

65 FLRA No. 39

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 164
(Union)

0-AR-4607

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DECISION

October 26, 2010

Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members¹

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Elvis C. Stephens 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.

The Arbitrator found that the Agency improperly suspended the grievant, and he awarded the grievant: (1) backpay and other related benefits for the time during which the grievant was affected by the suspension; (2) a make-whole remedy for the loss of pay and other benefits, including overtime and opportunities to earn overtime, that resulted from the Agency's withdrawal of the grievant's permit to carry a firearm; and (3) the opportunity to transfer to other parts of the Agency, if an opening exists.

For the reasons that follow, we set aside the make-whole remedy with respect to the removal of

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

the grievant's firearm, and we deny the remaining exceptions.

II. Background and Arbitrator's Award

The grievant, a United States Customs and Border Protection Officer, worked at the Agency's port of entry in Danville, Washington. Award at 2. Sometime after moving to Danville in 2003, the grievant rented a house near a person (X). *Id.* Other agents at the Agency "gossiped" that X was "probably smuggling drugs[;]" however, "[t]here were no official briefings or official notices that [X] was a suspect[]" in connection with any drug-related crimes. *Id.* Moreover, X had never been arrested or indicted for dealing drugs. *Id.* However, the grievant had been to X's house for a party, had purchased a vehicle from X, and had X perform work on his car. *Id.* at 3. In addition, the grievant's wife had worked for X for approximately six months. *Id.* Around 2005, the grievant ceased contact with X. *Id.* at 2.

Beginning in July 2008, the Agency investigated the grievant regarding his possible inappropriate association with "individuals suspected of being drug smugglers[;]" including X. *Id.* at 3. Subsequently, the Agency issued to the grievant a proposed notice of removal, in which it charged the grievant with: (1) "improper association with individual(s) who are suspected or known to be connected to criminal activities[;]" and (2) "creating the appearance of improper association." *Id.* at 2-3. Upon review, the Director of Field Operations of the Agency's Seattle, Washington office upheld the first charge, but not the second. *Id.* Accordingly, she reduced the grievant's proposed removal to a five-day suspension. *Id.*

The Union filed a grievance, which was unresolved and submitted to expedited arbitration. *Id.* at 4. At arbitration, the parties stipulated to the following issues:

1. Whether [the grievant] committed the charge of [i]mproper [a]ssociation with [i]ndividual(s) who are [s]uspected or [k]nown to be [c]onected to [c]riminal [a]ctivities; and
2. Whether the penalty of a five (5) day suspension for the conduct is reasonable.

Id. at 1.

Addressing the charge of improper association with X, the Arbitrator found that, although the

grievant may not have “exercised good judgment in his earlier behavior,” X neither had been formally indicted or charged with any violation of drug laws, nor had been included, in the computer files reviewed by the Agency’s officers, as a person “suspected” of such activity. *Id.* at 4-5. In the latter connection, the Arbitrator defined “suspected” as meaning “that the person has been identified as a suspect during a muster or other formal meeting, rather than as the subject of idle gossip.” *Id.* at 5. The Arbitrator found that, at the time when the grievant associated with X, the grievant merely had heard gossip from other officers that “X is connected with drug smuggling[.]” *Id.* The Arbitrator determined that the Agency failed to prove that the grievant improperly associated with X.

In addition, the Arbitrator found that the grievant’s association with X had ceased more than three years prior to the Agency’s investigation. *Id.* at 4-5. In this connection, the Arbitrator noted that “[t]here was testimony of a personal[] conflict between” the grievant and his supervisor, “giving rise to the speculation of why [the supervisor] waited so long to” raise the issue of the grievant’s association with X. *Id.* at 4. The Arbitrator determined that the extensive delay in investigating the grievant weighed against finding that the Agency timely disciplined the grievant. *Id.* The Arbitrator further determined that, in other disciplinary cases, arbitrators had found that the Agency violated Article 28 of the parties’ agreement when it imposed discipline on grievants that was not timely or prompt.² *Id.* Moreover, the Arbitrator noted that the Director of the port of entry where the grievant worked had “no concern about [the grievant’s] integrity and recommended him (twice) for a transfer to the Trusted Traveler Vetting Center [(the Center)]”. *Id.* at 5.

