

63 FLRA No. 143

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL ASSOCIATION
OF AGRICULTURE EMPLOYEES
(Union)

0-AR-4093

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DECISION

June 30, 2009

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Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This case is before the Authority on exceptions to an award of Arbitrator Gregg L. McCurdy filed by Customs and Border Protection (CBP) under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to CBP's exceptions.

The Arbitrator found that a grievance challenging the grievant's three-day suspension for sleeping on duty was procedurally arbitrable. On the merits, the Arbitrator sustained the grievance.

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

II. Background and Arbitrator's Award

The grievant was employed as a Plant Protection and Quarantine (PPQ) Inspector at the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA), where she was involved in clearing incoming ships in the port of Seattle, Washington. The USDA/APHIS/PPQ unit was transferred to the Department of Homeland Security (DHS), CBP unit on March 9, 2003.

On December 16, 2003, the grievant's regular supervisor issued her a letter of counseling concerning her attitude, work practices, failure to carry her CBP cell phone during duty hours, and following instructions. On January 13, 2004, the Area Port Director issued the

grievant an official letter of reprimand for failing: to report for training, to complete vessel inspection forms, and to carry the CBP cell phone during duty hours. The cell phone issue included incidents covered by the December 16, 2003 counseling letter. The reprimand was issued according to the USDA's Guide for Disciplinary Penalties (USDA Guide), category 4a, a copy of which was placed in the grievant's Official Personnel File (OPF).¹

On February 8, 2004,² the grievant was verbally warned by another supervisor for sleeping on duty during an overtime shift. Later, a ship serviced by the grievant submitted a complaint concerning her behavior. On March 20, while on a voluntary overtime shift, the grievant was found asleep again. On March 30, the shift supervisor issued a letter of warning to the grievant for sleeping on duty. On April 9, the Area Port Director issued the grievant a notice of proposed suspension for five days for "sleeping on duty" on March 20. The notice also noted the verbal warning for sleeping on duty on February 8, the January 13 letter of reprimand, and the complaint received from the ship about the grievant.

On May 18, the grievant responded to the notice of proposed suspension claiming medical reasons for falling asleep and "double jeopardy." Award at 7. The double jeopardy "was premised on the assertion that [the] March 30th letter of warning was intended to correct the 'employee's mistake' and that the proposed suspension was one corrective measure on top of another for the same misconduct." *Id.* On May 25, the Director of Field Operations, CBP suspended the grievant for three rather than the proposed five days. The grievant served the three day suspension.

On June 22, the grievant filed a grievance pursuant to Article X of the parties' collective bargaining agreement (CBA).³ On June 30, while the grievance was pending, the grievant submitted her resignation and effectively resigned on July 7. Her last working day was July 6.

1. The letter of reprimand stated that it would be considered prior discipline if there were any additional misconduct during the eighteen month period during which the reprimand could remain in the grievant's OPF. It also stated that additional misconduct could result in more severe action, including suspension.

2. Hereafter, the date refers to the year 2004, unless indicated.

3. The text of the relevant contract provisions are set forth in the Appendix to this decision.

CBP denied the grievance on grounds that the grievance procedure is reserved for employees and as grievant had resigned she had “relinquished [her] rights to pursue issues under that procedure.” *Id.* at 8. The grievance was not resolved and was submitted to arbitration. The Arbitrator stated the three stipulated issues as follows:

- I. Whether this matter is arbitrable in light of the grievant’s voluntary resignation after initiation of the grievance process, but prior to completion of that process and invocation of arbitration?
- II. Whether the three-day suspension grievant received for sleeping on duty constitutes a prohibited double penalty and thus an improper personnel action under the Back Pay Act?
- III. If so, what is the proper remedy?

Id. at 2.

Addressing the arbitrability issue, the Arbitrator found that under Article X, Sections 2 and 3, the grievant “is not precluded from filing or pursuing a grievance by . . . the . . . definition of ‘employee’ because she satisfies all of [the] requirements” of the provisions. *Id.* at 17. The Arbitrator found that *Hess v. IRS*, 892 F.2d 1019 (Fed. Cir. 1989) (*Hess*), supported the position that a former employee could file a grievance for conduct that occurred while the employee was on duty and a member of a bargaining unit. The Arbitrator rejected the Agency’s contention that *Nellis Air Force Base v. AFGE, Local 1199*, FMCS Case No. 89-12161 (Arbitrator Ansell) (Westlaw: 190 WL 1107067) (*Nellis*), supported its position. The Arbitrator thus concluded that a “former employee . . . does not lose standing to prosecute a grievance filed before leaving active employment.” *Id.* at 18.

