70 FLRA No. 90

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3294
(Union)

and

UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
(Agency)

0-AR-5275

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DECISION

March 26, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

I. Statement of the Case

The Union filed a grievance alleging that the Agency failed to consult with the Union prior to its decision to relocate its office in Boise, Idaho. Arbitrator Eduardo Escamilla concluded that the grievance was not arbitrable because it was untimely, denied the grievance, and ordered the parties to split all arbitration fees and charges evenly.

The Union excepts to the award, raising four substantive questions. The first question is whether the procedural-arbitrability determination is based on nonfacts, but for which the Arbitrator would have reached a different result. Existing Authority precedent holds that parties may not file nonfact exceptions to procedural-arbitrability determinations. We take this opportunity to reexamine and reverse that precedent. Therefore, we find that the Union has properly raised a nonfact exception to the Arbitrator's procedural-arbitrability determination. We deny the exception, however, because the Union does not demonstrate that any central facts underlying the award are clearly erroneous, which would have led the Arbitrator to reach a different result.

The second question is whether the Arbitrator exceeded his authority by making a procedural-arbitrability determination. Because the Arbitrator's procedural-arbitrability determination directly responds to the issues before him, the answer is no.

The third question is whether the Arbitrator failed to conduct a fair hearing. Because the Union fails to demonstrate that the Arbitrator refused to hear or consider pertinent and material evidence, the answer is no.

The fourth question is whether the Arbitrator's ruling to split the arbitration fees and charges evenly between the parties fails to draw its essence from the parties' collective-bargaining agreement (agreement). Because the parties concede that the Arbitrator's remedy is deficient to the extent that it ordered the parties to split the arbitration fees and charges evenly, we set aside this portion of the award. Because the parties disagree as to which fee provision should apply, and the Arbitrator did not interpret the provisions, or determine which provision should apply, we are unable to determine which provision should apply. Accordingly, we remand the award to the parties for resubmission to the Arbitrator to interpret the provisions.

II. Background and Arbitrator's Award

This dispute arose in January 2014 after the Agency notified the Union of its plan to relocate the Boise office. The Agency held discussions with the Union about the new office, but after some time, the Union filed a grievance alleging that the Agency violated the agreement by failing to timely consult with the Union on its space needs prior to its decision to move offices. The parties were unable to resolve the grievance and submitted the matter to arbitration.

Several months prior to the November 2016 arbitration hearing, the Agency filed a motion to dismiss the grievance. The Agency argued the grievance was both untimely filed and was not arbitrable under § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute)[1] because the Union had filed a prior unfair labor practice charge. The Union opposed by arguing the Agency's repeated failures to follow the negotiation process constituted a continuing violation, and the Agency's participation in the grievance process effectively barred it from raising this issue before the Arbitrator.

Through a series of email messages, the parties jointly informed the Arbitrator that their agreement

[1] 5 U.S.C. § 7116(d).

contained a provision regarding threshold issues of arbitrability. Article 51, Section 51.14 of the agreement provides that "[q]uestions of arbitrability . . . shall be decided prior to any hearing unless agreed otherwise."[2] Pursuant to Section 51.14, both parties asked the Arbitrator to rule on the Agency's arbitrability motion without a hearing. However, the Arbitrator found that it would be "imprudent" to rule on the motion to dismiss without a hearing, and offered to either bifurcate the proceeding or to proceed to a hearing on both the arbitrability issue and the merits.[3] The Union rejected the offer to bifurcate, and the parties proceeded to the scheduled hearing.

At arbitration, the Agency requested that the Arbitrator rule on the arbitrability motion prior to any testimony on the merits; however, the Union's opening statement referenced a history of prior arbitrations where the parties proceeded to present evidence despite pending threshold issues, and advocated for the Arbitrator to continue to hear the grievance on the merits.[4] The Arbitrator demurred, and the hearing proceeded on the merits.

The parties did not stipulate the issue to be resolved. In its post-hearing brief, the Agency requested to withdraw its motion to dismiss because it had already presented its case-in-chief.[5] In his award, however, the Arbitrator framed the issues as: (1) is the grievance arbitrable; and (2) did the Agency violate the agreement by failing to timely bargain with the Union over its decision to relocate one of its field offices.

