69 FLRA No. 88

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

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

0-AR-4933
(68 FLRA 829 (2015))
(68 FLRA 253 (2015))

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DECISION

September 28, 2016

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

I. Statement of the Case

The Agency filed exceptions to Arbitrator Andrew Strongin's (the Arbitrator's) award (award), which granted the Union's second interim request for attorney fees. We must decide three substantive questions.

First, we must decide whether the award is contrary to the Back Pay Act (BPA)[1] because the grievants did not suffer any actual loss in pay, allowances, or differentials. Because the Authority already considered and rejected this very argument in the underlying case, the answer to this question is no.

Second, we must decide whether the award is contrary to 5 U.S.C. § 7701(g) because attorney fees are not warranted in the interest of justice. Because the Agency fails to establish that its arguments in the underlying dispute were not clearly without merit, or that it should not have known that it would not prevail, the answer to this question is no.

Third, we must decide whether the award is based on nonfacts. Because two of the alleged nonfacts are legal conclusions and contractual interpretations, which may not be challenged as nonfacts, and because the third alleged nonfact is not a central fact underlying the award, but for which the Arbitrator would have reached a different conclusion, the answer to this question is no.

For the foregoing reasons, as well as the reasons explained below, we dismiss, in part, and deny, in part, the Agency's exceptions.

II. Background and Arbitrators' Awards

The Authority more fully detailed the circumstances of this dispute in the three underlying cases.[2] As such, this decision discusses only those aspects of the case that are pertinent to the Agency's exceptions immediately before us.

This dispute arose out of the Agency's use of its Revised National Inspectional Assignment Policy (RNIAP) to determine staffing levels and tours of duty at the local level. The Union requested bargaining over the RNIAP and a new "bid-and-rotation" system.[3] After the Agency refused the request, the Union filed a grievance in 2006 alleging that the Agency violated several federal laws and regulations, as well as the parties' collective-bargaining agreement. The grievance was unresolved, and the parties submitted the matter to arbitration.

A. The Interim Award

Following the first arbitration hearing between the parties, Arbitrator Margery F. Gootnick found that the Agency violated numerous legal provisions. She then issued an interim award that ordered the Agency to cease and desist from continuing these violations; to post a notice; and to provide the Union with information concerning the affected grievants' work-assignment changes. She further ordered the parties to meet and confer regarding remedies, and she retained jurisdiction for sixty days for the limited purpose of considering remedial issues and issuing an appropriate remedy.

B. The First Remedial Award

When the parties could not agree to a remedy, they brought the matter back to Arbitrator Gootnick. Arbitrator Gootnick found that, with certain exceptions, the Agency's unjustified or unwarranted personnel action, in changing the grievants' established work schedules in violation of applicable law and regulation,

[1] 5 U.S.C. § 5596.

[2] *U.S. DHS, U.S. CBP*, 68 FLRA 253, 253 (2015) (*DHS*); *see also U.S. DHS, U.S. CBP*, 65 FLRA 978, 978 (2011) (*DHS II*); *U.S. DHS, U.S. CBP*, *recons. denied*, 68 FLRA 829, 829 (2015) (*DHS III*).

[3] *Id.* (citing *DHS II*, 65 FLRA at 978).

resulted in the reduction of their pay, allowances, or differentials.

Finally, Arbitrator Gootnick found that the Union was the prevailing party, that the award of attorney fees was in the interest of justice because the Agency's actions were "clearly without merit and the Agency knew or should have known that it would not prevail on the merits,"[4] and that the fees then sought by the Union were reasonable. Accordingly, Arbitrator Gootnick ordered the relief set out in her interim award, along with compensation under the BPA, and granted the Union's request for attorney fees.

The Agency filed exceptions to the first remedial award with the Authority. In its exceptions, the Agency did not challenge Arbitrator Gootnick's finding that attorney fees should be awarded in the interest of justice. The Authority dismissed the Agency's exceptions, in part, and denied them, in part.[5]

C. The Second Remedial Award

When the parties were again unable to resolve the remaining remedial issues – and after the death of Arbitrator Gootnick – they submitted the matter to Arbitrator Susan R. Meredith. Arbitrator Meredith noted that Arbitrator Gootnick had: found that the grievants whose work schedules were changed in violation of applicable law and regulation were entitled to retroactive adjustments in their pay; determined the period for which retroactive pay could be made; and ruled on objections the Agency raised regarding those payments. Arbitrator Meredith concluded, therefore, that the only issue before her was "how these retroactive adjustments are to be accomplished."[6] The parties each submitted a proposed claims procedure to Arbitrator Meredith, and she adopted the Union's proposed claims procedure.

