68 FLRA No. 124

UNITED STATES
DEPARTMENT OF LABOR
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

0-AR-4924

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DECISION

July 23, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members[1]

I. Statement of the Case

An employee (the grievant) filed eleven grievances stemming from negative interactions with her immediate supervisor, who required up to six face-to-face meetings daily. The first grievance, and the core of the case before us, involves the Agency's denials of the grievant's requests for a reasonable accommodation (RA) under the then newly-amended Americans with Disabilities Act (ADA). The subsequent ten grievances include challenges to the grievant's performance appraisals, written warnings, leave restrictions, denials of administrative leave and official time, and removal from the Agency's telework program. The grievances were consolidated for hearing.

As relevant here, Arbitrator Ezio E. Borchini decided that: (1) the grievant was a qualified individual with a disability; (2) the Agency failed to reasonably accommodate the grievant; (3) he would not admit into the arbitration record a judicially sealed Equal Employment Opportunity Commission (EEOC) Administrative Judge (AJ) decision; (4) the failure to reasonably accommodate the grievant caused her fiscal year (FY) 2009 and FY 2010 performance appraisals to be improperly issued; and (5) the failure to reasonably accommodate the grievant caused the Agency to improperly terminate the grievant's participation in the Agency's telework program. This case presents the Authority with five questions.

The first question is whether the Arbitrator's finding that the grievant is a qualified individual with a disability is contrary to the ADA.[2] Because the Arbitrator's finding is not contrary to the ADA, the answer is no.

The second question is whether the Arbitrator's finding that the Agency failed to reasonably accommodate the grievant is contrary to law. Because the Agency does not show how its denial of the grievant's RA request is consistent with law, rule, or regulation, the answer is no.

The third question is whether the Arbitrator's refusal to admit the EEOC AJ decision into the record is contrary to law. Because arbitrators have considerable latitude in conducting hearings, and the Agency does not identify any law or regulation requiring the Arbitrator to admit the EEOC AJ decision, the answer is no.

The fourth and fifth questions are whether the Arbitrator's findings that the Agency improperly issued the grievant performance appraisals for FY 2009 and FY 2010, and that the Agency improperly removed the grievant from the Agency's telework program, are contrary to law. Because the Agency's arguments supporting these exceptions rely on the same arguments that the Agency makes concerning its first two exceptions, which we deny, the answer is no.

II. Background and Arbitrator's Award

In 1995, the grievant was hired as an employee-benefits-law specialist in the Agency's Employee Benefits Security Administration. In 2006, the grievant submitted her first request for an RA because she experienced high levels of anxiety and stress when meeting face-to-face with her supervisor. Although the Agency found that she was not disabled and denied her request, the Agency established an alternative-meeting arrangement. Under the new arrangement, meetings between the grievant and her supervisor were conducted in a larger vacant office instead of the supervisor's office.

In September 2008, in response to a series of Supreme Court decisions that restricted the scope of who qualified as "disabled" under the ADA,[3] Congress passed amendments to the ADA with the stated purpose of

[1] Member Pizzella did not participate in this decision.

[2] 42 U.S.C. §§ 12101-12213.

[3] *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999).

reinstating a broad scope of protection.[4] Under the amended ADA, Congress provided "that the definition of disability shall be construed in favor of broad coverage of individuals . . . to the maximum extent permitted,"[5] and that an impairment that "'substantially limits' [a major life activity] be interpreted consistently with the liberalized purposes of the [amended ADA]."[6]

Shortly thereafter, the grievant gave the Agency a medical certificate from her doctor stating that she suffered from major depression and post-traumatic stress disorder (PTSD) associated with high levels of anxiety. She also submitted her second and final RA request under Article 25 of the parties' agreement, which incorporates the newly amended ADA.[7]

Article 25, Section 10, of the parties' agreement states that the Agency shall "provide [RAs] for qualified individuals with disabilities as required by the [ADA]."[8] It also clarifies that the term "reasonable accommodation" includes "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held . . . is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position."[9]

The grievant claimed that the continued face-to-face interaction with her supervisor negatively affected her PTSD and depression. As a part of the RA, the grievant requested an extended detail, administrative leave, reassignment, increased telework of four days per week, to be seated at least six feet from her supervisor during meetings, and restrictions on communications with her supervisor to telephone, e-mail, or web camera. While the RA request was pending, the grievant and the Agency agreed to modify their alternative-meeting arrangement. Under the new agreement, the grievant and her supervisor would sit six feet away from each other during open-door meetings, and a third-party would be present during closed-door meetings.