The Arbitrator concluded that the Agency violated Article 28, Section 1.A of the agreement and that the grievant should be made whole for his loss of pay and benefits as a result of the suspension. *Id.* at 4-6. Accordingly, the Arbitrator awarded the grievant backpay and other related benefits for the time the grievant was affected by the unjustified and

2. Article 28, Section 1.A of the parties’ agreement provides, in pertinent part, that: “In the interest of promoting a safe, efficient and effective work environment, and in order to minimize the cost of employee turnover and time off the job, the parties agree that misconduct should be remediated in a fair, impartial and timely manner.” Award at 4. Article 28, Section 1.B provides that “instances of alleged misconduct should be raised and discussed in a timely manner . . .” *Id.*

unwarranted personnel action. In addition, the Arbitrator awarded a make-whole remedy for the loss of pay and other benefits, including overtime and opportunities to earn overtime, due to the withdrawal of the grievant’s permit to carry a firearm. Finally, the Arbitrator determined that, “given the situation” at the grievant’s current work location, “he shall be given the opportunity to transfer” to other Agency ports of entry, or to the Center, “if an opening exists.” *Id.* at 6.

III. Positions of the Parties

A. Agency’s Exceptions

The Agency asserts that the Arbitrator based his award on a nonfact -- specifically, that the grievant ceased his associations with X in 2005 -- because the grievant admitted that he continued to associate with X until 2008. Exceptions at 9, 21.

The Agency also asserts that the Arbitrator failed to apply the appropriate legal standard when determining whether X was a “suspected law violator.” *Id.* at 11-12. According to the Agency, the Arbitrator should have applied the standard set forth by the United States Court of Appeals for the Federal Circuit (the Federal Circuit) in *James v. Dale*, 355 F.3d 1375, 1378-79 (Fed. Cir. 2004) (*James*).

In addition, the Agency contends that the award is contrary to the Back Pay Act. According to the Agency, the Arbitrator summarily found that the Agency failed to prove the charge of improper association and that the Agency violated Article 28, Section 1 of the parties’ agreement.³ Exceptions at 13. The Agency contends that this summary conclusion does not satisfy the requirements of the Back Pay Act because there was no evidence that the grievant ever served his five-day suspension or that the suspension resulted in the reduction of the grievant’s pay. *Id.* at 14.

The Agency also alleges that the Arbitrator exceeded his authority by addressing: (1) the removal of the grievant’s firearm while the disciplinary action was pending; and (2) the grievant’s non-selection for transfer. *Id.* at 8. The

3. The Agency notes that this section of the parties’ agreement states that “the parties agree that misconduct *should* be remediated in a fair, impartial and timely manner.” Exceptions at 13 n.12 (emphasis in original). The Agency further notes that, contrary to the Arbitrator’s conclusion, the parties’ agreement does not “*require*” that discipline be timely. *Id.* at 14 n.12 (emphasis in original).

Agency contends that, because the propriety of the removal of the grievant's firearm and the non-selection of the grievant for transfer were not before the Arbitrator, the Arbitrator erred by providing remedies in connection with these issues. *Id.* The Agency also contends that it was "severely prejudiced" by the Arbitrator's consideration of the firearm issue, and that if it had known that the Arbitrator was going to resolve a transfer issue, it "would have offered evidence . . . and made arguments" regarding that issue. *Id.* at 19-20.

Finally, the Agency argues that the award is ambiguous. According to the Agency, it is unclear what the Arbitrator directed when he stated that the grievant should be given the opportunity to transfer to other ports of entry or the Center because all employees have such transfer opportunities, provided a vacancy is available. *Id.* at 8, 20. The Agency asserts that, if this portion of the award is not set aside, then the award should be remanded to the Arbitrator for clarification. *Id.* at 20.

B. Union's Opposition

The Union asserts that the Authority should deny the Agency's nonfact exception because it involves a fact that was disputed at arbitration and, even assuming that the Arbitrator erred, the Agency does not demonstrate that, but for the error, the Arbitrator would have reached a different result. Opp'n at 16-17. The Union also asserts that the award is not contrary to the decision in *James*, 355 F.3d 1375, because the instant case, unlike *James*, does not involve an adverse action under 5 U.S.C. §§ 4303 or 7512. Opp'n at 8. In addition, the Union contends that the award is not contrary to the Back Pay Act because the Arbitrator found that the Agency violated the parties' agreement and that, "because of this violation," the grievant "was affected by an unjustified and unwarranted personnel action, which resulted in his loss of pay and other benefits." *Id.* at 9 (quoting Award at 6).