Turning to the merits, to resolve the issue of whether the three-day suspension constituted a prohibited double penalty, the Arbitrator stated that it was necessary to first determine “whether a letter of warning constitutes ‘discipline.’” *Id.* at 22. The Arbitrator found that the CBA did not address this question. The Arbitrator examined Authority and Merit Systems Protection Board (MSPB) decisions. The Arbitrator determined that a Federal employee “may appeal serious disciplinary action [such as a suspension for more than fourteen (14) days] through either the MSPB or the negotiated grievance process, but not both (unless a claim of discrimination has been made).” *Id.* at 20. The Arbitrator then found that as the grievant was suspended for three days, Authority precedent “must control . . .” *Id.* at 21. Further, citing *Railroad Ret. Bd., Chi., Ill.*, 61 FLRA

320 (2005) (*RRB*); and *United States Gen. Serv. Admin., Northeast and Caribbean Region*, 60 FLRA 864 (2005) (*GSA*), the Arbitrator stated that the Authority “views a letter of warning to be a form of lower level discipline in at least some cases.” *Id.* at 27.

The Arbitrator then considered Agency regulations. The Arbitrator found that the merger of the USDA/APHIS/PPQ into DHS/CBP raised issues of which agency personnel policies and practices applied. The Arbitrator found that the parties agreed that the USDA’s Disciplinary Guide (the Guide) applied to the dispute, but disagreed on whether Chapter 751, Appendix A of the 1994 Guide or USDA Personnel Bulletin No. 751-3 (Bulletin 751-3) applied. The Arbitrator found that Bulletin 751-3 “superseded” Chapter 751, Appendix A, and “specifically encourages the use of alternative discipline, which could include a letter of warning.” *Id.* at 29. The Arbitrator also found that USDA Internal Procedure (IP) 408.1, which requires that letters of reprimand, caution, warning and/or admonishment be filed on the left side of the employee’s OPF and be retained for not more than three years, was in effect at the time of the grievant’s suspension. The Arbitrator then found that as CBP issued a recognized form of alternative discipline - a warning letter, the letter of warning involved here was “cognizable as a form of discipline” *Id.* at 30 and 31.

The Arbitrator found that the notice of proposed suspension of April 9 and the letter of warning of March 30 concerned the March 20 sleeping on duty incident. *Id.* at 32. The Arbitrator also found that the only “formal discipline noted . . . in the notice of proposed suspension was the [January] . . . letter of reprimand.”⁴ *Id.* at 33. The Arbitrator found that “[n]either the [February 8] verbal warning for sleeping on duty nor the . . . complaint from [the ship serviced by the grievant] satisfied the ‘formal’ discipline requirement, yet they were taken into consideration [.]” by the Port Director in deciding that a suspension for the second sleeping on duty was justified, even though they were not a part of the grievant’s OPF. *Id.*

The Arbitrator concluded that the suspension was precluded by the letter of warning, and thus was an unjustified and unwarranted personnel action under the Back Pay Act. Accordingly, the Arbitrator found that the grievant was entitled to back pay for the normal shift she would have worked during the three-day suspension. *Id.*

4. The Arbitrator referred to a February letter of reprimand. The correct month is January. *See* Award at 7.

III. Preliminary Matter

Pursuant to § 2429.5 of the Authority's Regulations, the Agency requests the Authority to take official notice of Agency policies and other attachments included in its exceptions that "were not made a part of the underlying proceedings."⁵ Exceptions at 8 n.2. In support, the Agency cites *United States Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 875 (1990) (*Customs Serv.*), and *Gen. Serv. Admin., Region 2*, 46 FLRA 1039 (1992) (*GSA, Region 2*). In particular, the Agency's exceptions contain the following documents: Attachment D, a June 30 memorandum (June 30 Memo) from the CBP Commissioner concerning delegation of authority for discipline and adverse actions, grievances, and third party settlements; attachment E (Delegation Order) entitled "Delegation of Authority for Discipline and Adverse Actions;" Attachment K, The OPM Guide to Personnel Recordkeeping, which contains information on documents maintained in an employee's OPF; Attachment L, a USDA Human Resources Desk Guide, which contains information on personnel procedures and identifies information kept in an employee's OPF; and Attachment M, an affidavit from a former labor relations specialist declaring that she had never seen IP 408.1

The Union "objects [to CBP's request]" Opposition at 15. The Union requests that the Authority disregard these documents as a matter of "fundamental fairness" because consideration of these documents would deprive the Union of the opportunity to "challenge their admissibility on grounds of relevance, hearsay, materiality," and of the opportunity to present rebuttal testimony. *Id.* at 13 and 17.