In March 2009, a Federal Occupational Health (FOH) doctor reviewed the grievant's medical certificates and disagreed with her doctor's diagnosis. The FOH doctor determined that the grievant was not an individual with a disability under the ADA because (1) her inability to work with her supervisor was not a limitation of a major life activity, (2) her medical condition had not changed since FOH's last assessment in 2007, and (3) there was no information that her concentration was significantly reduced. Based on the FOH doctor's recommendation, the Agency denied her RA request and concluded that the grievant was not an individual with a disability. However, the Agency found that even assuming she was disabled under the ADA, her requested RA was not reasonable because the "majority of [her] work involved complex issues that require careful consideration, which . . . is best achieved by in-person meetings."[10]

Throughout 2010, the grievant and her supervisor continued to conduct up to six face-to-face meetings daily, resulting in the grievant filing a number of grievances and EEO complaints. Despite receiving high ratings for many years, the grievant's rating was lowered to "effective" in her FY 2009 appraisal and to "minimally satisfactory" in her FY 2010 appraisal.[11] As a result of her "minimally satisfactory" rating, the Agency revoked her ability to telework, in accordance with internal regulations and the parties' agreement. The parties could not resolve the issues and submitted the grievances to arbitration.

During pre-hearing motions, the Agency introduced, without objection, a 2010 EEOC decision in which an AJ determined that the Agency's denial of the grievant's RA request in 2007 was not discriminatory, and was not taken in reprisal for protected activity.[12] Four months later, the Union sought to exclude the EEOC AJ decision from the arbitration record because the U.S. District Court Judge presiding over the grievant's EEOC appeal placed the decision under seal.[13] Although the Arbitrator determined that "[t]he Agency is not prohibited from referencing the EEOC [AJ decision] or its outcome in this arbitration," he concluded that, "in an abundance of caution and in deference to the [court]," he would remove the EEOC AJ decision from the record.[14]

As relevant here, the parties stipulated to four issues: (1) "[w]hether the grievant properly requested an [RA] . . . and, if so, whether the Agency improperly denied that request;"[15] (2) "[w]hether the grievant's

[4] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2-6), 122 Stat 3553, 3553 (2008); s*ee also Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 329 (4th Cir. 2014) (*Summers*); *Rohr v. Salt River Project Agric. Imp. & Power Dist*., 555 F.3d 850, 860-61 (9th Cir. 2009) (*Rohr*).
[5] 42 U.S.C. § 12102(4)(A); *see Summers*, 740 F.3d at 329 (citing 42 U.S.C. § 12102(4)(A)) (internal quotation marks omitted).
[6] *Summers*, 740 F.3d at 329 (citing 42 U.S.C. § 12102(4)(B)).
[7] Award at 13.
[8] *Id*. at 6.
[9] *Id*.
[10] *Id.* at 14.
[11] *Id.* at 29 (effective rating), 32 (minimally-satisfactory rating).
[12] *Id.* at 13 n.27; *see also* Exceptions, Attach. 4, Arbitrator's Ruling on Union's Motion to Sanction Alleged Misconduct in the Presentation of Arbitration Proceedings (Ruling on Motion) at 2.
[13] Exceptions, Attach. 4, Ruling on Motion at 24.
[14] *Id.*
[15] Award at 3.

FY [ ]2009 performance appraisal . . . was improperly issued;"[16] (3) "[w]hether the grievant's FY[ ]2010 performance appraisal . . . was improperly issued;"[17] and (4) "[w]hether the Agency discriminated against the grievant based on [a] disability when it terminated the grievant's [telework] agreement in November 2010[.]"[18]

At arbitration, the Agency argued that the grievant's sole limitation in the workplace was her inability to deal with her supervisor. And the Agency asserted that her impairment was episodic in nature and did not qualify as a "substantial limitation in a major life activity" [19] under the ADA. In the alternative, the Agency argued that "[e]ven if the grievant is a qualified individual with a disability and entitled to an accommodation, [the grievant] is not entitled to the accommodation of her choice," and the Agency's two alternative-meeting arrangements enabled the grievant to perform the essential functions of her position.[20]

