68 FLRA No. 149

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 83
(Union)

and

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

0-AR-5037

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DECISION

September 16, 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 M. David Vaughn issued an award (merits award) in which he found that the Agency violated Article 13 of the parties' collective-bargaining agreement (Article 13), violated 5 C.F.R. §§ 300.103 and 335.103, and engaged in a prohibited personnel practice when it interviewed best-qualified candidates "by a panel of [non-bargaining-unit] managers and supervisors other than the selecting official" for vacancies within the Agency.[1] He remanded the issue of an appropriate remedy to the parties, and after the parties were unable to reach an agreement on that issue, he issued a second, remedial award (remedial award). In the remedial award, he awarded priority consideration for a two-year period to best-qualified bargaining-unit applicants who applied for vacancies that the Agency filled internally through its use of interview panels. He declined to award priority consideration to best-qualified bargaining-unit applicants in instances where the Agency instead selected external applicants for those vacancies. This case presents us with five substantive questions.

The first question is whether the remedial award fails to draw its essence from the parties' agreement. Because the Agency's essence exception does not demonstrate that the Arbitrator's interpretation of Article 13 is irrational, unfounded, implausible, or in manifest disregard of the agreement, we find that the Agency has not demonstrated that the award fails to draw its essence from the agreement. And because the Union's essence exception does not demonstrate that awarding priority consideration to affected employees for a two-year period is inconsistent with the wording of the parties' agreement, we find that the Union also has not demonstrated that the award fails to draw its essence from the agreement.

The second question is whether the remedial award is contrary to law because it interferes with management's right to assign work under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute).[2] Because the Agency failed to allege to the Arbitrator that the applicable provisions in Article 13 are not "procedures" within the meaning of § 7106(b)(2) of the Statute, we find that the Authority's Regulations bar the Agency from raising this argument before the Authority, and that the Agency's management-rights exception therefore fails as a matter of law.

The third question is whether the remedial award is contrary to an internal Agency rule because the applicants covered by the grievance (the grievants) did not establish that they suffered the harm necessary to qualify for priority consideration. Because the parties' agreement – and not the internal rule – governs this matter's disposition, we find that the internal rule provides no basis for finding the award deficient.

The fourth question is whether the remedial award is contrary to 5 C.F.R. § 300.103 because the Arbitrator erred in finding a prohibited personnel practice. Because the Arbitrator sustained the grievance on both regulatory and contractual grounds, and the contractual ground is a separate and independent basis for the award, we find that the Arbitrator's reliance on § 300.103 provides no basis for setting aside the award.

The fifth question is whether the remedial award is based on a nonfact. Specifically, the Agency argues that the Arbitrator erred in finding that the parties agreed to award priority consideration to best-qualified applicants who ranked higher than the lowest-scoring selectee. The Agency has failed to establish that, but for the alleged error, the Arbitrator would have reached a different conclusion. Therefore, we find that the remedial award is not based on a nonfact.

[1] Agency's Exceptions, Attach. 2, Opinion and Award (Merits Award) at 51.

[2] 5 U.S.C. § 7106(a)(2)(B).

II. Background and Arbitrator's Awards

The parties negotiated an agreement that reflected certain Agency changes to its promotion process for bargaining-unit employees. At the time of the negotiations, the Agency was transitioning its rating-and-ranking procedures for selecting best-qualified candidates from a manual to an automated process. Under the original process (the manual system), the Agency's human-resources personnel would manually determine which applicants met the minimal qualifications. A "ranking panel" or "rating official" would then evaluate the applications, create a best-qualified list, and send the best-qualified list, in rank order, to the selecting official.[3] The selecting official who received the best-qualified list typically used an interview panel of non-bargaining-unit personnel to "further evaluate prospective candidates and suggest which [best-qualified] candidates to select."[4]

Under the new process (the automated system) that the parties addressed in their negotiations, managers and supervisors no longer reviewed applications or created a best-qualified list to refer to the selecting official. Rather, in order to remove the subjectivity of the selection process, the automated system would rate and rank candidates on an objective basis from their responses to online questions, and would then create a best-qualified list based on the numerical ranking. The selecting official would then receive the best-qualified list from the automated system and, without input or recommendations from any other source, would make a final decision. The parties' agreement reflected the transition from the manual system to the automated system, in that it incorporated the new procedures under the automated system, but also included procedures from the manual system "for those vacancies not yet addressed on the [automated] system."[5]

Following the implementation of the automated system, the Agency continued to sometimes use interview panels after the selecting official would receive the best-qualified list from the automated system. The Union filed a grievance over the Agency's use of interview panels to conduct interviews of the applicants on the best-qualified list. Specifically, the Union alleged that the Agency violated Article 13, violated 5 C.F.R. §§ 300.103 and 335.103, and committed a prohibited personnel practice when it used interview panels to assist the selecting official in differentiating among best-qualified candidates after they were referred from the automated program. The Union asserted that, under the automated system, only the selecting official, and not interview panels, had the authority to evaluate best-qualified candidates and make a decision from the list provided by the automated program. The grievance went to arbitration.

At arbitration, the parties stipulated that the issues before the Arbitrator were whether "the manner in which the [Agency] conducts selection interviews by other than selecting officials violate[d] the [parties' agreement] and/or applicable law, rule[,] and regulation[.] If so, what shall be the remedy?"[6] In the merits award, the Arbitrator addressed the parties' inclusion of the term "panel" in Article 13, Section 6 of the agreement.[7] In this regard, Section 6.D.1 provides that "[q]uestions used in the interview process and the [e]mployer's notes will be recorded and kept in the file. This shall not require the *panel* to ask identical questions of each applicant."[8] The Arbitrator concluded that "Section 6.D.1's reference to 'panels' asking questions applies to the remnant of the manual system[,] which was not and is not intended to be applied to positions where the automated system has already been implemented."[9]

The Arbitrator also rejected an Agency argument that the interview-panel members' comments functioned merely as a "note-taking tool."[10] Instead, he found that the interview panels constituted "a second, informal, unsanctioned[,] and unregulated process to evaluate candidates on a quantitative and qualitative basis for use by the selecting official," and that this process had neither statutory nor contractual authorization.[11] In this regard, he found that neither the parties' agreement nor applicable law or regulation permitted the selecting official "to delegate authority *or* for someone other than the selecting official to make the selection."[12] The Arbitrator further reasoned that, because the parties had bargained for the selecting official's judgment to be the "dispositive step" in the selection process, only the selecting official could "further assess" best-qualified candidates once they were referred from the automated system.[13] Moreover, the Arbitrator found that a selecting official's act of receiving and considering the input of interview panels was tantamount to "considering subjective opinions[,] which the [p]arties, by adopting the automated rating[-]and[-]ranking system, agreed to vest solely in the selecting official."[14]

[3] Merits Award at 15-16.
[4] *Id.* at 41.
[5] *Id.* at 17.
[6] *Id.* at 2.
[7] *Id.* at 42.
[8] Agency's Exceptions, Jt. Ex. 3, Article 13, Section 6.D.1 at 48 (emphasis added).
[9] Merits Award at 42.
[10] *Id.* at 43 (internal quotation marks omitted).
[11] *Id.* at 47.
[12] *Id.* at 46.
[13] *Id.*
[14] *Id.* at 47.

