68 FLRA No. 32

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
U.S. BORDER PATROL, YUMA SECTOR
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 2595
(Union)

0-AR-4987

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DECISION

January 14, 2015

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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 William W. Petrie found that the Agency's process for selecting employees for temporary assignments (details) violated the parties' collective-bargaining agreement. As remedies, the Arbitrator directed the Agency to "cease and desist" using the detail-selection process that violated the agreement (existing selection process), and to bargain with the Union over a replacement process that would "fully comply" with the agreement (replacement selection process).[1] There are three substantive questions before us.

The first question is whether the Arbitrator exceeded his authority by finding that the Agency violated two sections of the parties' agreement that were not at issue before him. Apart from finding violations of those two sections, the Arbitrator also made separate and independent findings that the Agency violated other sections of the agreement that were undisputedly before him. Because those separate and independent findings support the Arbitrator's conclusion that the Agency violated the parties' agreement, the Arbitrator's reliance on two other sections of the agreement does not provide a basis for finding that he exceeded his authority.

The second question is whether the Arbitrator exceeded his authority by fashioning remedies based on contractual provisions not raised in the grievance, and without regard for a certain article of the parties' agreement. As arbitrators have broad discretion to formulate remedies, and the Agency does not establish that the parties' agreement limits the Arbitrator's discretion in this case, the answer to the second question is no.

The third question is whether the award violates management's right to assign employees under § 7106(a)(2)(A) of the Federal Service Labor-Management Relations Statute (the Statute). Because the Arbitrator enforced a contract provision negotiated under § 7106(b)(2) of the Statute, and as the Agency has provided no basis for finding that the awarded relief is not reasonably related to the harm being remedied, the answer to the third question is also no.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the existing selection process violated the parties' agreement by discouraging professional self-development and encouraging personal favoritism. As relevant here, the grievance relied on: (1) Article 15, Section B of the parties' agreement (§ 15(B)), which pertinently states that "each employee is responsible for . . . self-development and training[, and e]mployees are encouraged to take advantage of training and educational opportunities";[2] and (2) Article 15, Section C of the agreement (§ 15(C)), which pertinently states that the "nomination of employees to participate in training and career development . . . will be free of personal favoritism."[3] The grievance went to arbitration.

At arbitration, the "parties agreed that the [Arbitrator] . . . had the authority to frame the issues,"[4] and he framed them to include the following questions: "[D]id the [Agency] violate the collective[-]bargaining agreement as alleged in the underlying grievance? . . . If so, what is the appropriate remedy?"[5] In reviewing the parties' positions on those issues, the Arbitrator noted the Agency's contention that the agreement does not contain "a single procedure [that] would limit management's right to assign employees to details."[6] But the Arbitrator

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[1] Award at 29.

[2] *Id.* at 4 (quoting § 15(B)).

[3] *Id.* (quoting § 15(C)).

[4] *Id.* at 2.

[5] *Id.*

[6] *Id.* at 9 (outlining Agency's position); *see also* Exceptions, Attach., Tab 2, Agency's Closing Br. at 2 (arguing that

rejected that contention and determined that, under the agreement, the Agency could not "devise[] and rel[y] upon" the existing selection process to encourage professional development and prevent personal favoritism without first "bargain[ing] relative thereto with the Union."[7] And because the Agency had not offered the Union an opportunity to bargain over certain aspects of the existing selection process, the Arbitrator found that the Agency violated not only §§ 15(B) and 15(C), but also "Article 15, Sections A . . . and I" of the agreement (§§ 15(A) and 15(I)),[8] discussed further below. Consequently, the Arbitrator sustained the grievance.

As to the appropriate remedies, the Arbitrator noted the Union's request that he direct the Agency to cease and desist using the existing selection process and to bargain over a replacement selection process that "furthers the agreement of the parties" in Article 15.[9] The Arbitrator found that one of Article 15's purposes, as stated in § 15(A), was to ensure that the parties "seek the maximum training and development of all employees" through "procedures established for employee-management cooperation."[10] And the Arbitrator found that one such cooperative procedure appears in § 15(I), which "encourages the Union to submit recommendations" on "employee training needs and programs."[11] In those respects, the Arbitrator determined that §§ 15(A) and 15(I) support the "participation of both parties in replac[ing]" the existing selection process.[12] The Arbitrator directed the Agency to "cease and desist" using the existing selection process and to "enter into negotiations with the Union to develop, agree upon[,] and implement a replacement [selection process] sufficient to fully comply with . . . Article 15."[13]

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

III. Preliminary Matter: The Union has established extraordinary circumstances under § 2429.23(b) of the Authority's Regulations to waive the deadline for filing its opposition.

After the Authority's Office of Case Intake and Publication (CIP) received a copy of the Union's opposition by mail, CIP sent the Union an order to show cause why the opposition should not be dismissed as untimely filed (order). With its response to the order (Union's response), the Union provided a sworn declaration from a paralegal working for the Union's counsel in this case. The declaration explains that, after 5 p.m. on the last day for timely filing, the paralegal attempted to use the Authority's eFiling system to submit the Union's opposition. Under § 2429.24(a) of the Authority's Regulations, a document may be eFiled "no later than midnight" – and, thus, after 5 p.m. – on its due date.[14] The paralegal's declaration further explains that she experienced several eFiling-related technical difficulties, which are undisputed and set out below.

