68 FLRA No. 128

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5025

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DECISION

July 31, 2015

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

I. Statement of the Case

This matter is before the Authority on the Agency's exceptions to an arbitration award (initial award) and an addendum to that award (supplemental award). Arbitrator Joshua M. Javits found that the Agency violated the parties' national collective-bargaining agreement (parties' agreement) by not retroactively paying eligible employees mass-transit subsidy benefits (transit subsidy) up to $240 per month for the period from January through December 2012, and up to $245 for January and February 2013. As a remedy in the initial award, he directed the Agency to make whole affected employees by reimbursing them for the amounts that they would have received absent the contractual violation. The Agency did not file exceptions to the initial award. After the parties were unable to agree on the appropriate manner in which to satisfy the remedial aspects of the initial award, the Arbitrator subsequently issued the supplemental award, which directed the Agency to provide cash reimbursements to the affected employees.

After determining that the majority of the Agency's exceptions are untimely because they were submitted almost two months after the thirty-day period to file exceptions under the Authority's Regulations,[1] two substantive questions remain before the Authority.

The first question is whether the supplemental award is contrary to law because no law authorizes or requires the Agency to pay retroactive transit subsidies. Because the Federal Employees Clean Air Incentives Act (Incentives Act)[2] and the Back Pay Act (BPA)[3] support the award, the answer is no.

The second question is whether the supplemental award fails to draw its essence from the parties' agreement. Because the Agency has not shown that the parties' agreement precludes a cash reimbursement as a remedy for the Agency's contract violation, and the Agency does not establish that the supplemental award is irrational, implausible, unfounded, or in manifest disregard of the parties' agreement, the answer is no.

II. Background and Arbitrator's Awards

Under the Incentives Act, Congress authorized all federal agencies to establish transit-subsidy programs.[4] The Incentives Act provides for cash reimbursements to employees if transit passes are not "readily available for direct distribution by the agency."[5] Executive Order 13,150 requires all federal agencies in the national capital area to implement transit-subsidy programs.[6] It also requires that those agencies provide transit benefits to qualified employees in amounts equal to their commuting costs, not to exceed the maximum non-taxable amount allowed by 26 U.S.C. § 132(f)(2), which is part of the Internal Revenue Code.[7] The Agency extended its transit-subsidy program to all qualified employees under the parties' agreement.[8] Article 53, Section 10 of the parties' agreement provides that the "[Agency] will subsidize an employee's use of public transit by paying for qualified transit passes up to the non-taxable amount."[9]

Before the enactment of the American Taxpayer Relief Act of 2012 (ATRA),[10] the maximum non-taxable amount allowed by § 132(f)(2)(A) in 2012 was $125 per month. On January 2, 2013, ATRA amended § 132(f)(2)(A) to retroactively increase the maximum amount of non-taxable transit benefits from $125 to $240 per month for 2012, and, as relevant here, to increase the

[1] *See* 5 C.F.R. § 2425.2.

[2] 5 U.S.C. § 7905.
[3] *Id.* § 5596.
[4] *Id.* § 7905(b)(1).
[5] *Id.* § 7905(b)(2)(A).
[6] Exec. Order No. 13,150, § 2, 65 Fed. Reg. 24,613, 24,613 (Apr. 26, 2000).
[7] *Id.* (citing 26 U.S.C. § 132(f)(2)).
[8] Initial Award at 4.
[9] *Id.* (citing Exceptions, Jt. Ex. 5 at 154 (2012).
[10] ATRA, Pub. L. No. 112-240, 126 Stat. 2313 (2013).

maximum amount of non-taxable transit benefits for January and February 2013 to $245.[11]

Before ATRA's enactment, the Agency provided eligible employees with subsidies up to the maximum amount allowed: $125 per month for mass-transit expenses incurred from January 2012 through February 2013. After ATRA's enactment, the Agency did not retroactively reimburse employees for transit expenses incurred over $125 per month – that is, up to $240 per month in 2012 and up to $245 per month in January and February 2013.

