72 FLRA No. 52

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
U.S. BORDER PATROL, EL PASO SECTOR
EL PASO, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1929
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-5498

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DECISION

May 12, 2021

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

I. Statement of the Case

In this case, Arbitrator Ed W. Bankston issued an award finding that the Agency violated the parties' collective-bargaining agreement by engaging in a pattern of retaliation against a border patrol agent (the grievant) because of her union activities. The Agency filed numerous exceptions to the award.

For the reasons discussed below, we find that the Arbitrator exceeded his authority by resolving an issue that was not before him, and we set aside that portion of the award. Because the Agency's remaining exceptions fail to otherwise establish that the award is deficient, we deny them.

II. Background and Arbitrator's Award

The grievant worked as a border patrol agent and served as a Union representative at the Santa Teresa Border Patrol Station in New Mexico. Acting in her representational capacity, she filed grievances on behalf of other agents seeking night-differential pay for the Memorial Day holiday in 2015. Later that year, the grievant filed similar grievances for the Fourth of July holiday on behalf of herself and other agents. The Agency denied the grievances.

During pre-shift meetings between management and agents (musters) in July 2015, the grievant routinely asked management questions about the Agency's grievance denials. After muster one day, the grievant's supervisor told her to refrain from asking questions about management decisions during musters and to meet with him privately to discuss such matters instead.

A week later, prior to the start of a shift, the grievant informed her supervisor that she and another agent had agreed to trade assignments, with each agreeing to work in the area initially assigned to the other (assignment trading). The grievant's supervisor denied the assignment trade without explanation. During that shift, the grievant also received a counseling memorandum for failing to timely submit her time-and-attendance information for a previous pay period "on the last day of her work week but no later than Saturday."[1] One week after that, the Agency denied the grievant's request for five hours of official time to prepare step-three grievance presentations on behalf of seven agents who were denied night-differential pay.

The Union filed a grievance alleging that the Agency violated various laws, regulations, and the parties' agreement by "refusing to pay [the grievant] . . . night differential[,] . . . refusing to grant . . . [official] time[,] . . . directing [the grievant] to remain silent at muster, not affording the grievant [the ability] to perform assignment trades" with other agents, and "frivolously counseling" the grievant for "violating [a] nonexistent policy" when she allegedly failed to timely submit her time-and-attendance information.[2] As relevant here, Articles 4(E) and 6(A) of the parties' agreement state that employees shall be freely permitted to engage in union activities without interference from the Agency,[3] while Article 7(a)(1) permits union representative to use official time for performing labor-relations duties.[4]

The Union requested, in relevant part, that the Agency: pay the grievant her missing night differential with interest; cease enforcement of a "nonexistent payroll polic[y] and immediately follow all applicable federal

[1] Award at 10-11.
[2] *Id.* at 9.
[3] Article 4, Section E protects employees "in the exercise of the right . . . to form, join, and assist the affiliated locals of th[e] Union." Exceptions, Attach. 7, Collective-Bargaining Agreement (CBA) at 9-10. Article 6, Section A provides that the Agency "shall not impose any restraint . . . upon duly designated employee representatives acting on behalf of an employee or group of employees within the bargaining unit." *Id.* at 11.
[4] *Id.* at 12-13 (entitling the Union to official time "[u]pon request and approval in advance . . . to perform [representational] duties . . . which are consistent with the Statute and this contract").

payroll laws, guidelines and procedures"; "immediately cease and desist any harassment, unjustified personnel action or retaliatory behavior and discrimination against the [g]rievant"; "rescind the counseling [memo]"; and disseminate a written notice detailing the Agency's violations of the parties' agreement.[5] In addition, the Union requested the following remedies concerning assignment trading: (1) "[t]he Agency shall immediately cease and desist from any further restraining and interference and allow agents at the Santa Teresa Border Patrol Station to continue the past practice of assignment trades," and (2) the grievant's watch commander "will immediately notify the agents publicly at muster that assignment trades will continue to be allowed on his shift."[6]