When the paralegal logged into the eFiling system online, she noticed that the fields for "Filing Party Information" were blank, and there were no available boxes in which to enter that information.[15] After unsuccessfully searching for fields in which to enter the filing-party information, the paralegal completed all of the other information fields and attempted to upload the Union's opposition brief. But the eFiling system informed her that she could not upload any documents without completing the "Filing Party Information."[16] Trying to fix that problem, the paralegal clicked a checkbox on the eFiling webpage to indicate that she was "ready to file."[17] But clicking that checkbox generated a message that the opposition "ha[d] been filed and [could]not be edited,"[18] as well as an online time stamp reflecting the "[d]ate [f]iled . . . [as of] 8:27" p.m. that day.[19] The message also stated that the paralegal could call CIP between 9 a.m. and 5 p.m. if she needed to make any corrections or changes to the opposition filing.

Within the Authority's business hours the next day, the paralegal called CIP to explain her difficulties with the eFiling system. During the call, the paralegal explained that she had taken the precaution of mailing a copy of the Union's opposition that morning using the U.S. Postal Service. The Authority later received that mailing, which bears a postmark one day after the filing deadline for the opposition and includes printouts of the eFiling screens as they appeared when the paralegal attempted to upload the Union's opposition brief. Consistent with the paralegal's declaration, the eFiling-screen printouts show that there were not any open fields in which to enter the requested filing-party information, and the eFiling system generated an online

"procedures regarding the selection of agents [for] details were never negotiated").

[7] Award at 27; *see also id.* at 28.

[8] *Id.* at 28.

[9] *Id.* at 9.

[10] *Id.* at 29 (quoting § 15(A)) (emphases omitted).

[11] *Id.* (quoting § 15(I)) (emphases omitted).

[12] *Id.*

[13] *Id.* (emphases omitted).

[14] 5 C.F.R. § 2429.24(a); *see also id.* § 2429.21(b)(1)(v) ("The date of filing is the calendar day . . . on which the document is transmitted in the eFiling system.").

[15] Union's Resp., Attach. 3, Decl. in Support at 1.

[16] *Id.* at 2.

[17] *Id.*

[18] Union's Resp., Attach. 1, eFiling Printouts at 1.

[19] *Id.* at 11.

time stamp for the opposition several hours before the midnight eFiling deadline.[20]

As relevant here, under § 2429.23(b) of the Authority's Regulations, the Authority, "as appropriate, may waive an[] expired time limit . . . in extraordinary circumstances."[21] The Authority has found extraordinary circumstances where, for example, a party correctly addressed and timely mailed its filing, but the U.S. Postal Service erroneously delivered that filing to another agency, rather than to the Authority.[22] In explaining the decision to waive the expired time limit there, the Authority noted that the "untimely re-filing was due to circumstances beyond [the party's] control" and that the party promptly re-filed after discovering the mailing error.[23] Here, the Union has documented the eFiling impediments that it experienced – all of which appear to have been beyond its control – and the Union mailed a copy of its opposition just one day after encountering those impediments. Consistent with the precedent mentioned above,[24] we find that the Union has demonstrated extraordinary circumstances, under § 2429.23(b), that warrant waiving the expired deadline for filing its opposition. As such, we waive the expired deadline and consider the Union's opposition.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority in three respects. As relevant here, an arbitrator exceeds his or her authority by resolving an issue not submitted to arbitration or disregarding specific limitations on his or her authority.[25] But when an arbitrator bases an award on separate and independent grounds, an excepting party must establish that all of those grounds are deficient in order to demonstrate that the award is deficient.[26] If the excepting party fails to allege and demonstrate that one of the separate and independent grounds for the award is deficient, then it is unnecessary to address exceptions to the other separate and independent grounds.[27]

The Agency's first exceeded-authority argument is that the Arbitrator decided two issues that were not before him – specifically, whether the Agency violated §§ 15(A) and 15(I).[28] But even assuming that the parties did not present arguments regarding those contractual provisions at arbitration, the Arbitrator additionally found that the Agency violated §§ 15(B) and 15(C).[29] Although the dissent contends that the Arbitrator did not find violations of all four of these sections,[30] the plain wording of the award shows otherwise: "[T]he [Agency] violated various sections of the [parties' agreement] . . . , most notably Article 15, Sections *A, B, C, and I*."[31] Thus, the Agency's and the dissent's claims that the Arbitrator found violations of only §§ 15(A) and 15(I) are inaccurate.