The Union filed a grievance alleging that the Agency violated Article 53, Section 10 of the parties' agreement and ATRA because, according to the Union, the agreement required the Agency to pay employees subsidies in the amount of their actual commuting costs, up to the maximum non-taxable amounts set forth in § 132(f)(2)(A). The grievance went to arbitration.

As described by the Arbitrator, the parties stipulated the issues for arbitration as:

> 1) Did the [Agency] violate the law and/or Article 53, Section 10 of the [parties' agreement] by not retroactively paying transportation subsidies up to $240 per month to qualified bargaining [-]unit employees for the period January 1, 2012 through December 31, 2012? If so, what shall be the remedy?
>
> 2) Did the [Agency] violate the law/and or Article 53, Section 10 of the [parties' agreement] when it began providing the increased transportation subsidy of up to $245 per month on March 1, 2013 and it did not provide the increased transportation subsidy of up to $245 per month to qualified bargaining[-]unit employees for January and February 2013? If so, what shall be the remedy?
>
> 3) Did the [Agency] commit a "clear and patent" breach of Article 53, Section 10 of the [parties' agreement] constituting an unfair labor practice [(ULP)] in violation of [§ 7116 of the Federal Service Labor-Management Relations Statute (the Statute)] by not retroactively paying transportation subsidies . . . . If so, what shall be the remedy?[12]

The Arbitrator found that Article 53, Section 10 of the parties' agreement required the Agency "to pay the non-taxable amount of transit subsidy to an employee who incurred commuting costs up to [the] maximum non-taxable amount."[13] Reading this contract language in conjunction with ATRA, the Arbitrator determined that the Agency "was obligated" under the parties' agreement to pay its employees the increased amount of non-taxable transit subsidies retroactively as set by ATRA's amendment to § 132(f)(2)(A).[14] He found that the Agency violated the parties' agreement, but did not find that the Agency's actions constituted a ULP.[15] As a remedy for the contract violation, the Arbitrator directed the Agency to make affected employees whole by reimbursing them for the transit subsidies to which they were entitled but were improperly denied.[16]

Specifically related to the remedy, the Arbitrator considered the Agency's arguments that, under 26 U.S.C. § 132(f), the Agency could not distribute cash to employees because a transit-pass program was readily available,[17] and the Agency could not make retroactive reimbursements to employees because employees already receiving the maximum non-taxable amount of transit benefits would exceed the current statutory monthly cap.[18] He further considered the Agency's argument that it would not be feasible to retroactively reimburse employees with transit passes because, under the transit-subsidy program, any unused amount is "swept away at the end of the month."[19] The Arbitrator noted that the remedy "would not deal with 'prospective' transit [subsidies] but rather deals with 'retroactive' transit [subsidies],"[20] and "[w]hen dealing with retroactive transit [subsidies], one could argue forcefully that a . . . voucher is not 'readily available' to Agency employees."[21]

Rejecting the Agency's arguments that "any remedy" would be "ineffective at best and administratively impossible at worst,"[22] the Arbitrator concluded that qualified employees were entitled to any retroactive payments that were legislated by Congress.[23]

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[11] *Id.* at § 203.

[12] Initial Award at 2.
[13] *Id.* at 36.
[14] *Id.* at 38.
[15] *Id.* at 43.
[16] *Id.* at 43-45.
[17] *Id.* at 13, 27, 32, 44.
[18] *Id.* at 11, 28.
[19] *Id.* at 11; *see also id.* at 28, 44.
[20] *Id.* at 44.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 45.

He found that this was a contractual right and that the employees should receive up to the maximum non-taxable amount of transit benefits available. He ordered a "remedy that [would] effectively make employees whole for transit benefits which they had been denied."[24] In doing so, the Arbitrator instructed the parties to discuss the best formulation for providing that remedy to the employees.[25] The parties, however, could not agree on how to provide the employees the denied benefits. So they resubmitted the matter of implementing the remedy to the Arbitrator, and he issued the supplemental award.[26]