Under § 2429.5 of the Authority's Regulations, normally, the Authority will not consider documents that were in existence at the time of the arbitration hearing but not presented to the Arbitrator. *See Soc. Sec. Admin.*, 57 FLRA 530, 534 (2001) (*SSA I*). Also, the Authority has consistently held that arbitration awards are not subject to review on the basis of evidence that comes into existence after arbitration. *See United States Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1068 n.12 (2001) (Authority granted motion to strike an affidavit in support of exceptions because it constituted evidence that

5. Section 2429.5 of the Authority's Regulations provides, in relevant part, as follows:

The Authority will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the . . . arbitrator. The Authority may, however, take official notice of such matters as would be proper.

came into existence after the issuance of the arbitrator's award). Moreover, when the Authority has taken official notice of documents that could have been, but were not, presented for the arbitrator's consideration, those documents have been of widespread application or of an undisputed nature. *See United States Dep't of Justice*, 52 FLRA 1093, 1096 n.6 (1997) (Authority took official notice of relevant executive orders upon request of agency after union did not oppose their introduction).

In this case, CBP seeks to have the Authority take official notice of documents that apply only to CBP, and an OPM document that CBP uses to challenge the Arbitrator's interpretation of an agency regulation, documents that were in existence at the time of the hearing and could have been presented to the Arbitrator, as well as an affidavit that came into existence after the hearing, which challenges the IP document offered into evidence by the Union. Based on Authority precedent and consistent with § 2429.5 of the Authority's Regulations, CBP has not demonstrated that the disputed documents should be considered by the Authority. *See, e.g., United States Envtl. Prot. Agency, Region 2*, 59 FLRA 520, 524 (2003); *AFGE, Local 2142*, 58 FLRA 692, 693 (2003).

We note that in support of its request CBP cites *Customs Serv.* and asserts that the Authority may take official notice of agency directives where the authenticity of such documents is not at issue. That case, however, was submitted directly to the Authority on a stipulation of facts. *See SSA I*, 57 FLRA at 533-34. Under § 2429.5 of the Authority's Regulations, where, as here, the parties previously had an opportunity to introduce internal agency regulations into evidence, the Authority has refused to take official notice of regulations of that nature. *See id.; Nat'l Park Serv., Nat'l Capital Region, United States Park Police*, 48 FLRA 1151, 1163 n.10 (1993). CBP also relies on *GSA* and argues that the documents should be considered in support of its position that the award is based on nonfacts. In *GSA, Region 2*, the Authority concluded that the challenged documents submitted were pertinent and thus considered the documents. However, the Authority's decision was summary and did not describe the documents or set forth information to determine whether the circumstances are similar to the instance case. In such circumstance, there is no basis to depart from Authority precedent holding that the Authority will not consider documents that were in existence at the time of the arbitration hearing but not presented to the Arbitrator. *See, e.g., SSA I*, 57 FLRA at 534.

Accordingly, the documents submitted by CBP will not be considered.

IV. Positions of the Parties

A. Agency's Exceptions

CBP contends that the Arbitrator's arbitrability determination does not draw its essence from the parties' CBA because it does not represent a plausible interpretation of the CBA. According to CBP, "in order to arbitrate a grievance [under Article X, Sections 1 and 3], the aggrieved individual must be an 'employee' at each stage of the grievance process and at the time that arbitration is invoked." Exceptions at 10 (emphasis in exceptions). CBP asserts that because the grievant resigned prior to the Union invoking arbitration, she "relinquished her right under the CBA to complete the grievance process . . ." *Id.* at 11.

CBP also claims that the arbitrability determination is contrary to law because the Arbitrator relied on cases, including *Hess*, which do not address the issue involved here of whether the grievant had the "proper standing" to continue the grievance process after her resignation. *Id.* at 14. CBP also asserts that the Arbitrator ignored *Nellis*, which it claims supports its position that as the grievant had resigned she could not continue the grievance process.