Further, the Union argues that the Arbitrator did not exceed his authority by directing the Agency: (1) to compensate the grievant for losses suffered as a result of the withdrawal of his permit to carry a firearm; or (2) to provide the grievant an opportunity to transfer. *Id.* at 11, 13. According to the Union, these issues necessarily arose from the stipulated issues and were directly related to the Agency's disciplinary action. *Id.* at 10-11. With regard to the transfer issue, the Union argues that "[t]he record reveals, and the Arbitrator noted in his decision, that there was conflict between [the grievant] and his

supervisor, . . . whose 2008 complaint resulted in the investigation and discipline at issue." *Id.* at 13. In addition, the Union contends that "the Arbitrator referred to 'the situation there' in [the grievant's] home port when awarding the opportunity to transfer[.]" *Id.* Finally, the Union contends that the award is not ambiguous because the intent of the award can be reasonably determined. *Id.* at 14.

IV. Analysis and Conclusions

A. The award is not based on 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.*

The Agency asserts that the Arbitrator based his award on a nonfact, specifically, that the grievant ceased associating with X in 2005. Exceptions at 9, 21. This fact was disputed at arbitration. Exceptions, Attach., Jt. Ex. 3 (Agency contended grievant's statement proves that grievant continued to associate with X after 2005); *see also* Exceptions, Attach., Jt. Ex. 4(a) at 10 (Union contended grievant's alleged association with X occurred in November 2005); Award at 4 (Arbitrator found that grievant ceased associations with X in 2005). Consequently, the Agency's claim provides no basis for finding that the award is based on a nonfact, and we deny the exception. *See U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993) (award not deficient based on a nonfact where excepting party challenges a factual matter that the parties disputed at arbitration).

B. The award of backpay for the removal of the grievant's firearm is contrary to law, but the remainder of the award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See*

U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala., 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

i. Federal Circuit Precedent

Suspensions of fourteen days or less are not covered under 5 U.S.C. §§ 4303 or 7512. *See AFGE, Local 1770*, 51 FLRA 1302 (1996); *U.S. Dep't of the Air Force, Air Force Logistics Command, Hill Air Force Base, Utah*, 34 FLRA 986, 991 (1990). *See also U.S. Dep't of Justice, Immigration & Naturalization Serv., Jacksonville, Fla.*, 36 FLRA 928 (1990) (in a case involving a five-day suspension, the arbitrator was not bound to follow the same substantive standards of the Federal Circuit and the Merit Systems Protection Board). “[A]rbitrators considering suspensions of [fourteen] days or less may use and apply legal principles established by the Federal Circuit for review of adverse actions under § 7703; [however,] such use is not mandatory.” *AFGE, Local 2172*, 57 FLRA 625, 629 (2001).

The Agency asserts that the award is contrary to law because the Arbitrator failed to apply the Federal Circuit's standard for determining whether an individual is a “suspected law violator.” Exceptions at 11-12. As stated above, the use of principles established by the Federal Circuit for suspensions of less than fourteen days is not mandatory. Because the grievant's suspension here was for five days, the Arbitrator did not err in failing to apply the Federal Circuit's standard for determining whether X was a “suspected law violator.” Accordingly, the award is not contrary to Federal Circuit precedent, and we deny this exception.

ii. The Back Pay Act

An award of backpay is authorized under the Back Pay Act only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of an employee's pay, allowances, or differentials. *U.S. Dep't of the Air Force, Warner Robins Air Force Base, Ga.*, 56 FLRA 541, 543 (2000) (*Warner Robins*) (citing *U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1218-19 (1998) (*HHS*)).

- a. The award of backpay for the grievant's five-day suspension is not contrary to the Back Pay Act.

A violation of a collective bargaining agreement constitutes an unjustified and unwarranted personnel action under the Back Pay Act. *See U.S. Dep't of Def., Dep't of Def. Dependents Schools*, 54 FLRA 773, 785 (1998)). The Arbitrator found that the Agency violated Article 28, Section 1 of the parties' agreement. Award at 4. The Agency has not demonstrated that this finding is deficient.⁴ Accordingly, we find that the award satisfies the first requirement of the Back Pay Act.

The Arbitrator also found that the unwarranted and unjustified personnel action resulted in a reduction of the grievant's pay. Although the Arbitrator did not specify the amount of the loss incurred by the grievant, the Arbitrator did find that the action “resulted in [the grievant's] loss of pay and other benefits.” Award at 6; *see also id.* at 5 (ordering that grievant be “made whole” for any loss of pay or benefits that were a direct result of the unjustified and unwarranted personnel action). This finding satisfies the second requirement of the Back Pay Act. *See, e.g., U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008) (arbitrator's finding that the unwarranted and unjustified personnel action resulted in grievant's loss of pay was sufficient to satisfy the requirement under the Back Pay Act).

