68 FLRA No. 29

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
BOARD OF VETERANS APPEALS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL VETERANS AFFAIRS COUNCIL
LOCAL UNION NO. 17
(Union)

0-AR-5006

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DECISION

January 8, 2015

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

I. Statement of the Case

Arbitrator Blanca E. Torres found that the Agency violated Article 27, Section 5(E) of the parties' collective-bargaining agreement (Article 27) and § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by changing how the Agency enforced one of its performance standards. As a remedy, the Arbitrator directed the Agency to return to the status quo ante and bargain over the impact and implementation of the change. This case presents us with four substantive questions.

The first question is whether the Arbitrator erroneously concluded that the Agency changed its enforcement of a performance standard based on the nonfact that the Agency had previously enforced the performance standard on a quarterly – rather than weekly – basis. Because the Agency's nonfact argument challenges a matter that was disputed at arbitration, the answer is no.

The second question is whether the award is contradictory so as to make implementation impossible because it allegedly directs the Agency to adopt two inconsistent performance standards. Because the award does not require the Agency to adopt two inconsistent performance standards, the answer is no.

The third question is whether the award is contrary to public policy because it reduces the Agency's productivity requirement. As the Agency's argument misinterprets the award, the answer is no.

And the fourth question is whether the award is contrary to § 7106(a) of the Statute because the Arbitrator's remedies for the Agency's contractual violation and unfair labor practice (ULP) "violate[] management rights by specifying the substantive content of a performance standard."[2] Because § 7106 does not limit the Arbitrator's authority under the Statute to remedy ULPs, the Agency's reliance on § 7106 provides no basis for setting aside the Arbitrator's remedies insofar as they remedy the ULP. And, because the finding of a ULP is a sufficient ground – separate and independent from the Arbitrator's finding of a contractual violation – for the remedies, we find it unnecessary to determine whether the contractual violation also supports those remedies.

II. Background and Arbitrator's Award

The Agency evaluates its attorneys based, in part, on how many "decisions, remands, and request[s] [for] medical opinions" they produce (the productivity element).[3] Specifically, attorneys earn credits for drafting these documents, and the productivity element requires attorneys to earn 156 credits per fiscal year (the annual quota). When the Agency allegedly changed the manner in which it enforced the productivity element, the Union requested bargaining. The Agency refused to bargain, and the Union filed a grievance that went to arbitration.

At arbitration, the parties were unable to agree on the issues, so the Arbitrator framed them, in relevant part, as follows: (1) "[w]hether there was a change in the implementation and enforcement of the [a]ttorneys' annual quota that gave rise to a duty to bargain"; (2) "[w]hether [m]anagement gave notice of the change pursuant to the collective[-]bargaining agreement and federal statute"; and (3) "[i]f not, what shall be the remedy?"[4]

The Arbitrator stated that "[t]he Agency has consistently tracked attorneys' productivity requirements on a weekly basis."[5] Specifically, the Arbitrator found that, when the Agency first introduced the productivity

[1] 5 U.S.C. § 7116(a)(1), (5).

[2] Exceptions at 14.
[3] Award at 3.
[4] *Id.* at 2.
[5] *Id.* at 4.

element, it used a "fair[-]share chart" with "weekly goal[s]" to track attorneys' progress toward meeting the annual quota (the original chart).[6] Using the original chart, Agency managers considered an attorney "green" if the attorney was on track to meet the annual quota and "yellow" if he or she fell behind weekly productivity goals.[7] However, the original chart included a buffer (the margin) between the green and yellow zones so that an attorney could fall slightly behind the green productivity goals, and yet the managers would not treat the attorney as yellow. Throughout the year, the margin would decrease. For example, during the first quarter, attorneys' productivity would fall within the margin – and they would not be "yellow" – if they were at 75% of the weekly goal.[8] But, during the third quarter, their productivity would fall within the margin only if they were at 85% of the weekly goal. As the year drew to a close, managers required attorneys to close the gap and earn enough credits to meet the annual quota by the last week of the year.[9]

