

**67 FLRA No. 151**

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

and

NATIONAL TREASURY  
EMPLOYEES UNION  
CHAPTER 160  
(Union)

0-AR-4925

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DECISION

September 19, 2014

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

**I. Statement of the Case**

Arbitrator Diane Dunham Massey found that the Agency violated the parties' collective-bargaining agreement when it failed to assign an employee (the grievant) overtime, and that the grievant was entitled to backpay under the Back Pay Act (BPA).<sup>1</sup> The Arbitrator rejected the Agency's claim that the parties had a binding past practice that allowed the Agency to remedy its violation by assigning the grievant another overtime opportunity (make-up overtime), finding that the alleged practice conflicts with the parties' agreement. This case presents the Authority with five questions.

The first question is whether the Authority should deny the Agency's exceptions to the award because they fail to challenge one of the "separate and independent ground[s]" for the award.<sup>2</sup> Because the exceptions challenge both of the separate and independent grounds for the award, we find that the answer is no.

The second question is whether the award is deficient because the Arbitrator erred, as a matter of law, in finding that the alleged past practice conflicts with the

parties' agreement. Such findings involve an arbitrator's interpretation and application of the parties' agreement, and accordingly are analyzed under the deferential "essence" analysis. Because the Agency does not argue that the award fails to draw its essence from the agreement, we find that the answer is no.

The third question is whether the award of backpay is contrary to the BPA because the parties' agreement allegedly allows only a remedy of make-up overtime. The Agency has not shown that the Arbitrator erred in finding that the agreement precludes a remedy of make-up overtime. Thus, we find that the answer is no.

The fourth question is whether the award conflicts with the grievant's duty to mitigate damages under the BPA. Because there is no basis for finding that the BPA's duty to mitigate applies to denials of overtime opportunities, the answer is no.

The fifth question is whether the Arbitrator exceeded her authority. Because the Agency's exceeded-authority claim is premised on its arguments regarding the BPA, and we reject those arguments, we also reject the exceeded-authority claim.

**II. Background and Arbitrator's Award**

Under the parties' collective-bargaining agreement, the Agency is required to grant an overtime opportunity to the employee who has volunteered to work overtime and has earned the least amount of overtime pay for the year – also known as the "low earner."<sup>3</sup> The grievant volunteered for an eight-hour overtime shift, and was the low earner, but the Agency assigned the overtime to another employee.<sup>4</sup> After a grievance was filed, the Agency offered the grievant the opportunity to work make-up overtime. The grievant declined the offer, and the grievance went to arbitration.

The Arbitrator framed the relevant portion of the issue before her as "[w]hether the remedy for failing to properly assign the [g]rievant to an overtime assignment . . . is to compensate the [g]rievant for the bypassed overtime assignment pursuant to the [BPA] and the [c]ollective-[b]argaining [a]greement?"<sup>5</sup>

The Arbitrator found that the grievant was the "low earner" for the disputed overtime opportunity, and that there was no dispute that he should have been assigned that overtime under the parties' agreement.<sup>6</sup> The Arbitrator then addressed the Agency's claim that the parties had a binding past practice that allowed the

<sup>3</sup> Award at 13.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 13.

<sup>1</sup> 5 U.S.C. § 5596.

<sup>2</sup> Opp'n at 10.

Agency to offer the grievant make-up overtime, rather than backpay, to remedy its failure to follow the agreement.

The Arbitrator found that even if such a past practice existed, it no longer survived under the parties' current agreement. The Arbitrator focused first on the language of the current agreement. Specifically, the Arbitrator quoted Article 3, Section 3 of the parties' agreement, which provides, in pertinent part, that the agreement "*supersedes* all . . . past practices in conflict with it," but "[o]therwise, all practices . . . will continue until otherwise modified by the parties."<sup>7</sup> She also quoted Article 26, Section 10, which provides that "[l]ocal and national agreements and past practices will stay in place unless they conflict with this [a]greement or are re-negotiated in accordance with law and this [a]greement."<sup>8</sup>