The Arbitrator concluded that the Agency's continued use of interview panels violated both Article 13 and the "applicable selection regulations" in 5 C.F.R. §§ 300.103 and 335.103.[15] He remanded the issue of an appropriate remedy to the parties.

After the parties were unable to reach an agreement on this issue, they returned to the Arbitrator for further proceedings. Both parties submitted remedial proposals to the Arbitrator, and he issued the remedial award. In that award, the Arbitrator framed the issue as "[w]hat is the appropriate remedy for the violations that were found?"[16] He incorporated by reference his findings from the merits award that the Agency was prohibited from conducting interview panels, regardless of whether the selecting official participates on those panels, and that only the selecting official may interview best-qualified applicants.

After evaluating each party's remedial proposal, the Arbitrator found common ground between the two proposals, stating that, "at its core, the Agency's proposal . . . explicitly adopt[s] the Union's proposal, i.e., granting [priority consideration] to internal applicants who had a higher score than the lowest[-]scoring selectee."[17] But the Arbitrator rejected the Agency's argument that the prohibition of interview panels should not preclude their use "where the selecting official participates."[18] He noted that this reading of the merits award contradicted his findings, because the "[m]erits [a]ward states . . . that *only* the selecting official may further assess [best-qualified] applicants."[19] While noting that the Agency may seek to negotiate new procedures on this matter, the Arbitrator stated that the remedial award "prohibits the Agency from using interview panels unless and until it provides notice to the Union and an opportunity to bargain."[20]

Where the relevant vacancies were filled by internal applicants, the Arbitrator awarded priority consideration to internal, best-qualified applicants who received higher scores through the automated system than the lowest-scoring selectees. In so doing, the Arbitrator clarified that it was the panel's "provision of subjective evaluation of applicants," and not the "presence [or] absence of the selecting official from panel interviews," that violated the parties' negotiated selection procedure.[21] For the internal applicants who qualified for priority consideration, the Arbitrator determined that the remedy applied to "all applicants for vacancies where the Agency announced [that] it hired employee(s) . . . [fifteen] workdays prior to the grievance being filed."[22] For those applicants, the Arbitrator found that priority consideration would go into effect for two years.

The Arbitrator also granted bargaining-unit employees sixty days from the issuance of the remedial award to assert claims for retroactive promotion. The Arbitrator noted that, in bringing a claim for retroactive promotion, an employee faces the "difficulty of meeting the standard that, 'but for' the illegal interview process, the selecting official would have selected the applicant for the vacant position."[23] Further, the Arbitrator directed that "[r]etroactive promotion will only be granted based on satisfaction of statutory, [internal Agency,] or contractual requirements."[24]

The Arbitrator did not award priority consideration to internal applicants who were subject to interview panels for vacancies that were ultimately filled by external applicants. In this regard, the Arbitrator determined that there were "too many steps" between creating the best-qualified list and selecting an external applicant to support a conclusion that "all of the internal candidates were collectively and substantially harmed by the use of an interview panel."[25]

Both parties filed exceptions to various aspects of the remedial award, and both parties filed oppositions to each other's exceptions.

III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar two of the Agency's arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented before the Arbitrator.[26]

The Agency argues that the Arbitrator's award of priority consideration is contrary to the public policy articulated in merit-selection principles and procedures.[27] Specifically, the Agency asserts that 5 C.F.R. § 335.103(d) reflects a public policy that applicants who are on a best-qualified list are considered to be equally qualified and that, therefore, the selection of

[15] *Id.* at 51.
[16] Remedial Award at 2.
[17] *Id.* at 17-18.
[18] *Id.* at 18.
[19] *Id.* at 18-19.
[20] *Id.* at 19.
[21] *Id.* at 18.
[22] *Id.* at 21.
[23] *Id.* at 23-24.
[24] *Id.* at 25.
[25] *Id.* at 22
[26] 5 C.F.R. §§ 2425.4(c), 2429.5; *e.g.*, *AFGE, Local 3571*, 67 FLRA 218, 219 (2014) (citing *U.S. DHS, CBP*, 66 FLRA 495, 497 (2012)).
[27] Agency's Exceptions at 27.

one best-qualified applicant over another "cannot be presumed to be erroneous."[28]

In its original grievance, the Union sought "any and all remedies appropriate to [the alleged] violations," including a request for priority consideration.[29] The Union also requested priority consideration at arbitration, and again during settlement negotiations with the Agency in its remedial proposal.[30] There is no evidence that, at any point during these proceedings, the Agency argued that the Union's request for priority consideration was contrary to public policy or 5 C.F.R. § 335.103(d). Because the Agency could have raised this argument before the Arbitrator, but failed to do so, we dismiss this exception.[31]

As discussed in greater detail in Section IV.B.1. below, the Agency also argues that the remedial award interferes with management's right to assign work under § 7106(a)(2)(B) of the Statute.[32] In making this argument, the Agency contends that "the Arbitrator's interpretation of Article 13 . . . does not constitute . . . a procedure."[33]

Section 7106(b)(2) of the Statute allows for the enforcement of "procedures which management officials of the agency will observe in exercising any authority under" § 7106.[34] Where an agency should have known to argue to an arbitrator that a contract provision was not negotiated under § 7106(b), and the agency did not do so, the Authority will not consider that argument for the first time on exceptions to the arbitrator's award.[35]

At arbitration, the Union argued that the Arbitrator should interpret Article 13 as rescinding the use of interview panels, because this provision "contains a detailed promotion rating/ranking process that clearly and unambiguously does *not* recognize interviews of [best-qualified] candidates by anyone other than the selecting official."[36] The Agency could have argued that, if the Arbitrator adopted that interpretation, Article 13 would not constitute a "procedure" under § 7106(b)(2) of the Statute. But there is no evidence that the Agency did so. And, in fact, the Agency repeatedly referred to the applicable provisions in Article 13 as "procedures."[37] Because the Agency could have argued that the provisions in Article 13 were not procedures within the meaning of § 7106(b)(2), but failed to do so, we find that §§ 2425.4(c) and 2429.5 bar the Agency's argument.