The Arbitrator found that, at the beginning of a new fiscal year, the Agency issued a revised fair-share chart (the new chart) that "eliminated any margin between the 'green' and 'yellow' zones."[10] According to the Arbitrator, this meant that an attorney would now be "deemed 'yellow' within any given week should he or she fall a mere 0.5 credits behind what is considered 'green.'"[11] As a result, the Arbitrator found that attorneys who fell behind the weekly goal by as few as 0.5 credits were subject to pre-disciplinary communications by supervisors, which could lead to lower performance ratings. At arbitration, the Union argued that this "strict weekly enforcement" of the productivity element was a "new management practice."[12] The Agency disputed that argument, claiming that it had "consistently . . . enforced" attorneys' productivity goals on a weekly basis prior to implementation of the new chart,[13] and that the new chart was "merely a tool for management personnel."[14]

The Union asked the Arbitrator to direct the Agency to "institute quarterly review, using as a guide the prior production schedule [(the original chart)]."[15] Similarly, in her analysis, the Arbitrator repeatedly referred to the use of the original chart – with weekly goals that changed according to the quarter – as "quarterly enforcement"[16] or "quarterly review."[17] And she referred to the implementation of the new chart as the "elimination of quarterly enforcement"[18] because she found that the new chart "eliminated the percentage margin allowing attorneys to produce a certain percentage of credits each quarter toward their annual quota" and, instead, "required [attorneys] to complete three credits per week."[19] In this regard, the Arbitrator characterized implementation of the new chart as a "strict weekly enforcement of a weekly quota,"[20] and she rejected the Agency's argument that the chart was "merely a tool for management personnel" rather than a production schedule.[21]

Relatedly, the Arbitrator rejected the Agency's argument that implementing the new chart was only a de minimis change to attorneys' conditions of employment. Specifically, she found that "having to meet the quota of three credits a week, each and every week . . . took a policy whose application was reasonable[] into a realm of strict application [that had an] adverse[] impact[] on the employees."[22] For example, she found that the change affected attorneys' conditions of employment by: (1) increasing the unpaid overtime that attorneys felt compelled to work in order to meet weekly goals; (2) limiting the use of leave, because attorneys were expected to meet goals even for weeks when they were on approved leave; (3) disadvantaging attorneys whose work was not promptly reviewed, thereby preventing the attorneys from earning credits in a timely manner; (4) increasing pre-disciplinary measures that "may lead to reduced appraisal ratings"; and (5) reducing attorneys' ability to manage their own time by, for example, balancing work time with use of leave.[23]

While recognizing that the change did not increase the annual quota,[24] the Arbitrator concluded that the above-listed effects on attorneys' conditions of employment were "reasonably foreseeable . . . at the time of the change," and that the Agency therefore had "a duty to give notice to the Union of the change."[25] She also

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[6] *Id.* (internal quotation marks omitted).
[7] *Id.* (internal quotation marks omitted).
[8] *Id.* at 4-5 (internal quotation marks omitted).
[9] *See id.* at 5 ("Attorneys had to be at . . . 100% [of the annual quota] by week [fifty-two].").
[10] *Id.*
[11] *Id.*
[12] *Id.* at 4.
[13] *Id.* at 11.
[14] *Id.* at 12.
[15] Opp'n, Attach. B, Union's Post-Hr'g Br. at 41 (citing Union Ex. [6]J, Fair Share Production Goals); *see also* Opp'n, Attach. G, Tr. (Tr.) at 218-19 (referring to chart the Union would submit with its post-hearing brief – the original chart – when describing "what . . . quarterly review would look like").
[16] *E.g.*, Award at 12.
[17] *E.g.*, *id.* at 9.
[18] *Id.* at 13.
[19] *Id.* at 12 (emphasis omitted).
[20] *Id.* at 9.
[21] *Id.* at 12.
[22] *Id.*
[23] *Id.* at 13.
[24] *Id.* (finding implementation of new chart did not "result in more work *annually* for [attorneys]").
[25] *Id.*

found that the Agency gave the Union no notice of the change, and that the Union made a timely request for impact and implementation bargaining, which the Agency denied.

Accordingly, the Arbitrator found that the Agency violated "its duty to engage in impact and implementation bargaining" over the change[26] under § 7116(a)(1) and (5) of the Statute.