The Arbitrator issued his award on February 24, 2017. In resolving the procedural-arbitrability issue, the Arbitrator found that the grievance was untimely, and he rejected the Union's arguments that the Agency's actions constituted a continuing violation. While the Arbitrator found that the Agency's decision to relocate its office may have a continued impact that is subject to negotiations, the grievance filing deadline provided in the agreement was still applicable and the grievance was "clearly filed outside of the [agreement's] time requirements."[6] As such, the Arbitrator found that the grievance was untimely, and denied the grievance. The Arbitrator then ordered the parties to split his arbitration fees and charges evenly.

The Union filed exceptions to the award on March 30, 2017. The Agency filed an opposition on April 26, 2017.

[2] Opp'n, Ex. 3, Art. 51 at 232.
[3] Opp'n, Ex. 4, Email Correspondence at 1-2.
[4] Opp'n, Ex. 12, Tr. at 14-15.
[5] Opp'n, Ex. 19, Agency's Post-Hearing Br. at 5-6.
[6] Award at 6.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar parts of the Union's essence and exceeds-authority exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[7] the Authority will not consider any argument that could have been, but was not, presented to the arbitrator. Where a party makes an argument before the Authority that is inconsistent with its position before the arbitrator, the Authority applies § 2429.5 to bar the argument.[8]

In its exceptions, the Union argues that Article 51, Section 51.14 of the agreement requires that threshold arguments, such as procedural-arbitrability issues, must be decided prior to the hearing unless mutually agreed otherwise.[9] In this regard, the Union argues that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the agreement because the Arbitrator did not decide this matter prior to the arbitration hearing. The Union also argues that the Arbitrator exceeded his authority in this regard.[10] In its opposition, the Agency asserts that the Union is barred from raising these arguments on exceptions because it did not raise them before the Arbitrator.[11]

In our review of the record, we note that, through a series of email messages, included in the record by both parties, the parties jointly informed the Arbitrator that their agreement mandated that threshold issues be raised and decided prior to a hearing on the merits unless the parties agreed otherwise.[12] The Arbitrator repeatedly responded that he could not resolve the issue of arbitrability based on the documents before him and offered to bifurcate the hearing, but the Union would not agree to bifurcate the hearing. In its opening statement at arbitration, however, the Union agreed that the Arbitrator should proceed with a hearing on the merits.[13]

The Union's arguments now and those made before the Arbitrator are inconsistent. Therefore, we find

[7] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also AFGE, Local 3571*, 67 FLRA 218, 219 (2014).
[8] *U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 328 (2009) (*FAA*) (citing *U.S. Dep't of the Treasury, IRS*, 57 FLRA 444, 448 (2001)); *see also U.S. Dep't of the Treasury, IRS*, 68 FLRA 1027, 1029 (2015) (agency's argument at arbitration that if union prevailed, status quo ante remedy would be the only permissive remedy, bars its argument before Authority that status quo ante remedy violated the Statute).
[9] Exceptions Br. at 6-7.
[10] *Id.* at 6-8.
[11] Opp'n Br. at 6-10.
[12] Exceptions, Ex. 13, Email Correspondence; Opp'n, Ex. 4, Email Correspondence.
[13] Opp'n, Ex. 12, Tr. at 14-15.

that § 2429.5 of the Authority's Regulations bars those parts of the Union's essence and exceeds-authority exceptions.[14]

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Union contends that the Arbitrator's finding that the grievance was untimely is based on the following nonfacts: (1) the motion to dismiss was "referred to the hearing;"[15] (2) the Union's complaint was that it was not given an opportunity to bargain over the effects of the Agency's decision to move facilities;[16] (3) the Agency argued that the office must be in the central business area;[17] (4) the General Services Administration was involved in the negotiations;[18] (5) the Agency asked for the Union's input on their search for a new office;[19] (6) the Union learned about the upcoming office relocation in January 2014;[20] and (7) the grievance had to be filed within thirty days after the conduct.[21]