As to the merits, the Agency claims that the award is deficient on the grounds that it is contrary to law and based on nonfacts. With respect to the first ground, CBP asserts that the award is contrary to MSPB and Authority precedent, and Agency policy. As to MSPB precedent, citing *Special Counsel v. Spears*, 75 M.S.P.R. 639 (1997) (*Special Counsel*), among other MSPB decisions, CBP argues that MSPB decisions support a conclusion that the letter of warning was not discipline and therefore did not preclude CBP from suspending the grievant. *Id.* CBP asserts that the letter of warning was not identified as a disciplinary action, a SF-50 was not issued, nor was the letter included in the grievant's OPF file. *Id.* at 24. CBP thus contends that as the Arbitrator failed to find that the letter of warning did not constitute discipline, the award is contrary to *Special Counsel* and other MSPB decisions.

Concerning Authority precedent, CBP claims that the award conflicts with Authority precedent because contrary to what the Arbitrator "impl[ie]d" a letter of warning "is not generally recognized as a form of discipline under [Authority precedent], but "depends on the terms" of the parties' agreement or Agency policy. *Id.* at 28. In support, the Agency cites *RRB* and *Soc. Sec. Admin.*, 59 FLRA 257 (2003) (Member Pope dissenting) (*SSA II*). The Agency thus claims that the Arbitrator's reliance on *RRB*, as well as *GSA*, is misplaced because

these cases do not stand for the proposition that a letter of warning constitutes discipline. Exceptions at 27. Additionally, CBP asserts that the award would disrupt its disciplinary process because a supervisor may believe it is best not to speak to an employee at the time of the misconduct, "so as not to preclude the Agency from initiating discipline[.]" *Id.* at 42.

As to CBP policy, CBP argues that the letter of warning is not recognized as discipline under its policy. According to CBP, a CBP witness testified at the hearing that the lowest form of discipline recognized by CBP is a letter of reprimand. *Id.* at 30. CBP refers to a memorandum from the CBP Commissioner and a document that it claims lists disciplinary actions recognized by CBP and the managerial positions authorized to propose discipline, and argues that, as reflected in the referenced memorandum, the lowest form of discipline recognized by CBP policy was a reprimand.⁶ *Id.* CBP further asserts that the Arbitrator determined that the letter of warning constituted discipline based on IP 408.1, and USDA Personnel Bulletin 751-3. *Id.* at 33. Relying on the referenced memorandum, CBP argues that IP 408.1 and Bulletin 751-3 are not applicable because such policy was "superseded" by the referenced memorandum. *Id.* at 34. CBP further refers to another document that it claims is a new delegation of authority for discipline and adverse actions. *Id.* at 35. CBP also states that the letter of warning does not constitute discipline under the parties' CBA. *Id.* at 29.

With respect to the second ground, CBP contends that the Arbitrator's finding that the letter of warning constitutes discipline under USDA internal procedures is based on "non-facts." *Id.* CBP refers to a document entitled "USDA Human Resources Desk Guide," and contends that the Agency "has learned[]" since the hearing" that the USDA (1) does not consider a letter of warning to be disciplinary action; and (2) prohibits the sending of warning letters to an employee's OPF. *Id.* at 37. CBP also included an attachment from OPM entitled "The Guide to Personnel Recordkeeping" and contends that this guide supports its position that the letter of warning was not maintained in the employee's OPF.

CBP also claims that the award is based on a non-fact because Bulletin 751-3 does not indicate that a "letter of warning constitute[s] 'alternative discipline[.]'" *Id.* at 39. CBP challenges the Arbitrator's finding that the letter of warning "'had indicia of both formality and finality,' in that it was on official agency letterhead . . .

6. For the reasons discussed above in Section III., the documents referenced here and in the paragraph below by CBP, will not be considered.

did not advise [the grievant] that she could receive future discipline for the incident, and the document was signed by both [the supervisor and the grievant].” *Id.* CPB argues that these factors are not relevant because the supervisor had no authority to issue the letter as discipline.

B. Union’s Opposition

The Union contends that CBP’s challenge to the Arbitrator’s arbitrability finding does not provide a basis for finding the award deficient because such finding is a “procedural arbitrability[]” determination. Opposition at 4. The Union further asserts that even if the Agency’s essence claim was considered, it would not provide a basis for finding the award deficient because the parties’ CBA authorizes an employee to initiate a grievance. *Id.* at 5.

The Union asserts that the Arbitrator “correctly rule[d]” that the grievant’s suspension is a double penalty because the Authority, not MSPB, has jurisdiction over challenges to disciplinary actions not involving suspensions of more than 14 days. *Id.* at 7.