Moreover, an employee is only entitled to receive compensation “equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred[.]” 5 U.S.C. § 5596(b)(1)(A)(i). The award provides that the grievant should be “made whole” for the loss of any pay or benefits as a result of the suspension. Award at 6. Thus, the award does

4. The Agency asserts that Article 28, § 1 of the parties' agreement states that “the parties agree that misconduct *should* be remediated in a fair, impartial and timely matter” but does not “*require*” that the discipline be timely. Exceptions at 13 n.12. We construe this assertion as a claim that the award fails to draw its essence from the parties' agreement. As the Agency fails to provide any arguments to support this claim, we deny the claim as a bare assertion. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Port of Seattle, Seattle, Wash.*, 60 FLRA 490, 492 n.7 (2004) (when a party fails to provide any arguments or authority to support its exception, the Authority will deny the exception as a bare assertion).

not provide that the grievant be compensated for any losses not actually sustained as a result of that action.

For the foregoing reasons, we find that the award of backpay in connection with the suspension does not violate the Back Pay Act, and we deny the exception. *See HHS*, 54 FLRA at 1218-19 (award of backpay is warranted where the arbitrator found that the unjustified and unwarranted personnel action resulted in the loss of pay for the grievant).

- b. The award of backpay for the removal of the grievant's firearm is contrary to the Back Pay Act.

As stated above, an award of backpay is authorized under the Back Pay Act only when an arbitrator finds that the unjustified or unwarranted personnel action resulted in the withdrawal or the reduction of an employee's pay, allowances, or differentials. *See Warner Robins*, 56 FLRA at 543. Here, the Arbitrator failed to find a nexus between the removal of the grievant's firearm and a loss in pay or benefits, as required by the Back Pay Act. Accordingly, the award of backpay for the removal of the grievant's firearm is contrary to the Back Pay Act, and we set it aside.⁵ *See Portsmouth Naval Shipyard, Portsmouth, N.H.*, 49 FLRA 1522, 1533 (1994) (Authority declined to order an award of backpay where there was no nexus between the violation and a monetary loss).

C. The Arbitrator did not exceed his authority.

An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In addition, an arbitrator is granted broad discretion to fashion a remedy that the arbitrator considers to be appropriate. *See U.S. DOD, Dependents Schools*, 49 FLRA 658, 663 (1994) (*DODDS*).

The Agency contends that the Arbitrator exceeded his authority by directing that the grievant be given an opportunity to transfer because that remedy addressed an issue -- i.e., the nonselection of the grievant for a position at the Center -- that was

not before the Arbitrator. Exceptions at 8. For the following reasons, we find that the Agency's contention lacks merit.

The stipulated issues before the Arbitrator involved whether the grievant committed the charge of improper association and whether a five-day suspension for that conduct was reasonable. *See Award* at 1. Before the Arbitrator, the Union submitted evidence regarding both the grievant's prior applications for transfer and his relationship with his supervisor. *See Exceptions, Attach., Jt. Ex. 5* at 5-6 (transcript of oral reply to notice of proposed removal discussing removal of firearm); *id.* at 32-37, 45-46 (transcript of oral reply to notice of proposed removal discussing the supervisor's conduct and alleging that the investigation was "driven entirely by" the supervisor's "false accusations"); *Exceptions, Attach., Jt. Ex. 4(g)* (letters regarding applications for transfer). In resolving the stipulated issues and finding that the suspension was improper, the Arbitrator considered the fact that the Agency's investigation into the grievant's conduct did not take place until years after the grievant ended his association with X. In this connection, the Arbitrator considered the fact that the grievant's supervisor raised the issue that led to the Agency investigation, and stated: "There was testimony of a personal[] conflict between" the grievant and his supervisor, "giving rise to the speculation of why [the supervisor] waited so long to" raise the issue of the grievant's association with X. *Award* at 4. Based on this evidence, the Arbitrator found that, "given the situation" at the grievant's work location, an appropriate remedy would be to award the grievant the opportunity to transfer to a different location. *Id.* at 6. In these circumstances, we find that this remedy directly relates to the stipulated issues.

We note the Agency's claim that, if it had known that the Arbitrator was going to resolve a transfer issue, then it "would have offered evidence . . . and made arguments" regarding that issue. Exceptions at 20. To the extent that the Agency's claim could be construed as arguing that the Agency was prejudiced by the Arbitrator's decision to award a transfer, we reject that argument. In this connection, as discussed above, the Union submitted evidence to the Arbitrator regarding both the grievant's prior applications for transfer and his relationship with his supervisor. There is no basis for finding that the Agency was denied an opportunity to address that evidence. Accordingly, there is no basis for finding that the Agency was unfairly prejudiced by the Arbitrator's resolution of this issue.