The Arbitrator disagreed with the Agency. He found that the grievant "suffer[ed] from a mental impairment,"[21] "was substantially limited in the major life activities of interacting with others and working,"[22] and therefore "was a qualified individual with a disability."[23] He based his conclusions on the testimony of the grievant, her doctor, and Agency supervisors, who collectively testified that the grievant's face-to-face meetings with her supervisor resulted in severe problems, high levels of hostility, social withdrawal, a failure to communicate when necessary, and negative work appraisals. Although finding that communication between the grievant and her supervisor was "an essential part of [her] job," the Arbitrator found that "neither the grievant's position description nor her performance standards require face-to-face meetings."[24] Citing "exceptions" to the Agency's face-to-face meetings rule, the Arbitrator found that it was "not essential that the grievant meet . . . with her supervisor daily."[25]

As to the first stipulated issue, the Arbitrator concluded that the Agency's modified alternative-meeting arrangement was an insufficient accommodation, that the grievant's requested RA would have been effective, and that the grievant's RA would not have imposed an undue hardship on the Agency. Therefore, the Arbitrator found that the grievant properly requested an RA due to her disability, and that the Agency improperly denied the request. He sustained the portion of the consolidated grievance relating to the first stipulated issue.

As to the second and third stipulated issues, the Agency argued that the grievant's ratings were proper because the grievant failed to effectively communicate with her supervisor. The Arbitrator, relying on his determination that the grievant was a qualified individual with a disability who was not afforded an RA, found that the Agency's alternative-meeting arrangement resulted in "the grievant being unable to perform acceptably."[26] He determined that had the Agency "granted the [RA] as requested . . . the performance of the grievant, more likely than not, would have shown improvement."[27] Therefore, the Arbitrator found that both the FY 2009 and FY 2010 appraisals did not take into account the grievant's disability, and he sustained the consolidated grievance with respect to the second and third stipulated issues.

As to the fourth stipulated issue, the Arbitrator relied on his previous findings, and determined that the grievant's removal from the Agency's telework program based on her FY 2010 appraisal was erroneous because she was not given an RA during that rating period. However, the Arbitrator found that the Agency did not "discriminate" against the grievant because it removed her based on collective-bargaining-agreement language that employees rated less than fully satisfactory will be removed from the telework program. Therefore, he sustained in part and denied in part the fourth stipulated issue.

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

III. Analysis and Conclusions

The Agency argues that the award is contrary to law because: (1) the grievant is not a qualified individual with a disability;[28] (2) the Agency did not fail to reasonably accommodate the grievant;[29] (3) the grievant's FY 2009 and FY 2010 appraisals were appropriately issued; and (4) the grievant's removal from the Agency's telework program was proper.[30]

When an exception involves an award's consistency with law, the Authority reviews any questions of law raised by the exception and the award

[16] *Id.*
[17] *Id.* at 4.
[18] *Id.*
[19] *Id.* at 19.
[20] *Id.*
[21] *Id.* at 22.
[22] *Id.* at 23.
[23] *Id.*
[24] *Id.* at 22-23.
[25] *Id.* at 23.
[26] *Id.* at 37-38.
[27] *Id.* at 72-73.
[28] Exceptions at 12-15.
[29] *Id.* at 15-17.
[30] *Id.* at 19-20.

de novo.[31] In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[32] In making that determination, the Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that those findings are deficient as nonfacts.[33]

A. The Arbitrator's finding that the grievant is a qualified individual with a disability is not contrary to the ADA.

In its first contrary-to-law exception, the Agency argues that the Arbitrator's award is contrary to law because he erroneously found that the grievant is a qualified individual with a disability under the ADA.[34] In making this claim, the Agency does not except to the Arbitrator's finding that the grievant has an impairment. Rather, the Agency argues that the grievant's impairment – or "inability to deal with her supervisor" – is not sufficient to render her substantially limited in the major life activity of working.[35]

As relevant here, § 12102(1)(A) of the ADA provides that a qualified individual with a disability under the ADA must (1) have "a physical or mental impairment that [(2)] substantially limits one or more major life activities."[36] And § 12102(4)(D) of the ADA provides that a "disability" includes "[a]n impairment that is episodic or in remission . . . if it would substantially limit a major life activity when active."[37] As acknowledged by the Agency[38] and federal circuit courts,[39] the ADA was amended by Congress, in part, to broaden the interpretation of the term "disability."[40]

