65 FLRA No. 62

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

and

PATENT OFFICE PROFESSIONAL
ASSOCIATION
(Union)

0-AR-4128

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DECISION

November 30, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Salvatore J. Arrigo filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

For the reasons that follow, we dismiss the exceptions in part and deny them in part.

II. Background and Arbitrator's Award

A. Background

In 2000, the Agency's patent examiners were paid under the General Schedule (GS). Award at 2. Because it was having difficulty recruiting and retaining employees, the Agency sought and received Office of Personnel Management (OPM) approval to pay employees special rates that were ten percent and fifteen percent higher than the GS rates. *Id.* at 2, 10. Under OPM regulations, employees paid a special rate receive the same general increases, but not the locality pay, that employees paid GS rates receive. *Id*. at 5. As a result, over time, special pay rates erode in value relative to the GS rates. Therefore, in conjunction with OPM's approval of the special rates, the Agency and the Union reached an agreement (the "Millennium Agreement," hereinafter "MA") that included Section A.2 (§ A.2), which provides as follows:

> The [Agency] shall request OPM approval for the next five years to increase the special pay schedule so as to maintain the 10% and 15% salary differentials relative to the updated GS rates, in a manner consistent with OPM regulations. If OPM refuses the request, the Agency shall enter into discussions with [the Union] in order to provide substantially equivalent alternatives.

Id. at 8.

B. 2002 Dispute

In 2002, federal employees in the Washington area received a 1.17 percent increase in locality pay in addition to the 3.6 percent general increase. *Id.* at 11. Consistent with the first sentence in § A.2, the Agency requested that OPM increase the Agency's special pay rate by 1.17 percent. *Id.* OPM denied the request, stating that the Agency no longer had recruitment and retention problems, and recommended that the Agency explore "the strategic use of other compensation flexibilities to address targeted recruitment and retention problems." *Id.*

Pursuant to the second sentence in § A.2, after OPM denied the Agency's request, the parties discussed ways in which a substantially equivalent alternative could be paid to employees. When the discussions failed to produce an agreement, the Union filed a grievance that was ultimately submitted to arbitration. *See id.* at 12. The arbitrator sustained the grievance and ordered the Agency to "engage in discussions with the Union 'in good faith with a sincere resolve to find a way to make-up for the lost locality pay,' without proposing or insisting on any other conditions." *U.S. Dep't of Commerce, Patent & Trademark Office*, 60 FLRA 839, 840 (2005), *pet. for review dismissed*, 180 F. App'x 176 (D.C. Cir. Mar. 21, 2006) (unpublished) (*PTO I*).

The Agency filed exceptions to the award. In resolving those exceptions, the Authority noted that the right to retain employees under § 7106(a)(2)(A) of the Statute "is the right to establish policies or practices that encourage or discourage employees from remaining employed by an agency." *Id.* at 841

1. Member Beck's separate opinion, dissenting in part, is set forth at the end of this decision.

(citation omitted). The Authority found that, as interpreted by the arbitrator, the second sentence of § A.2 effectively required the Agency to engage in good-faith discussions and to agree to an alternative to special pay increases, provided such alternative was lawful and within the Agency's funding ability. *Id.* The Authority further found that, as special rates "are a means to encourage retention of employees," the award affected management's right to retain employees. *Id.* at 841.

The Authority then addressed *the Union's claim that* § A.2 constituted an appropriate arrangement under § 7106(b)(3) of the Statute. The Authority stated that, in order for a provision to be enforceable as an appropriate arrangement, the provision must seek "to mitigate adverse effects flowing from the exercise of a management right." *Id.* at 842 (citation omitted). The Authority noted that, according to the arbitrator, § A.2 "was intended to address the adverse effect of special rate erosion that would occur over time as non-special rate employees received locality pay increases." *Id.* Because this "adverse effect [did] not result from the exercise of any management right, but by the operation of law," the Authority concluded that § A.2 was not an "arrangement" and, as a result, was not an appropriate arrangement under § 7106(b)(3). *Id.* at 842, 843.

The Authority rejected "as unsupported" the Union's argument that § A.2 was an arrangement for employees who were adversely affected by management's decision to eliminate paper files for patent searches and to include a customer-service element in employees' performance plans. *Id.* at 843. According to the Authority, "the [a]rbitrator made no findings that the second sentence of [§] A.2 was intended to ameliorate the alleged adverse effects cited by the Union." *Id.* at 842. Also according to the Authority, there was no basis in the wording of § A.2, and no other evidence, to support the Union's claims. *Id.* at 843. Accordingly, the Authority set aside the award.