IV. Analysis and Conclusions

A. The remedial award does not fail to draw its essence from the parties' agreement.

Both the Agency[38] and the Union[39] argue that the remedial award fails to draw its essence from the parties' agreement. 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.[40] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the 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 agreement; or (4) evidences a manifest disregard of the agreement.[41] 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."[42] The Authority has found that an award fails to draw its essence from an agreement when an arbitrator's interpretation of an agreement conflicts with the express provisions of that agreement.[43]

The Agency argues that the remedial award fails to draw its essence from the agreement because it does not represent a plausible interpretation of the promotion process set forth in Article 13, Sections 5 and 6.[44] The Agency asserts that the use of interview panels after the referral of the best-qualified list is an established practice

[28] *Id.* at 28.
[29] Merits Award at 21 (internal quotation marks omitted).
[30] *Id.* at 31; Remedial Award at 4.
[31] *Int'l Bhd. of Elec. Workers, Local 26*, 67 FLRA 455, 456 (2014).
[32] Agency's Exceptions at 17-18.
[33] *Id.* at 18.
[34] 5 U.S.C. § 7106(b)(2).
[35] *U.S. DHS, U.S. CBP*, 66 FLRA 634, 637 (2012) (*CBP*).
[36] Merits Award at 28.
[37] Agency's Exceptions, Attach., Tab C, Agency's Post-Hr'g Br. at 4-5; Agency's Reply Br. at 3, 7; Agency's Sur-Reply Br. at 2-3, 6.
[38] Agency's Exceptions at 13-17.
[39] Union's Exceptions at 5-12.
[40] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[41] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[42] *Id.* at 576.
[43] *SSA*, 63 FLRA 691, 693 (2009) (*SSA*) (citing *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993); *U.S. Dep't of the Air Force, Hill Air Force Base, Utah*, 39 FLRA 103, 108 (1991)).
[44] Agency's Exceptions at 14.

that existed both before and after the implementation of the automated system, and that the Arbitrator confused the negotiated rating-and-ranking procedures that determine the best-qualified list through the automated system with the subsequent selection procedures that involve a final selection by the selecting official.[45] In particular, the Agency points to Article 13, Section 6.D.1, which states that "[q]uestions used in the interview process and the [e]mployer's notes will be recorded and kept in the file. This shall not be construed to require the *panel* to ask identical questions of each applicant."[46] According to the Agency, the incorporation of the term "panel" into the agreement, which the parties negotiated while the Agency was in the process of implementing the automated system, authorizes the Agency to continue its longstanding practice of using interview panels when interviewing best-qualified candidates.[47]

The Arbitrator specifically addressed the parties' inclusion of the term "panel" in their agreement, and concluded that "Section 6.D.1's reference to 'panels' asking questions applies to the remnant of the manual system[,] which was not and is not intended to be applied to positions where the automated system has already been implemented."[48] Further, considering that the term "panel" is not defined in the parties' agreement, and that the Authority accords deference to an arbitrator's interpretation of an agreement's provisions, the Agency provides no basis for concluding that the Arbitrator's interpretation of "panel" or the negotiated promotion process is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.[49] Accordingly, we deny the Agency's essence exception.

The Union also argues in its exceptions that the Arbitrator's decision to place priority consideration into effect for only two years fails to draw its essence from the parties' agreement.[50] In the remedial award, the Arbitrator directed, "consistent with Article 13, Section 11, that employees' [priority consideration] be in effect for two years."[51] Section 11 states, in pertinent part, that "[i]n those circumstances where a vacancy does not occur within two . . . years of the date the priority consideration was granted, the employee will be considered for vacancies meeting the above criteria within the [s]tate of the [post of duty] of the original vacancy."[52] The Union asserts that this wording was intended to broaden the applicability of the remedy, and that limiting priority consideration to two years "would ostensibly negate an employee's remedy where the [A]gency decides to halt or limit hiring in a particular [post-of-duty] for two years."[53]

As stated previously, the Authority has found that an award fails to draw its essence from an agreement when an arbitrator's interpretation of an agreement conflicts with the express provisions of that agreement.[54] Here, the remedy of priority consideration for a two-year period does not conflict with the plain wording of Section 11.[55] Although the Union contends that the wording of Section 11 was intended to broaden (not limit) the applicability of the priority-consideration remedy,[56] the Union provides no basis for finding that the Arbitrator's interpretation is irrational, unfounded, implausible, or manifestly in disregard of the agreement.[57] Accordingly, we deny the Union's essence exceptions.

B. The remedial award is not contrary to law, rule, or regulation.

The Agency argues that the award is contrary to law, rule, or regulation in several respects.[58] When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.[59] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[60] In making that assessment, the Authority defers to the Arbitrator's underlying factual findings, unless the appealing party establishes that those findings are "nonfacts."[61]

[45] *Id.*
[46] *Id.* at 15 (quoting Article 13, Section 6.D.1) (emphasis added).
[47] *Id.*
[48] Merits Award at 42.
[49] *See U.S. Dep't of HHS, Substance Abuse & Mental Health Serv. Admin.*, 65 FLRA 568, 572 (2011).
[50] Union's Exceptions at 5.
[51] Remedial Award at 23.
[52] Union's Exceptions at 1.
[53] *Id.* at 6-7.
[54] *SSA*, 63 FLRA at 693.
[55] *AFGE, Local 12*, 61 FLRA 507, 509 (2006) (upholding arbitrator's interpretation that "comports with the plain wording" of agreement).
[56] Union's Exceptions at 6-7.
[57] *See U.S. DOJ, Exec. Office for Immigration Review Bd. of Immigration Appeals*, 65 FLRA 657, 660 (2011).
[58] Agency's Exceptions at 17, 22, 28.
[59] *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).
[60] *Id.* (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[61] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012) (*IRS*)).

1. The remedial award is not contrary to § 7106(a)(2)(B) of the Statute.

The Agency argues that the remedial award violates the Agency's right to assign work under § 7106(a)(2)(B) of the Statute.[62] Specifically, it asserts that the Arbitrator's conclusion that Article 13 authorized only the selecting official to interview best-qualified candidates interferes with management's right to assign this task to individuals other than the selecting official.[63] The Agency also argues that Article 13 is not a procedure under § 7106(b)(2), or an appropriate arrangement under § 7106(b)(3), of the Statute. [64]

The Authority places the burden on the party arguing that the award is contrary to management rights to allege not only that the award affects a right under § 7106(a), but also that the agreement provision that the arbitrator has enforced is not the type of contract provision that falls within § 7106(b) of the Statute.[65] Without an allegation that a contract provision was not negotiated under § 7106(b), management-rights exceptions fail as a matter of law.[66] Here, the Arbitrator repeatedly found that the provisions in Article 13 that he enforced were "procedures,"[67] which we interpret as findings that the provisions are procedures within the meaning of § 7106(b)(2).[68] Although the Agency argues that Article 13 is not a procedure under § 7106(b)(2), as discussed in Section III above, the Agency is barred from making that argument before us. As a result, its management-rights claim fails as a matter of law.[69] Accordingly, we deny the Agency's management-rights exception.

2. The remedial award is not contrary to an internal Agency rule.

The Agency argues that the Arbitrator's award of priority consideration is contrary to the Agency's Internal Revenue Manual (the manual).[70] According to the Agency, the terms of the manual dictate that priority consideration is not appropriate in this case because the harm to individual candidates is "quite speculative."[71] The manual provides, in pertinent part, that in order to be entitled to priority consideration, "a non[-]selected employee must have been adversely impacted by the violation of competitive procedures."[72] It then enumerates four examples in which priority consideration is appropriate, but notes that these scenarios are "not all-inclusive."[73] The Agency asserts that these four examples demonstrate that priority consideration is appropriate only when best-qualified candidates are "actually disadvantaged."[74]

Section 7122(a)(1) of the Statute provides that an arbitration award will be found deficient if it conflicts with any law, rule, or regulation.[75] For purposes of § 7122(a)(1), the Authority has defined rule or regulation to include both government-wide and governing agency rules and regulations.[76] However, when both a collective-bargaining agreement and an agency-specific – as opposed to government-wide – rule or regulation apply to a matter, the negotiated agreement governs the matter's disposition.[77] Thus, when an agency negotiates an agreement that conflicts with an internal agency regulation, the agency is nonetheless bound by its agreement.[78]