Arbitrator Meredith also stated that she would retain jurisdiction over "any requests for attorney[] fees," as well as "any disputes over an interim [Union] request and a subsequent final request for attorney fees after the implementation of the [second remedial award] is complete."[7]

The Agency filed exceptions to the second remedial award, which the Authority addressed in *U.S. DHS, U.S. CBP* (*DHS*).[8]

D. The Authority's Decision in *DHS*

In *DHS*, the Authority dismissed in part, and denied in part, all of the Agency's exceptions.[9] As is relevant to the instant matter, the Authority rejected the Agency's argument that the second remedial award was contrary to the BPA because it awarded backpay without determining whether individual grievants had suffered an actual (as opposed to speculative) loss in pay, allowances, or differentials.[10] In that regard, the Authority found that the question of whether the grievants suffered a loss in pay, allowances, or differentials due to the Agency's unjustified or unwarranted personnel actions was resolved by Arbitrator Gootnick and was not before Arbitrator Meredith.[11]

The Agency filed a motion for reconsideration of *DHS*, which the Authority denied.[12]

E. The Interim Petition for Attorney Fees

After the Authority issued its decision in *DHS*, the Union submitted the petition for interim attorney fees that is at issue in this case. This petition requested attorney fees for work performed in preparation for the arbitration hearing that preceded the second remedial award, and for work performed in opposition to the Agency's exceptions to the second remedial award.

The Arbitrator noted that Arbitrator Gootnick had already determined that attorney fees were warranted in the interest of justice. The Arbitrator observed that the Authority upheld Arbitrator Gootnick's award of backpay and attorney fees under the BPA, and that the Agency did not file an exception challenging her decision to award attorney fees. The Arbitrator also noted that Arbitrator Meredith "invited an interim [attorney-]fee request from the Union," which the Agency did not challenge in its exceptions in *DHS*.[13] The Arbitrator thus concluded, as he was "stand[ing] in the shoes of" the previous arbitrators,[14] that the time had already passed for the Agency to contest whether attorney fees were warranted under the BPA.

The Arbitrator also stated that, even if he were to "ignore the clear inference to be drawn from the [second remedial award] in favor of an award of interim attorney[] fees," he would nonetheless conclude that the legal requirements for attorney fees had been satisfied.[15] In this regard, the Arbitrator noted that the Union's fees

[4] First Remedial Award at 17.
[5] *See DHS II*, 65 FLRA at 978.
[6] *DHS*, 68 FLRA at 255 (quoting Second Remedial Award at 5).
[7] Award at 3 (quoting Second Remedial Award at 10, 15).
[8] 68 FLRA at 253.
[9] *Id.* at 254.
[10] *Id.* at 256.
[11] *Id.* at 257.
[12] *See DHS III*, 68 FLRA at 829.
[13] Award at 7.
[14] *Id.* at 9.
[15] *Id.* at 9-10.

were incurred in relation to litigating the underlying violations found by the previous two arbitrators, and that they represented a "continuation of the Union's efforts that already have been found to be a proper, legal basis for awarding attorney[] fees."[16] Accordingly, the Arbitrator granted the Union's request for attorney fees.

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

III. Preliminary Matters

A. We deny the Union's motion to dismiss the Agency's exceptions.

The Authority's Regulations state that documents may be served on other parties by email, "but only when the receiving party has agreed to be served by email."[17] When an excepting party fails to properly serve a copy of its exceptions on the opposing party, the Authority considers whether the failure harmed the opposing party.[18]

Here, the Agency indicated on its statement of service that it served its exceptions on the Union via both email and first class mail.

In its opposition to the Agency's exceptions, the Union attached a motion to dismiss the Agency's exceptions. In the motion, the Union asserts that the Agency served the Union with a copy of the exceptions solely by email, and that the Union did not consent to service by email.[19] The Union also attached email messages between the parties in which it appears that the Agency's representative asked the Union's representative whether, in addition to an electronic copy, the Union would like a hard copy of the Agency's exceptions via first class mail.[20] Finally, the Union argues that the Authority should dismiss the Agency's exceptions for failure to properly serve the Union with a copy of the exceptions.