C. Grievance and Award in this Case

In 2003, the locality pay rate for the Washington, D.C. area was again increased by 1.17 percent. However, the Agency concluded that it could not certify that it was "critical to the mission of the Agency" to amend the special pay rate, and it notified the Union that it would not request OPM to increase the special rate. Award at 13. The Union filed another grievance, and the matter was submitted to arbitration, where the Arbitrator adopted the issues as set forth by the Union:

> 1. Whether the [Agency] violated [§] A.2 of the [MA] when it refused to request OPM approval to increase the special pay schedule to maintain the 10% and 15% salary differentials following the increase in locality pay received by [GS] employees in the Washington, D.C. [area] in January 2003?
>
> 2. Whether the [Agency] violated [§] A.2 of the [MA] when it refused to engage in discussions to provide a substantially equivalent alternative following the increase in locality pay received by [GS] employees in the Washington, D.C. [area] in January 2003?
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> 3. Assuming *arguendo* that either sentence of [§] A.2 interferes with management's right to retain employees, is [§] A.2 an appropriate arrangement for employees who were adversely affected by management's decision to eliminate the paper patent files and impose a customer service element in unit employees' performance plans?
>
> 4. Whether the [Agency's] refusal to request OPM approval to increase the special pay schedule or to engage in discussions to provide a substantially equivalent alternative constitute a clear and patent breach of a provision that goes to the heart of the [MA], thereby constituting a contract repudiation and unfair labor practice [(ULP)] in violation of 5 U.S.C. § 7116(a)(1) and (5)?
>
> 5. Whether the [Agency's] refusal to request OPM approval to increase the special pay schedule or to engage in discussions to provide a substantially equivalent alternative constitute a refusal to implement [§] A.2 of the [MA] in violation of the duty to negotiate in good faith as defined by § 7114(b)(5), thereby constituting [a ULP] in violation of 5 U.S.C. § 7116(a)(1) and (5)?
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> 6. What shall the remedy be?

Award at 17-18.

The Arbitrator determined that the first sentence of § A.2 requires the Agency to make "yearly requests" to OPM for an increase in the special pay rate. *Id.* at 22. In this regard, he found that "the

requirement to certify that the request . . . [is] necessary to ensure adequate staffing does not prevent the Agency from honestly certifying and explaining that the need is based upon the Agency's long-term needs . . . as the parties concluded in their discussions which led to the agreement." *Id.* The Arbitrator also found that the Agency did not petition OPM and, as a result, no refusal was made. *Id.* at 22-23. However, he concluded that the Agency was obligated to enter into discussions with the Union under the second sentence in § A.2 even though there was no refusal by OPM. *Id.* at 23. According to the Arbitrator,

> even if [§] A.2 does not specifically state so, the most reasonable and sensible interpretation of this section . . . is to require discussion, [as] set forth in the second sentence of [§] A.2, whenever application or consideration of the first sentence of [§] A.2 fails to achieve the agreed-upon and express objective of maintaining the 10% and 15% differential.

Id.

Because "the essential facts and circumstances" in the case before him were "substantially identical" to those found by the Authority in *PTO I*, the Arbitrator found, in accordance with that decision, that § A.2 of the MA affected management's right to retain employees. *Id.* at 24. The Arbitrator then addressed the Union's claim that § A.2 was intended to be an appropriate arrangement under § 7106(b)(3) of the Statute. Based on the record before him, the Arbitrator also found that "the entirety of [§] A," including § A.2, "was negotiated as a quid pro quo for the elimination of paper patents and the addition of customer service duties for employees[,]" two changes desired by the Agency and opposed by the Union. *Id.* (emphasis removed). According to the Arbitrator, the linkage between a special pay schedule and the paper file and customer service issues was established "in every document concerning the discussions between the parties[.]" *Id.* at 25. The Arbitrator determined that § A's provisions regarding the special pay schedule were a "balm" to "ameliorate the adverse effects upon employees for the Union's acceding to the Agency's desire to exercise its management rights regarding the elimination of paper files . . . and employees being assigned additional duties[,]" and were enforceable as appropriate arrangements under § 7106(b)(3). *Id.* at 25-26.

The Arbitrator also addressed the Union's claim that the Agency repudiated § A.2 of the MA. Assessing whether the Agency clearly and patently breached that provision, the Arbitrator found § A.2 to be "clear and unambiguous" in its requirements. *Id.* at 26. He noted the Agency's argument that the phrase "in a manner consistent with OPM regulations[,]" found in the first sentence of § A.2, should be interpreted as requiring the existence of supporting recruitment and retention data before the Agency would be obligated to submit a request to OPM. *Id.* at 21. The Arbitrator considered the parties' bargaining history and determined that the parties had "specifically rejected" such a prerequisite. *Id.* at 22. In this connection, the Arbitrator found that, during negotiations, the Agency had proposed such a prerequisite, but that the proposal had been "rejected based upon the parties' recognition that such data might not be present in a given year," despite the "long-term necessity for pay rates that would attract employees over the future years[.]" *Id.* at 21. In addition, the Arbitrator "credited testimony" that the Union proposed the "in a manner consistent with OPM regulations[]" wording, and that this wording merely expressed the Union's "concern . . . that it was essential that the Agency comply with all the aspects of the regulations in order to justify a special pay rate[,] stating that they wished assurance [that] the Agency presented to OPM a complete application containing all the required data." *Id.* at 22. The Arbitrator concluded that the Agency clearly and patently breached the agreement.