"[A]s a separate matter,"[27] the Arbitrator found that the Agency violated Article 27, which requires the Agency to give the Union advance written notice of any changes to performance standards, and to "meet all bargaining obligations."[28]

As to remedy, the Arbitrator applied the factors set forth in *Federal Correctional Institution*[29] and concluded that status quo ante relief was appropriate. Thus, the Arbitrator directed the parties to "return to the status quo ante, i.e., enforcement of the quota on a quarterly basis," until the parties completed bargaining over any Agency changes to the enforcement of the productivity element.[30]

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

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's exceptions.

The Agency argues that the award's requirement that the Agency cease strict weekly enforcement of the productivity element until bargaining is complete conflicts with 5 C.F.R. § 432.104's mandate that the Agency address unacceptable performance "[a]t any time"[31] during the appraisal cycle.[32] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[33] The Agency acknowledges that, at arbitration, the Union asked the Arbitrator to direct the Agency to enforce the productivity element less frequently than every week.[34] Therefore, the Agency could have argued to the Arbitrator that less frequent enforcement of the productivity element would conflict with § 432.104. But there is no evidence that the Agency did so. Accordingly, §§ 2425.4(c) and 2429.5 bar the Agency's argument, and we dismiss the Agency's exception that contains that argument.[35]

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the Arbitrator erroneously concluded that the Agency changed its enforcement of the productivity element based on the nonfact that the Agency had previously enforced productivity on a quarterly – rather than weekly – basis.[36] As relevant here, under § 7122(a)(2) of the Statute, the Authority reviews whether arbitration awards are deficient based on "grounds similar to those applied by [f]ederal courts in private[-]sector labor-management relations."[37] Federal courts – including the U.S. Supreme Court – generally refuse to disturb arbitrators' factual findings,[38] and will set aside an award for alleged factual errors only "where *the* 'fact' underlying an arbitrator's decision is concededly a [nonfact]."[39] Thus, 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.[40]

And 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.[41] In this regard, the Supreme Court has advised:

> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts . . . that they have agreed to accept. Courts thus do not sit to hear claims of factual . . . error by an arbitrator as an

[26] *Id.* at 14.
[27] *Id.* at 15.
[28] *Id.* (quoting Article 27).
[29] 8 FLRA 604, 606 (1982).
[30] Award at 17.
[31] 5 C.F.R. § 432.104.
[32] Exceptions at 15.
[33] 5 C.F.R. §§ 2425.4(c), 2429.5; *e.g.*, *SSA, Region V*, 67 FLRA 155, 156 (2013) (*SSA*).
[34] *See* Exceptions at 12.
[35] *E.g.*, *SSA*, 67 FLRA at 156.
[36] *See* Exceptions at 4-13.
[37] 5 U.S.C. § 7122(a)(2).
[38] *See U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993) (*Lowry AFB*) (discussing *United Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987) (*Misco*); *Nat'l Post Office Mailhandlers v. U.S. Postal Serv.*, 751 F.2d 834 (6th Cir. 1985) (*Post Office*); *Elecs. Corp. of Am. v. Int'l Union of Elec.*, 492 F.2d 1255 (1st Cir. 1974) (*Elecs.*)).
[39] *Elecs.*, 492 F.2d at 1257.
[40] *E.g.*, *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 461 (2012) (*NLRB*) (citation omitted).
[41] *NFFE, Local 2030*, 56 FLRA 667, 672 (2000) (*Local 2030*); *AFGE, Local 1858*, 56 FLRA 422, 424 (2000) (*Local 1858*); *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*Local 1984*).

> appellate court does in reviewing decisions of lower courts. To resolve disputes . . . , an arbitrator must find facts[,] and a court may not reject those findings simply because it disagrees with them.[42]

Accordingly, "improvident, even silly, factfinding" is insufficient to establish the deficiency of an arbitration award.[43] Rather, only "clear misstatements of undisputed historical fact" qualify as grounds for overturning an arbitration award.[44]

To support its nonfact exception, the Agency asserts that "weekly review of credits ha[s] been in place" since the Agency instituted the productivity element.[45] If the Arbitrator had understood that fact, the Agency argues, she would not have characterized the implementation of the original chart as "quarterly review"[46] and erroneously concluded that the Agency's implementation of the new chart was a "new practice."[47]

In order to address the Agency's argument, it is necessary to recognize the distinction between "review" (or tracking) of attorneys' productivity performance and "enforcement" of credit goals.[48] The Arbitrator found that "[t]he Agency has consistently *tracked* attorneys' productivity requirements on a weekly basis."[49] And, in her award, the Arbitrator described the operation of the original chart, including its use of "weekly goal[s]."[50] Thus, the Arbitrator clearly understood that, even before the alleged change at issue here, the Agency *reviewed* attorneys' productivity on a weekly basis.