Here, the Arbitrator found that there was "no statutory or contractual authorization" for the Agency's use of interview panels.[79] In accordance with sustaining

[62] Agency's Exceptions at 17.
[63] *Id.* at 18-19.
[64] *Id.* at 17-18.
[65] *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 602 (2014) (*SSA Region VI*) (citing *CBP*, 66 FLRA at 638) (Member Pizzella dissenting).
[66] *CBP*, 66 FLRA at 638.
[67] Merits Award at 17, 41, 42.
[68] *SSA Region VI*, 67 FLRA at 603.
[69] *CBP*, 66 FLRA at 638.
[70] Agency's Exceptions at 28.
[71] *Id.*
[72] *Id.* at 29 (citing EEO requirement in § 6.335.1.12.8(5) of the Manual).
[73] *Id.*
[74] *Id.* at 30.
[75] 5 U.S.C. § 7122(a)(1).
[76] *USDA, Forest Serv., Monongahela Nat'l Forest*, 64 FLRA 1126, 1128 (2010) (*Forest Serv.*) (citing *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 51 FLRA 1210, 1216 (1996)).
[77] *Id.* (citing *U.S. Dep't of the Army, Ft. Campbell Dist., Third Region, Ft. Campbell, Ky.*, 37 FLRA 186, 195 (1990)).
[78] *U.S. Dep't of the Air Force, Seymour Johnson Air Force Base, N.C.*, 55 FLRA 163, 166 (1999) (holding that "[a]ny alleged inconsistency between the agency regulation and the award does not provide a basis for vacating the award, because the award is based on the parties' agreement, and the agreement – not the regulation – governs the matter").
[79] Merits Award at 47.

the grievance on contractual grounds, he awarded priority consideration in a manner that was consistent with the parties' agreement.[80] Even assuming that the award conflicts with the manual, the parties' agreement trumps the manual.[81] Therefore, the Agency's reliance on the manual does not provide a basis for finding the remedial award deficient.

For the foregoing reasons, we deny this exception.

3. The remedial award is not contrary to a government-wide regulation.

The Arbitrator found that the Agency committed a prohibited personnel practice when it used interview panels to interview best-qualified candidates.[82] The Agency argues that this "legal constriction" is contrary to 5 C.F.R. § 300.103, because that regulation requires only that "any technique encompassed within its parameters be appropriately validated," and does not prohibit the Agency's use of interview panels to interview best-qualified candidates.[83] Section 300.103 provides, in relevant part, that "[t]here shall be a rational relationship between performance in the position to be filled . . . and the employment practice used. The demonstration of rational relationship shall include a showing that the employment practice was professionally developed."[84] The Agency also asserts that the Arbitrator's finding that interview panels are a prohibited personnel practice is internally inconsistent with his finding that the Agency could reinstate the interview panels through bargaining.[85] Further, the Agency contends that the Arbitrator failed to provide any reasoning for his prohibited-personnel-practice finding.[86]

An arbitration award is based on separate and independent grounds when more than one ground independently would support the remedies that the arbitrator awards.[87] The Authority has recognized that, when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to have the Authority find the award deficient.[88] In those circumstances, if the excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the arbitrator, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other ground.[89]

Here, the Arbitrator determined that the Agency's use of interview panels violated both Article 13 of the parties' agreement and 5 C.F.R. §§ 300.103 and 335.103.[90] These determinations constitute separate and independent grounds for the Arbitrator's award. As discussed above, we have denied the Agency's essence exception. Because the Agency has not established that the Arbitrator's finding of a contractual violation fails to draw its essence from the agreement, and that finding is a separate and independent ground for the award, the Agency's contrary-to-regulation exception provides no basis for setting aside the award.[91]

Accordingly, we deny this exception.

C. The remedial award is not based on a nonfact.

The Agency argues that the remedial award is based on a nonfact.[92] 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.[93] However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[94] Moreover, disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be given such evidence, provides no basis for finding the award deficient.[95]

The Agency asserts that the Arbitrator based part of the priority-consideration remedy on an erroneous finding that both parties had agreed to that remedy.[96] Specifically, the Agency cites the Arbitrator's decision, regarding vacancies that the Agency filled with internal applicants, to award priority consideration to best-qualified applicants who received higher scores than the lowest-scoring selectees, noting that he was "disinclined to deny, or interfere with, a proposed remedy

[80] *Id.* at 51; Remedial Award at 23, 25.
[81] *See Forest Serv.*, 64 FLRA at 1129.
[82] Merits Award at 51.
[83] Agency's Exceptions at 24.
[84] 5 C.F.R. § 300.103(b)(1).
[85] Agency's Exceptions at 23-24.
[86] *Id.* at 22.
[87] *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 86 (2011).
[88] *E.g., U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000).
[89] *See U.S. Dep't of VA Med. Ctr., Hampton, Va.*, 65 FLRA 125, 129 (2010); *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 892 (2010).
[90] Merits Award at 51; Remedial Award at 1.
[91] *Union of Pension Emps.*, 67 FLRA 63, 66 (2012) (citing *Broad. Bd. of Governors*, 66 FLRA 380, 385-86 (2011)).
[92] Agency's Exceptions at 25.
[93] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[94] *Id.*
[95] *IRS*, 67 FLRA at 103.
[96] Agency's Exceptions at 26.

to which the [p]arties have actually agreed."[97] The Agency argues that this is a mistaken understanding of the parties' positions regarding a priority-consideration remedy.[98]

The Agency's assertion that the remedial award is based on a nonfact because the Arbitrator incorrectly believed that the parties had agreed to a portion of the remedy is without merit. As discussed previously, after evaluating each party's remedial proposal, the Arbitrator found common ground between the two proposals, stating that, "at its core, the Agency's proposal . . . explicitly adopt[s] the Union's proposal, i.e., granting [priority consideration] to internal applicants who had a higher score than the lowest[-]scoring selectee."[99] In making this determination, the Arbitrator also rejected both the Agency's proposal to limit priority consideration to cases in which a selecting official was not part of the interview panel and its argument that priority consideration "would be unfair" to other applicants.[100] The Arbitrator therefore relied on multiple considerations when awarding priority consideration to certain best-qualified applicants. As such, the Agency has not established that, but for the Arbitrator's finding that the parties agreed on this point, he would have reached a different result. Accordingly, we deny this exception.

The dissent trots out a parade of horribles that it alleges the remedial award will lead to,[101] apparently based on the premises that: the award "grants a priority consideration to over 10,000 employees";[102] and the Agency "will be unable to fill 10,000 of its next vacancies competitively until all 10,000 employees who were interviewed, and not selected, by a panel will have to be noncompetitively *promoted* to each and every vacancy that occurs in the [Agency]."[103]

There are just two problems with the dissent's apparent premises: (1) the Agency – the excepting party, which has the burden of explaining why the remedial award is deficient[104] – does not claim in its exceptions that the award would have such effects; and (2) the record does not support a conclusion that the award would have those effects.