The Arbitrator stated that "[t]he evidence does not really support a finding of [a] past practice" of granting make-up overtime for missed overtime opportunities.<sup>9</sup> But she found it unnecessary "to definitively determine whether there was a binding past practice, because even if it existed, it conflicts with the current [agreement] . . . and, therefore, the alleged past practice no longer survives."<sup>10</sup>

Specifically, the Arbitrator found that granting make-up overtime "almost always violates" Article 35, Sections C and E of the agreement.<sup>11</sup> Article 35, Section C(1) pertinently provides that "[u]nanticipated overtime assignments will be made on least[-]cost, lower[-]earner, principles and in accordance with the call-out order contained in Subsection E," and Section E lists the order in which overtime is assigned.<sup>12</sup> According to the Arbitrator, if the Agency remedies a failure to assign an employee overtime by granting that employee the next opportunity to work overtime, and the employee "is not the low earner for the next overtime assignment, then [m]anagement violates the [agreement] when it bypasses the low earner to schedule the skipped employee."<sup>13</sup> Also, according to the Arbitrator, "the other employee who should rightfully be scheduled for overtime, as the low earner at that time, would arguably have a legitimate grievance" for being skipped.<sup>14</sup> Further, the Arbitrator found that Article 35 "does not incorporate any exceptions to the low[-]earner principle,"

and does not give management any discretion to remedy overtime errors by offering make-up overtime.<sup>15</sup>

Having found that the alleged practice violates Article 35, the Arbitrator stated that "the analysis could stop at th[at] point."<sup>16</sup> Nevertheless, she found that "there is further support for the Union's contention that the only appropriate remedy is the payment of overtime."<sup>17</sup> Specifically, she addressed Article 28, Section 9 of the parties' agreement, which provides: "When the Union has requested such a remedy, . . . [backpay] and interest will be provided in accordance with standards established by the [Federal Labor Relations Authority], [the Merit Systems Protection Board], or other applicable jurisdiction."<sup>18</sup> She also quoted Article 3, Section 1, which provides, in pertinent part, that "in the administration of all matters covered by this [a]greement, the parties are governed by . . . laws."<sup>19</sup> Based on these provisions, the Arbitrator found that the agreement incorporates external law, including the BPA, and that, if external law requires a remedy other than make-up overtime, then the alleged past practice conflicts with the agreement. She also found that the alleged past practice "cannot rise to contractually override" the agreement's incorporation of external law.<sup>20</sup>

Accordingly, the Arbitrator next addressed the requirements of the BPA and found those requirements satisfied. In particular, she found that the Agency's violation of the agreement was an unjustified and unwarranted personnel action that directly resulted in a loss of pay to the grievant. In addition, quoting *NTEU, Chapter 231*<sup>21</sup> – a decision in which the Authority set aside an arbitrator's award of make-up overtime as contrary to the BPA – the Arbitrator found that "where an arbitrator's findings support an award of backpay under the BPA, the arbitrator's failure to award backpay is contrary to the BPA."<sup>22</sup> Therefore, she found that backpay was the proper remedy.

Next, the Arbitrator addressed an Agency claim that the grievant had a duty to mitigate his denial of overtime pay by accepting additional overtime assignments. The Arbitrator quoted § 5596(b)(1)(A)(i) of the BPA, which requires deducting from backpay awards

<sup>7</sup> *Id.* at 15 (emphasis added).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 16.

<sup>12</sup> *Id.* at 15.

<sup>13</sup> *Id.* at 16.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (footnote omitted).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 17.

<sup>20</sup> *Id.*

<sup>21</sup> 66 FLRA 1024, *recons. denied*, 67 FLRA 67, 67 (2012), *remanded without decision sub nom. U.S. DHS v. FLRA*, No. 13-1024 2013 U.S. App. LEXIS 16063 (D.C. Cir. Sept. 25, 2013), *recons. denied*, 67 FLRA 247 (2014).

<sup>22</sup> Award at 19 (quoting *NTEU, Chapter 231*, 66 FLRA at 1026).