But the Arbitrator found that the Agency changed how frequently it *enforced* the productivity element, and *that* is what is relevant to the Arbitrator's conclusion that the Agency changed attorneys' conditions of employment. At arbitration, the Union argued that "strict weekly enforcement" of the productivity element was a "new management practice,"[51] whereas the Agency argued that it had "consistently . . . enforced" attorneys' productivity goals on a weekly basis prior to implementation of the new chart,[52] and that the new chart was "merely a tool for management personnel."[53] The Arbitrator resolved the parties' dispute by rejecting the Agency's arguments, and finding that strict weekly enforcement of the productivity element using the new chart constituted a change.[54] Thus, the Agency's argument challenges a matter that was disputed at arbitration, and – consistent with the deference that we owe the Arbitrator's factual findings because the parties jointly chose her, not us, to make those findings – the exception provides no basis for us to set aside the award as based on a nonfact.[55]

For the foregoing reasons, we deny the Agency's nonfact exception.

B. The award is not contradictory so as to make implementation impossible.

According to the Agency, when the Arbitrator directed the Agency to return to the status quo ante and implement the original chart, "she effectively changed the performance standard . . . to require only 148 credits . . . per year" because she "erroneously accepted the Union's position" that, under the original chart, an attorney had "permission" to end the year with only 95% of the annual quota.[56] The Agency also states that the Arbitrator "up[held] the standard[] requiring 156 credits."[57] Thus, the Agency argues that the award is "internally contradictory so as to make implementation impossible" because it directs the Agency to adopt two contradictory performance standards.[58]

The Authority will set aside an award that is "incomplete, ambiguous, or contradictory"[59] where an appealing party demonstrates that the award is "impossible to implement because the meaning and effect of the award are too unclear or uncertain."[60] Here, the Agency argues that the award is contradictory because it imposes two different annual quotas.[61] But the Agency's argument misinterprets the award. The Arbitrator clearly found that the implementation of the new chart did not

[42] *Misco*, 484 U.S. at 37-38.
[43] *Id.* at 39.
[44] *Post Office*, 751 F.2d at 843; *see also Lowry AFB*, 48 FLRA at 594 (quoting *Post Office*, 751 F.2d at 843).
[45] Exceptions at 4.
[46] *Id.*
[47] *Id.* at 8.
[48] *E.g.*, Award at 9.
[49] *Id.* at 4 (emphasis added).
[50] *Id.*
[51] *Id.*
[52] *Id.* at 11.
[53] *Id.* at 12.
[54] *Id.* at 11-13.
[55] *E.g.*, *Local 2030*, 56 FLRA at 672; *Local 1858*, 56 FLRA at 424; *Local 1984*, 56 FLRA at 42; *see also Misco*, 484 U.S. at 36-38; *Lowry AFB*, 48 FLRA at 593-94.
[56] Exceptions at 13.
[57] *Id.* at 14 (citing Award at 12).
[58] *Id.*
[59] *U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs.*, 67 FLRA 665, 668 (2014) (Member Pizzella concurring on unrelated grounds) (quoting 5 C.F.R. § 2425.6(b)(2)(iii)) (internal quotation marks omitted).
[60] *U.S. DOD, Def. Logistics Agency*, 66 FLRA 49, 51 (2011) (citing *NATCA*, 55 FLRA 1025, 1027 (1999) (Member Wasserman dissenting as to other matters)).
[61] *See* Exceptions at 13-14.

increase the annual quota.[62] Thus, the Arbitrator's remedy directing the Agency to reinstate the original chart until bargaining is complete does not decrease the quota. And nothing in the Arbitrator's findings supports the Agency's assertion that the Arbitrator interpreted the original chart to permit an attorney to end the year with only 148 credits.[63] Because the award does not direct the Agency to adopt two contradictory performance standards, the Agency does not demonstrate that the award is impossible to implement. Accordingly, we deny this exception.[64]