In the supplemental award, the Arbitrator summarized the Agency's arguments that he had addressed in the initial award concerning purported legal impediments to giving cash reimbursements to employees and paying for transit subsidies retroactively.[27] The Arbitrator concluded that he need not determine how any tax law should be interpreted because the "remedy . . . is crafted so as to effectuate a remedy for an underlying violation of the parties' [agreement]."[28] Noting again the distinction between the direct-cash subsidies to employees that the Agency argued it could not give, and a "cash reimbursement to employees as part of a grievance remedy" for a contract violation,[29] the Arbitrator ordered the Agency to provide cash reimbursements up to the maximum amount allowed at the time, to employees who had incurred transit costs for the period between January 2012 and February 2013, in excess of $125, up to the caps defined under ATRA.[30] In doing so, he required "each employee to self-certify what he/she spent each month on transit costs during the relevant period of time."[31]

After the Arbitrator issued his supplemental award, the Agency filed exceptions to both awards, and the Union filed an opposition to the Agency's exceptions. Neither party filed exceptions related to the Arbitrator's finding that the Agency's actions did not constitute a ULP, and thus, we do not consider it here.

[24] *Id*.
[25] *Id*.
[26] Supplemental Award at 3.
[27] *Id.* at 3-4.
[28] *Id.* at 5.
[29] *Id.*
[30] *Id.*
[31] *Id*.

III. Preliminary Matter: The Agency's exceptions to the initial award are untimely.

The initial award, issued January 9, 2014, resolved all of the issues before the Arbitrator, including the remedy. The Agency, however, failed to file any exceptions to this award within the thirty-day time period provided by the Authority's Regulations.[32] After receiving the Agency's exceptions, filed on April 7, 2014, the Authority issued an order directing the Agency to show cause why its exceptions to the initial award should not be dismissed as untimely.[33] In response, the Agency asserts that its exceptions were timely filed because the initial award did not become final until the Arbitrator issued the supplemental award on March 7, 2014, which, it alleges, was the "remedy" award.[34]

In order to determine the timeliness of the Agency's exceptions, the Authority must determine whether the initial award was final.[35] An award is final for purposes of filing exceptions when it completely resolves all of the issues submitted for arbitration.[36] An arbitrator's retention of jurisdiction simply to assist the parties in the details of implementation of any awarded remedies does not prevent the award from being final.[37] The mistaken belief that an award is not yet final will not excuse a party's failure to file timely exceptions.[38] And an arbitrator's characterization of an award does not, by itself, demonstrate whether an award is final.[39]

As relevant here, the issues before the Arbitrator in the initial award were whether the Agency violated the parties' agreement "by not retroactively paying transportation subsidies" for the time periods at issue, and, "[i]f so, what shall be the remedy?"[40] The Arbitrator

[32] 5 C.F.R. § 2524.2(b).
[33] Order to Show Cause at 3.
[34] Response to Order (Response) at 1.
[35] *E.g.*, *U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 589 (2010) (*IRS, Bloomington*).
[36] *Id.*at 589-90; *SSA*, 67 FLRA 534, 537 (2014) (*SSA*).
[37] *SSA*, 67 FLRA at 537; *Cong. Research Emp. Assoc., IFPTE*, 64 FLRA 486, 489 (2010) (*CREA*) (citing *U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007)); s*ee also OPM*, 61 FLRA 358, 361 (2005) (award is final when it awards fees or damages, but leaves amount of those damages to be determined); *SSA, Balt., Md.*, 60 FLRA 32, 33-34 (2004) (award is final where arbitrator retains jurisdiction solely to assist parties in determining costs owed to the union); *U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project*, 55 FLRA 152, 158 (1999) (award is final where arbitrator retains jurisdiction to assist parties in computing amount of backpay and interest).
[38] *See, e.g.*, *AFGE, Council 243*, 67 FLRA 96, 97 (2012).
[39] *AFGE, Local 12*, 61 FLRA 355, 357 (2005) (*Local 12*); *AFGE, Local 1760*, 37 FLRA 1193, 1200 (1990) (*Local 1760*).
[40] Initial Award at 2.

completely resolved all the issues in the initial award. He: (1) found that the Agency violated the parties' agreement when it failed to pay retroactive transportation subsidies for the applicable 2012-13 time period;[41] and (2) directed the Agency to make whole affected employees by reimbursing them with "any retroactive payments" to which they were entitled "up to the maximum non-taxable amount of transit benefits available."[42] The Arbitrator retained jurisdiction "should the parties have any difficulties arising out of the remedy aspect" of the award.[43] He returned the matter to the parties "to discuss how best employees should receive the retroactive transit benefits they were denied."[44] The parties did not file exceptions to the initial award within the thirty-day time period provided by the Authority's Regulations.[45]