“any amounts earned by the employee through other employment during that period.”<sup>23</sup> But she found that the mitigation principle requires only removed employees to make reasonable efforts to secure other employment, and does not apply in this case because “[t]he [g]rievant cannot be expected to seek employment to mitigate the loss of [eight] hours of overtime.”<sup>24</sup> Further, she found that the Agency did not provide any authority that establishes the duty to mitigate damages by an employee who remains employed by an agency after a contractual violation, and that it “does not appear that it [wa]s the intent of the BPA for an employee to mitigate damages in the event that he/she was skipped for an overtime assignment.”<sup>25</sup> Therefore, she found that the grievant was not obligated to work make-up overtime to mitigate his loss of pay.

For the foregoing reasons, the Arbitrator found that the appropriate remedy for the Agency’s contract violation was an award of backpay, and she awarded the grievant eight hours of overtime pay, with interest.

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

### III. Analysis and Conclusions

#### A. The Agency has not failed to except to a “separate and independent ground” for the award.

In its opposition, the Union claims that the Arbitrator based her award on “separate and independent ground[s],” and that the Agency has not excepted to both of those grounds.<sup>26</sup> Specifically, the Union claims that the Agency excepts only to the Arbitrator’s finding that the alleged past practice violates Article 35 of the agreement, and not to her finding that the alleged practice violates external law (particularly the BPA) and the contract provisions that incorporate such law.<sup>27</sup> As a result, the Union claims that it is unnecessary for the Authority to resolve the Agency’s exceptions.<sup>28</sup>

When an arbitrator bases an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient for the Authority to find the award deficient.<sup>29</sup> In such circumstances, if the excepting party does not

demonstrate that the award is deficient on one or more of the grounds relied on by the arbitrator, then it is unnecessary to address exceptions to the other grounds.<sup>30</sup>

As discussed in greater detail below, the Agency argues that the Arbitrator erred by finding that the alleged past practice conflicts with the parties’ agreement,<sup>31</sup> which is a finding that underlies both of the allegedly separate and independent bases for her award. Further, the Agency challenges both the Arbitrator’s interpretation of Article 35 and her findings regarding the BPA.<sup>32</sup> Accordingly, we find that the Agency has excepted to both of the separate and independent grounds for the award, and address the merits of the Agency’s exceptions.

#### B. The award is not contrary to law.

The Agency argues that the award is contrary to law in several respects. When exceptions involve an award’s consistency with law, the Authority reviews any question of law raised by the exceptions and the award de novo.<sup>33</sup> 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.<sup>34</sup> In making that assessment, the Authority defers to the Arbitrator’s underlying factual findings unless the appealing party establishes that those findings are “nonfacts.”<sup>35</sup>

##### 1. The Arbitrator’s finding that the alleged past practice violates the parties’ agreement is not contrary to law.

The Agency contends that the Arbitrator erred, as a matter of law, in finding that the alleged past practice conflicts with the parties’ agreement.<sup>36</sup> Specifically, the Agency argues that the agreement and the practice have existed “in harmony” for a long time,<sup>37</sup> and that the Arbitrator erred in finding that Article 35 does not give management discretion to award make-up overtime.<sup>38</sup> And, according to the Agency, the Arbitrator erred in finding that giving make-up overtime would deprive

<sup>23</sup> 5 U.S.C. § 5596(b)(1)(A)(i).

<sup>24</sup> Award at 20 n.7.

<sup>25</sup> *Id.* at 21.

<sup>26</sup> Opp’n at 10.

<sup>27</sup> *Id.* at 10-12.

<sup>28</sup> *Id.* at 14-15.

<sup>29</sup> *U.S. DOL, Bureau of Labor Statistics*, 67 FLRA 77, 81 (2012).

<sup>30</sup> *Id.*

<sup>31</sup> Exceptions at 15-21.

<sup>32</sup> *See id.* at 21-25.

<sup>33</sup> *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)).

<sup>34</sup> *U.S. DOD, Dep’t of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

<sup>35</sup> *U.S. Dep’t of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012) (*IRS*).