C. The award is not contrary to public policy.

The Agency claims that the award is contrary to public policy. For an award to be found deficient on this basis, the asserted public policy must be "explicit," "well defined," and "dominant,"[65] and a violation of the policy "must be clearly shown."[66] In addition, the appealing party must identify the policy "'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"[67]

The Agency argues that the Arbitrator's "diminution of the [annual quota] to 148 . . . credits per year" is "against public policy" because it impairs the Agency's ability to serve its mission.[68] However, as discussed above, the award does not reduce the annual quota to 148 credits. Therefore, even assuming that the asserted public policy is sufficiently "explicit," "well-defined," and "dominant,"[69] the Agency has not "clearly shown" that the award violates that policy.[70] Accordingly, we deny this exception.[71]

D. The award is not contrary to § 7106(a) of the Statute.

The Agency argues that the award is contrary to § 7106(a) of the Statute because the Arbitrator's remedy "violates management rights by specifying the substantive content of a performance standard."[72] Where, as here, 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 of the Statute.[73] In this regard, the Authority has held that "an arbitrator is empowered to fashion the same remedies in the arbitration of a grievance alleging the commission of [a ULP] as those authorized under [§] 7118 of the Statute."[74] In addition, the Authority has held that § 7106(a) "'limits the scope of bargaining[,] rather than limiting the . . . ability to issue remedial orders' under § 7118 of the Statute."[75] Consistent with this principle, the Authority has held that management's right to change employees' conditions of employment does not provide a basis for denying a status quo ante remedy for a ULP.[76]

Consistent with this precedent, the Agency's argument that the award conflicts with its § 7106(a) rights by specifying the content of a performance standard does not provide a basis for finding that the Arbitrator erred in awarding status quo ante relief.[77] Moreover, the decisions cited by the Agency[78] do not support a contrary conclusion, because none of them addresses an arbitrator's authority to award status quo ante relief to remedy a ULP. In particular, although the Agency cites *NFFE, Local 858*[79] and *Newark Air Force Station*,[80] its reliance on those decisions is misplaced. Those decisions involved alleged violations of 5 U.S.C. § 4302,[81] which is not at issue here.

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[62] Award at 13 (implementation of new chart "[did] not result in more work *annually* for [attorneys]"); *id.* at 4 (implementation of new chart left "actual quota . . . unchanged").
[63] *See id.* at 4-5 (attorneys expected to earn "100% [of their annual quota of 156 credits] by week [fifty-two]").
[64] *See, e.g.*, *NLRB*, 66 FLRA at 460.
[65] *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers of Am.*, 461 U.S. 757, 766 (1983) (*Rubber Workers*).
[66] *Misco*, 484 U.S. at 43.
[67] *NTEU*, 63 FLRA 198, 201 (2009) (quoting *Rubber Workers*, 461 U.S. at 766).
[68] Exceptions at 15.
[69] *See Rubber Workers*, 461 U.S. at 766.
[70] *Misco*, 484 U.S. at 43.
[71] *E.g.*, *NLRB*, 66 FLRA at 459.
[72] Exceptions at 14.
[73] *NTEU*, 64 FLRA 833, 837 (2010).
[74] *U.S. DHS, U.S. CBP*, 65 FLRA 88, 89 (2010) (*CBP*) (quoting *NTEU*, 48 FLRA 566, 570 (1993)) (internal quotation marks omitted).
[75] *Id.* (quoting *U.S. Dep't of the Air Force, 60th Air Mobility Wing, Travis Air Force Base, Cal.*, 59 FLRA 632, 639 (2004)); *see also Fed. BOP, Wash., D.C.*, 55 FLRA 1250, 1256 (2000) (Member Cabaniss dissenting on unrelated grounds) ("Congress intended [§] 7106 to limit the scope of collective bargaining rather than the Authority's [ULP] remedial power").
[76] *CBP*, 65 FLRA at 89.
[77] *See, e.g.*, *id.*
[78] Exceptions at 14-15 (citing *Dep't of the Treasury, IRS v. FLRA*, 494 U.S. 922 (1990); *AFGE, Council 224*, 60 FLRA 278 (2004) (Concurring Opinion of Chairman Cabaniss); *U.S. Dep't of HUD*, 56 FLRA 592 (2000); *Dep't of the Treasury, BEP*, 53 FLRA 146 (1997); *NFFE, Local 858*, 47 FLRA 481 (1993) (*Local 858*); *Patent Office Prof'l Ass'n*, 41 FLRA 795 (1991); *Dep't of the Treasury, Customs Serv.*, 37 FLRA 309 (1990); *Newark Air Force Station*, 30 FLRA 616 (1987) (*Air Force*); *AFGE, Local 32, AFL*-CIO, 28 FLRA 714 (1987); *AFGE, AFL-CIO, Local 2302*, 15 FLRA 17 (1984)).
[79] 47 FLRA 481.
[80] 30 FLRA 616.
[81] *See Local 858*, 47 FLRA at 486 (discussing potential remedy for alleged violation of 5 U.S.C. § 4302); *Air Force*, 30 FLRA at 636-37 (same).