V. Analysis and Conclusions

A. The arbitrator’s procedural arbitrability determination is not deficient

The Authority generally will not find an arbitrator’s ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural arbitrability ruling itself. *See, e.g., AFGE, Local 3882*, 59 FLRA 469, 470 (2003). However, the Authority has stated that a procedural arbitrability determination may be found deficient on the ground that it is contrary to law. *See id.* (citing *AFGE Local 933*, 58 FLRA 480, 481 (2003)). In addition, the Authority has stated that a procedural arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or that the arbitrator exceeded his or her authority. *See id.*; *see also United States Equal Employment Opportunity Comm’n*, 60 FLRA 83, 86 (2004) (citing *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995)).

In this case, CBP claims that the award does not draw its essence from the CBA because the grievant resigned before arbitration was invoked and thus relinquished her right under the CBA to complete the grievance process. Such contention challenges the Arbitrator’s procedural arbitrability determination in relation to whether the grievant could grieve the matter under the parties’ CBA and as such does not provide a

basis for finding the award deficient. *See, e.g., AFGE, Local 1931*, 50 FLRA 279, 281 (1995) (arbitrator’s finding that grievance was not arbitrable because the grievant did not fall within the contractual definition of employee under the parties’ negotiated grievance procedure was a procedural arbitrability determination and did not provide a basis for finding the award deficient).

Additionally, CBP claims that the Arbitrator’s arbitrability determination is contrary to law because he relied on *Hess*. In *Hess*, the court held that an employee’s status “at the time adverse action [i]s taken” is determinative. 892 F.2d at 1020. Consistent with *Hess* and based on his interpretation of the CBA, the Arbitrator concluded that, as the grievant was a unit employee at the time CBP issued its suspension decision, the grievant was entitled to grieve the decision under the parties’ negotiated grievance procedure. The Arbitrator’s conclusion is consistent with *Hess* and there is no basis on which to conclude that the Arbitrator was precluded from applying *Hess*. *See United States Dep’t of the Treasury, Bureau of Engraving and Printing, Fort Worth, Tex.*, 58 FLRA 397, 398 (2003) (where Authority, citing *Hess*, found that award was not contrary to law because the grievant filed the grievance at the time he was in the bargaining unit); *IRS, Brookhaven Serv. Ctr.*, 11 FLRA 486, 487-88 (1983) (grievance arbitrable where grievant was a unit employee when dispute arose, grievance was filed, and arbitration was invoked, but was promoted to a supervisor before the hearing). *See also Gen. Serv. Admin., Region 9*, 44 FLRA 901 (1992) (Authority rejected union’s claim that arbitrator erred by applying *Hess* in finding that grievant could not grieve adverse action because he was not a unit employee at the time the action was taken). Also, the Agency’s claim that the Arbitrator improperly ignored the arbitrator’s decision in *Nellis* provides no basis for finding the award deficient under the Statute because arbitration awards are not precedential. *See, e.g., NFFE, Local 2030*, 56 FLRA 667, 672 (2000).

Accordingly, CBP has failed to establish that the Arbitrator’s procedural arbitrability determination is deficient.

B. The arbitrator’s merits decision is not contrary to law

Under § 7122(a) of the Statute, an award is deficient if it is contrary to any law. When an exception involves the award’s consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See, e.g., NTEU Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of *de novo* review, the Authority assesses whether the arbitra-

tor's legal conclusions are consistent with the applicable standard of law. *See, e.g., NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

CBP asserts that the award is contrary to MSPB decisions, including *Special Counsel* because MSPB decisions have held that warning or counseling letters do not constitute discipline. However, the Authority has repeatedly held that arbitrators are not bound by the same substantive standards as the MSPB when resolving grievances concerning actions not covered by 5 U.S.C. §§ 4303 and 7512. *See United States Dep't of Homeland Sec., United States Customs and Border Prot., United States Border Patrol, El Paso, Tex.*, 60 FLRA 883, 885 (2005); *United States Dep't of Justice, Immigration and Naturalization Serv., Jacksonville, Fla.*, 36 FLRA 928, 932 (1990). As the grievant's suspension was for three days, it is not covered by §§ 4303 and 7512 and is not appealable to the MSPB. Accordingly, the Arbitrator was not required to apply MSPB standards. As CBP has not demonstrated that the Arbitrator was required to follow MSPB decisions, there is no basis for finding the award deficient in this respect.