However, the Union does not allege that it suffered any harm as a result of the Agency's failure to properly serve its exceptions, and there is no dispute that the Union timely filed its opposition, which closely tracked the Agency's exceptions. As such, even assuming that the Union did not consent to email service, the Union still timely filed its opposition and therefore suffered no harm.[21]

Accordingly, we deny the Union's motion to dismiss the Agency's exceptions.

B. Three of the Agency's exceptions are moot.

A dispute becomes moot when there is no longer a legally cognizable interest in the case.[22] In this respect, although there may have been a justiciable controversy when a case was filed, once that controversy ceases to exist, the issues arising out of that controversy will be dismissed for want of jurisdiction.[23] Accordingly, issues will be dismissed as moot if they have been resolved by interim events.[24]

In its exceptions, the Agency notes that it has appealed the Authority's decision in *DHS* to the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit), and that this appeal was still pending at the time the Agency filed its exceptions.[25] Due to the pendency of this appeal, the Agency sets forth three exceptions arguing that an award of attorney fees is premature. First, the Agency argues that the award is contrary to 5 U.S.C. § 7701(b)(2)(C), which states that any award of attorney fees resulting from an appeal to the Merit Systems Protection Board (MSPB) may not be paid "before the decision is final."[26] Second, the Agency argues that the award is contrary to § 7701(g)(1) because there has not yet been a final determination as to who is the prevailing party in the underlying dispute.[27] Finally, the Agency argues that the award is contrary to the language of the parties' agreement, which provides that an arbitration award "will not be implemented until all appeals are exhausted and a final decision is rendered by the [Authority] or the court of highest authority to which the case has been appealed."[28] According to the Agency, because the D.C. Circuit is still considering its appeal of *DHS*, a final decision has not yet been rendered and the Authority must grant these exceptions.

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[16] *Id.* at 10.
[17] 5 C.F.R. § 2429.27(b)(6).
[18] *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 599-600 (2014) (*SSA*) (denying motion to dismiss where union was not harmed by delay in service); *see also U.S. Dep't of Transp., FAA, Wash. D.C.*, 63 FLRA 492, 493 (2009) (*FAA*); *NAGE, Local R1-109*, 61 FLRA 593, 595 (2006) (*NAGE*).
[19] Union's Mot. to Dismiss at 1.
[20] *Id.*, Attach. 1, Feb. 8, 2016 email.
[21] *See SSA*, 67 FLRA at 599-600; *FAA*, 63 FLRA at 493; *NAGE*, 61 FLRA at 595.
[22] *NTEU*, 63 FLRA 26, 27 (2008) (citing *Ass'n of Civilian Technicians, Show-Me Army Chapter*, 59 FLRA 378, 380 (2003)).
[23] *Id.* (citation omitted).
[24] *Id.* (citation omitted).
[25] Exceptions at 9 (citing Agency's Ex. C, Opp'n to Union's Request for Attorney Fees at 2; Agency's Ex. E, Hr'g Tr. Jan. 7, 2016, at 60-61).
[26] *Id.* at 8-9 (quoting 5 U.S.C. § 7701(b)(2)(C)).
[27] *Id.* at 14-15.
[28] *Id.* at 20 (citing Agency Ex. B, Parties' Agreement, Chapter 28, Section 12).

However, after the Agency filed its exceptions, the D.C. Circuit dismissed the Agency's appeal of the Authority's decision in *DHS* for lack of jurisdiction.[29] The Agency then filed a petition for rehearing or rehearing en banc with the D.C. Circuit, which the D.C. Circuit subsequently denied.[30] Although these decisions from the D.C. Circuit are not part of the record in this case, our Regulations allow us to take official notice "of such matters as would be proper."[31] As such, we take official notice of the D.C. Circuit's dismissal of the Agency's appeal of *DHS*, as well as the D.C. Circuit's denial of the Agency's petition for rehearing or rehearing en banc.

Therefore, there are no longer any appeals currently pending in relation to this case. Because all of the Agency's appeals have been resolved, it is no longer necessary for us to address the issues raised in the three exceptions described above (even assuming that they are otherwise properly before us and all raise recognized grounds for review).