The Agency contends that the Arbitrator returned the issue of the remedy to the parties and thus did not resolve all issues submitted for arbitration.[46] Even though the Arbitrator stated that he was directing the parties to formulate "an appropriate remedy,"[47] this characterization, by itself, is not determinative of whether the initial award was final.[48] Instead, the Authority looks to whether all the issues have been resolved.[49] Regardless of how the Arbitrator characterized the matter he was returning to the parties, he resolved all of the issues before him and awarded a make-whole remedy.

Nonetheless, the Agency argues that its exceptions are timely because the make-whole aspect of the award "is not sufficiently complete to constitute a remedy that would render the [initial award] a final award."[50] But the Agency relies on Authority precedent that is distinguishable from the present case. In *U.S. Department of the Treasury, IRS, National Distribution Center, Bloomington, Illinois*,[51] the arbitrator found that the record was insufficient to determine whether a make-whole remedy was appropriate.[52] In *U.S. DOJ, Federal BOP, Metropolitan Detention Center, Guaynabo, Puerto Rico*,[53] the arbitrator returned the issue of an employee's entitlement to compensatory damages – "a significant part of the remedy" – to the parties for fact finding and settlement negotiation.[54] In *U.S. Department of HHS, Navajo Area Indian Health Service*,[55] the arbitrator declined to issue a remedy and instead returned the matter of an appropriate remedy to the parties for them to discuss and attempt to resolve.[56] And *U.S. Department of Transportation, FAA, Washington, D.C.*[57] involved a bifurcated proceeding in which the first award postponed the determination of an issue submitted for arbitration.[58] In each case, an issue remained unresolved by the arbitrator.

Here, unlike the cases cited by the Agency, the record was sufficient for the Arbitrator to determine that a make-whole remedy was appropriate. He resolved all three issues submitted to him for arbitration: (1) he found a contractual violation; (2) he did not find a ULP; and (3) he found that employees should be made whole and reimbursed for any transit subsidy they were improperly denied, "up to the maximum non-taxable amount" allowed.[59] Thus, while the initial award did not detail the implementation of the remedy, the Arbitrator issued a make-whole remedy that specifically included retroactive reimbursements.[60] Further, the award did not contemplate the introduction of some other measure of damages and record evidence was not required.[61]

Additionally, to the extent the Agency argues that the supplemental award modifies the initial award,[62] it is mistaken. The supplemental award only specifies how the parties are to implement the remedy. Although the Agency contends that the initial award failed to resolve "two overarching legal issues"[63] – first, how the Agency could legally pay the denied transit benefits retroactively up to the non-taxable amount,[64] and second, how cash payments may be a viable remedy[65] – the Arbitrator did, in fact, resolve those issues, rejecting the Agency's arguments in the initial award.[66] He found that there was no legal impediment to the award because, among other reasons, the remedy would concern retroactive, as opposed to prospective, transit subsidies.[67] He further stated that a strong argument could be made that a voucher was not "readily available"[68] in this case. The supplemental award did not modify the initial award. The Arbitrator merely clarified it and determined that a

[41] *Id.* at 37-40.
[42] *Id.* at 45.
[43] *Id.* at 46.
[44] *Id*. at 45.
[45] *See* 5 C.F.R. § 2524.2(b).
[46] Response at 2.
[47] Initial Award at 45.
[48] *Local 12*, 61 FLRA at 357; *Local 1760*, 37 FLRA at 1200-01.
[49] *CREA, Local 75*, 64 FLRA at 489.
[50] Response at 3.
[51] 64 FLRA 586 (2010).
[52] *Id.* at 590.
[53] 59 FLRA 787 (2004).
[54] *Id.* at 788.
[55] 58 FLRA 356 (2003).
[56] *Id.* at 356.
[57] 60 FLRA 333 (2000).
[58] *Id.* at 334.
[59] Initial Award at 45.
[60] *See e.g., CREA*, 64 FLRA at 490.
[61] *See id*.
[62] Response at 10.
[63] *Id.* at 4.
[64] *Id.*
[65] *Id.* at 5.
[66] Initial Award at 44; *see id*. at 28.
[67] *Id*. at 44; *see id*. at 28.
[68] *Id*. at 44.