In the latter regard, some context is in order. After the merits award, the Union put forth a "remedy *proposal*" that contained various terms,[105] including (as relevant here) a remedial period beginning on October 1, 2012,[106] and priority consideration for certain internal applicants who were passed over in favor of both certain internal and external applicants.[107]

The Agency then put forth its own proposal, and commented, in pertinent part:

> The Agency is proposing a shorter coverage period, since [the Union's] *proposed remedy period* (starting October 1, 2012) would require [A]gency personnel to *access and open* individual electronic and hardcopy *files* store[d] in various locations *for more than 3,000 certificates (involving* more than 1,700 announcements and *more than 10,000 unique applicants*). Limiting the time frame of the remedy is necessary, since [the Union's] proposal would require close to 16,000 man hours to accomplish the task (reviews of individual files would take at least four hours each). Limiting the [priority-consideration] period to one year will lessen the chance of the remedy taking two or more years to accomplish.[108]

Then, at arbitration, the Agency contended that:

> [B]ecause the Union's proposed remedy would require an enormous manual effort to review 3,500

[97] Remedial Award at 18.
[98] Agency's Exceptions at 27.
[99] Remedial Award at 17-18.
[100] *Id.* at 18.
[101] Dissent at 18 (stating that this case has "the potential to upend the fundamental mission of [the] entire" Agency); *id.* at 22 (stating that the Arbitrator's remedy is "a perfect storm for disaster"); *id.* at 23 (stating that the remedial award is "devastatingly impactful"); *id.* at 25 (stating that the award "effectively usurps the right of the [Agency] to make selections and to assign work for the foreseeable future").
[102] *Id.* at 18 (emphasis omitted).
[103] *Id.* at 19 (emphasis added).
[104] *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, Red River, Texarkana, Tex.*, 67 FLRA 609, 613 (2014) (Member Pizzella dissenting) ("the Authority has explained that 'important policies underlying the Statute support placing this burden on the party that is arguing that the award is deficient,' including Congress's intention that the Authority exercise only limited review of arbitration awards") (quoting *SSA, Region VI*, 67 FLRA at 602).
[105] Remedial Award at 3 (emphasis added).
[106] *Id.* at 4.
[107] *Id.* at 4-5.
[108] *Id.* at 7 (emphasis added).

> promotion certificates, locate and retrieve paper files and, potentially, grant and manage [priority consideration] for a large number of applicants, such a remedy would overwhelm its staffing function, resulting in the protracted suspension of competitive procedures for many years.[109]

The Union disputed the Agency's contentions, stating that:

> [T]he Agency's assertion that it would be burdensome to require it to review promotion actions back to October 1, 2012, is inflated, particularly its contention that it would take someone four hours to review [each] promotion package. [The Union] points out that [the Agency] provided to the Union numerous promotion actions during the processing of the instant grievance and [that] the Union was able to identify in a matter of minutes which of the promotion actions used interviews as a selection method and, of those, which interviews were conducted by a panel that did not include the selecting official. [The Union] contends that it should take a Labor[-]Relations Specialist no more than five to ten minutes to review each promotion action and learn whether interviews were conducted and, if so, whether the interview was conducted by a panel or by the selecting official.[110]

The Arbitrator was "not completely persuaded by either [party's] proposal."[111] Accordingly, he limited the time period requested by the Union's proposal,[112] and he declined to award priority consideration to internal applicants for vacancies that the Agency filled with external applicants.[113] The Arbitrator also expressly found that the burden on the Agency would not be as great as the Agency suggested. Specifically, the Arbitrator stated:

> I am not persuaded that the burden will be as great as [the Agency] suggests, i.e., that it will require taking "hundreds of Employment Specialists off-line to examine thousands of manual records simply to identify employees who may be considered for [priority consideration]." . . . Even if the Agency's estimate – four hours to review each promotion package – were accurate (the Union contends that it should take no more than five or ten minutes), its estimate of the total number of hours it will take – one person 350 weeks – represents exponentially less time when divided among "hundreds of Employment Specialists."[114]

In short: the Union proposed a particular remedy; the Agency claimed that the Union's proposed remedy would require the Agency to expend significant amounts of time *accessing files* involving "more than 10,000 unique applicants;"[115] and the Arbitrator, while rejecting the Agency's assessment of the time burden, *did not grant the Union's proposed remedy in its entirety*, but limited both the temporal scope of, and the number of personnel actions that would have been covered under, that proposed remedy.

The Agency did not claim, at arbitration, that the Union's proposed remedy would entitle all of these alleged 10,000 applicants to priority consideration. And, even more importantly, the Agency *does not* claim in its exceptions – nor did the Arbitrator find – that the remedy that the Arbitrator *actually provided* would entitle the alleged 10,000 applicants to priority consideration. In fact, this is *extremely* unlikely, as: (1) some of those applicants undoubtedly were ultimately *selected*; (2) other applicants undoubtedly were external applicants, to whom the priority-consideration remedy does not apply; and (3) the Arbitrator limited the categories of unit employees who would be entitled to priority considerations, by limiting the remedial period, deciding not to award priority consideration to internal applicants for vacancies that the Agency filled with external applicants, and limiting priority consideration to only those best-qualified applicants "who had a higher score than the lowest scoring selectee."[116] Thus, without a factual basis (or an Agency claim to this effect, which would have enabled the Union to respond), the dissent incorrectly equates the *alleged* number of *applicants* with the class of *grievants* entitled to priority consideration – thereby exaggerating the burden of the remedial award.

[109] *Id.* at 12.
[110] *Id.* at 9-10.
[111] *Id.* at 20.
[112] *Id.* at 20-21.
[113] *Id.* at 22.
[114] *Id.* at 21.
[115] *Id.* at 7.
[116] *Id.* at 25.

As noted previously, the dissent also claims that the Agency "will be unable to fill 10,000 of its next vacancies competitively until all 10,000 employees who were interviewed, and not selected, by a panel will have to be noncompetitively *promoted* to each and every vacancy that occurs in the [Agency]."[117] As stated above, there is no factual basis for the statement that the class of affected grievants totals 10,000 Agency employees. Further, *the Agency does not claim, and the Arbitrator did not find*, that all affected grievants must actually receive *promotions*. Instead, the award provides only for the *priority consideration* of best-qualified candidates for vacant positions. Because the award entitles affected employees to consideration, not selection, there is no merit to the dissent's assertion that the Agency will be unable to move forward with hiring until all these employees have been promoted. And, to the extent that the Arbitrator addressed the retroactive promotion of qualifying grievants in the remedial award, he found that it would be granted only "based on satisfaction of statutory, [internal Agency,] or contractual requirements."[118] He also noted that these grievants would encounter "the difficulty of meeting the standard" that the illegal interview process was the "but for" cause of their nonselection.[119] The remedial award therefore imposes specific constraints on affected grievants seeking promotions, and it does not guarantee promotions to all employees who receive priority consideration.

Finally, we note that in adjudicating exceptions to arbitration awards, the parties must base their exceptions on the arguments and the factual record that was before the arbitrator[120] – and, in reviewing those exceptions, the Members (including those who write separately) must do the same.[121] Further, the Statute expressly states that "collective bargaining . . . [is] in the public interest,"[122] and provides for binding arbitration of matters relating to the interpretation of contract provisions that the parties lawfully agree to in the course of such collective bargaining.[123] Plain and simple, that is what this case is about. The administration and application of lawful collective-bargaining agreements is not inconsistent with effective and efficient government.