Accordingly, as these three exceptions have been resolved by interim events, we dismiss them as moot.[32]

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law.[33] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[34] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[35] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[36]

1. The award is not contrary to the BPA.

The Agency argues that the award is "contrary to the principles" of the BPA.[37] Specifically, the Agency claims that the Union has failed to show that the grievants suffered any "actual loss," as required by the BPA.[38]

However, the Authority considered and rejected this very argument in *DHS*, and the question of whether or not the Agency violated the BPA is no longer before us.[39] The Agency's attempt to relitigate conclusions that the Authority already reached does not provide a basis for setting aside the award.[40] Accordingly, we deny the Agency's argument that the award is contrary to the BPA.

2. The award is not contrary to 5 U.S.C. § 7701(g).

The Agency argues that the award is contrary to 5 U.S.C. § 7701(g).[41] Under the BPA, an award of attorney fees must be: (1) in conjunction with an award of backpay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with the standards established under 5 U.S.C. § 7701(g), which pertains to attorney fee awards by the MSPB.[42] The prerequisites for an award under § 7701(g) are that: (1) the employee must be the prevailing party; (2) the award of attorney fees must be warranted in the interest of justice; (3) the amount of fees must be reasonable; and (4) the fees must have been incurred by the employee.[43]

The Agency argues that the award is contrary to § 7701(g) because granting attorney fees is not in the interest of justice.[44] The Authority has resolved whether an award of fees is warranted in the interest of justice in accordance with § 7701(g)(1) by applying the criteria established by the MSPB in *Allen v. U.S. Postal Service*

[29] *U.S. DHS v. FLRA*, *mot. to dismiss for lack of jurisdiction granted*, No. 15-1351 (D.C. Cir. Mar. 9, 2016).
[30] *U.S. DHS v. FLRA*, *order denying petition for rehearing en banc*, No. 15-1351 (D.C. Cir. Sept. 8, 2016).
[31] 5 C.F.R. § 2429.5; *see U.S. DHS, Citizenship & Immigration Serv.*, 68 FLRA 772, 774 (2015).
[32] *NTEU*, 63 FLRA at 27.
[33] Exceptions at 8-20.
[34] *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995); *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[35] *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't Naval Station, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (*Naval Station Honolulu*) (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[36] *E.g.*, *AFGE, Nat'l INS Council*, 69 FLRA 549, 552 (2016).
[37] Exceptions at 10-14.
[38] *Id.* at 10 (citing *W. Div. Naval Facilities Eng'g Command*, 35 FLRA 19 (1990); *U.S. Dep't of the Air Force, Warner Robins Air Force Base*, 56 FLRA 541, 543 (2000)).
[39] *See DHS*, 68 FLRA at 256-258.
[40] *E.g.*, *DHS III*, 68 FLRA at 834 (citing *Bremerton Metal Trades Council*, 64 FLRA 543, 545 (2010)).
[41] Exceptions at 14-20.
[42] *Naval Station Honolulu*, 64 FLRA at 928 (citing *U.S. DOD, Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995) (*DOD New Cumberland*)).
[43] *Id.* (citing *DOD New Cumberland*, 51 FLRA at 158).
[44] Exceptions at 15-20.

(*Allen*).[45] In *Allen*, the MSPB listed five broad categories of cases in which an award of attorney fees would be warranted in the interest of justice: (1) where the agency engaged in a prohibited personnel practice; (2) where the agency action was clearly without merit or wholly unfounded or the employee was substantially innocent of charges brought by the agency; (3) where the agency initiated the action in bad faith; (4) where the agency committed a gross procedural error; or (5) where the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.[46] Additionally, the Authority has stated that an award of attorney fees is warranted in the interest of justice when there is a service to the federal workforce or a benefit to the public derived from maintaining the action.[47]

First, the Agency argues that the Arbitrator erroneously found that the Agency's actions were clearly without merit or wholly unfounded.[48] In determining whether fees are required under this criterion, the "competing interests to be examined are the degree of fault on the employee's part and the existence of any reasonable basis for the [a]gency's action."[49] This standard is met if it is plain that an agency's actions are based on incredible or unspecific evidence fully countered by the appellant, or if an agency presents little or no evidence to support its actions.[50]