5. As we set aside the portion of the award concerning backpay for the removal of the grievant's firearm, we need not consider whether the Arbitrator exceeded his authority by ordering such a remedy.

For the foregoing reasons, we find that the Arbitrator did not exceed his authority by directing the transfer remedy, and we deny the exception.

- D. The award is not incomplete, ambiguous, or contradictory.

The Authority will find an award deficient when it is incomplete, ambiguous, or so contradictory as to make implementation of the award impossible. *See U.S. Dep't of Labor, Mine Safety & Health Admin., Se. Dist.*, 40 FLRA 937, 943 (1991). For an award to be found deficient on this ground, the appealing party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. *See U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1074 (2001).

Although the Agency alleges that the transfer remedy is ambiguous, the Agency does not argue, and there is no basis for finding, that the award is impossible to implement. Consequently, we find that the award is not deficient in this regard, and we deny the exception. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 64 FLRA 916 (2010) (finding award not deficient when agency, although alleging award was ambiguous, failed to allege that it was impossible to implement).

V. Decision

The award of backpay for the removal of the grievant's firearm is set aside, and the remaining exceptions are denied.

Member Beck, Dissenting in part:

I disagree with my colleagues' conclusion that the Arbitrator did not exceed his authority when he ordered that the grievant be given an opportunity to transfer within the Agency. Moreover, although I agree with my colleagues that the Arbitrator's award of backpay to the grievant due to the withdrawal of his permit to carry a weapon is contrary to law, I believe that the Arbitrator also exceeded his authority by awarding this remedy.

I recognize that arbitrators are granted broad discretion in the fashioning of appropriate remedies. *See, e.g., Veterans Admin.*, 24 FLRA 447, 450 (1986) (VA). However, despite the deference that we give to arbitrators in this regard, the Authority has adhered to the fundamental principle that arbitrators must confine their awards and remedies to those issues submitted for resolution. *See id.*, and cases cited therein. An arbitrator's discretion is not a license to address issues that are not presented by the parties. *U.S. Dep't of the Navy, Naval Sea Logistics Ctr., Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688 (2002). Although arbitrators may properly bring their judgment to bear in reaching a fair resolution of a dispute submitted to them, they may not decide matters that are not before them. *U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 780 (2005) (then-Member Pope dissenting as to application).

Here, the parties specifically agreed that the Arbitrator would resolve the following two issues:

1. Whether [the grievant] committed the charge of [i]mproper [a]ssociation with [i]ndividual(s) who are [s]uspected or [k]nown to be [c]onnected to [c]riminal [a]ctivities; and
2. Whether the penalty of a five (5) day suspension for the conduct is reasonable.

Award at 1. The Arbitrator answered these questions when he found that the grievant had not committed the charge and implicitly found that the five-day penalty was unreasonable. Having so found, the Arbitrator possessed the authority to return the grievant to the position that he was in prior to the Agency's actions – i.e., to rescind the suspension and award to him the pay or benefits that he lost as a result of the suspension. The Arbitrator, however, went beyond this authority and awarded the grievant additional relief not warranted by the specific issues

to which the parties stipulated – i.e., providing the grievant backpay due to the withdrawal of his permit to carry a firearm and the opportunity to transfer to other parts of the agency.¹

This additional relief concerns issues that were not before the Arbitrator: First, whether the Agency had properly withdrawn the grievant's permit to carry a weapon, and second, the grievant's non-selection for transfer. As noted previously, the Arbitrator was neither asked to, nor authorized to, resolve these other issues, nor to direct remedies concerning them. *See VA, 24 FLRA at 451* (holding that arbitrators may not decide matters that are not before them).

Accordingly, I would find that the Arbitrator exceeded his authority and would modify the award to vacate the portions of the award concerning these remedies.²

1. The Majority describes the Arbitrator's award of backpay due to the withdrawal of the grievant's permit to carry a firearm as "make-whole" relief. Majority at 1, 3. However, the Arbitrator failed to make any finding that the permit was withdrawn because of the charge against the grievant or that the grievant lost any pay or benefits due to the withdrawal. Accordingly, this award of backpay does not constitute make-whole relief.

2. Because I conclude that these additional remedies should be set aside, I would find it unnecessary to address the Agency's remaining exception that the award is ambiguous. Exceptions at 18. However, I concur with my colleagues' resolution of this issue.