The Agency denied the grievance and failed to submit a written response to the grievance at later steps. As a result, the dispute proceeded to arbitration. Before the arbitration hearing, the Agency paid the grievant her missing night differential, without interest. In addition, at arbitration, the Union withdrew the assignment-trading issue.[7]

The Arbitrator adopted the Union's proposed issues, which asked:

> 1. Did the Agency violate the [parties' a]greement or otherwise violate any law, rule or regulation when it compensated [the grievant] . . . without interest for . . . [the] July 4 holiday . . . ? [I]f so, what shall the remedy be?
>
> 2. Did the Agency violate the [parties' a]greement or otherwise violate any law, rule or regulation when it denied official time to [the grievant]? If so, what shall the remedy be?
>
> 3. Did the Agency engage in reprisal, discrimination[,] . . . violate the [parties' a]greement[,] or otherwise violate any law, rule or regulation when the Agency did not pay [the grievant's] holiday night differential timely, . . . when it provided a written counseling for failing to follow directions[,] . . . [and] when it denied her official time and . . . instructed [her not] to address agents during meetings or musters as a union representative? If so, what shall the remedy be?[8]

Based on the evidence and testimony submitted at arbitration, the Arbitrator determined that the Agency's actions toward the grievant "were a blatant attempt to shut her down" and constituted "reprisals" for her representational efforts, in violation of the parties' agreement.[9] The Arbitrator found that the Agency: did not "timely pa[y the grievant's] night differential"; "forbid her to talk at musters[;] issued her a counseling memorandum[;] and denied her official time" – all in retaliation for pursuing the night-differential-pay grievances.[10] The Arbitrator also found that the Agency was subject to "condemnation of default" because it did not explain why it failed to answer the grievance at step two or three.[11] The Arbitrator granted all of the Union's requested remedies.

On April 16, 2019, the Agency filed exceptions to the Arbitrator's award.[12]

[5] Award at 17-19.
[6] *Id.* at 18.
[7] *Id.* at 4 (confirming that "the Union withdrew [the assignment-trading] issue from consideration at the hearing" (emphasis omitted)).
[8] *Id.* at 3-4.
[9] *Id.* at 23.
[10] *Id.*
[11] *Id.* at 24.
[12] The Union filed an opposition on May 17, 2019, and a supplemental submission on June 14, 2019. The deadline to file an opposition is thirty days after the date that exceptions are served on the opposing party. 5 C.F.R. § 2425.3. Here, the Authority's Office of Case Intake and Publication ordered the Union to show why its opposition should not be rejected as untimely. Order to Show Cause at 2. In its response, the Union conceded that it filed its opposition one day late but argued that it should receive a waiver of the deadline because its mistake was clerical in nature and did not prejudice the Agency or cause a significant delay. Union Resp. to Order at 2. A party's own miscalculation of its filing deadline does not establish "extraordinary circumstances" warranting a waiver of a deadline. Therefore, we will not consider the Union's opposition. *See Tidewater Va. Fed. Emps. Metal Trades Council*, 65 FLRA 60, 60 n.1 (2010) (rejecting opposition as untimely where union conceded that it "miscalculated the due date" and failed to establish extraordinary circumstances to excuse the lack of timeliness). In addition, the Union did not request leave to file its supplemental submission. Therefore, we do not consider it. 5 C.F.R. § 2429.26 (requiring a party to request "leave to file" a supplemental submission); *see AFGE, Loc. 1923*, 65 FLRA 130, 130 n.2 (2010) (denying consideration of supplemental submissions because the parties did not request permission to file them).

III. Analysis and Conclusions

A. The Arbitrator exceeded his authority, in part.

The Agency argues that the Arbitrator exceeded his authority in two respects, addressed separately below.[13] As relevant here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration.[14]

1. The Arbitrator exceeded his authority by granting a remedy affecting the Agency's practice of allowing agents to trade their assigned work areas.