cash reimbursement was the best implementation option for the make-whole remedy.[69]

For all of these reasons, we find that the initial award is a final award for the purpose of filing exceptions, and that the Agency's exceptions to the initial award are untimely. Thus, to the extent the Agency's exceptions challenge the Arbitrator's conclusions in the initial award – that the findings in the initial award are contrary to law and that the initial decision and make-whole remedy fail to draw their essence from the parties' agreement – we do not consider them. Accordingly, we dismiss the Agency's exceptions to the initial award.

We will, however, consider the Agency's exceptions that deal directly with the supplemental award because there is no dispute that these exceptions are timely.[70]

IV. Analysis and Conclusions

A. The supplemental award is not contrary to law.

The Agency claims that the supplemental award is contrary to law.[71] Specifically, the Agency claims that the evidence established that transit passes are available, and citing the Incentives Act and 26 U.S.C. § 132(f), the Agency argues that "where transit passes are readily available, there is no legal authority for the Agency to make cash payments for a transit subsidy benefit."[72] The Agency also argues that the award is contrary to appropriations law, as the award would require it to expend funds on transit benefits beyond what is authorized under the Incentives Act.[73] Specifically, it argues that the payment of retroactive transit benefits, in conjunction with the current payments it already makes, will require the Agency to spend unauthorized funds over the specified non-taxable limits.[74]

When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[75] In conducting de novo review, the Authority assesses whether the arbitrator's legal conclusion is consistent with the relevant legal standard.[76] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party demonstrates that the findings are nonfacts.[77] Absent a nonfact, challenges to an arbitrator's factual findings cannot demonstrate that an award is contrary to law.[78]

In the supplemental award, the Arbitrator clarified the remedial aspects of the initial award in two ways to effectuate the make-whole remedy. First, he directed employees to use Agency forms to self-certify the amount of money they spent each month during the relevant periods and to seek retroactive reimbursements for those costs from the Agency. Second, he ordered the Agency to provide cash reimbursements to the affected employees. In his award, the Arbitrator did not need to interpret the Internal Revenue Code because "any remedial order in this case relate[d] solely to the underlying grievance,"[79] and is "crafted" to effectuate a remedy for a violation of the parties' agreement.[80] The Arbitrator directed the Agency "to provide cash reimbursements to employees" for the period at issue "in excess of the $125 that was payable at the time," per the contractual obligation.[81]

The Agency has not demonstrated that the supplemental award is contrary to law. First, the Agency argues that the evidence shows that transit passes are available, which would preclude reimbursement under the Incentives Act. But the Agency's reliance on the Incentives Act is misplaced, as the plain wording of § 7905(b)(2)(A) permits agencies to provide cash reimbursements as part of their transit subsidy programs where "a voucher or similar item . . . for a transit pass is not readily available."[82] The record indicates that the Agency argued before the Arbitrator that it would be futile for it to load all the retroactive transit subsidies onto an employee's current transit pass "because any unused benefits would be 'wiped away' at the end of the month."[83] The Agency concedes, and the Arbitrator found, that providing a voucher or similar item would not make the employees whole in this case. The Agency has not otherwise shown that transit passes are "readily available" for the retroactive reimbursement of transit subsidies awarded in this case.[84] Additionally, the Agency does not assert that the supplemental award is based on a nonfact. Thus, a cash payment is permitted, and the Agency does not demonstrate that the supplemental award is contrary to the Incentives Act.