An arbitrator's determination as to the timeliness of the grievance constitutes a procedural-arbitrability determination.[22] Historically, the Authority has generally found an arbitrator's procedural-arbitrability determination deficient only on grounds that did not directly challenge the procedural-arbitrability determination itself.[23] Consequently, the Authority previously has held that a nonfact challenge that directly challenged an arbitrator's procedural-arbitrability determination did not provide a basis for finding that determination deficient.[24] However, that approach is inconsistent with the practice of federal courts, which allow parties to make nonfact challenges to arbitrators' procedural-arbitrability determinations.[25] To the extent that the Authority's existing precedent is based on that erroneous interpretation of the U.S. Supreme Court's decision in *John Wiley & Sons, Inc. v. Livingston* (*Wiley*),[26] we no longer follow that precedent.

In *Wiley*, the Court addressed only who – arbitrators or courts – *initially* decides questions of procedural arbitrability,[27] not whether courts *can* review nonfact challenges to procedural-arbitrability determinations made by an arbitrator. We also observe that the Authority's former standard of unbending obeisance to arbitrators' arbitrability findings has led to unfortunate conclusions that could be avoided given proper review.[28]

For these reasons, and consistent with the Authority's mandate to review arbitral awards on grounds similar to those applied by federal courts in private-sector labor-management relations,[29] we will now allow nonfact challenges to an arbitrator's procedural-arbitrability finding.

Turning to the merits of the Union's exception, to establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which

[14] *FAA*, 64 FLRA at 328.
[15] Exceptions Br. at 12.
[16] *Id.* at 13.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 13-14.
[20] *Id.* at 14.
[21] *Id.* at 15.
[22] *AFGE, Local 3911, AFL-CIO*, 68 FLRA 564, 567 (2015) (citing *AFGE, Local 507*, 61 FLRA 88, 90 (2005)); *see also Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1006 (2015) (citing *AFGE, Local 2921*, 50 FLRA 184, 185 (1995) (procedural arbitrability award may be found deficient because the arbitrator exceeded his or her authority)).
[23] *U.S. EPA, Region IV, Atlanta, Ga.*, 5 FLRA 277, 279 (1981) (*EPA*).
[24] *E.g., AFGE, Council of Prison Locals 33, Local 3976*, 66 FLRA 289, 290 (2011).
[25] *See, e.g., UMass Mem'l Med. Ctr., Inc. v. United Food & Commercial Workers Union*, 527 F.3d 1, 7 (1st Cir. 2008) (in case involving procedural-arbitrability determination, court set out nonfact as one standard for reversal of arbitration award); *Union de Tronquistas de P.R., Local 901 v. Cadillac Unif. & Linen Supply, Inc.*, 257 F. Supp. 3d 188, 192 (D. P.R. 2017) (same); *Union Gen. de Trabajadores v. Triple-S, Inc.*, 143 F. Supp. 2d 178, 183-84 (D. P.R. 2001) (same); *Burke Distrib. Corp. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local Union No. 122*, 1986 WL 15732 at *1 (D. Mass. 1986) (same); *Union de Tronquistas de P.R., Local 901 v. Trailer Marine Transp. Corp.*, 556 F. Supp. 120, 122 (D. P.R. 1983) (same).
[26] 376 U.S. 543 (1964); *see, e.g., AFGE, Local 2172*, 57 FLRA 625, 627 (2001) (citing *Wiley*, 376 U.S. at 557); *EPA*, 5 FLRA at 279 (relying on *Wiley* to deny a direct challenge to an arbitrator's procedural-arbitrability determination).
[27] *See Wiley*, 376 U.S. at 557-59.
[28] *See, e.g., U.S. Dep't of VA, John J. Pershing Med. Ctr., Poplar Bluff, Mo.*, 68 FLRA 852, 855 (2015) (Dissenting Opinion of Member Pizzella).
[29] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998) (Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector).

the arbitrator would have reached a different result.[30] Here, the Union presents several instances where the Arbitrator allegedly misstated background information. However, it has not established that these findings were clearly erroneous and that the Arbitrator would have reached a different result but for those allegedly erroneous findings.[31] Accordingly, we deny the exception.