<sup>36</sup> Exceptions at 17.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 7.

another low earner of overtime, because there was hearing testimony that the Agency does not always have enough volunteers for overtime.<sup>39</sup> The Agency claims that, because the practice does not conflict with the agreement, the agreement incorporates the practice.<sup>40</sup> Further, the Agency claims that the agreement is silent as to the appropriate remedy<sup>41</sup> and, citing *Cruz-Martinez v. DHS*,<sup>42</sup> claims that the Arbitrator should have applied the parties' practice.<sup>43</sup> Finally, the Agency argues<sup>44</sup> that the award conflicts with the Authority's decision in *U.S. Department of the Navy, U.S. Marine Corps Logistics Base, Albany, Georgia (Navy)*.<sup>45</sup>

In reviewing an arbitrator's award concerning whether a past practice has altered a contract term negotiated by the parties, the Authority considers the issue as a challenge to an arbitrator's interpretation and application of the parties' agreement.<sup>46</sup> An allegation that an arbitrator erred in this regard does not provide a basis for finding the award contrary to law.<sup>47</sup> Instead, the Authority applies the deferential essence standard in reviewing the arbitrator's findings.<sup>48</sup>

Here, although the Agency challenges the Arbitrator's interpretation of the parties' agreement, it does not argue that the award fails to draw its essence from the agreement. And to the extent that some of the Agency's arguments challenge the Arbitrator's factual findings, the Agency does not argue that the award is based on nonfacts. As stated previously, in applying de novo review, the Authority defers to an arbitrator's factual findings, absent a demonstration that those findings are nonfacts.<sup>49</sup>

Further, the Agency's reliance on *Cruz-Martinez*<sup>50</sup> and *Navy*<sup>51</sup> is misplaced. *Cruz-Martinez* held that "past practices . . . can establish terms of [an] agreement that are as binding as any specific written provision[. . .] . . . particularly . . . where the past practice does not contradict any written provision in the" collective-bargaining agreement.<sup>52</sup> That decision does not support a conclusion that the Arbitrator was required, as a matter of law, to find that the particular alleged past

practice in this case was binding on the parties – particularly given her finding that the alleged practice conflicts with written provisions of the agreement. As for *Navy*, in that decision, the Authority denied an essence exception to an arbitrator's award of make-up overtime.<sup>53</sup> *Navy* did not hold, as a matter of law, that an arbitrator is required to grant a make-up remedy when the requirements of the BPA have been met, as in this case. In fact, in *NTEU, Chapter 231*, the Authority held that when the requirements of the BPA are met in connection with a denial of overtime, an arbitrator *must* award backpay.<sup>54</sup> In so holding, the Authority noted that *Navy* did not address whether the BPA allows make-up overtime as a remedy.<sup>55</sup>

For these reasons, we find that the Agency has not demonstrated that the Arbitrator erred, as a matter of law, in finding that the alleged past practice conflicts with the parties' agreement.

The Agency also challenges the Arbitrator's failure to find whether the past practice existed.<sup>56</sup> However, given her finding that (even if it existed) the alleged practice conflicted with the agreement – which the Agency has not shown to be deficient – it was unnecessary for the Arbitrator to resolve that issue. Accordingly, we reject the Agency's challenge.

2. The award is not contrary to § 5596(b)(4) of the BPA.

The Agency asserts that, under 5 U.S.C. § 5596(b)(4), any remedy available under the BPA is restricted to limitations placed by the parties' collective-bargaining agreement.<sup>57</sup> The Agency further asserts that the parties' agreement incorporates the alleged past practice of granting make-up overtime and that, therefore, any remedy is limited to make-up overtime.<sup>58</sup>

Title 5, § 5596(b)(4) of the U.S. Code provides, in pertinent part, that backpay "shall not exceed that authorized by the . . . collective[-]bargaining agreement under which the unjustified or unwarranted personnel action is found."<sup>59</sup> Here, the Arbitrator found that the alleged past practice conflicted with the current agreement, and that the agreement "supersedes" such conflicting past practices. Further, the Agency has not shown these findings to be deficient. As a result, there is no basis for finding that the alleged practice was

<sup>39</sup> *Id.* at 20.