[69] Supplemental Award at 5-6.
[70] 5 C.F.R. § 2425.2(b).
[71] Exceptions at 5, 25-26.
[72] *Id*. at 26-27.
[73] *Id.* at 20.
[74] *Id*. at 16, 20-21.
[75] *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (*NTEU*) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[76] *SSA*, 67 FLRA at 538.
[77] *AFGE, Local 331*, 67 FLRA 295, 296 (2014) (*AFGE*).
[78] *Id.*
[79] Supplemental Award at 4.
[80] *Id*. at 5.
[81] *Id*. at 6.
[82] 5 U.S.C. § 7905(b)(2)(A).
[83] Initial Award at 44.
[84] *Id.*; *see also, e.g., U.S. DOL*, 61 FLRA 64, 66 (2005) (*DOL*).

Furthermore, the Authority in *U.S. Department of HHS* (*HHS*)[85] and *U.S. Department of HHS, Washington, D.C.* (*HHS, Wash., D.C.*)[86] recognized that "the Incentives Act 'constitutes explicit [c]ongressional authorization for agencies to provide funds for transit subsidies,'" and that "'options under the subsidy program include transit passes, *including cash reimbursements*.'"[87] And consistent with the Authority's decision in *HHS, Wash., D.C.*, cash reimbursements are permissible to remedy "subsidies already foregone."[88] Despite the Agency's attempts to frame the Arbitrator's remedy as requiring it to combine the cash payments with its obligations arising under the ongoing transit subsidy program, we find that "there is no prohibition on agencies using money in one fiscal year to reimburse employees for transit subsidies that were unpaid in a previous fiscal year."[89] As the Arbitrator found, this remedy is retroactive in nature to make the employees whole for the contract violation, and to provide them with the benefits they should have received in prior years.

HHS, Wash., D.C. is dispositive in this case.[90] There, as here, the Authority denied an agency's contrary-to-law exceptions to an award that found that the agency violated the parties' collective-bargaining agreement by not retroactively paying eligible employees the identical mass-transit subsidies. As a remedy, the arbitrator in *HHS, Wash., D.C.*, like the Arbitrator here, directed the agency to provide *cash* reimbursement to affected employees for the amounts that they would have received absent the contractual violation.[91] Thus, as in *HHS, Wash., D.C.*, the Incentives Act, in conjunction with the BPA, supports the supplemental award.[92]

In support of its decision in *HHS, Wash., D.C.*, the Authority relied on Comptroller General opinions and Authority precedent, specifically the Authority's earlier decision in *HHS*,[93] which found that the BPA waives sovereign immunity for remedies that meet its requirements, and held that an award of retroactive transit subsidies is authorized under the BPA.[94] In so holding, the Authority concluded that transit subsidies constitute "pay, allowances, and differentials" within the meaning of the BPA.[95] As in *HHS, Wash., D.C.*, the Arbitrator in the instant case held that the Agency violated the parties' agreement, and we find that the Agency's actions adversely affected the employees when it failed to reimburse them for certain transit expenses required by the parties' agreement.[96] This constitutes an "unjustified and unwarranted personnel action" for purposes of the BPA.[97]

Here, the Arbitrator found that employees were entitled to a make-whole remedy, and the initial award requires the Agency to provide affected employees retroactive transit subsidies.[98] Although the Arbitrator did not explicitly state that he was awarding backpay under the BPA, we find the Authority's determinations in *HHS, Wash., D.C.*, *U.S. DOL*, and *HHS* dispositive because, in those cases, as here, the arbitrators awarded make-whole relief, which the Authority found constituted an award of backpay under the BPA.[99] Thus, we find that the BPA supports the Arbitrator's remedy that the Agency is required to make cash payments to the employees.

Lastly, the Arbitrator correctly found that he did not need to interpret the Internal Revenue Code. To the extent that the Agency argues that it is entitled to deference in its interpretation of 26 U.S.C. § 132,[100] the Agency points to no official interpretation. At best, the Agency repeatedly relies on testimonial evidence provided before the Arbitrator. We find this unpersuasive as it relates to the Arbitrator's supplemental award and irrelevant. Because the Incentives Act and the BPA support the award, an interpretation of 26 U.S.C. § 132 is unnecessary.

Accordingly, we deny this exception.