V. Decision

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

[117] Dissent at 19 (emphasis added).
[118] Remedial Award at 25.
[119] *Id.* at 23-24.
[120] *See* 5 C.F.R. §§ 2425.4(c), 2429.5 (exceptions may not rely on any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented to the arbitrator).
[121] *Cf.* Dissent at 18 (citing an article from the Boston Globe).
[122] 5 U.S.C. § 7101.
[123] *See id.* § 7121(b)(1)(A)(iii) (negotiated grievance procedures must "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency").

Member Pizzella, dissenting:

Few cases that come before the Authority have the potential to upend the fundamental mission of an entire federal agency. But this case does. With today's decision, the majority embraces an ill-conceived arbitral award which grants a *priority consideration* to ***over 10,000 employees***[1] of the Internal Revenue Service (IRS), effectively suspending the fundamental (and statutory) rights of the IRS to make selections and to assign work for the foreseeable future.

Just last year, John Koskinen, Commissioner of the IRS, testified that between fiscal years 2010 and 2014 the IRS absorbed budget cuts of "over [one] billion in real dollars . . . represent[ing] a [seven] percent cut" in the IRS's operating budget."[2] During the same timeframe, Commissioner Koskinen reported that the IRS lost over 11,000 employees[3] (more than eleven percent (11%) of its full-time, permanent workforce).[4]

Despite these challenges, the IRS reduced the time that it took to fill vacancies from "more than five months" in 2009 to "an average of [ninety (90)] days in 2012, a reduction of nearly [sixty] percent [(60 %)]."[5] That reduction in fill time came about, in large part, because NTEU worked with the IRS to implement an automated rating-and-ranking tool ("Career Connector"). Historically, the rating and ranking of applicants was a cumbersome process whereby subject-matter experts manually reviewed applications in order to rank and rate all applicants[6] in order to create a "best-qualified" list that would be given to a selecting supervisor looking to fill a vacancy.[7]

All of that progress, however, came to a screeching halt by December 2012. During the 2013 tax-filing season (which followed the filing of this grievance in December 2012), IRS officials reported to Congress and "dozens of government reports and audits" reflected that the IRS became "so short-staffed it [could not] answer nearly [forty (40)] percent of [taxpayer] phone calls[8] and fifty-three percent (53%) of taxpayer letters could not be answered within the IRS's internal deadline of forty-five (45) days.[9]

Thus, the grievance in this case is paradoxical at its core. NTEU complained that some supervisors were opting to use an interview panel to interview applicants rather than interviewing applicants on their own. The option for using an interview panel, to assist the supervisor by making a recommendation to the supervisor, was a practice that had been in use *for over thirty* (30) *years*[10] and was permitted by Article 13, Section 6.D.1. of the parties' national agreement.[11] When a supervisor opted to use an interview panel, the final selection decision was still made by the supervisor.

Despite the clear language of Article 13, Section 6.D.1., NTEU decided they did not like interview panels. When the matter went to arbitration, Arbitrator M. David Vaughn determined that IRS supervisors could no longer use interview panels to inform the interview and selection process. As a remedy, the Arbitrator ordered the IRS to give *priority consideration* to *every* IRS employee, who applied for any vacancy (between November 2012 and April 2014), and who, in the interview process, was interviewed by a selection panel rather than just the selecting supervisor, and then not selected by that supervisor.[12]

To put this into perspective, between November 2012 and April 2014, the IRS advertised no less than 1700 vacancies and made 3000 selections.[13] As many as, and possibly more than, 10,000 internal applicants were not selected in this manner,[14] all of whom, according to the Arbitrator, are now eligible for at least one priority consideration. 10,000 employees represents nearly *eleven percent (11%) of the IRS's full-time permanent employees*.[15]

For those not familiar with the term, the Office of Personnel Management (OPM) has generally described *priority consideration* as consideration that is

[1] Remedial Award at 7.
[2] Written Testimony of John A. Koskinen, Commissioner, Internal Revenue Service, Before the Senate Appropriations Committee, Subcommittee on Financial Services and General Government on the FY 2015 IRS Budget (Apr. 30, 2014) at 11.
[3] *Id*. at 5.
[4] Written Testimony of John A. Koskinen, Commissioner, Internal Revenue Service, Before the House Ways and Means Committee, Subcommittee on Oversight on the State of the IRS (Feb. 5, 2014) (Koskinen Ways and Means Testimony) at 10.
[5] IRS has improved hiring times, report says, Washington Post (Feb. 1, 2013).
[6] Merits Award at 16.
[7] *Id*. at 15, 17.
[8] *IRS is America's feared and failing agency*, www.bostonglobe.com/news/nation2014/02/17/internal-revenue-service-institution (Boston Globe).
[9] *Id*.
[10] *Id*. at 22; see also Art. 13, § 6.D.
[11] Merits Award at 20.
[12] Remedial Award at 25.
[13] *Id*. at 7.
[14] *Id*.
[15] Written Testimony of John A. Koskinen, Commissioner, Internal Revenue Service, Before the House Ways and Means Committee, Subcommittee on Oversight on the State of the IRS (Feb. 5, 2014) at 10.

given to one candidate "*ahead of* other candidates."[16] The parties' national agreement similarly defines "priority consideration" as "a selection certificate which contains an employee's name *alone* being sent to a selecting official *before* the official considers *other applicants* for a position."[17]

But in the context of this case, it means that the IRS will be unable to fill 10,000 of its next vacancies competitively until all 10,000 employees who were interviewed, and not selected, by a panel will have to be noncompetitively promoted to each and every vacancy that occurs in the IRS.

Considering NTEU's grievance and the Arbitrator's award, one would naturally presume that this grievance stemmed from a long-simmering dispute between the IRS and NTEU over the manner in which the IRS conducted interviews. But that is not the case.

Article 13, Section 5 of the parties' national agreement concerns the "process"[18] by which applicants are "rate[d] and rank[ed]"[19] as "[b]est [q]ualified"[20] and then referred to a selecting supervisor. Article 13, Section 6, on the other hand, concerns what happens *after* a best-qualified list is prepared and "refer[ed]" to the selecting supervisor. Article 13, Section 6 addresses the "techniques," including "interview[s],"[21] by which a supervisor makes his or her selection. Under Section 6, a selecting supervisor has three options − to conduct *no interviews*, to interview alone, or to use an *interview panel* (the supervisor may or may not participate on the interview panel).[22]

In its grievance, NTEU alleges that "the manner in which the IRS conducts *selection interviews* by other than selecting officials violate the [n]ational [a]greement."[23] As noted above, however, that allegation is inconsistent with the plain language of Sections 5 and 6 and, as noted below, is not consistent with the parties' extensive bargaining history.