<sup>40</sup> *Id.* at 19.

<sup>41</sup> *Id.* at 18.

<sup>42</sup> 410 F.3d 1366 (Fed. Cir. 2005).

<sup>43</sup> Exceptions at 19.

<sup>44</sup> *Id.* at 20.

<sup>45</sup> 39 FLRA 576 (1991).

<sup>46</sup> *U.S. DOJ, Fed. BOP, Mgmt. & Specialty Training Ctr., Aurora, Colo.*, 56 FLRA 943, 944 (2000).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *IRS*, 67 FLRA at 104.

<sup>50</sup> 410 F.3d 1366.

<sup>51</sup> 39 FLRA 576.

<sup>52</sup> 410 F.3d at 1370-71.

<sup>53</sup> 39 FLRA at 578-79.

<sup>54</sup> 66 FLRA at 1026-27.

<sup>55</sup> *Id.* at 1026.

<sup>56</sup> Exceptions at 9.

<sup>57</sup> *Id.* at 22.

<sup>58</sup> *Id.* at 8-9, 21-22.

<sup>59</sup> 5 U.S.C. § 5596(b)(4).

incorporated into the agreement. Consequently, there is also no basis for finding that the award of backpay exceeds a limit contained in the parties' agreement, and we find that the award is not contrary to § 5596(b)(4).

Moreover, the Authority has found that § 5596(b)(4)'s purpose is to establish an outermost time limit on backpay awards, while allowing for a shorter limitations period where "authorized by the applicable law, rule, regulations, or . . . agreement under which the unjustified or unwarranted personnel action" was found.<sup>60</sup> In other words, § 5596(b)(4) merely places time limits on recovery under the BPA.<sup>61</sup> As time limits on recovery were not an issue in this case, the Agency's reliance on § 5596(b)(4) is misplaced.

3. The award is not contrary to the BPA's duty to mitigate damages.

In the alternative, the Agency argues that the award conflicts with the BPA's duty to mitigate damages.<sup>62</sup> Specifically, the Agency claims that the grievant failed to mitigate his loss by not accepting subsequent offers of make-up overtime.<sup>63</sup>

Under the BPA, employees who have been wrongfully discharged from their positions must "make reasonable efforts to mitigate damages, i.e., make reasonable efforts to obtain interim employment."<sup>64</sup> There is no basis for finding that this principle bars the award of backpay in this case. As an initial matter, there is no basis for finding that it applies to employees who have been improperly denied overtime opportunities, rather than being improperly discharged. Moreover, the precedent does not indicate that an employee who has been denied overtime must make reasonable efforts to obtain "interim *employment*" within the meaning of this principle.<sup>65</sup> Further undercutting the Agency's claim, in cases involving backpay for missed overtime, the Authority routinely has found backpay appropriate under the BPA without requiring mitigation.<sup>66</sup>

Accordingly, we find that the Agency has not established that the remedy awarded violates the BPA, and deny this exception.

- C. The Arbitrator did not exceed her authority.

The Agency asserts that the Arbitrator exceeded her authority because she awarded a remedy that "exceeded the limitation of what is authorized by Congress."<sup>67</sup> This exception is premised on the Agency's claim that the award is contrary to the BPA. Because we have rejected the Agency's claims regarding the BPA, we also reject the exceeds-authority claim.

#### IV. Decision

We deny the Agency's exceptions.

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<sup>60</sup> *NTEU, Chapter 231*, 67 FLRA 247, 250 (2014) (quoting 5 U.S.C. § 5596(b)(4)).

<sup>61</sup> *Id.*

<sup>62</sup> Exceptions at 22-23.

<sup>63</sup> *Id.* at 23.

<sup>64</sup> *Naekel v. Dep't of Transp., FAA*, 850 F.2d 682, 685 (Fed. Cir. 1988).