Further, the Agency concedes "that the Union specifically alleged violations of [§§ 15(B) and 15(C)] in the Step II and III written grievances, at hearing, and in the Union's . . . brief,"[32] which put those sections of the agreement before the Arbitrator. And the Agency does not except to the Arbitrator's findings that it violated §§ 15(B) and 15(C), which are sufficient by themselves to support the Arbitrator's determination that the Agency violated the agreement. The dissent argues that the Agency has contested the Arbitrator's findings regarding §§ 15(B) and 15(C),[33] but the dissent cannot identify any wording in the exceptions that contests those violations, as distinct from the violations of §§ 15(A) and 15(I). Consequently, as the Agency has failed to argue that the Arbitrator's separate and independent bases for finding that the Agency violated the agreement – specifically, that the Agency violated §§ 15(B) and 15(C) – are deficient,[34] the Agency's first exceeded-authority argument provides no basis for finding the award deficient.

The Agency's second exceeded-authority argument is that the Arbitrator erred by "fashion[ing a] remedy based solely on" contractual provisions that were not at issue – in particular, §§ 15(A) and 15(I).[35] Arbitrators have broad discretion in fashioning remedies,[36] and nothing in the Arbitrator's formulation of

[20] *See* 5 C.F.R. § 2429.24(a).
[21] *Id.* § 2429.23(b).
[22] *U.S. Dep't of HHS, Nat'l Insts. of Health*, 64 FLRA 266, 268 n.7 (2009).
[23] *Id.*
[24] *See id.*; *cf. AFGE, Local 1770*, 64 FLRA 953, 955 (2010) ("Postal Service's failed delivery" is an extraordinary circumstance).
[25] *U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995).
[26] *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000) (*Oxon Hill*).
[27] *See id.*
[28] Exceptions Form at 11; Exceptions Br. at 4.
[29] *See* Award at 28.
[30] Dissent at 14-15.
[31] Award at 28 (emphasis added).
[32] Exceptions Br. at 14; *see* Award at 4 (quoting §§ 15(B), 15(C)).
[33] Dissent at 14.
[34] *See Oxon Hill*, 56 FLRA at 299; *see also U.S. DOD, R.I. Nat'l Guard, Cranston, R.I.*, 57 FLRA 594, 597-98 (2001) (relying on separate and independent grounds for award to deny exceeded-authority exception).
[35] Exceptions Br. at 4, 13.
[36] *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 861 (2012) (*BOP*) (citing *U.S. DOJ, U.S. Fed.*

the issues restricted the remedies that he could direct for violations of the agreement.[37] In that regard, and as mentioned above, the Arbitrator found that the Agency violated §§ 15(B) and 15(C),[38] both of which were undisputedly before him, and those unchallenged findings fully support the award. Consequently, whether the Arbitrator relied on §§ 15(A) and 15(I) when fashioning remedies is immaterial.[39] In addition, although the Agency asserts that it had no opportunity to argue against the Arbitrator's chosen remedies, that assertion is without merit because the Arbitrator awarded the very remedies that the Union requested at arbitration.[40] In short, the Agency has not identified a limitation on the Arbitrator's authority that precluded him from relying on any sections of the parties' agreement when fashioning remedies, so the Arbitrator did not exceed his authority in this respect.[41]

The Agency's third exceeded-authority argument is that the remedial direction to bargain does not comply with Article 3A of the parties' agreement, which, according to the Agency, requires that the parties follow certain procedures to accomplish any mid-term bargaining. In Article 3A, the "parties recognize that . . . during the life of the agreement, the need will arise requiring . . . change[s]" to existing policies, practices, and other working conditions, so the parties negotiated a framework for "[i]mpact [b]argaining at [the n]ational, [r]egional, and [s]ector [l]evel."[42] But Article 3A does not limit, and the Agency has not identified another provision of the agreement that limits, the Arbitrator's remedial authority here.[43] Thus, to the extent that the Agency is alleging that the Arbitrator exceeded a specific contractual limit on his remedial authority, the Agency has not demonstrated that the Arbitrator did so.

We note that the dissent's contrary exceeded-authority analysis involves a de novo reinterpretation of Article 15 of the parties' agreement, based on what the dissent characterizes as the Agency's "obvious essence exception."[44] But the dissent fails to explain how such an exception can be "obvious" when the exceptions form that the Agency filed asks, "Are you alleging that the award fails to draw its essence from the parties' . . . agreement?," and the Agency responded "No."[45] Further, the Agency does not argue in its exceptions brief that the award fails to draw its essence from the agreement. In the dissent's zeal to play the role of the Agency's advocate, it has found an "obvious" exception[46] even when the Agency has expressly stated that it is not making that exception. We also disagree with the dissent's attempt to resolve the exceptions based on facts that were not found by the Arbitrator[47] and, in some cases, that are not even in the record before us.[48] In that regard, the Authority defers to an arbitrator's factual findings because the parties bargained for the facts found by an arbitrator chosen by them[49] – not the facts found by the dissent.

B. The award does not violate management's right to assign employees.

The Agency argues that, in three respects, the award violates management's right to assign employees under § 7106(a)(2)(A) of the Statute. When an agency files management-rights exceptions to an award enforcing a contract provision, the agency must allege not only that

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BOP, U.S. Penitentiary, Lewisburg, Pa., 39 FLRA 1288, 1301 (1991)).