The Arbitrator also concluded that the breached provision "went to the heart of the parties' agreement." *Id.* at 27. In this regard, the Arbitrator found that § A.2 was a "critical part" of § A, which was, in turn, necessary to the Union's acceptance of the rest of the MA. *Id.* Therefore, according to the Arbitrator, the Agency repudiated the agreement in violation of § 7116(a)(1) and (5) of the Statute. *Id.*

In light of this violation, the Arbitrator concluded that the appropriate remedy was to "require the Agency to fulfill its obligations under the agreement and to 'enter discussions with [the Union] in order to provide substantially equivalent alternatives' to the erosion of the agreed-upon pay differentials set forth in the agreement." *Id.* at 29 (quoting § A.2). In this connection, the Arbitrator stated that the substantially equivalent alternatives should be "relative to updated GS rates from January 1, 2001, to January 2003, occasioned by raises in locality pay for Washington, D.C. GS employees during that period." *Id.* at 30. Citing the arbitrator's finding in the award set aside in *PTO I*,

the Arbitrator stated that the object of the discussions should be to "find a lawful way to overcome the lost . . . locality pay and to compensate bargaining unit members[.]" *Id.* at 29 (citation omitted). The Arbitrator added that interest should be paid "on any money the employees might receive pursuant to the discussions envisioned in [§] A.2." *Id.* at 30.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to OPM regulations concerning special pay. In this regard, the Agency contends that the Arbitrator's interpretation of § A.2 violates: (1) the procedures for establishing and adjusting special pay rates set forth in 5 C.F.R. §§ 530.304-306; (2) the prohibition against receiving both special pay and locality pay set forth in 5 C.F.R. § 531.608; and (3) the requirement that the Agency certify to the necessity of adjusting special pay rates set forth in 5 C.F.R. § 530.[2] Exceptions at 19-23.

Relying on *PTO I*, the Agency also asserts that § A.2, as interpreted by the Arbitrator, is contrary to management's right to retain employees under § 7106(a)(2)(A) of the Statute. *Id.* at 2. The Agency argues that *PTO I* provides "binding Authority precedent" that § A.2 is not an arrangement because it ameliorates adverse effects resulting from "the operation of law, not the exercise of a management right." *Id.* at 14. The Agency maintains that the Arbitrator made no findings that the reduction in paper files or addition of a customer-service element to employees' performance plans either constituted the exercise of management rights or resulted in adverse effects. *Id.* at 15. In addition, according to the Agency, additional compensation is not a "balm" administered to mitigate adverse effects and is not "in any way narrowly tailored to compensate only those employees suffering adverse effects attributable to the Agency." *Id.* at 17.

The Agency also argues that the Arbitrator's finding of a repudiation of § A.2 is contrary to law. As an initial matter, the Agency asserts that, because the Arbitrator's interpretation and application of § A.2 is unlawful, the Agency's failure to comply with the provisions, as interpreted and applied by the Arbitrator, did not constitute repudiation. *Id.* at 24. In addition, the Agency contends that, even assuming that it breached § A.2 on one occasion, "this one-time breach is insufficient to establish" repudiation. *Id.* at 25. Further, the Agency asserts that it acted in accordance with a reasonable interpretation of § A.2. In this regard, the Agency contends that it was reasonable to interpret the first sentence of § A.2 as requiring it to submit a request to OPM "*only* in the event that it could lawfully and honestly make the required certification in good faith." *Id.* Moreover, the Agency asserts that the alleged breach does not go to the "heart" of the MA, as the heart of the MA "was to obtain the initial special pay rate from OPM." *Id.* at 26.

Additionally, the Agency argues that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596, because the Arbitrator awarded interest without awarding backpay. *Id.* at 27-28. Finally, the Agency contends that the Arbitrator exceeded his authority. In this connection, the Agency asserts that the award "appears to effectively require the Agency to agree to substantially equivalent alternatives for 2002 and 2003[,]" but the grievance did not cover 2002. *Id.* at 29.

B. Union's Opposition

The Union asserts that the award is not contrary to OPM regulations because it neither requires the Agency to increase the special pay rate without approval nor grants employees special pay and locality pay. According to the Union, the award merely requires the Agency to enter discussions to make up for the lost locality pay. Opp'n at 32.

With respect to the Agency's management-rights argument, the Union contends that the award is not contrary to *PTO I* because the factual situation and legal arguments in the present case are different from that decision. *Id.* at 5-6. The Union also contends that, in *PTO I*, the Authority erroneously found that § A.2 affects management's rights. *Id.* at 8-9. The Union alternatively argues that, if the award affects management's rights, then the Arbitrator correctly found that the § A.2 is enforceable as an appropriate arrangement under § 7106(b)(3). *Id.* at 19. In this connection, the Union asserts that testimony at the arbitration hearing demonstrated that the elimination of paper files and the addition of a customer-service performance element negatively impacted employees. *Id.* at 23-24. The Union also claims that the Statute does not preclude negotiating additional compensation as an appropriate arrangement. *Id.*