B. The Arbitrator did not exceed his authority.

The Union argues that the Arbitrator exceeded his authority by deciding an issue that was not submitted to arbitration: the procedural-arbitrability issue. According to the Union, the Arbitrator did not have the authority to address that issue because the Agency requested to withdraw its arbitrability motion prior to the issuance of the award.[32] The Union also asserts that the Agency did not challenge the Union's arguments, below, that the Agency's actions constituted a continuing violation,[33] and, thus, the Agency did not meet its burden of proof with regard to non-arbitrability.

The Authority has held that, where parties fail to stipulate to an issue, the arbitrator's framing of the issue is accorded substantial deference.[34] In such circumstances, the Authority examines whether the award directly responds to the issue as framed by the arbitrator.[35]

Here, the parties failed to submit stipulated issues, so the Arbitrator framed them as including an arbitrability issue. And his award is directly responsive to that issue. Further, the Union neither explains how the Agency's request to withdraw its motion limited the Arbitrator's authority to address the framed issues, nor substantiates its allegations with appropriate authority or case law. And the Union's burden-of-proof argument does not demonstrate that the award is unresponsive to the Arbitrator's framed issues.[36] Accordingly, the Union has not demonstrated that the Arbitrator exceeded his authority by deciding the procedural-arbitrability issue.

C. The Arbitrator did not deny the Union a fair hearing.

The Union argues that the Arbitrator denied it a fair hearing.[37] As relevant here, the Authority will find that an arbitrator failed to provide a fair hearing when a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence.[38] Disagreements with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provide no basis for finding an award deficient on this ground.[39]

The Union asserts that the Arbitrator denied the Union a fair hearing because the award lacked factual analysis and "contain[ed] . . . many critical misstatements."[40] The Union does not demonstrate that the Arbitrator refused to hear or consider pertinent and material evidence. Rather, the Union simply disagrees with how the Arbitrator evaluated the evidence.[41]

[30] *See U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010) (citations omitted); *see also U.S. Dep't of Interior, Bureau of Reclamation, Great Plains Region, Colo./Wyo. Area Office*, 68 FLRA 992, 995-96 (2015) (Member Pizzella dissenting on other grounds) (reviewing the allegation that an arbitrator made mathematical error under the nonfact standard and modifying the award to correct that mathematical error).

[31] *U.S. Dep't of VA, VA Med. Ctr., Dayton, Ohio*, 65 FLRA 988, 992-93 (2011) (denying nonfact exception alleging that arbitrator mischaracterized testimony absent a demonstration that, but for this finding, the arbitrator would have reached a different result).

[32] Exceptions Br. at 6-8.

[33] *Id.* at 9-10.

[34] *NTEU*, 70 FLRA 57, 60 (2016) (citing *AFGE, Local 522*, 66 FLRA 560, 562 (2012)).

[35] *Id.*

[36] We note that the Union's argument is thinly supported by case law discussing the burden of proof typically met for affirmative defenses, yet the Union does not provide any argument explaining how the Arbitrator is prohibited from making these findings. Exceptions Br. at 9-10 (citing arbitrator's award in *U.S. Dep't of VA, Reg'l Off., Winston-Salem, N.C.*, 66 FLRA 34 (2011)). While an arbitrator's procedural-arbitrability determination may be challenged on such grounds as the arbitrator exceeded his or her authority, we are not persuaded by the Union's argument that the Agency failed to meet its burden of proof sufficient to sustain an arbitrability argument would in turn preclude the arbitrability issue from being presented, framed, and decided by the Arbitrator.

[37] Exceptions Br. at 11.

[38] *Nat'l Nurses United*, 70 FLRA 166, 167 (2017) (citing *AFGE, Local 2152*, 69 FLRA 149, 152 (2015)).

[39] *U.S. DOD, Def. Logistics Agency*, 66 FLRA 49, 51-52 (2011).

[40] Exceptions Br. at 12.

[41] *NFFE, Local 858*, 63 FLRA 227, 231 (2009) (citing *AFGE, Local 1668*, 50 FLRA 124, 126 (1995)).