In sum, because § 7106 does not limit an arbitrator's ability to issue remedies for ULPs, the Agency's argument provides no basis for finding that the Arbitrator erred in awarding status quo ante relief and directing impact-and-implementation bargaining to remedy the Agency's ULP.[82]

To the extent that the Agency is arguing that the Arbitrator's finding of a contractual violation cannot support her remedies, the Authority has held that where an arbitrator has based an award on separate and independent grounds, an excepting party must establish that all of the grounds are deficient in order to show that the award is deficient.[83] In those circumstances, if the excepting party does not allege and demonstrate that one of the separate and independent grounds for the award is deficient, then it is unnecessary for the Authority to resolve exceptions concerning the other separate and independent grounds.[84] Here, because the Arbitrator's finding of a ULP provides a separate and independent ground for her remedies, it is unnecessary to resolve whether her finding of a contractual violation also supports those remedies. Accordingly, we find it unnecessary to resolve the Agency's argument.[85]

For the foregoing reasons, the Agency has not established that the award is contrary to law.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[82] *See, e.g.*, *CBP*, 65 FLRA at 89-90.
[83] *E.g.*, *Union of Pension Emps.*, 67 FLRA 63, 66 (2012) (citing *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000)).
[84] *Id.*
[85] *Id.*

Member Pizzella, dissenting:

In the 1950 film, *Harvey*, James Stewart, in the role of Elwood P. Dowd, was able to see a six-foot bunny . . . that no one else could.[1] Similarly, in this case, Arbitrator Blanca E. Torres was able to see a practice that had *never* existed and conclude that the Agency committed an unfair labor practice when it supposedly changed the non-existent practice. But, just like Elwood Dowd's family and friends, neither of the parties could see the practice that Arbitrator Torres discovered. The Union did not argue, and its exhibits did not establish, that the practice had ever existed, and the Agency denied that such a practice had ever existed.

Unlike the majority, I would vacate the Arbitrator's award in its entirety.

This case demonstrates that it is time for the Authority to reexamine the manner by which it addresses and resolves nonfact exceptions.

I am mindful of the general proposition that arbitrators are entitled to substantial deference with respect to their factual findings and that we should take care so as to not second guess their resolution of points of disagreement that are based on different recollections or perceptions or on ambiguous evidence.[2] In those circumstances, the nonfact exception should be applied sparingly.

But I cannot subscribe to the notion that the nonfact exception should be applied so narrowly that it is, for all practical purposes, denigrated to extinction. In recent years, the Authority has so conflated its application of the nonfact exception that now the exception is precluded whenever the Authority declares that the exception involves a matter that was "disputed" before the arbitrator,[3] with no regard for how inconsistent, outrageous, or wrong is the finding,[4] and with no consideration of how significant, or insignificant, is that finding to the arbitrator's ultimate conclusion.