[37] Award at 2 ("[D]id the [Agency] violate the . . . agreement . . . ? . . . If so, what is the appropriate remedy?"); *see BOP*, 66 FLRA at 861 ("[N]othing in the . . . issue [statement] restricted the remedy that the [a]rbitrator could order if he found the [a]gency violated the agreement.").

[38] *See* Award at 28.

[39] *Cf. U.S. Dep't of Transp., FAA, Wash., D.C.*, 65 FLRA 950, 954 (2011) (arbitrators may direct remedies "never mentioned or discussed by the parties").

[40] *See* Award at 9 (Union requested that Arbitrator direct Agency to stop using the existing selection process and bargain with the Union over a replacement process consistent with the agreement); Exceptions, Attach., Tab 3, Arbitration-Hr'g Tr. at 11.

[41] *Cf., e.g.*, *BOP*, 66 FLRA at 861 (denying exceeded-authority exception to arbitrator's direction that parties bargain over the issue that gave rise to the grievance); *U.S. EPA, N.Y.C., N.Y.*, 64 FLRA 227, 230 (2009) (same); *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div.*, 60 FLRA 530, 532 (2004) (denying exceeded-authority exception to arbitrator's direction that agency cease and desist using assignment-distribution procedure that violated parties' agreement).

[42] Exceptions Br., Attach., Joint Ex. 1, Collective-Bargaining Agreement at 8 (Art. 3A).

[43] *See U.S. Dep't of VA, Montgomery Reg'l Office, Montgomery, Ala.*, 65 FLRA 487, 490 (2011) (rejecting argument that arbitrator "contravened contractual limits on his remedial authority," where excepting party failed to identify contractual provision establishing a limit).

[44] Dissent at 15.

[45] Exceptions Form at 10.

[46] Dissent at 15.

[47] *E.g.*, *id.* at 12-13 & nn.25-26 (citing Joint Exs. 3, 5) (making a factual finding that the Agency's method for evaluating candidates for details is one that it "had used . . . , quite successfully, for several years").

[48] *E.g.*, *id.* at 11 & n.9 (citing http://www.kpho.com/).

[49] *See, e.g.*, *U.S. DOL*, 62 FLRA 153, 156 (2007); *NATCA*, 60 FLRA 398, 400 (2004); *AFGE, Local 2612*, 55 FLRA 483, 486 (1999); *cf. United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them . . . , it is the *arbitrator's view* of the facts and of the meaning of the contract that they have agreed to accept." (emphasis added)).

the award affects specific management rights,[50] but also that the relevant contract provision is not enforceable under § 7106(b).[51] Where it is undisputed that an award affects the asserted management right, the Authority assumes such an effect and,[52] as relevant here, examines whether the award enforces a contract provision negotiated under § 7106(b).[53]

As pertinent to this dispute, management's right to assign employees under § 7106(a)(2)(A) includes the rights to: (1) assign employees to details;[54] (2) determine the qualifications and skills needed to perform the work of the detailed positions or assignments;[55] and (3) determine whether individual employees meet those qualifications.[56] The Union does not dispute the Agency's claim that the award affects management's right to assign employees, so we assume that the award does so.[57]

The Agency's first management-rights argument is that the award does not enforce a contractual provision negotiated under § 7106(b) of the Statute. In this regard, as noted by the Union,[58] the Arbitrator enforced the Agency's § 15(C) commitment to employee development and training opportunities free of personal favoritism.[59] Specifically, the Arbitrator found that § 15(C) requires detail-selection procedures that are free of favoritism. Viewed in light of this finding, § 15(C) is comparable to other provisions found to constitute procedures under § 7106(b)(2) of the Statute. In particular, the Authority has held that "[o]nce management has determined that employees are qualified for an assignment, . . . the procedure by which one of the qualified employees will be selected is negotiable under [§]7106(b)(2) of the Statute."[60] Moreover, a contractual commitment that any selection technique will be "uniformly applied in a fair and objective manner to all" qualified candidates is enforceable as a procedure under § 7106(b)(2) of the Statute.[61] Consistent with this precedent, § 15(C) is likewise enforceable under § 7106(b)(2), and, accordingly, we reject the Agency's argument that the award does not enforce a provision negotiated under § 7106(b).

The Agency's second management-rights argument is that the Arbitrator's cease-and-desist remedy unlawfully precludes the Agency from determining detail-selection criteria, assessing candidates' qualifications, and ultimately selecting detailees. But the Union states that the award does not affect the Agency's rights in those ways because, according to the Union, the award "does *not* require the Agency to change [its] selection criteria . . . [and] does *not* require the Agency to select any particular candidate" for details.[62] Rather, the Union contends that the award requires the Agency to bargain over "procedures" for evaluating candidates for details "free of personal favoritism," as Article 15 requires.[63] When an opposing party agrees to interpret an award so as to avoid a deficiency alleged by an excepting party, the Authority has recognized the agreed-to interpretation of the award as binding, and has dismissed, as moot, any objections to the award based on a different interpretation.[64] In accordance with this practice, we interpret the award to be consistent with the Union's contentions that the Agency is required to bargain over only procedures for evaluating candidates – and not the qualifications or selection criteria themselves – and we find that the Agency's contrary arguments are, therefore, moot.[65] Further, in light of this agreed-to interpretation of the award, the dissent's argument that the award "circumvents the

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[50] *E.g.*, *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 602 (2014) (*Region VI*); *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 241 (2011) (*IRS*) (denying exception that alleged effects on management's rights under § 7106(a) without identifying any particular right).