Accordingly, we deny the Union's fair-hearing exception.[42]

D. We set aside the Arbitrator's ruling to split the arbitration fees and charges evenly between the parties, but remand is required for further clarification.

When an opposing party concedes that a remedy is deficient, the Authority modifies the award to set aside the deficient remedy.[43] Here, the Union argues[44]—and the Agency concedes[45]—that the Arbitrator's ruling to split the arbitration fees and charges evenly between the parties fails to draw its essence from the agreement. Accordingly, we set aside the Arbitrator's ruling to split his fees and charges evenly between the parties.

The Union further asks us to modify the award to require the Agency to pay for the arbitration fees and charges because Article 51, Section 51.14 provides that the party who successfully raises an arbitrability issue should pay all costs and fees. On the other hand, the Agency argues that the Union should pay all of the costs because Article 52, Section 52.04 of the agreement requires that the losing party pays fees and expenses.[46]

Section 51.14 of the parties' agreement addresses the specific issue of which party pays an arbitrator's fees when a question of arbitrability is successfully raised at the arbitration stage. Section 52.04 addresses the more general issue of which party – the losing party – pays the arbitrator's fees and expenses.[47] The Arbitrator did not interpret these provisions. And, in our view, the provisions are sufficiently ambiguous that it is not clear which provision applies in the circumstances of this case. Accordingly, we find it appropriate to remand the award to the parties for resubmission to the Arbitrator, absent settlement, to interpret these provisions in the first instance.[48]

[42] We note that the Union also challenges, on exceeds-authority grounds, the Arbitrator's framing of the substantive issue before him. *See* Exceptions Br. at 5. Because the Arbitrator dismissed the grievance on procedural grounds, any alleged error in framing the substantive issue is immaterial. *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009) (citing *U.S. Dep't of Commerce, NOAA, Office of Marine & Aviation Operations, Marine Operations Ctr., Va.*, 57 FLRA 430, 434 (2001) (once an arbitrator determines that the grievance is not arbitrable, any comments concerning the merits of the grievance constitutes non-binding dicta that provides no basis for finding an award deficient)). Additionally, in its nonfact and fair-hearing exceptions, the Union interprets the award as denying the merits of the grievance. *See* Exceptions Br. at 11. However, we believe that the most reasonable reading of the award is that the Arbitrator did *not* address the merits of the grievance. Therefore, the Union's arguments in this regard are based on a misreading of the award and provide no basis for finding it deficient.

[43] *U.S. DOD, Ill. Nat'l Guard, Scott Air Force Base, Ill.*, 69 FLRA 345, 348-49 (2016) (citing *U.S. Dep't of VA, Zablocki VA Med. Ctr., Milwaukee, Wis.*, 66 FLRA 806, 807 (2012); *U.S. Dep't of VA, Long Beach Healthcare Sys., Long Beach, Cal.*, 63 FLRA 332, 334 (2009) (*Long Beach*) (holding that arbitration matters are moot when the parties no longer have a legally cognizable interest in the dispute)); *see also U.S. Dep't of VA, Med. Ctr., Hampton, Va.*, 65 FLRA 125, 127 (2010) (citing *Long Beach*, 63 FLRA at 334 (2009) ("Where a party in opposition agrees with construing an award in the manner that the excepting party desires, the Authority has dismissed as moot, exceptions that allege a deficient based on a different construction of the award.")); *AFGE, Local 171, Council of Prison Locals 33*, 61 FLRA 661, 663 (2006) (citing *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 59 FLRA 787, 790 (2004) ("An arbitration matter becomes moot when the parties no longer have a legally cognizable interest in the dispute.")).

[44] Exceptions Br. at 16.

[45] Opp'n Br. at 10.