In addition, the Union maintains that the Arbitrator did not err in finding a repudiation of the MA and that the award does not violate the Back Pay

2. The text of relevant provisions is in the appendix to this decision.

Act. Opp'n at 39-44. Finally, the Union argues that the Arbitrator did not exceed his authority because, contrary to the Agency's interpretation of the award, the Union "does not read [the] . . . award as to require any payment of a substantially equivalent alternative that the employees should have received during the year 2002." *Id.* at 44.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency alleges that the award is contrary to law in several respects. The Authority reviews questions of law *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a standard of *de novo* review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. OPM Pay Regulations

The Agency argues that the award violates three provisions of OPM regulations by requiring the Agency to: (1) increase the special pay rate without OPM approval; (2) pay employees both special pay and locality pay; and (3) make false certifications to OPM regarding the need for special pay.

With regard to the arguments about special pay and locality pay, the Arbitrator did not find that the Agency was required to "increase the special pay rate" or to "provide employees with the locality pay increase[.]" Exceptions at 19, 21. Rather, he found that the MA required "discussion, [as] set forth in the second sentence of [§] A.2[,]" with the goal of achieving "the agreed-upon and express objective of maintaining the 10% and 15% differential." Award at 23. The Agency does not explain how these negotiations would constitute a violation of §§ 530.304, 530.305, or 530.306, which govern the formal creation of special pay rates. Likewise, the Agency does not explain how negotiations over methods of maintaining a pay differential would violate 5 C.F.R. § 531.608, which governs locality pay. The mere fact that the discussions would address some form of compensation does not mean that these OPM regulations would be violated. In this regard, we note that OPM recommended that the Agency explore "the strategic use of other compensation flexibilities" when it denied the Agency's request to increase the special pay rate for 2002. Award at 11.

In addition, contrary to the Agency's exception regarding 5 C.F.R § 530.305, the Arbitrator did not "require[] the Agency to submit a false certification" when finding that the Agency was required to make yearly requests to OPM for five years to increase the special pay rate. Exceptions at 22. In this regard, the Arbitrator found that the Agency could truthfully certify, in accordance with OPM regulations, that there was a long-term need for such increases. Award at 21-22. The Agency did not present any evidence to establish that the Arbitrator erred in this factual finding.

For the foregoing reasons, the Agency has not established that the award is in any manner contrary to the above cited provisions. *See Prof'l Airways Sys. Specialists, Dist. No. 1, MEBA/NMU (AFL-CIO)*, 48 FLRA 764, 769 (1993) (union failed to demonstrate that arbitrator conclusions were contrary to travel regulations); *Veterans Admin. Hosp., Newington, Conn.*, 5 FLRA 64, 66 (1981) (union failed to demonstrate that regulations mandated the remedy desired by the union and consequently failed to demonstrate that the award was in any manner contrary to those regulations). Accordingly, we deny these exceptions.

2. Section 7106(a)(2)(A) of the Statute

The Authority recently revised the analysis that it will apply when reviewing management-rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102 (2010) (Chairman Pope concurring) (*FDIC*). Under the revised analysis, the Authority assesses whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b).[3] *Id.* Also under the revised analysis, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the

3. When an award affects a management right under § 7106(a)(2) of the Statute, the Authority may also examine whether the award enforces an applicable law. *EPA*, 65 FLRA at 115 n.7.

arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *See id.* at 118. In concluding that it would apply an abrogation standard, the Authority rejected continued application of an excessive-interference standard. *Id.* at 113.

In his award, the Arbitrator found that, because "the essential facts and circumstances" in the case before him were "substantially identical" to *PTO I*, he was required to find that § A.2 of the MA affects management's right to retain employees. Award at 24. Neither the Agency nor the Union filed timely exceptions to this finding.[4] Accordingly, we find that the award affects management's right to retain employees.

Contrary to the arbitrator's determination in *PTO I*, the Arbitrator in this case expressly determined that § A, including § A.2, constitutes an arrangement under § 7106(b)(3) of the Statute. Award at 26. Although the Agency argues that the decision in *PTO I* precluded the Arbitrator from making this determination, the Authority has acknowledged that the enforceability of a contract provision depends on the particular circumstances of each case. In this connection, the Authority has held that if a particular arbitrator's interpretation of a contract provision is inconsistent with a management right, then the award will be set aside, but "the contractual provision, susceptible to a different and sustainable interpretation by a different arbitrator, will not be affected." *Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 314 (1990) (*Customs Serv.*). *Cf. NTEU*, 45 FLRA 1256, 1262 (1992) (in negotiability decision, Authority noted that union failed to demonstrate adverse effects and, "without addressing whether the Authority would conclude differently in another case," found that the provision was not an arrangement). As the Arbitrator was presented with different facts and arguments than were presented in *PTO I*, we find that *PTO I* did not preclude the Arbitrator from finding that § A is an appropriate arrangement.[5]