The Agency asserts that attorney fees are not justified under this factor because it "presented sufficient evidence to establish that its actions were potentially meritorious and were reasonable."[51] As support for this, the Agency points to its arguments concerning the BPA and the Customs Officer Pay Reform Act (COPRA) that it raised to the Authority in *DHS*.[52] However, the Authority dismissed the Agency's COPRA argument in *DHS* as improperly raised.[53] The Authority also held that the issue of whether the Agency violated the BPA was resolved by Arbitrator Gootnick, and was not before Arbitrator Meredith.[54] In resolving that issue in the first remedial award, Arbitrator Gootnick found that attorney fees were warranted in the interest of justice,[55] and the Agency did not file exceptions to this finding. As such, the time to contest Arbitrator Gootnick's finding that attorney fees are in the interest of justice has passed, and the Agency may not do so now in its exceptions in this case.[56] The only issue before us is whether the Arbitrator erred in granting the Union's instant interim attorney-fees request following the issuance of the second remedial award.

The Agency further argues that the Arbitrator mistakenly relies on the first and second remedial awards as the "necessary analysis to award attorney fees."[57] According to the Agency, "Arbitrator Gootnick's decision should not be a determining factor in the award of interim attorney[] fees," and "[t]here is nothing to support the notion that the Agency failed to present[] evidence to support its actions."[58]

However, the content of the instant request for attorney fees cannot be divorced from the underlying disputes that were decided by Arbitrators Gootnick and Meredith. As the Arbitrator noted, the Union's attorney fees "were incurred in relation to remediating the underlying violations found by Arbitrator Gootnick."[59] In this regard, the Arbitrator relied upon Arbitrator Gootnick's finding that the Agency's actions were "clearly without merit and the Agency knew or should have known that it would not prevail on the merits,"[60] as well as Arbitrator Meredith's finding that the Agency's proposed remedy "would not result in a fair and reasonable resolution to the problem of remedying the violations Arbitrator Gootnick found."[61] The Arbitrator then concluded that "the work at issue is but a continuation of the Union's efforts that already have been found to be a proper, legal basis for awarding attorney[] fees."[62] The Agency offers little – aside from the bare assertion that its arguments were meritorious – to show

[45] 2 M.S.P.R. 420, 434-35 (1980); *see AFGE, Local 3294*, 66 FLRA 430, 430 n.3 (2012); *but see NAIL, Local 5*, 69 FLRA 573, 577 (2016) (stating that the Authority may, in an appropriate case, reconsider its reliance on the *Allen* factors and "fashion interest-of-justice guidelines that are better adapted to the collective-bargaining context").

[46] *AFGE, Local 3294* at 430 n.3 (citing *Allen*, 2 M.S.P.R. at 434-35).

[47] *Naval Air Dev. Ctr.*, 21 FLRA 131, 139 (1986) (citing *Wells v. Harris*, 2 M.S.P.R. 409 (1980)); *see also AFGE, Local 2583*, 69 FLRA 538, 540 (2016).

[48] Exceptions at 16-17.

[49] *Naval Station Honolulu*, 64 FLRA at 929 (quoting *NAGE, Local R4-6*, 56 FLRA 1092, 1095 (2001)).

[50] *Id.* (citing *Ala. Ass'n of Civilian Technicians*, 56 FLRA 231, 234 (2000); *U.S. DOD, Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C.*, 47 FLRA 1187, 1193-94 (1993)).

[51] Exceptions at 16.

[52] *Id.* (citing Agency's Ex. F, Exceptions to Second Remedial Award).

[53] *See DHS*, 68 FLRA at 256 (dismissing Agency's COPRA argument under 5 C.F.R. §§ 2424.25(c) & 2429.5 for failure to raise it at arbitration).

[54] *Id.* at 257 (citing *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 67 FLRA 417, 419 (2014)).

[55] *DHS II*, 65 FLRA at 980 (2011) (citing First Remedial Award at 15-23).

[56] *See U.S. DHS, U.S. Citizenship & Immigration Serv.*, 68 FLRA 1074, 1076-77 (2015).

[57] Exceptions at 17.

[58] *Id.*

[59] Award at 10.

[60] *Id.* at 7 (quoting First Remedial Award at 17).