Until 2009, applicants for any IRS vacancy were rated and ranked by a "ranking panel" which "assess[ed] [each] candidate's potential to perform in the vacant position."[24] The rating-and-ranking process was performed by a panel which manually reviewed each candidate's application. According to retired[25] NTEU National Executive Vice President, Frank Ferris, who also served as NTEU's Chairperson and Chief Negotiator,[26] the manual-ranking process was "time[]consuming," "subjectiv[e]," and over time generated far too many grievances.[27] To address NTEU's concerns, the IRS decided to adopt an automated rating-and-ranking process to replace the manual process. The IRS "selected" "Career Connector" which generated an automated, best-qualified list by scanning online applications for "objective" criteria[28] and also "worked in conjunction with [OPM's] USAJobs website."[29]

The 2009 national agreement modified Article 13, Section 5. The parties agreed that Career Connector would be "phased in"[30] but *ranking* panels would continue to be used at those locations "where [Career Connector] had not yet been phased in."[31] In the 2012 national agreement, NTEU agreed to the full implementation of Career Connector. Article 13, Section 5 reflected this change by replacing the "phased in" language, from the 2009 agreement, with: "[t]he [IRS] has determined to utilize an automated rating and ranking system."[32]

Throughout the 2009 and 2012 negotiations, NTEU *did not make even one proposal* to change, or voice *any concern whatsoever*, about Article 13, Section 6 which concerns the referral and interview process. Instead, all of the Union's proposals focused exclusively on the Section 5 rating-and-ranking process. Section 6.D., in both the 2009 and 2012 national agreements, permit a selecting supervisor to conduct interviews alone or through an interview panel, of which the supervisor may or may not be a part.[33] Other provisions in Section 6 continued to require uniform treatment of applicants: "all applicants will be treated uniformly;"[34] "any selection technique utilized by the selecting official will be uniformly applied to all [best-qualified] applicants referred;"[35] and "if the selecting official interviews any one . . . applicant . . . then all applicants referred . . . will also be interviewed."[36] These practices remained unchanged and

[16] *Dominguez v. Nelson*, 43 FEP 74 (S.D.Tex. 1986) (emphasis added) (internal citation omitted).
[17] Art. 13, § 11.B (emphasis added).
[18] Merits Award at 16.
[19] *Id*.
[20] *Id*. at 15.
[21] Art. 13, § 6.
[22] *Id*.
[23] Merits Award at 2.
[24] *Id*.; Merits Award at 16.
[25] Summer Edition Newsletter, NTEU Chapter 29 at 5.
[26] Union's Opp'n (Merits Award) at 3.
[27] Merits Award at 16.
[28] *Id*.
[29] *Id*.
[30] *Id*. at 17.
[31] *Id*.
[32] *Id*. at 17-18 (quoting Art. 13, § 5) (internal quotation marks omitted).
[33] Merits Award at 22; see also Art. 13, § 6.D.
[34] Art. 13, § 6.A.
[35] *Id*., § 6.B.
[36] *Id*., § 6.D.

reflected how candidates had been interviewed for the preceding thirty (30) years.[37]

It is telling, therefore, that NTEU, which did not mention Section 6 during the negotiations of three national agreements, could hardly wait until the ink was dry on the 2012 national agreement, to file this grievance and challenge the manner in which interviews had been conducted by the IRS for over thirty (30) years.

Against this backdrop, I am even more perplexed how Arbitrator Vaughn could conclude that the elimination of *ranking* panels in the 2009 and 2012 iterations of the national agreement, could usurp the right of a selecting official to use an *interview* panel, when that right is guaranteed by language that is contained within Section 6.D.1. and had remained unchanged, throughout the 2006, 2009, and 2012 iterations of the national agreement: "Questions used *in the interview process* and the Employer's notes will be recorded and kept in the file. This shall not be construed to require *the panel* to *ask identical questions* of each applicant."[38]

Nonetheless, the Arbitrator found that Section 6.D.1.'s language about "*panels* asking questions" referred to the manual-*ranking* "panels"[39] from Section 5.

That conclusion is not only not a plausible interpretation of the plain language of Sections 5 and 6.D.1. and is not supported by the parties' bargaining history throughout 2006, 2009, and 2012,[40] it is erroneous in several other respects as well.

The process of "ranking applicants" in Section 5, whether performed by a panel or by Career Connector, *never involved the asking of questions*. Under the manual process, the ranking panel performed a rote review of the candidates' applications and then assigned a "score on five critical job elements."[41] *No questions were asked* and *there was no contact* whatsoever between the ranking-panel members and the applicants.[42] Career Connector scans applications which are submitted online "to determine whether [the applicant] is minimally qualified" and possesses the basic skills that are required "to perform successfully in the position being filled."[43]

Section 6, on the other hand, concerns the "selection techniques" which may be "utilized by the selecting official."[44] Under Section 6, after the best-qualified list is "refer[red]" to the selecting supervisor,[45] the selecting supervisor has three options: to do no interviews,[46] to interview alone,[47] or to use an interview "panel."[48]

As I noted in *U.S. Department of Veterans Affairs, Medical Center, Perry Point, Maryland*, the Authority "generally defer[s] to an arbitrator's interpretation of the parties' agreement [but] that deference is not limitless."[49]

Under these circumstances, I do not agree that the Arbitrator's interpretation of Article 13 is a plausible interpretation of the parties' agreement and does not draw its essence therefrom.

Furthermore, Arbitrator Vaughn's ill-conceived remedy is a perfect storm for disaster. In his remedy award, the Arbitrator gives priority consideration to each and every applicant who applied for any vacancy that was filled by another IRS employee and the supervisor decided to interview applicants with the assistance of an *interview* panel (as permitted by Section 6.D.1.) rather than conducting the interviews alone.

As part of his original award, the Arbitrator ordered the parties to determine the scope and extent of the remedy.[50] In response, the IRS calculated that the Arbitrator's award of priority consideration could apply to "more than *10,000 unique applicants*,"[51] a calculation *which NTEU does not dispute*.

Even though NTEU never disputes the potential impact and scope of the Arbitrator's award (as it is detailed by the IRS), the majority devotes no less than four pages in an attempt to gloss over and minimize the magnitude of the Arbitrator's outrageous remedy.[52]

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[37] Merits Award at 22.
[38] Art 13. § 6.D.1.
[39] Merits Award at 42 (emphasis added).
[40] *See Geo. A. Hormel & Company v. United Food and Commercial Workers, Local 9, AFL-CIO*, 129 LRRM 2773 n.2 (D.Minn. 1988) (bargaining history is an important source in determining parties' intent); *see also Specialized Distribution Management, Inc. v. The Brotherhood of Teamsters, Auto Truck Drivers, Line Drivers, Car Haulers and Helpers, Local #70*, 1995 WL 688662 at 6 (N.D.Calif. 1995)
[41] Merits Award at 15.
[42] *Id*.
[43] *Id.* at 16.
[44] Art. 13. § 6.B.
[45] *Id.* § 6. ("Referral of Candidates").
[46] *Id.* § 6.D.
[47] *Id*.
[48] *Id*. § 6.D.1.
[49] 68 FLRA 83, 87 (2014) (Dissenting Opinion of Member Pizzella) (citing *Beacon Journal Pub'g Co. v. Akron Newspaper Guild, Local No. 7*, 114 F.3d 596, 599 (6th Cir. 1997) (noting that, despite great amount of deference accorded an arbitrator's decision, the court's "review is not toothless.")).
[50] Merits Award at 52.
[51] Remedial Award at 7.
[52] Majority at 13-16.