As for the Agency's claim that the Arbitrator erred on the merits in finding § A to be an appropriate arrangement, the Arbitrator found that the entire subject of special pay was negotiated "to provide a 'balm' to the Union which would ameliorate the adverse effects upon employees" of "the Agency's desire to exercise its management rights regarding the elimination of paper files[,]" among other things. Award at 25-26. Although the Arbitrator did not specify what management rights the Agency was exercising when it reduced the paper search files, the Authority previously has held, based on this Agency's undisputed assertions, that the Agency's determination to use a computerized patent-search system, rather than paper files, involved an exercise of the right to determine the methods and means of performing work under § 7106(b)(1) of the Statute. *See POPA*, 56 FLRA 69, 69, 87-91 (2000). Thus, Authority precedent supports the Arbitrator's conclusion that the Agency's reduction of paper search files constituted the exercise of a management right under § 7106 of the Statute. *Cf. AFGE, Council 215*, 60 FLRA 461, 464 (2004) (where arbitrator did not explain finding that agreement affected management rights, Authority relied on precedent to uphold finding). With regard to the Arbitrator's finding that the exercise of management's right adversely affected employees, before the Arbitrator, the Union submitted evidence regarding how the reduction of paper search files adversely affected employees. *See* Opp'n, Attach., Tr. at 52, 67, 71-73, 160, 163-69, 173-74 (testimony that electronic versions were more difficult to read than paper files, did not contain helpful notes that paper files contained, and slowed

4. To the extent that the Union's arguments related to whether management's rights are affected by § A.2 and the correctness of the Authority's findings in *PTO I* can be construed as exceptions, we do not consider them. In this connection, under the Authority Regulations that were in effect when the Arbitrator served his award and the parties had the opportunity to file exceptions, exceptions were required to be filed within 30 days of service of the award. *See former* 5 C.F.R. § 2425.1(b). As the Union did not file exceptions within that time period, its arguments are not timely raised. We note that the Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural regulations, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the prior regulations were in effect during the time period when the Union had the opportunity to file exceptions, we apply the prior regulations.

5. To the extent that the Agency's exceptions can be construed as arguing that the Arbitrator was collaterally estopped from finding § A.2 to be an appropriate arrangement, we reject that argument. In this connection, before the doctrine of collateral estoppel can be applied, it must be demonstrated that, among other things, "the same issue was involved . . . [and] was litigated in" the previous decision. *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 11 (2000). For the reasons stated above, the "same issue" presented in this case – i.e., whether § A.2, as interpreted and enforced by *this* Arbitrator, is an appropriate arrangement – was not involved or litigated in *PTO I*. Accordingly, the Arbitrator was not collaterally estopped from finding § A.2 to be an appropriate arrangement.

down examiners' work in at least some instances). Accordingly, based on Authority precedent and the record in this case, we find that, by adopting the Union's position that the reduction in paper files adversely affected employees, the Arbitrator implicitly credited the Union's evidence of adverse effects.

Consistent with the foregoing, the management right affected by the award (the right to retain employees) is a right different from the management right that adversely affected employees (the right to determine the methods and means of performing work). However, the Authority has stated that, in determining whether a proposal or provision is an appropriate arrangement, "[t]he adverse effect . . . need not flow from the management right that a given proposal [or provision] affects." *Fraternal Order of Police, Lodge # 1F*, 57 FLRA 373, 381 (2001). In addition, the Authority previously held that various forms of monetary relief can constitute appropriate arrangements. *See, e.g.*, *NATCA*, 61 FLRA 437, 440-41 (2006) (proposal requiring compensation to employees whose promotions are delayed by management assignment of training); *AFGE, Local 1827*, 58 FLRA 344, 346-47 (2003) (Chairman Cabaniss concurring in part and Member Armendariz dissenting in part) (voluntary separation incentive payments). Thus, the fact that the "balm" provided by § A is a potential increase in compensation does not demonstrate that the Arbitrator erred by finding § A to be an appropriate arrangement. Finally, with regard to the Agency's claim that § A is not sufficiently tailored to constitute an appropriate arrangement, the Authority does not apply a tailoring analysis in the arbitration context. *See EPA*, 65 FLRA at 116. Thus, the Agency's claim does not provide a basis for finding the award deficient.

For the foregoing reasons, we deny the exception to the Arbitrator's finding that § A2 was intended to be an arrangement.

With regard to whether the arrangement is appropriate, the Agency argues that the award excessively interferes with management's right to retain employees. However, as stated above, the Authority no longer applies an excessive-interference standard to determine whether an arrangement is appropriate. *See EPA*, 65 FLRA at 118. Rather, the Authority applies an abrogation standard, which the Authority has described as an assessment of whether the arbitration award "precludes [the] agency from exercising" the affected management right. *Customs Serv.*, 37 FLRA at 314. The Agency has provided no basis for finding that the award precludes the Agency from exercising its right to retain employees. Therefore, we find that the arrangement is appropriate within the meaning of § 7106(b)(3) of the Statute.

For the foregoing reasons, we find that the award is not contrary to management's right to retain employees under § 7106(a)(2)(A) of the Statute, and we deny the Agency's management-rights exception.