[51] *See, e.g.*, *Region VI*, 67 FLRA at 603 & n.88 (citing *U.S. DHS, U.S. CBP*, 66 FLRA 634, 638 (2012) (without an allegation that contract provisions were not negotiated under § 7106(b), "management-rights exceptions fail as a matter of law"); *IRS*, 66 FLRA at 242 (failure to allege that arbitrator enforced provisions that were not negotiated under § 7106(b) implicitly conceded that provisions were enforceable under § 7106(b))).

[52] *IRS*, 66 FLRA at 242 (citing *SSA*, 65 FLRA 339, 341 (2010) (*SSA*)).

[53] *E.g.*, *U.S. Dep't of Transp., FAA*, 60 FLRA 159, 163 (2004).

[54] *E.g.*, *U.S. Dep't of the Navy, Phila. Naval Shipyard, Phila., Pa.*, 51 FLRA 1777, 1782 (1996) (citing *AFGE, AFL-CIO*, 2 FLRA 604, 612-13 (1980)).

[55] *Id.* (citing *AFGE, Local 3295*, 47 FLRA 884, 907 (1993) (*Local 3295*)).

[56] *Id.* (citing *Local 3295*, 47 FLRA at 907).

[57] *IRS*, 66 FLRA at 242 (citing *SSA*, 65 FLRA at 341) (assuming effect on asserted management rights when reviewing exceptions).

[58] Opp'n at 3, 4.

[59] *See* Award at 21, 28.

[60] *AFGE, Local 1923*, 41 FLRA 618, 624 (1991) (*Local 1923*) (citing *NFFE, Local 2096*, 36 FLRA 834, 850 (1990)); *see also U.S. DOD, Def. Logistics Agency, Def. Distrib. Ctr., Def. Distrib. Depot, Red River, Texarkana, Tex.*, 56 FLRA 637, 642 (2000) (denying exception to arbitral enforcement of § 7106(b)(2) procedure for assigning temporary promotions among qualified employees).

[61] *NTEU*, 45 FLRA 696, 705, 708-10 (1992) (*NTEU*); *see also NAGE, Local R14-52*, 44 FLRA 738, 740-42 (1992) (finding procedure for "equitable distribution" of assignments among qualified employees negotiable under § 7106(b)(2)).

[62] Opp'n at 4.

[63] *Id.* (internal quotation marks omitted).

[64] *See, e.g.*, *U.S. Dep't of VA, VA Long Beach Healthcare Sys., Long Beach, Cal.*, 63 FLRA 332, 334 (2009) (*VA*); *U.S. Food & Drug Admin., Detroit Dist.*, 59 FLRA 679, 683 (2004); *U.S. DOJ, INS, Jacksonville, Fla.*, 36 FLRA 928, 932 (1990).

[65] *See VA*, 63 FLRA at 334.

[Agency's] right to determine . . . qualifications . . . for . . . details" is wholly unfounded.[66]

The Agency's third management-rights argument is that the remedies awarded are not "reasonably related to the negotiated provisions at issue and the harm being remedied."[67] In *FDIC, Division of Supervision & Consumer Protection, San Francisco Region* (*FDIC*), 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."[68]

Here, the Agency's argument that the arbitral remedies are not "reasonably related to the negotiated provisions at issue and the harm being remedied"[69] is based entirely on its earlier-mentioned claim that there are no § 7106(b) provisions "regarding the assignment of . . . details"[70] in the parties' agreement, and that, consequently, the Arbitrator could not have enforced a § 7106(b) provision. According to the Agency, absent any pertinent § 7106(b) provisions for the Arbitrator to enforce, the awarded remedies cannot possibly be reasonably related to a provision negotiated under § 7106(b) or to the harm from violating such a provision. But consistent with our finding above that § 7106(b)(2) authorized the Arbitrator's enforcement of § 15(C), and considering that the Agency has not asserted any other basis for finding the awarded remedies deficient under *FDIC*, we reject the Agency's argument that the remedies are contrary to management's rights.[71]

V. Decision

We deny the Agency's exceptions.

[66] Dissent at 13.
[67] Exceptions Br. at 5, 15-16 (citing *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102 (2010) (Chairman Pope concurring)).
[68] 65 FLRA at 107.
[69] Exceptions Br. at 5, 15-16.
[70] *Id.* at 5 ("The [a]rbitration [a]ward . . . is not reasonably related to negotiated [§ 7106(b)] provisions[] because none exist regarding the assignment of . . . details.").
[71] *See Region VI*, 67 FLRA at 603 & n.103.

