agreement) did not "forfeit[ ] the Agency's [§ 7106(a)] right to choose the best-suited candidates"[62] or its § 7106(a) right to select. If the current Article 26 did not "forfeit" [63] the Agency's § 7106(a) rights then it is equally apparent that the provisions were not negotiated under § 7106(b)(1), (b)(2), or (b)(3).

*IRS*, *HHS*, *EPA*, and *FDIC* do not require the Agency to do any more. And, as noted above, even my colleagues do not agree exactly how a party will demonstrate when an award is contrary to law or the parties' agreement. I would suggest that the majority must first establish a clear and coherent standard (that the parties can understand), before they may conclude that the Agency did not properly "allege . . . that the provision that the arbitrator has enforced is not the type of contract provision that falls within § 7106(b)."[64]

I am concerned with the viability of the entire *FDIC* and *EPA* framework, but I remain particularly concerned to the extent the framework embraces an "abrogation" standard.[65] After the recent decision of the U.S. Court of Appeals for the D.C. Circuit in *U.S. Department of the Treasury, IRS, Office of the Chief Counsel, Washington, D.C. v. FLRA*,[66] it is imperative that the Authority "bring this matter to repose for the labor-management relations community."[67] But that question is not before us and must wait for another day.

Thank you.

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[59] *FDIC*, 65 FLRA at 106.
[60] Majority at 9.
[61] Exceptions at 10 (emphasis added) (internal citations omitted).
[62] *Id*.
[63] *Id*.
[64] *Id*. at 9.
[65] *See EPA*, 65 FLRA at 116-119.
[66] 739 F.3d 13 (D.C. Cir. 2014).
[67] *AFGE, Local* 1164, 67 FLRA 316, 321 (2014) (Concurring Opinion of Member Pizzella).