3. Section 7116(a)(1) and (5) of the Statute

When a grievance under § 7121 of the Statute involves an alleged ULP, the arbitrator must apply the same standards and burdens that would be applied by an administrative law judge in a ULP proceeding under § 7118. *E.g.*, *NTEU*, 64 FLRA 462, 464 (2010). An allegation of repudiation in violation of § 7116(a)(1) and (5) of the Statute is analyzed using the standard set forth by the Authority in *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois*, 51 FLRA 858 (1996) (*Scott AFB*). Under that standard, the Authority examines two elements: (1) the nature and scope of the alleged breach of the agreement – i.e., was the breach clear and patent?; and (2) the nature of the agreement provision allegedly breached – i.e., did the provision go to the heart of the parties' agreement? *Id.* at 862. With regard to the first element, if the meaning of a particular agreement term is unclear and a party acts in accordance with a reasonable interpretation of that term, then that action will not constitute a clear and patent breach of the agreement. *E.g.*, *SSA, N.Y., N.Y.*, 60 FLRA 301, 304 (2004). With regard to the second element, the Authority focuses on the importance of the provision that was breached, or allegedly breached, relative to the agreement in which it is contained. *E.g.*, *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 355, 357 (2009) (Member Beck concurring in part and dissenting in part on other grounds).

Applying that standard here, as for the first element, as stated previously, the first sentence of § A.2 states: "The [Agency] shall request OPM approval for the next five years to increase the special pay schedule so as to maintain the 10% and 15% salary differentials relative to the updated GS rates, in a manner consistent with OPM regulations." Award at 8. There is no dispute that the Agency refused to request OPM approval. The Agency argues that this refusal did not clearly and patently breach § A.2 because it would not have been "consistent with OPM regulations[]" to make the request. Exceptions

at 25. However, as discussed previously, we have found that it would not have been inconsistent with OPM regulations to make the request. In addition, although the Agency asserts that a one-time breach cannot constitute a clear and patent breach of the agreement, the Authority has held that a one-time breach may constitute a repudiation, depending on the "nature and scope" of the breach. *Scott AFB*, 51 FLRA at 861 (quoting *DOD, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 40 FLRA 1211, 1219 (1991)). Further, § A.2 clearly requires the Agency to make a request "for the next five years[,]" Award at 8, and the Agency's refusal to do so one of those five years was in clear violation of the plain terms of that requirement. For these reasons, we find that the Agency clearly and patently breached the first sentence of § A.2.

As for the second element of the *Scott AFB* test, the Arbitrator found that "the entirety of [§] A," including § A.2, "was negotiated as a quid pro quo for the elimination of paper patents and the addition of customer service duties for employees[,]" and that, but for the inclusion of § A, "there would have been no agreement" to the MA. Award at 24, 27 (emphasis removed). The Agency does not assert that these factual findings are nonfacts; rather, its only argument in this connection is that, by making these findings, the Arbitrator was "attempt[ing] to evade th[e] binding precedent[]" of *PTO I*. Exceptions at 14. However, as discussed previously, we have found that *PTO I* did not bind the Arbitrator to reach a different conclusion in this case, given the differences in the record evidence before him. Thus, the Agency provides no basis for finding that the Arbitrator erred in his "quid pro quo" finding, and for the foregoing reasons, we find that the Arbitrator correctly determined that the Agency's breach of § A.2 went to the heart of the MA.

For the foregoing reasons, we conclude that the Arbitrator properly found that the Agency repudiated § A.2 of the agreement, and we deny the Agency's exception to that finding.

To the extent that the Arbitrator found a repudiation of the second sentence of § A.2, the Authority has held that, when an arbitrator bases an award on two or more separate and independent grounds, the appealing party must establish that all of the grounds relied on are deficient in order for the Authority to find the award deficient. *E.g., Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 892 (2010). Therefore, if the excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the arbitrator, then it is unnecessary to address exceptions to the other ground. *Id.*

The Arbitrator's finding of repudiation of the first sentence of § A.2 provides a separate and independent basis for his finding of a violation of § 7116(a)(1) and (5) of the Statute. As such, it is unnecessary to determine whether the Arbitrator erroneously found a repudiation of the second sentence of § A.2, and to the extent that the Agency's exceptions challenge such a finding, we find it unnecessary to resolve the exceptions in that regard.[6]

4. The Back Pay Act

The Agency argues that the award is contrary to the Back Pay Act because it requires the award of interest without an underlying award of backpay. However, the Agency mischaracterizes the award. In this connection, the Arbitrator stated that interest should be paid "on any money the employees might receive pursuant to the discussions envisioned in [§] A.2." Award at 30. In other words, the Arbitrator did not award any backpay or interest, but merely determined that, if any backpay is found to be warranted, then the Agency must also pay interest on that backpay. This determination is consistent with the Back Pay Act, which provides that "interest must be paid" on backpay awards. *NATCA*, 64 FLRA 906, 907 (2010). Accordingly, we find that the Agency has not demonstrated that the award is contrary to the Back Pay Act, and we deny the exception.