Member Pizzella, dissenting:

The Arbitrator's award in this case is just the type of "circular" and "incoherent" award of which I cautioned in *U.S. DHS, CBP*.[1] The Union, AFGE, Local 2595, grieved the non-selection of the grievant, who scored dead last on the qualifications assessment used to measure the suitability of the applicants, for two details. Arbitrator William Petrie decided that the Agency, the Border Patrol, violated two sections of the parties' agreement. But wait, those sections were not even addressed by Local 2595 in its grievance or in its arguments at arbitration. Arbitrator Petrie then awarded a remedy that bears no relation whatsoever to the non-selection of the grievant or the sections grieved by Local 2595.

Because the majority "endors[es]"[2] this incoherent award, I dissent.

Jose Medina (Medina), a border-patrol agent, applied, along with five other agents, for two temporary details in the Smuggling Interdiction Group (SIG) that is located in the Border Patrol's Yuma, Arizona sector.

The SIG unit "perform[s] interdiction activities involving drug and alien smuggling."[3] SIG agents engage in "intelligence" activities[4] and require "specialized training in air and/or water surveillance, weapons, and covert and overt surveillance."[5] SIG agents must also have a demonstrated ability to "develop informants, cultivate human intelligence, and perform surveillance on targets."[6] And, unlike a typical border unit, which focuses on "rounding up illegal immigrants" and returning them to the border,[7] "nearly every person arrested for unlawful entry [by the SIG is] charged with a crime, convicted, and imprisoned."[8]

The Yuma sector is known as an exceedingly dangerous assignment and has been described as the "hot spot for border bandits."[9] It is also the sector to which

[1] 67 FLRA 107, 113 (2013) (Concurring Opinion of Member Pizzella) (internal quotation marks omitted).
[2] *Id.*
[3] Exceptions at 7 (citing Tr. 167-68).
[4] *Id.*, Ex. 2, Agency's Closing Brief (Agency's Closing Br.) at 7.
[5] www.borderpatrol.edu.org/california/san-diego (last visited Oct. 29, 2014).
[6] Exceptions at 7 (citing Tr. 167-68).
[7] Dennis Wagner, Arizona Border: Security Differs in Yuma and Tucson Regions, The Arizona Republic (May 18, 2011), http://www.azcentral.com/news/articles/2011/05/18/20110518arizona-border-security-yuma-tucson-sector.html (last visited Nov. 20, 2014).
[8] *Id.*
[9] Morgan Loew, Sources: Hunt for Bandits Led to Fatal Shooting, World Now (Feb. 7, 2011),

Agent Brian Terry was assigned, and then murdered, in 2010.[10] Therefore, when the sector experienced a dramatic increase in violence against immigrants, smugglers,[11] and agents, its staffing was "doubled" in size.[12]

Against this backdrop, the Border Patrol set out to fill two details to the SIG unit. Obviously, details to the SIG unit are not ordinary details, and the Border Patrol exercised great care in identifying eight specialized skills that a SIG detailee would require to perform successfully.[13] Six agents applied for the two details[14] and each applicant was assessed, against these qualifications, by their supervisors.[15] After the supervisory assessments were recorded and compared, the Border Patrol determined that only four of the applicants met the minimum qualifications. Medina was not one of those four. In fact, Medina tied for dead last on the overall assessment[16] (a fact that is ignored entirely by the Arbitrator). The two agents who received the top scores were found to be "the best qualified" and selected for the details.[17]

Until today, that would have been the end of this case because the Authority has consistently held that the determination of qualifications for a position is a right that belongs solely to management.[18]

The fact that the Border Patrol would select the two agents who received the top assessment scores[19] would not come as a surprise to any independent observer. But, Medina, who tied for last on the assessments, decided that the process was not fair. Never mind that not one of the other unsuccessful applicants shared that view, even though all of them scored significantly higher than Medina and one scored just one-half point lower than the second-place selectee.[20] Yet, Local 2595 filed a grievance on his behalf anyway.[21] (I find it odd that Local 2595 would challenge the selection of the "best-qualified" agents because they are also members of the bargaining unit, just as was Medina. As the exclusive representative, Local 2595 has an obligation to "represent[] the interests of *all employees in the unit*."[22] But that is a matter for those applicants to address directly with AFGE, Local 2595).

The Federal Service Labor-Management Relations Statute (the Statute)[23] does not permit a union to grieve an agency's assessment of applicant qualifications or otherwise interfere with the selection process.[24] Undeterred by this statutory roadblock, Derek Hernandez, president of Local 2595 tried his best to fit Medina's grievance into the confines of the parties' agreement and the Statute. Sometime *after the selections were already made*, Hernandez jumped in and asserted that the Border Patrol had never negotiated the use of the "matrix" that the Border Patrol had used to record the supervisory assessments and compare the assessed ratings,[25] quite successfully, for several years.[26]

If Hernandez had done a minimal amount of research, he would have discovered that supervisory assessments are used throughout the federal government and are recommended by the Office of Personnel Management as an *objective* means (thereby removing *subjective* considerations from the selection process) to evaluate whether any individual applicant possesses the skills that an agency has determined are necessary to perform successfully in any position.[27]

Here, all six candidates were "assessed by two supervisors within their chain of command" against the "qualifications" that had been established by the Border Patrol and the two, who were considered to be the best qualified, were selected.[28] There is simply no way around it, Arbitrator Petrie's award circumvents the Border Patrol's right to determine what qualifications were required for the SIG details and also which applicants were best qualified to fill the details.[29]

Therefore, Arbitrator Petrie's award is contrary to law.