[61] *Id.* at 10 (quoting Second Remedial Award at 9).

[62] *Id.*

that the Arbitrator erred in applying the second criterion of the *Allen* factors. And so, we reject the Agency's argument.

Next, the Agency argues that the Arbitrator misinterpreted the fifth *Allen* factor; namely, that the Agency knew or should have known it would not prevail on the merits when it brought this proceeding.[63] In support of this proposition, the Agency restates its arguments concerning the BPA and the doctrine of sovereign immunity that it presented to the Authority in *DHS*.[64] The Agency then asserts that it could not have known that these arguments would not prevail before Arbitrator Meredith.[65]

However, as explained above, in the first remedial award, Arbitrator Gootnick decided the question of whether the Agency violated the BPA. As this issue had already been resolved in favor of the Union, the Agency knew or should have known that this argument would not prevail before Arbitrator Meredith. Accordingly, we reject the Agency's argument that the Arbitrator improperly applied the fifth *Allen* criterion.

Based on the foregoing, we deny the Agency's exceptions that the award is contrary to law.

B. The award is not based on nonfacts.

The Agency argues that the award is based on nonfacts.[66] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[67] The Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[68] In addition, neither legal conclusions nor conclusions based on the interpretation of a collective-bargaining agreement may be challenged as nonfacts.[69]

Here, the Agency argues that the Arbitrator based his decision on three nonfacts. First, the Agency argues that the Arbitrator's determination that the Union was the prevailing party is a nonfact.[70] Second, the Agency argues that the Arbitrator erred by stating that "there is no basis in law or equity to not award interim attorney[] fees," which, according to the Agency, "is a [nonfact,] as the [parties' agreement's] language clearly states that the parties have the right to appeal."[71] These arguments challenge the Arbitrator's legal conclusions and contractual interpretations, and as stated above, legal conclusions and contractual interpretations may not be challenged as nonfacts. Accordingly, we reject these arguments.

Third, the Agency argues that the Arbitrator wrongly concluded that Arbitrator Meredith awarded attorney fees in the second remedial award, and that the Agency could not now challenge them.[72] The Agency asserts that Arbitrator Meredith never affirmatively awarded attorney fees; rather, she merely retained jurisdiction to hear any potential attorney-fee requests that might arise in the future.[73] According to the Agency, this nonfact led the Arbitrator to conclude that the Agency's opportunity to challenge Arbitrator Meredith's award of attorney fees had passed.[74]

However, the Arbitrator stated that even if he were to "ignore the clear inference to be drawn from the [second remedial award] in favor of an award of interim attorney[] fees," he "nevertheless concludes that an award of interim attorney[] fees meets [the] legal requirements" set forth in *Allen*.[75] The Arbitrator then set forth an independent explanation for his decision to grant the Union's request for attorney fees.[76] Given this separate justification – which, as discussed above, the Agency has not shown to be contrary to law – we find that this alleged nonfact was not a central fact underlying the award, but for which the Arbitrator would have reached a different result.

Moreover, to the extent that this exception challenges the Arbitrator's finding that the Agency could not challenge the appropriateness of fees *at this stage*,[77] again, the Arbitrator's findings regarding *Allen* provide a separate justification for his award of fees. Accordingly, we conclude that this challenged finding is not a central fact underlying the award, but for which the Arbitrator would have reached a different result.

[63] Exceptions at 17-20.
[64] *Compare id.* at 18-20 *with DHS*, 68 FLRA at 256-58.
[65] Exceptions at 20.
[66] *Id.* at 15, 21-22.
[67] *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).
[68] *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 628 (2012) (citing *NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009)); *see also U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 173 (2015) (Member Pizzella, dissenting).
[69] *AFGE, Local 3974*, 67 FLRA 306, 308 (2014) (citing *AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 456-57 (2003); *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 501 (2000); *NLRB*, 50 FLRA 88, 92 (1995)).
[70] Exceptions at 15.
[71] *Id.* at 20-21.
[72] *Id.* at 21 (quoting Award at 3-4).
[73] *Id.* (quoting Second Remedial Award at 10).
[74] *Id.* at 22.
[75] Award at 9-10.
[76] *See id.* at 10.
[77] *See* Exceptions at 21.

Accordingly, we deny the Agency's nonfact exceptions.

V. Decision

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