B. The exceeded-authority exception is dismissed as moot.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

6. We note that the second sentence of § A.2 contains the requirement to engage in discussions with the Union, and that this sentence formed part of the basis of the Arbitrator's remedy. However, regardless of whether the Arbitrator correctly found a repudiation of this sentence, the Arbitrator found a breach of the second sentence, and the Agency did not file an exception alleging that the award fails to draw its essence from the agreement. Thus, the finding of a breach of the second sentence is undisturbed, and to the extent that the Arbitrator's remedy is based on that sentence, there is no basis for setting aside that remedy.

As stated previously, the Arbitrator addressed the issue of whether the Agency violated the MA by its actions "in January 2003[,]" but then directed the Agency to enter discussions with the Union to provide substantially equivalent alternatives to the loss in salary differentials "relative to updated GS rates from January 1, 2001, to January 2003[.]" Award at 18, 30. Also as stated previously, the Agency asserts that the award "appears to effectively require the Agency to agree to substantially equivalent alternatives for 2002 and 2003[,]" Exceptions at 29, while the Union "does not read [the] . . . award as to require any payment of a substantially equivalent alternative that the employees should have received during the year 2002." Opp'n at 44.

Where a party in opposition agrees with construing an award in a manner that an excepting party desires, the Authority has dismissed, as moot, exceptions that allege a deficiency based on a different construction of the award. *E.g., U.S. Dep't of Veterans Affairs, Med. Ctr., Hampton, Va.*, 65 FLRA 125, 129 (2010). Construing the award consistently with the Union's contention that the Arbitrator provided a remedy only as to 2003, not 2002, we dismiss the exceeded-authority exception as moot. *See id.*

V. Decision

The exceptions are dismissed in part and denied in part.

APPENDIX

The following provisions of 5 C.F.R. parts 530 and 531 were applicable at the time of the Arbitrator's award in 2006.

Sec. 530.304 Establishing or increasing special rates.

(a) OPM may increase the minimum rates of pay otherwise payable to a category of employees in one or more areas or locations, grades or levels, occupational groups, series, classes, or subdivisions thereof, when it is necessary to address existing or likely significant recruitment or retention difficulties. OPM will consider the circumstances listed in paragraph (b) of this section and the factors listed in Sec. 530.306 when evaluating the need for special rates. When OPM establishes a minimum special rate under this authority, corresponding increases also may be made in one or more of the remaining rates of the affected grade or level. For any given grade, a minimum special rate may not exceed the maximum rate of basic pay for the rate range (excluding any locality rate, other special rate, or similar payment under other legal authority) by more than 30 percent. A special rate is not payable if it exceeds the rate for level IV of the Executive Schedule.

(b) The circumstances considered by OPM in evaluating the need for special rates are the following:
(1) Rates of pay offered by non-Federal employers which are significantly higher than those payable by the Government within the area, location, occupational group, or other category of positions under GS pay system;
(2) The remoteness of the area or location involved;
(3) The undesirability of the working conditions or the nature of the work involved (including exposure to toxic substances or other occupational hazards); or
(4) Any other circumstances OPM considers appropriate.

(c) In setting the level of special rates within a rate range for a category of employees, OPM will compute the special rate supplement by adding a fixed dollar amount or a fixed percentage to all GS rates within that range, except that an alternate method may be used for grades GS-1 and GS-2, where within-grade increases vary throughout the range.

(d) If OPM establishes a special rate schedule that covers only law enforcement officers, OPM may compute the special rate supplement for grades GS-3 through 10 as a fixed percentage of LEO special base rates instead of GS rates. With respect to such a schedule, references to GS rates in Sec. 530.307 are deemed to be references to LEO special base rates.

Sec. 530.305 Agency requests for new or increased special rates.

(a) An agency may request that a special rate schedule be established or increased or that its employees be covered by an existing special rate schedule at any time. An authorized agency official in the agency headquarters office must submit to OPM any request to establish or increase special rates for a category of agency employees. The request must include a certification by the authorized agency official that the requested special rates are necessary to ensure adequate staffing levels to accomplish the agency's mission.

(b) The authorized agency official is responsible for submitting complete supporting data for any request for new or higher special rates. OPM may require that the supporting data include a survey of prevailing non-Federal pay rates in the relevant labor market.

(c) OPM may coordinate an agency special rate request with other agencies that have similar categories of employees. OPM may designate a lead agency to assist in coordinating the collection of relevant data. Each affected agency is responsible for submitting complete supporting data upon request to OPM or the lead agency, as appropriate, unless the agency determines that a category of its employees will not be covered by the proposed special rate schedule, as provided in Sec. 530.303(c).

Sec. 530.306 Evaluating agency requests for new or increased special rates.