I would also conclude that Arbitrator Petrie exceeded his authority when he addressed and based his

www.kpho.com/story/14814651/sources-hunt-for-bandits-led-to-fatal-shooting-2-07-2011 (last visited Nov. 20, 2014).
[10] *Id.*
[11] *Id.*
[12] Yuma Sector Arizona, www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/yuma-sector-arizona (last visited Nov. 20, 2014).
[13] Exceptions at 7 (citing Tr. 207-08).
[14] Award at 1.
[15] Exceptions at 7-8 (citing Tr. 125-26, 164-65).
[16] *Id.*
[17] Exceptions at 8 (citing Tr. 172-73).
[18] 5 U.S.C. § 7106(a)(2)(C); *U.S. Dep't of the Navy, Phila. Naval Shipyard, Phila., Pa.,* 51 FLRA 1777, 1782 (1996) (citing *AFGE, Local 3295*, 47 FLRA 884 (1993) (aff'd 46 F.3d 73 (D.C. Cir. 1995)).
[19] Exceptions at 8 (citing Tr. 172-73).
[20] Exceptions, Attach., Joint Ex. 3.
[21] Exceptions, Attach., Joint Exs. 2, 4.
[22] 5 U.S.C. § 7114(a)(1) (emphasis added).
[23] *Id.* §§ 7101-7135.
[24] *Id.* § 7106(a)(2)(C).
[25] Joint Ex. 3.
[26] Joint Ex. 5.
[27] *Recruiting & Staffing Solutions, Assessment Questionnaires, Assessment Questionnaire Development*, www.opm.gov/services-for-agencies/recruiting-staffing-solutions/assessment-questionaires (last visited Nov. 21, 2014).
[28] Exceptions at 7 (citing Tr. 148-49).
[29] 5 U.S.C. § 7106(a)(2)(C).

award on §§ 15(A) and 15(I), sections that were not even mentioned by Local 2595 in its grievance or in its arguments during the arbitration and its closing brief to the Arbitrator.[30]

Even if I were to presume, as does the majority, that Arbitrator Petrie could consider §§ 15(A) and 15(I), those provisions have no bearing whatsoever on the process by which the Agency established the qualifications for the SIG details or made its selections for those details. Section 15(A) makes a generic statement that the "matter [of *training and development* is] of primary importance to the parties" but does not require the Border Patrol to do, or to refrain from doing, anything.[31] Section 15(I) states that "*the Union* [may] submit recommendations . . . concerning employee *training* needs and programs"[32] and, thereby, imposes a responsibility on Local 2595, not the Border Patrol.

The Arbitrator, therefore, exceeded his authority when he determined that the Agency violated §§ 15(A) and 15(I).

Arbitrator Petrie mentions §§ 15(B) and 15(C) *once* in a *thirty-page decision* and, then, only in a string citation to other provisions of the parties' agreement, but never provides a clue, nor explains, *how the Agency supposedly violated* those sections. He does not discuss them in any respect whatsoever. But how could he? Local 2595 based its grievance on those provisions, but § 15(B) imposes a "responsib[ility]"[33] on "*employees*"[34] "[to] apply[] reasonable effort, time and initiative . . . to take advantage of training and educational opportunities"[35] and § 15(C) requires Local 2595 *and* the Border Patrol to work together on "the *nomination* of employees to participate in *training* and career[-]development *programs* and *courses* . . . based on [Border Patrol] needs . . . free of personal favoritism"[36] This case has nothing to do with nominations for training, courses, or a career development *program.* Sections 15(B) and 15(C) do not address in any manner the right of the Border Patrol to determine what qualifications were required for the SIG details and which applicants were best qualified to fill those details. To the contrary, those provisions concern training and career-development.

For some reason, however, the majority is willing to go out of its way in a futile attempt to salvage this deficient award.