B. The supplemental award draws its essence from the parties' agreement.

The Agency also argues that that the supplemental award fails to draw its essence from Article 53, Section 10 of the parties' agreement.[101] In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[102] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' collective-bargaining agreement

[85] 54 FLRA 1210, 1210 (1998).
[86] 68 FLRA 239, 243 (2015).
[87] *Id.* at 242 (quoting *HHS*, 54 FLRA at 1222-23).
[88] *Id.* at 242 (quoting *DOL*, 61 FLRA at 66).
[89] *Id.*
[90] *Id.* at 243.
[91] *Id.* at 240.
[92] *See, e.g.*, *id.* at 243.
[93] 54 FLRA 1210 (1998).
[94] *Id.* at 1217, 1220-21.
[95] *Id.* at 1222-23; *accord DOL*, 61 FLRA at 68 (Chairman Cabaniss concurring).
[96] *E.g., HHS, Wash. D.C.*, 68 FLRA at 242.
[97] *HHS*, 54 FLRA at 1220.
[98] Award at 43-45.
[99] *HHS, Wash., D.C.*, 68 FLRA at 243; *DOL*, 61 FLRA at 66; *HHS*, 54 FLRA at 1220-23.
[100] Exceptions at 5, 27.
[101] *Id.* at 29.
[102] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

when the appealing party establishes that the award: (1) cannot in any rational way be derived from the collective-bargaining agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective-bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the collective-bargaining agreement; or (4) evidences a manifest disregard of the collective-bargaining agreement.[103] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[104]

Article 53, Section 10 states:

> The [Agency] will subsidize an employee's use of public transit by paying for qualified transit passes up to the non-taxable amount. The subsidy must be in a form not readily convertible to cash or used for purposes other than intended, e.g., fare cards, passes, tokens, tickets or other instruments issued by authorized local transit authorities. Direct cash subsidies to employees are prohibited.[105]

The Arbitrator, noting that cash reimbursement as a remedy for a grievance is not the same as "direct cash subsidies to employees which the Agency argues it is unable to give,"[106] found that cash reimbursement to employees for transit costs that should have been paid in previous years was a "permissible" means of providing a remedy for the Agency's violation of Article 53, Section 10 of the parties' agreement.[107]

The Agency disagrees with the Arbitrator's interpretation of Article 53, Section 10, contending that "the parties' agreement was not meant to provide transportation subsidies *over* the non-taxable amount, nor was it meant to lead to direct cash subsidies."[108] But the Agency misinterprets the supplemental award. Contrary to the Agency's assertions, the Arbitrator did not award the cash reimbursements under Article 53, Section 10 of the parties' agreement. In resolving the grievance, the Arbitrator considered Article 53, Section 10 to determine the amount of transit subsidies employees were entitled to receive, and whether the Agency violated Article 53, Section 10 by not paying the employees that amount.[109] Finding that the Agency violated Article 53, Section 10, the Arbitrator determined that the cash payments were not "direct cash subsidies" under that provision,[110] but reimbursements to employees for the Agency's contract violation and "part of a resolution of a grievance dispute."[111]

The Agency does not claim that the parties' agreement prohibits cash reimbursements to employees as a remedy for a sustained grievance, nor does it cite any contract language that prohibits cash reimbursements for contract violations. To the extent the Agency challenges the Arbitrator's interpretation of the term "direct cash subsidies,"[112] the Agency fails to establish that the Arbitrator's interpretation is implausible, unfounded, irrational, or in manifest disregard of the agreement.[113]

Accordingly, we deny the Agency's essence exception.

V. Decision

We deny the Agency's exceptions.

[103] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[104] *Id.* at 576 (citing *Paperworks v. Misco, Inc.*, 484 U.S. 29, 38 (1987); *Dep't of HHS, SSA, Louisville, Ky. Dist.*, 10 FLRA 436, 437 (1982)).
[105] Exceptions, App. 3, Jt. Ex. 5.
[106] Supplemental Award at 5.
[107] *Id*. at 2, 5-6.
[108] Exceptions at 33; *see also id*. at 31.
[109] Initial Award at 33, 36, 38, 40.
[110] Supplemental Award at 6 (internal quotation marks omitted).
[111] *Id*.
[112] Exceptions at 33.
[113] *E.g.*, *AFGE, Local 933*, 65 FLRA 9, 12 (2010).