The Arbitrator determined – and the Agency does not challenge – that the grievant was suffering from a mental impairment. Specifically, he found that the grievant suffered from major depression and PTSD because she had "consistently high levels of hostility, social withdrawal, and [she] fail[ed] to communicate when necessary" when meeting with her supervisor face-to-face.[41] However, as mentioned above, having an impairment does not make one disabled.[42] In order for a physical or mental impairment to rise to the level of an ADA-qualifying disability, the impairment must substantially limit one or more major life activities when active.[43] Under § 12102(2)(A) of the ADA, "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating . . . and working."[44] The Arbitrator found that "the grievant was substantially limited in the major life activit[y] of . . . working."[45]

The Agency argues that the award is contrary to the ADA because the grievant's impairment is insufficient to render the grievant substantially limited in the major life activity of working.[46] The Agency gives two reasons: (1) "instructive" case law has "emphatically held that the inability to work with certain people does not constitute a substantial limitation on working;"[47] and (2) "similarly to most people in the general population, [the g]rievant was still able to do her job, and to work for and with other people," and therefore can still perform the major life activity of working.[48]

In support of its first argument, the Agency cites *Palmer v. Circuit Court of Cook County*,[49] *Weiler v. Household Financial Corp.*,[50] and *Byrnes v. Lockheed-Martin, Inc.*,[51] for the proposition that numerous courts have found that conditions suffered by employees similar to the grievant "do[ ] not constitute a substantial limitation on working."[52] We find the Agency's argument unconvincing.

The Agency's cited cases are inapplicable here because they were decided under the ADA *before* the 2008 amendments. As the Agency concedes,[53] the pre-amendment ADA interpreted qualifying "disabilities" much more narrowly than the amended ADA. Section 12102(4)(D) of the ADA now provides that a "disability" includes "[a]n impairment that is episodic or in remission . . . if it would substantially limit a major life activity when active."[54] The Agency does not provide any additional authority to counter the Arbitrator's conclusion, and concedes that it is "unable to find any case law analyzing what constitutes a substantial

[31] *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 770 (2006).
[32] *Id.*
[33] *U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012).
[34] Exceptions at 12-15.
[35] *Id.* at 13-14.
[36] 42 U.S.C. §§ 12102(1)(A).
[37] *Id.* § 12102(4)(D).
[38] Exceptions at 12-13.
[39] *See Summers*, 740 F.3d at 329; *Rohr*, 555 F.3d at 860-61.
[40] H.R. Rep. No. 110-730, pt. 2 at 5-7 (2008).
[41] Award at 22.
[42] 42 U.S.C. § 12102(1)(A).
[43] *Id.*
[44] *Id.* § 12102(2)(A).
[45] Award at 23.
[46] Exceptions at 12-14.
[47] *Id.* at 14.
[48] *Id.* at 15.
[49] 117 F.3d 351 (7th Cir. 1997).
[50] 101 F.3d 519 (7th Cir. 1996).
[51] 2005 WL 3555701 at *5 (N.D. Cal. 2005), *aff'd*, 257 Fed. Appx. 34 (9th Cir. 2007).
[52] Exceptions at 14.
[53] *Id.* at 12.
[54] 42 U.S.C. § 12102(4)(D).

limitation on the major life activity of working post-[amended ADA]."[55]

Instead, we find that the Arbitrator's analysis is consistent with applicable legal principles. The Arbitrator found that "the grievant was substantially limited in the major life activities of . . . working."[56] The Agency does not challenge the factual bases for the Arbitrator's finding. The factual bases for the Arbitrator's finding were that "the grievant had difficulty communicating face-to-face with her supervisor, and in some cases was unable to do so. Face-to-face meetings with her supervisor were characterized regularly by severe problems, consistently high levels of hostility, social withdrawal, and the grievant's failure to communicate when necessary."[57]

Moreover, the Arbitrator's conclusion that the grievant's impairment qualified her as "disabled" under the ADA[58] accords with the ADA's plain language. Section 12102(1)(A) defines a "disability" as "a physical or mental impairment that substantially limits one or more major life activities."[59] Here, the Arbitrator determined that the grievant's major depression and PTSD qualified as a mental impairment, and that her mental impairment substantially limited her major life activity of working, for the reasons previously described. Because the Arbitrator correctly applied the applicable ADA provisions, we reject the Agency's first argument.