[46] *Id.*

[47] Member Abbott notes the procedural nature of these provisions in order to highlight an important aspect of the Authority's recent decision in *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 404 (2018) (*DOJ BOP*) (Member DuBester dissenting) and to demonstrate (contrary to our dissenting colleague's mischaracterization that the majority's framework for analyzing arbitral awards that excessively interfere with management's rights) that parties are subject to, and may not simply walk away from, the choices they make at the bargaining table. *See id.* at 412 (Dissenting Opinion of Member DuBester). As the majority noted in *DOJ BOP*, collective bargaining agreements contain many provisions such as these which are neither "an exception to, or waiver of, an agency's § 7106(a) rights" or "have [anything] to do with § 7106(b)." *Id.* at 404. Although one of the provisions – Article 51.14 – may well be considered odd by other negotiators because it provides for the prevailing (rather than losing) party to pay all costs and fees, it is, nonetheless, a provision that the parties agreed to include in their agreement. The provisions are therefore subject to the Arbitrator's interpretation. In other words, it is for the Arbitrator to determine how fees and costs should be allocated under the arguably conflicting provisions.

[48] *AFGE, Council of Prison Locals, Council 33*, 66 FLRA 602, 605 (2012); *see also SSA, Balt., Md.*, 57 FLRA 690, 693-94 (2002).

V. Decision

We dismiss, in part, and deny, in part, the Union's exceptions. We set aside the Arbitrator's ruling to split his fees evenly, and we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to interpret the agreement's fee provisions and apportion the arbitration fees and charges accordingly.

Member DuBester, concurring:

I agree with the majority that we should reexamine the Authority's precedent limiting review of arbitrators' procedural-arbitrability determinations.[1] Having reviewed this precedent,[2] I agree that it is premised on a misinterpretation of *John Wiley & Sons, Inc. v. Livingston* (*Wiley*).[3] And, I agree that under the Statute, we should review challenges to procedural-arbitrability rulings, raising factual issues, under the deferential nonfact standard of review,[4] as we do in this case.

However, I disagree with the majority's overly broad "observ[ation]" that the Authority's former standard was one of "unbending obeisance" to arbitrators' arbitrability findings.[5] Although the Authority did not entertain nonfact or essence challenges to procedural-arbitrability findings, the Authority did consider other grounds presented by a party for setting aside such findings as deficient.[6] That the Authority over almost four decades rarely overturned arbitrators' procedural-arbitrability rulings speaks more to the high degree of deference afforded arbitrators' factual findings

[1] *See U.S. EPA, Region IV, Atlanta, Ga.*, 5 FLRA 277, 279 (1981) (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (holding that an arbitrator's procedural-arbitrability determination cannot be the basis for finding an award deficient)).

[2] *E.g.*, *Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1006 (2015); *U.S. DHS, U.S. CBP, Border Patrol San Diego Sector, San Diego, Cal.*, 68 FLRA 128, 131 (2014).

[3] 376 U.S. 543 (1964)). In *Wiley*, a union sued to compel arbitration under a CBA. No procedural issue had yet been addressed by an arbitrator. *See id.* at 544-46. The Court held that when parties have an obligation to arbitrate a dispute, related procedural questions must also be resolved at arbitration. *Id.* at 557. *Wiley* does not discuss the extent to which such determinations are subject to judicial review.

[4] *See* 5 U.S.C. § 7122(a)(2); *see, e.g.*, *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) ("To establish that an award is based on a nonfact, the appealing party must demonstrate that the central fact underlying the award is clearly erroneous, but for which a different result would have been reached by the arbitrator.").

[5] Majority at 5.

[6] *See, e.g.*, *U.S. DOJ, Fed. BOP*, 68 FLRA 728, 730 (2015) (considering a contrary-to-law exception); *U.S. Dep't of VA Reg'l Office, Winston-Salem, N.C.*, 66 FLRA 34, 37 (2011) (recognizing that procedural-arbitrability findings may be challenged as contrary-to-law, that the arbitrator was biased, or that the arbitrator exceeded his or her authority).

by the Authority and the courts,[7] and the generally high quality of arbitrators' awards in the federal sector, than to any laxness on the Authority's part in enforcing established standards for those awards. I do not expect that the fair application of our expanded grounds for reviewing arbitrators' procedural-arbitrability rulings in the future will lead to any significant change.

[7] *See, e.g.*, *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) ("When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award." (citing *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 39 (1987)).