Also, relying on *SSA II*, *GSA* and *RRB*, CBP claims that the award conflicts with Authority precedent because under Authority precedent a letter of warning "is not generally recognized as a form of discipline[.]" but "depends on the terms" of the parties' agreement or Agency policy. Exceptions at 28. Although the Arbitrator misstates the Authority's ruling in *GSA* and *RRB* with respect to how the Authority views a letter of warning, the Agency has not demonstrated that his award is deficient. In this regard, as the Agency notes, in *SSA II*, *GSA*, and *RRB*, the Authority found that the matters involved in those cases were governed by the parties' collective bargaining agreements and, in *RRB*, an agency rule as well. Thus, those decisions turned on the arbitrators' application and interpretation of the particular provision or rule involved in those cases. Here, the Agency disputes the Arbitrator's determination that a letter of warning constitutes discipline under CBP policy. As the Arbitrator interpreted and applied CBP regulations, and the Agency has not shown, as discussed below, that such finding is contrary to these regulations, there is no basis to find that the award is contrary to Authority decisions.⁷ *See AFGE, Local 916*, 47 FLRA 735, 740 (1993) (arbitrators have authority to interpret and enforce agency regulations).

Additionally, we construe CBP's claim that the award would disrupt its disciplinary process as an asser-

tion that the award affects management's right to discipline employees. When resolving an exception which contends that the award is contrary to a management right under § 7106 of the Statute, the Authority first considers whether the award affects the exercise of a management right. *See United States Dep't of the Navy, Naval Undersea Warfare Ctr., Div. Newport, Newport, R.I.*, 63 FLRA 222, 225 (2009). In this case, the award does not affect CBP's right to discipline an employee. Rather, the award merely requires CBP, in disciplining an employee, to comply with its regulations.

As to CBP's claim that the award is contrary to its policy because the letter of warning is not recognized as discipline under this policy, CBP challenges the Arbitrator's determination that the letter of warning constitutes discipline on the basis of attachments that, pursuant to § 2429.5 of the Authority regulations have not been considered. As the Agency's challenge to the Arbitrator's determination is based on documents which have not been considered by the Authority and in the absence of other evidence in the record, there is no basis to conclude that the award is contrary to Agency policy.⁸

C. The award is not based on a nonfact

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.* In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA 88, 92 (1995).

CBP relies on documents not considered by the Authority to assert that the award is based on nonfacts.

7. Chairman Pope notes her agreement that the Authority's decision in *SSA II* is distinguishable from this case based on the facts. In this case, the Arbitrator enforced Agency regulations whereas the arbitrator in *SSA II* enforced the parties' agreement. However, for reasons set forth in her dissenting opinion in *SSA II*, 59 FLRA at 259-60, Chairman Pope affirms that, in her view, *SSA II* was wrongly decided. *See also United States Dep't of the Air Force, Davis-Monthan AFB, Tucson, AZ.*, 63 FLRA 241, 244 n.4 (2009).

8. To the extent that CBP asserts that the letter of warning does not constitute discipline under the parties' CBA, we construe this as an essence claim. As the Arbitrator did not find that the letter of warning constituted discipline under the parties' CBA, there is no basis to conclude that the award is deficient on this basis.

As these documents have not been considered and CBP has not provided any other basis for finding the award is based on nonfacts, CBP has not demonstrated that the award is based on nonfacts. Moreover, CBP's nonfact claims that the letter of warning did not constitute discipline and was issued by an official who had no authority to issue it as discipline were disputed at arbitration. Consequently, no basis is provided for finding that the award is based on nonfacts. *See United States Dep't of the Air Force, Lowry Air Force Base, Denver, Col.*, 48 FLRA 589, 594 (1993).

VI. Decision

CBP's exceptions are denied.

APPENDIX

Article X GRIEVANCE AND ARBITRATION PROCEDURES

Section 1. Definition and Purpose

The term "grievance" means any complaint--

A. by any employee concerning any matter relating to the employment of the employee.

B. by any labor organization concerning any matter relating to the employment of any employee,

C. by any employee, labor organization, or agency concerning--

i. the effect or interpretation, or a claim of breach, of a collective bargaining agreement,

ii. any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

This article establishes the exclusive procedures available to bargaining unit employees, the Union or the Employer, whereby they may seek consideration of grievances

. . . .

Section 3. Grievance Procedure for all Bargaining Unit Employees

Exceptions, Attachment 13.