Regarding the Agency's second argument, the Agency asserts that the award is contrary to law because, "similar[ ] to most people," the grievant was "still able to do her job, and . . . [that her] type of impairment did not sufficiently impair [her] ability to work."[60] We find the Agency's second argument unconvincing for two reasons.

First, the Arbitrator compared the grievant "to most people," and found "that the Agency misjudged the nature or degree of the grievant's disability."[61] Specifically, he found that her "relationship with her supervisor deteriorated substantially beyond the normal range of supervisor/employee difficulties."[62] The Agency does not challenge these factual findings.

Second, the record does not support the Agency's contention that the grievant's "type of impairment did not sufficiently impair [her] ability to work."[63] Rather, the Arbitrator found that the grievant's impairment negatively affected her work performance and her appraisals.[64] Specifically, the Arbitrator found that an essential part of the grievant's job is communicating with her supervisor,[65] and that the grievant's mental impairment contributed to her negative appraisals and ability to function at work.[66] He further found that the grievant's impairment: (1) caused her to hyperventilate when in close quarters with her supervisor;[67] (2) caused her to suffer "consistent[ ] high levels of hostility[and] social withdrawal;"[68] and (3) resulted in her "not readily discuss[ing] her cases with her supervisor[, which] diminished her performance."[69] As the Agency fails to show that the Arbitrator's findings in this respect are contrary to law, or based on a nonfact, we reject the Agency's second argument.

Accordingly, because the Agency fails to show that the award is contrary to law in this respect, we deny the Agency's first contrary-to-law exception.

B. The Arbitrator's finding that the Agency failed to reasonably accommodate the grievant is not contrary to law.

In its second contrary-to-law exception, the Agency argues that the award is erroneous because, contrary to the Arbitrator's finding, the Agency offered the grievant RAs – specifically alternative-meeting arrangements – in accordance with law. Although the Agency concluded that it was not obligated to give the grievant an RA because she was not disabled under the ADA, it asserts that even if the grievant was a qualified individual with a disability – as the Arbitrator concluded – then the Agency's alternative-meeting arrangements "enabled [the grievant] to perform the essential functions of her position."[70]

The Agency argues that it provided two adequate alternative-meeting arrangements. First, the Agency moved the grievant's meetings from her supervisor's office to a larger vacant office. Then the Agency modified that arrangement by moving the meetings to an even larger conference room, requiring the grievant and the supervisor to sit six feet apart with the door open, and providing for a third party to attend any closed-door meetings.[71] The Agency also argues that an

[55] Exceptions at 14.
[56] Award at 23.
[57] *Id.* at 22.
[58] *Id.* at 23.
[59] 42 U.S.C. § 12102(1)(A).
[60] Exceptions at 15.
[61] Award at 22.
[62] *Id*.
[63] Exceptions at 15.
[64] Award at 22.
[65] *Id.* at 22-23.
[66] *Id.* at 23-24.
[67] *Id.* at 23.
[68] *Id.* at 22.
[69] *Id.* at 23.
[70] *Id.* at 20.
[71] Exceptions at 15-16.

individual with a disability is not entitled to an RA merely because he or she prefers it.[72]

The ADA requires that an agency must provide RAs for the known limitations of a qualified individual with a disability unless doing so would create an undue hardship.[73] Section 12111(9)(B) of the ADA provides that RAs may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position . . . and other similar accommodations for individuals with disabilities."[74] Section 12111(10)(A)-(B) of the ADA defines "undue hardship" as an "action requiring significant difficulty or expense, when considered in light of . . . (i) the nature of the accommodation needed . . . (ii) the overall financial resources of the facility . . . (iii) the overall financial resources of the covered entity . . . and (iv) the type of operation or operations of the covered entity."[75]

The Agency's argument that the Arbitrator erred as a matter of law when he rejected the Agency's RAs lacks merit. The Arbitrator determined that the Agency's alternative-meeting arrangements were not RAs under the ADA because they not only were ineffective to deal with the grievant's disability, but also contributed to the disability. Specifically, he found that the grievant's disability "required some relief from face-to-face meetings with her supervisor, and the [Agency's] alternative[-meeting arrangements] continued the interaction that caused the disability."[76] Further, the Arbitrator found that the Agency's alternative-meeting arrangements not only exacerbated the grievant's disability, but also "negatively impacted the grievant's performance."[77] The Agency does not challenge these findings as nonfacts. As the Agency provides no additional arguments to support its position beyond those set forth in its first contrary-to-law exception above – which we deny – we find the Agency's argument that the Arbitrator erred by rejecting its RAs unpersuasive.