In earlier years, however, the Authority "*generally* refus[ed]" to grant a nonfact exception[5] but

[1] *Harvey* (Universal Int'l Pictures 1950).
[2] *See U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry AFB*) (citing *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 45 (1987) (*Misco*)).
[3] *See U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 64 FLRA 39, 56 (2009); *see also Lowry AFB*, 48 FLRA at 593.
[4] *See SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 605 (2014) (Dissenting Opinion of Member Pizzella).
[5] *Lowry AFB*, 48 FLRA at 594 (emphasis added).

the deference to an arbitrator's factual findings was not absolute. The Authority recognized, as did the U.S. Court of Appeals for the First Circuit, that a nonfact exception may be warranted whenever an arbitrator "not only err[s] in the *view of the facts*, but that the *sole articulated basis* for the award *[is] clearly in error* and that the *evidence discloses a gross mistake* of fact but for which . . . the expressed rationale of the arbitrator, a different result would have been reached."[6] The Authority also recognized, as late as 2010, that when the facts of a case are so integrally tied up with an arbitrator's ultimate "conclusion,"[7] or are "central to the [arbitrator's] award,"[8] an arbitrator's finding of fact may constitute a nonfact[9] or otherwise justify vacating the award altogether.[10]

Here, the Agency argues that the award is based on a finding that is "*clearly erroneous*, in the absence of which the Arbitrator would have reached a different result."[11]

Contrary to *all* of the evidence presented in this case, the Arbitrator inexplicably concluded that the Agency changed the manner in which it tracked the productivity element for attorneys – from quarterly to weekly. There is not one iota of evidence that the Agency ever measured attorneys' productivity on a quarterly basis. The Union did not argue this; the Agency denies it; and even the exhibits introduced by the Union support the Agency's argument that attorneys' productivity has been tracked by supervisors consistently on a weekly basis from 2003 through 2013.[12]

One need only look to the Union's grievance to see that the Arbitrator's finding is utterly baseless and has no foundation. In the grievance, the Union argued that the "failure [of the Agency] to *prorate* an attorney's quota *while on approved leave* violates"[13] OPM guidance, the leave provision of the parties' agreement, and the Fair Labor Standards Act. As a remedy, the Union requested that the Agency *begin* "*to prorate* attorney quotas *during periods of approved leave*."[14]

At arbitration, the Union repeated the same complaint but expanded the scope of its requested remedy and asked the Arbitrator to order the Agency to "implement"[15] and "institute"[16] a quarterly review in order to "measure[] [attorney] progress."[17] The Union provided the Arbitrator with examples of the "fair share production goals" charts that were used by supervisors to monitor and assess attorney progress on a weekly basis from 2003 through 2013.[18] The charts clearly demonstrate that, during the entire timeframe, the Agency tracked employee productivity on a week-to-week basis, and tracked the number of "points" each attorney earned each week against the goal of three points per week and cumulatively towards the annual goal of 156 points.[19] During the entire period, each attorney was expected to consistently achieve three points per week[20] in order to maintain a fully successful ("yellow") rating.[21]

Despite the fact that the Union never argued that the attorneys had ever been evaluated on a "quarterly" basis, and no evidence was provided by the Union that would permit the Arbitrator to make that presumption, the Arbitrator, nonetheless, concluded that the Agency had made a "significant change" by tracking attorney productivity on a weekly, rather than quarterly, basis – a falsity that is not found in the Union's grievance, evidence, or testimony.[22] Even in its requested remedy, the Union asked that the Arbitrator order the Agency to "*implement* a quarterly review,"[23] demonstrating that no such practice had existed before.

Nonetheless, the Arbitrator determined that the Agency committed an unfair labor practice when it "abandon[ed] . . . quarterly enforcement."[24] Huh? As Joseph Heller penned in the novel, *Catch-22* – "*[i]nsanity is contagious*."[25]

I would conclude, therefore, that the Arbitrator's award is based on a nonfact.[26]