<sup>65</sup> *Id.* (emphasis added).

<sup>66</sup> See, e.g., *NTEU, Chapter 231*, 66 FLRA at 1026; *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 1040, 1045-46 (2011); *U.S. Dep't of the Treasury, U.S. Customs Serv. Portland, Or.*, 54 FLRA 764, 769 (1998).

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<sup>67</sup> Exceptions at 21-22.

**Member Pizzella, concurring:**

I agree that the Agency's exceptions should be denied, but I do not agree with how my colleagues resolve the Agency's contrary-to-law exception.

The majority rejects the Agency's contrary-to-law exception because the Agency "has not demonstrated that the Arbitrator erred, *as a matter of law*, in finding that the *alleged past practice* conflicts with the parties' agreement."<sup>1</sup> As I noted in *U.S. DOD, Defense Logistics Agency, Defense Distribution Depot Red River, Texarkana, Texas (Defense Depot Red River)*, the Authority may not simply "read [an arbitrator's award] in context" to conclude "that [the arbitrator] *implicitly found* a violation of [the parties' contract]."<sup>2</sup>

For the same reason, I do not agree that the Arbitrator, nor the Authority, may simply *presume* the existence of a past practice, where the Arbitrator never found that a past practice existed. I agree that the question of whether a past practice conflicts with a provision in the parties' agreement is a matter of contract interpretation.<sup>3</sup> But I cannot fault the Agency for failing to raise an essence exception where, as here, the Arbitrator never "determine[d] whether there was a binding past practice."<sup>4</sup>

Arbitrator Diane Dunham Massey had only two choices – either there *was* a past practice or there *was not* a past practice. But she never made that determination. Instead, she confused everyone by musing that even though "[t]he evidence does not really support a finding of past practice, . . . even if [a past practice] existed, it conflicts with the current [agreement]."<sup>5</sup> Huh? Arbitrators are hired by parties to clarify and resolve, not add confusion to, their disputes. Therefore, I am perplexed why my colleagues would once again "implicitly" fill in the gaps that are left open by the Arbitrator who failed to finish her job, when they will summarily dismiss, without any hesitation, meritorious arguments that are raised by union stewards and agency representatives simply because they fail to use precise language or "particular" words in their submissions.<sup>6</sup>

Therefore, I do not believe the Agency can be faulted for failing to raise an essence exception.

I would, however, deny the Agency's contrary-to-law exception – that asserts "[t]he Arbitrator's [m]onetary [a]ward is [c]ontrary to [l]aw [b]ecause [i]t [e]xceeds the [a]uthority [g]ranted by Congress" – because the Agency makes only general assertions that are insufficient to support its contention that the award is contrary to law.<sup>7</sup> It is, therefore, unnecessary to address whether a purported past practice exists, as a matter of law, or whether it conflicts with the parties' agreement.<sup>8</sup>

Thank you.

<sup>1</sup> Majority at 7 (emphasis added).

<sup>2</sup> 67 FLRA 609, 617 (2014) (Dissenting Opinion of Member Pizzella) (emphasis in original).

<sup>3</sup> Majority at 6.

<sup>4</sup> Award at 15.

<sup>5</sup> *Id.*

<sup>6</sup> See *Defense Depot Red River*, 67 FLRA at 617 (Dissenting Opinion of Member Pizzella) (citing *AFGE, Local 1897*, 67 FLRA 239, 243 (2014) (Concurring Opinion of Member Pizzella) (citations omitted)).

<sup>7</sup> Exception at 7; see *NFFE, Local 1442*, 61 FLRA 857, 859 (2006) (internal citations omitted) ("The Authority has long held that an exception claiming a violation of law must contain a description of facts and circumstances to support its exception. A general assertion, absent more, is not sufficient to support a contention that an award is contrary to law.")

<sup>8</sup> *NTEU, Chapter 160*, 67 FLRA 482, 486 (2014) (finding it unnecessary to determine whether a past practice exists where the practice, if it existed, is covered by provisions in the parties' agreement).