Contrary to the majority's arguments, NTEU *never expressed any concern* that the IRS's calculations of impact were "*exaggerate*[*ed*]."[53] Rather, in its response to the IRS's calculations, NTEU argued that the remedy *did not go far enough* and *should be expanded* to include selections, whether or not the selecting official participated in the *interview* panel, and whether or not the selectee of any announcement was an "internal" or "external" candidate.[54] If anything, NTEU argued that the award *should be expanded to increase, not decrease*, the number of applicants entitled to priority consideration. Under longstanding Authority precedent, unrebutted assertions are considered to be true.[55]

I appreciate why the majority would attempt to minimize my concerns with this award, because it is, without any doubt, one of the most (if not the most) devastatingly impactful arbitral awards which the Authority has embraced in its thirty-seven year history.

My colleagues suggest that I "trot[] out a parade of horribles" as though I drew them out of thin air. Contrary to that suggestion, however, each and every "horrible" that I reference herein is contained within the record before us. The majority recites and references, in eleven paragraphs over four pages, the same facts and figures upon which I rely.

From whatever angle Arbitrator Vaughn's award is viewed, it undercuts the fundamental ability of the IRS to competitively hire the best-qualified individuals *for two years or until the IRS gives priority consideration to 10,000 individuals*.

The majority ignores that any one of the 10,000 employees awarded priority consideration by the Arbitrator's award is "entitled to a *separate priority consideration* for each vacancy announcement" for which the employee was not selected.[56] In plain terms, that means any employee who applied under more than one announcement, and was interviewed by an *interview* panel, and then not selected would be entitled to a priority consideration for *more than one* priority consideration. In its grievance, NTEU complained about 1,700 announcements,[57] effectively increasing the number of potential priority considerations far beyond 10,000.

The majority also ignores the tsunami of follow-on grievances which will most certainly follow this award. One's imagination does not need to leap far to reasonably foresee that when the IRS makes its first priority consideration to fill just one vacancy, as directed by this award, any one, or all, of the remaining 9,999 grievants will be able to challenge that placement. One may argue that they were more qualified; another may argue that they should be first because they were not selected first; and another may argue that they were not selected several times and should be afforded priority consideration first. The variety of similar arguments are endless, limited only by the creative imaginations of NTEU's attorneys and any employee looking for an easy promotion.

In an apparent attempt to minimize the certainty of this most certain consequence, the majority erroneously implies that the Arbitrator found that the IRS "at [the] core [of its proposed remedy] . . . explicitly adopt[ed] [NTEU's] proposal . . . concerning priority consideration."[58] Nothing could be further from the truth. In proper context, the Arbitrator specifically found the opposite:

> The [IRS] offers a compelling argument – indeed, it devotes a majority of its Submission . . . ***against*** the Union's proposed remedy for "*automatic*" [*priority consideration*], asserting that it *exceeds the scope of any alleged harm* which, in any case, is quite speculative ***and*** that it would be prohibitively time-consuming to provide. IRS contends that the "deviation from 'rank order' in any particular selection is not dispositive, or even persuasive, that any harm has occurred" and that, "since by law and contract the selecting official must consider all of the [best qualified] applicants on an equal basis, it is *not appropriate* to assume that *applicants towards the top* of a [best qualified] list *should be preferred* over those towards the bottom."[59]

I do not suggest that the Authority should permit itself to be swayed entirely by the potential cost of an award. But, in our review of arbitration awards, Congress mandated that we must "provide leadership"[60] and "take such action and make such recommendations . . . [the Authority] considers necessary"[61] to ensure that arbitral awards are "consistent with applicable laws,

[53] *Id.* at 16.
[54] Award at 8.
[55] *NTEU, Chapter 160*, 67 FLRA 482, 486 (2014) (Member DuBester dissenting); *AFGE, Local 2645*, 67 FLRA 438, 439 (2014) (Member Pizzella concurring).
[56] *Id.*, § C. (emphasis added).
[57] Award at 7.
[58] Majority at 5 (some alterations in original).
[59] Award at 17 (citing Ag. Brief at 2) (emphasis in original) (some emphasis added).
[60] 5 U.S.C. § 7105(a)(1).
[61] *Id.* § 7122 (a).

rules, or regulations"[62] and "with the requirement of an effective and efficient [g]overnment."[63]

It is inconceivable to me that Congress ever intended for a single arbitrator to have such expansive power to directly undermine the mission readiness of an entire federal agency and usurp fundamental management prerogatives. Congress certainly did not intend for the Authority to simply rubberstamp, and expand upon, such overreach.

Here, there is no other appeal for the IRS because, as in most arbitration cases, the Authority is the last level of review. Thus, this ill-conceived award is bound to go into effect.

In this respect, I fail to see how any aspect of this case, which effectively usurps the right of the IRS to make selections and to assign work for the foreseeable future, meets our statutory responsibility to promote "the effective conduct of [government] business" or to "facilitate" the resolution of disputes.[64]

Accordingly, I would vacate Arbitrator Vaughn's award and remedy in its entirety.

In conclusion, I share the majority's sentiment that "Members (including those who write separately)"[65] "must base their [opinions] on the arguments and the factual record that was before the arbitrator."[66] And that may be true with respect to the final disposition of a case. However, I do not believe that we, as Members of the Authority, may (or should) simply ignore matters of public record – i.e. the testimony of the Director of the IRS, other "IRS officials," or official "government reports and audits" [67] – that are directly relevant to or put a case into historic context for the federal labor-management relations community. Matters that are obvious to the parties may not be set forth in the official record or disputed before an arbitrator. But those same facts may nonetheless provide historic context for the federal labor-management relations community, without which they may not understand the significance of the case.

As I discuss above, this case is particularly consequential and historically significant. Therefore, it is telling that the majority does not dispute the relevance or veracity of the public testimony, records, and documents which I cite, not to dispose of this case, but to put it into historic context. Instead, the majority attacks the source which I cite to reference those public records. Each and every record that was collectively referenced in that one insightful article could have been cited separately, but there was no need to do so. Any participant in the federal labor-management relations community can readily access an article in the Boston Globe, but everyone is not so familiar with the Congressional record and niceties of legal research resources.

This was not simply a Pizzella aberration. Administrative agencies, including the Authority itself, and federal courts routinely take similar "administrative," "official,"[68] or "judicial"[69] notice of facts, professional resources, and historic information.

Thank you.

[62] *Id*.
[63] *Id.* at § 7101(b).
[64] *U.S. DHS CBP*, 68 FLRA 157, 168 (2015) (Dissenting Opinion of Member Pizzella).
[65] Majority at 18.
[66] *Id*. at 17-18.
[67] Boston Globe.
[68] *U.S. Dep't of VA Med. Ctr., Kan. City, Mo.*, 65 FLRA 809, 815 (2011) ; *U.S. DOD, Def. Language Inst., Foreign Language Ctr. Monterey, Cal.*, 64 FLRA 735, 742 (2010); *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 114 n.3 (2001).
[69] Fed. Rules of Evidence Rule 201(b)(2) (The Court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.).