In addition, regarding the Agency's argument that the grievant is not entitled to the RA of her choice, the Agency does not allege that the grievant's requested RAs would have created an undue hardship under § 12111(10)(A)-(B). Indeed, as the Arbitrator found, the Agency "permitted similar, even more extensive, accommodations" to other Agency employees.[78] Specifically, the Agency allowed, for decades, a subordinate of the grievant's supervisor to work remotely for at least two months each year and to work at home every morning as a RA.[79] Based on the findings, which the Agency does not challenge as nonfacts, we conclude that the Arbitrator correctly determined that the grievant's requested RAs "would have been effective, and would not have imposed an undue hardship."[80] Consequently, we find the Agency's argument concerning the grievant's requested RAs unpersuasive.

Accordingly, as the Agency fails to show that the award is contrary to law in this respect, we deny the Agency's second contrary-to-law exception.

C. The Arbitrator's refusal to admit into the record an EEOC AJ decision is not contrary to law.

The Agency's third contrary-to-law exception argues that the "Arbitrator's failure to acknowledge [the sealed EEOC AJ] decision[ ] and [the Arbitrator's decision] to bar it from the record was an error."[81] The Agency asserts that because of this error the Arbitrator "reach[ed] an erroneous conclusion [concerning] the Agency's obligations under the ADA[]."[82] We find that the Agency's argument does not demonstrate that the award is contrary to law.

The Agency's exception does not cite any law or regulation requiring the Arbitrator to consider the EEOC AJ decision, or make it part of the arbitration proceeding's record. Additionally, to the extent the Agency argues that the Arbitrator improperly ignored legal precedent when he excluded the EEOC AJ's decision from the record,[83] the Agency does not claim that the decision is legally binding on the Arbitrator. Finally, the Agency does not allege in its exceptions that the Arbitrator failed to conduct a fair hearing.

Accordingly, the Agency fails to show that the award is contrary to law in this respect, and we deny the Agency's third contrary-to-law exception.

[72] *Id.* at 16.
[73] *See* 42 U.S.C. § 12112(a), (b)(5)(A).
[74] *Id.* § 12111(9)(B).
[75] *Id.* § 12111(10)(A)-(B).
[76] Award at 25.
[77] *Id.* at 23.
[78] *Id.* at 26.
[79] *Id.* at 16 n.29.
[80] *Id.* at 26.
[81] Exceptions at 17.
[82] *Id.*
[83] *See id.* at 17-18.

D. The Arbitrator's findings that the grievant's performance appraisals were improperly issued, and that the grievant's removal from the Agency's telework program was inappropriate, are not contrary to law.

The Agency's fourth and fifth contrary-to-law exceptions assert that the Agency "did reasonably accommodate the [g]rievant's medical condition in accordance with the [ADA] and its implementing regulations, and . . . the Arbitrator's decision[s] on [the appraisals and grievant's removal from the Agency's telework program] [are] in error."[84] The Agency relies on its arguments discussed in its first and second contrary-to-law exceptions that (1) the grievant was not a qualified individual with a disability under the ADA, and (2) the alternative-meeting arrangements the Agency offered were adequate under the ADA.[85]

It is uncontested that "the Agency removed the grievant from participating in [the Agency's telework program] after assigning to her a [m]inimally [s]atisfactory performance appraisal."[86] However, as described above, the Arbitrator determined that the grievant's performance was negatively impacted when the Agency failed to grant the grievant's RA in violation of the parties' agreement and the ADA. Specifically, he found that her appraisals "did not take into account the grievant's disability," and were "improperly issued."[87] Therefore, he determined that her subsequent removal from the Agency's telework program was improper because it was based on her erroneous minimally-satisfactory rating.[88]

Because the Agency does not make any claims in addition to those concerning the Agency's first two contrary-to-law exceptions – which we deny – the Agency does not show that the award is contrary to law in these respects, and we deny the Agency's fourth and fifth contrary-to-law exceptions.

IV. Decision

We deny the Agency's exceptions.

[84] *Id.* at 19-20.
[85] *Id.*
[86] Award at 68.
[87] *Id.* at 38.
[88] *Id.* at 69.