First, my colleagues accept the Arbitrator's faulty reliance on §§ 15(A) and 15(I) and then call it a "separate and independent ground"[37] even though Local 2595 never mentioned those provisions in its *grievance*, at the *hearing*, or in its *closing brief.* But, to the extent Arbitrator Petrie found violations of §§ 15(A) and 15(I), he exceeded his authority, and his findings do not establish a "separate and independent" basis for his deficient award.[38]

Second, the majority mistakenly asserts that the Border Patrol "does not except" to the Arbitrator's non-existent finding that the Border Patrol violated §§ 15(B) and 15(C).[39] As noted above, the Arbitrator never explained how the Border Patrol supposedly violated §§ 15(B) and 15(C). Nonetheless, the Border Patrol specifically challenged the award in the only manner that it could (since a party cannot be expected to challenge a non-existent finding) − Arbitrator Petrie "exceeded his authority by raising and relying on [§§ 15(A) and 15(I),]" which concern "[d]evelopment and [t]raining[,]"[40] *rather than finding a violation* of "the [s]ections of the CBA alleged by [Local 2595] ([as relevant here]. . . . [§] *15.B* [and] [§] *15.C . . .*)."[41]

The majority is wrong when it asserts that it is "*immaterial*" "whether the Arbitrator relied on §§ 15(A) and 15(I)."[42] It seems to me that this point is exceedingly material to the outcome of this case because the Arbitrator *found no violations* of the provisions that *were* grieved − §§ 15(B) and 15(C) – but then found violations of §§ 15(A) and 15(I), provisions that *were not* grieved.

Unlike the majority, I would address the Border Patrol's obvious essence exception and conclude that the award fails to draw its essence from the parties' agreement.[43] Whereas my colleagues correctly note that

[30] Grievant's Post-Hr'g Br. at 14; Joint Ex. 5 at 1.
[31] Award at 4.
[32] *Id.* at 5 (emphases added).
[33] *Id*. at 4.
[34] *Id*.
[35] *Id*.
[36] *Id*.

[37] Majority at 5.
[38] *U.S. Dep't of VA, Boston Healthcare System, Boston, Mass*., 68 FLRA 116, 119 (2014) ("[a]rbitrators exceed their authority when they . . . resolve an issue not submitted to arbitration [or] disregard specific limitations on their authority"); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R.I.*, 64 FLRA 1136, 1140 (2010) (Dissenting Opinion of Member Beck) ("[a]rbitrator exceeded his authority when he failed to apply the relevant CBA provisions . . .") (citing *U.S. Dep't of VA., Med. Ctr., Richmond, Va.*, 63 FLRA 553, 557 (2009) (arbitrator exceeds authority when he fails to resolve an issue by not interpreting and applying relevant CBA provisions)).
[39] Majority at 5.
[40] Exceptions at 12-13.
[41] *Id.* at 15.
[42] Majority at 6 (emphasis added).
[43] *U.S. Dep't of the Air Force, Space & Missile Systems Ctr, L.A. Air Force Base, El Segundo, Cal.*, 67 FLRA 566, 572-73 (Dissenting Opinion of Member Pizzella) (quoting *NTEU v.*

(in an answer to *one (1) question* on page ten (10) of a *fifteen (15)-page* form that asks no less than fifty-three such questions) the Border Patrol answered "no" to a question that asks, "[a]re you alleging that the award fails to draw its essence from the parties' . . . agreement[,]"[44] I must presume that this was a mistake because, in its substantive seventeen-page brief, the Border Patrol clearly argues that the award "must be set aside because it *fails to adhere to [Article 15]*"[45] which addresses "[d]evelopment and [t]raining" and "does not . . . limit[] . . . the assignment of agents to details."[46] (And that, I would point out, provides far more detail than the Arbitrator's supposed finding of a violation of §§ 15(B) and 15(C).)

I am once again "perplexed" why "my colleagues are so eager to fill in the gaping holes left by a *professional arbitrator*"[47] and read a deficient award "as a whole" and "in context"[48] in order to "find a contractual violation '*implicitly*' when no contract violation was found by the arbitrator."[49] On the other hand, the majority will demand that a party use "precise language," and to frame its exceptions perfectly, in order for the majority to even consider the merits of its arguments.

Unlike the majority, I am willing to give the Border Patrol the benefit of the doubt (to the same degree that the majority is willing to give the Arbitrator the benefit of the doubt) because of the obtuse and contradictory nature of the Arbitrator's award.

Therefore, to the extent Arbitrator Petrie ordered the Border Patrol to stop using the matrix system, and to negotiate an alternative system with Local 2595, his award is not a plausible interpretation of Article 15.[50]

Ultimately, this case is about the Border Patrol's right to determine the qualifications and skills necessary to perform the details in SIG and to determine which of the applicants were most qualified for those details. The Border Patrol determined that Medina was *not qualified* and selected the two applicants who were *most qualified*. Those determinations are rights reserved to the Border Patrol. Article 15 does not take those rights away.

Thank you.

FLRA 754 F.3d 1031 (2014) ("'a party is not required to invoke 'magic words' in order to adequately raise an argument before the Authority.'")); *see also AFGE, Local 1897*, 67 FLRA 239, 243 (Concurring Opinion of Member Pizzella).

[44] Majority at 7 (citing Exceptions Form at 10).

[45] Exceptions at 5 (emphasis added).

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

[47] *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot Red River, Texarkana, Tex*., 67 FLRA 609, 617 (2014) (Dissenting Opinion of Member Pizzella).

[48] *Id.* at 611.

[49] *Id.* at 617 (emphasis added).

[50] *Id*.