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[6] *Id.* (quoting *Elecs. Corp. v. Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO, Local 272*, 492 F.2d 1255, 1257 (1st Cir. 1974) (emphases added)).
[7] *U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex.*, 46 FLRA 1292, 1295 (1993) (*Red River Army Depot*).
[8] *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 310-11 (2010) (*Def. Commissary Agency*).
[9] *Id.*
[10] *Red River Army Depot*, 46 FLRA at 1295.
[11] Exceptions at 4 (emphasis added).
[12] Opp'n, Attach. F, Union's Exs. 1-13.
[13] *Id.*, Ex. 5, Union's Grievance at 6.
[14] *Id.* at 10 (emphasis added).
[15] *Id.*, Attach. B, Union's Post-Hr'g Br. at 16.
[16] *Id.* at 41.
[17] *Id.*
[18] *Id.*, Attach. F, Exs. 6.A-J, 8.
[19] Union's Post-Hr'g Br. at 3 (In 2006, the points required to achieve fully successful (yellow) was increased from 152 to 156. However, that adjustment is not challenged by, or part of, this grievance.).
[20] *Id.*
[21] Opp'n, Attach. F, Exs. 6.A-J, 8.
[22] Union's Post-Hr'g Br. at 16, 41.
[23] *Id.* at 16 (emphasis added).
[24] Award at 16.
[25] Joseph Heller, *Catch-22* (Simon and Schuster 1961).
[26] *See Def. Commissary Agency*, 65 FLRA at 310-11; *Lowry AFB*, 48 FLRA at 594; *Red River Army Depot*, 46 FLRA at 1295.

I would also conclude that the Arbitrator's award is internally inconsistent and contradictory to such a degree that it is impossible to implement the award. As noted above, the Arbitrator's central finding is that the Agency "changed" how it tracked employee productivity *from* a quarterly, to a weekly, basis. But, contrary to that conclusion, the Arbitrator also found that "the Agency has consistently tracked attorneys' productivity requirements *on a weekly basis* since 2003."[27] The Arbitrator also found that "Agency managers have *consistently checked* and *followed up* with employees who may not meet their annual productivity requirements *based on these weekly charts*."[28]

To the extent the Agency had never before tracked productivity on a quarterly basis, there is no status quo to which the Agency can return. In that respect, the award is impossible to implement and is based on findings that are contradictory.

I would also conclude that the Arbitrator's award is contrary to law because the Arbitrator's remedy excessively interferes with (and also abrogates) management's rights to direct employees and assign work. By changing how the Agency's supervisors have tracked productivity since 2003, the award not only alters the "content" of the performance standards, but also alters the manner by which the Agency "measure[s]" attorneys' progress against "substantive criteria."[29]

The "fair share production goals" worksheet is simply a tool by which the Agency tracks and measures an attorney's progress against the undisputed production goals that are required for the attorney to meet a fully successful ("yellow") rating. And, when the Arbitrator tells the Agency that its supervisors must track productivity on a quarterly, rather than a weekly, basis, the Agency is precluded from holding an attorney "accountable" for consistently falling short in meeting the weekly production goals.[30] With that approach, the Arbitrator "effectively reduc[es] the level of performance which can be required of employees" by determining the amount of time (quarterly, rather than weekly, assessments of productivity) the attorney has to correct a recurring failure to meet weekly productivity goals.[31]

As in *NTEU*, the Arbitrator's award similarly "restrict[s] the range of management action,"[32] "conditions" when and how attorneys will be held "accountable" for meeting the production element at particular "points" in the rating cycle,[33] and further "place[s] conditions" on when and how the Agency will "measure'" attorney productivity.[34]

It seems to me that the award is also contrary to law because Arbitrator Torres erroneously concluded that the Agency was required to bargain over a change that did not exist and, therefore, could not have been changed. In 2005, the Authority rejected a similar claim from the *same Union* that the Agency's productivity element, including how productivity was measured, was not valid.[35] In *Patent Office Professional Association*,[36] the Authority held that the agency's decision to review employee progress towards productivity goals quarterly, rather than bi-weekly, did not constitute a change in working conditions that required the agency to bargain.[37]

As I noted above, in *Harvey*, no one, but Elwood himself, could see Elwood's bunny friend. In this case, no one but Arbitrator Torres, and now the majority, has been able to see a practice of quarterly review that could be changed.

Accordingly, I would vacate the Arbitrator's award in its entirety.

Thank you.

[27] Award at 4 (emphasis added).
[28] *Id.* at 5 (emphases added).
[29] *NTEU*, 42 FLRA 964, 986 (1991).
[30] *POPA*, 25 FLRA 384, 417 (1987).
[31] *Id*.
[32] *NTEU*, 42 FLRA at 975.
[33] *Id*. at 983-84.
[34] *Id*. at 986.
[35] *U.S. Dep't of VA, Bd. of Veterans Appeals*, 61 FLRA 422, 424 (2005).
[36] 66 FLRA 247 (2011).
[37] *Id.* at 253-54.