(a) In evaluating agency requests for new or increased special rates, OPM may consider the following factors:
(1) The number of existing vacant positions and the length of time they have been vacant;

(2) The number of employees who have quit (i.e., voluntarily left Federal service), including, when available, a subcount of the number of employees who quit to take a comparable position offering higher pay;
(3) Evidence to support a conclusion that recruitment or retention problems likely will develop (if such problems do not already exist) or will worsen;
(4) The number of vacancies an agency tried to fill, compared to the number of hires and offers made;
(5) The nature of the existing labor market;
(6) The degree to which an agency has considered and used other available pay flexibilities to alleviate staffing problems, including the superior qualifications and special needs pay-setting authority in 5 C.F.R. § 531.212 and recruitment, relocation, and retention incentives under 5 C.F.R. part 575;
(7) The degree to which an agency has considered relevant non-pay solutions to staffing problems, such as conducting an aggressive recruiting program, using appropriate appointment authorities, redesigning jobs, establishing training programs, and improving working conditions;
(8) The effect of the staffing problem on the agency's mission; and
(9) The level of non-Federal rates paid for comparable positions. Data on non-Federal salary rates may be supplemented, if appropriate, by data on Federal salary rates for comparable positions established under a non-GS pay system.

(b) In determining the level at which to set special rates, OPM may consider the following factors:
(1) The pay levels that, in OPM's judgment, are necessary to recruit or retain an adequate number of qualified employees based on OPM's findings with respect to the factors set forth in paragraph (a) of this section;
(2) The dollar costs that will be incurred if special rates are not authorized;
(3) The level of pay for comparable positions; and
(4) The need to provide for a reasonable progression in pay from lower grade levels to higher grade levels to avoid pay alignment problems (e.g., such as might result from applying the two-step promotion rule in 5 U.S.C. 5334(b)).

(c) No one factor or combination of factors specified in paragraph (a) or (b) of this section requires OPM to establish or increase special rates or to set special rates at any given level.

Sec. 531.608 Relationship of locality rates to other pay rates.

(a) An employee must receive the greatest of the following rates of pay, as applicable--
(1) The scheduled annual rate of pay payable to the employee;
(2) A locality rate under this subpart;
(3) A special rate under 5 C.F.R. part 530, subpart C, or a similar
rate under other legal authority (e.g., 38 U.S.C. 7455); or
(4) A retained rate under 5 C.F.R. part 536 or a similar rate under other legal authority.

(b) A GS employee receiving a special rate is entitled to any applicable locality payment on the same basis as any other GS employee. The locality payment is computed based on the employee's scheduled annual rate of pay, which excludes any special rate. The employee is entitled to the higher of the locality rate or the corresponding special rate. As provided in 5 U.S.C. 5305(h) and 5 CFR 530.303(d), when an employee's locality rate exceeds a corresponding special rate, the employee's entitlement to the special rate is terminated.

Member Beck, Dissenting in Part:

I agree with my colleagues in all but one respect - I disagree that it is necessary to apply the Authority's revised framework (in *U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring)) to address the Agency's management's right exception.

The Arbitrator improperly purports to enforce contract language that the Authority has already found to be non-negotiable and an impermissible infringement on management rights. This contract language is therefore, unenforceable, and any arbitral remedy based on it must be vacated.

In *U.S. Dep't of Commerce, Patent & Trademark Office, petition for review dismissed*, 180 F. App'x 176 (D.C. Cir. Mar 21, 2006) (unpublished), 60 FLRA 839 (2005) (*PTO 1*), these same parties fully litigated precisely the same issue that is presented here: Whether the second sentence of Section A.2 was an appropriate arrangement under Section 7106(b)(3) of our Statute. The Authority concluded that this sentence is not an appropriate arrangement and set aside the arbitral award that was based on the sentence. *Id.* at 843. Thus, this Award, to the extent it relies on the second sentence of Section A.2, is precluded by our decision in *PTO 1*.

In *U.S. Dep't of the Air Force, Scott Air Force Base, Ill.*, 35 FLRA 978 (1990) (*Scott AFB*), the Authority determined that collateral estoppel applies when five requirements are satisfied:

> (1) the same issue is involved in both cases;
> (2) the same issue was litigated in the first case;
> (3) the resolution of the issue was necessary to the decision in the first case;
> (4) the prior decision is final; and
> (5) the parties were fully represented at the prior hearing.

Scott AFB, 35 FLRA at 982-83. While the Agency does not use the specific term "collateral estoppel" in its arguments here, the arbitral proceedings and the Agency's exceptions are rife with collateral estoppel implications. Both parties and the Arbitrator recognized the implications of the Authority's prior decision (Award, at 19-20, 24, 25-26, 29), and the Agency addressed the impact of that decision throughout its exceptions. Agency Exceptions, at 5-7, 12, 29-30. Further, the Authority has applied the principle of collateral estoppel to such situations when, as here, an Arbitrator "expressly ignore[s]" a prior finding and makes "his own determinations on the same issues." *See Scott AFB*, 35 FLRA at 984.

It is plain to me that the Authority cannot permit an arbitrator to enforce contract language that the Authority has previously determined - after the question has been fully litigated by the same parties - to be unenforceable. Consequently, to the extent that the award is based on the second sentence of Section A.2, the award must be vacated.