The Agency argues that because the Union withdrew the issue of assignment trading, the Arbitrator exceeded his authority by directing the Agency to (1) continue its past practice of allowing agents to trade assignments and (2) instruct agents at musters that assignment trading would continue to be permitted.[15] In adopting the Union's proposed issues, the Arbitrator acknowledged that the Union withdrew the assignment-trading issue during the arbitration hearing.[16] Consequently, the Arbitrator exceeded his authority by making findings and awarding remedies with respect to assignment trading. Thus, we grant this exception[17] and set aside the following awarded remedies: (1) "[t]he [A]gency shall immediately cease and desist from any further restraining and interference and allow agents at the Santa Teresa Border Patrol Station to continue the past practice of assignment trades," and (2) the grievant's watch commander "will immediately notify the agents publicly at muster that assignment trades will continue to be allowed on his shift."[18]

2. The Arbitrator did not exceed his authority by awarding interest on the grievant's claim for backpay.

The Agency contends that the Arbitrator exceeded his authority by awarding the grievant backpay when "backpay was not in issue" once it paid the grievant her night differential before the arbitration hearing.[19]

In the award, the Arbitrator adopted the Union's proposed issue – whether the Agency violated the parties' agreement or applicable law when it "compensated [the grievant] . . . *without interest*."[20] In its grievance and before the Arbitrator, the Union maintained that the grievant was entitled to an interest remedy in addition to backpay.[21] And even though backpay was no longer in dispute once the Agency paid the grievant her night differential, the Arbitrator awarded an interest remedy – rather than backpay – due to the Agency unlawfully withholding that pay for three years.[22] The award was directly responsive to the interest issue before the Arbitrator and, therefore, the Arbitrator did not exceed his authority by addressing that matter. Accordingly, we deny the exception.[23]

B. The award is not based on a nonfact.

The Agency claims that the award is deficient because it is based on nonfacts.[24] The Authority will find that an award is based on a nonfact if the excepting party establishes that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have

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[13] Exceptions Br. at 6-7.

[14] *AFGE, Loc. 987*, 65 FLRA 411, 412 (2010) (citing *AFGE, Loc. 1617*, 51 FLRA 1645, 1647 (1996)).

[15] Exceptions Br. at 7.

[16] Award at 4; *see also* Exceptions, Attach. 5, Union's Post-Hr'g Br. (Union's Post-Hr'g Br.) at 8 n.1. ("[The] Union withdrew the portion of the grievance that had to deal with the [a]gent's ability to shift assignments, or trade assignments. Specifically, in regard to the Union's proposed issues . . . the Union is withdrawing the language . . . that states, 'When it did not allow trading assignment areas.'" (citation omitted)).

[17] *See Veterans Admin.*, 24 FLRA 447, 451 (1986) (holding that the arbitrator exceeded his authority by not limiting his decision to the issues as he framed them); *see also SSA, Off. of Disability Adjudication & Rev.*, 64 FLRA 469, 470 (2010) (Chairman Pope dissenting) ("Once the [a]rbitrator frame[s] the issues, he [or she is] constrained from ruling on any unrelated substantive issues.").

[18] Award at 25; *see SSA*, 71 FLRA 798, 800 (2020) (Member Abbott dissenting in part; then-Member DuBester dissenting in part) (setting aside remedies the arbitrator awarded while exceeding his authority).

[19] Exceptions Br. at 6.

[20] Award at 3 (emphasis added).

[21] In the grievance, the Union requested "night[-]differential and other pay" including "any interest owed to the grievant . . . under the Back Pay Act." *Id.* at 17. The Union's proposed issue to the Arbitrator also stated that interest was in dispute by asking whether the Agency violated applicable law or the parties' agreement by compensating the grievant "without interest." *Id.* at 3 (adopting the Union's proposed issue).

[22] *Id.* at 24.

[23] *See AFGE, Loc. 12*, 70 FLRA 582, 583 (2018) (*Loc. 12*) (holding that the arbitrator did not exceed his authority because the arbitral findings were directly responsive to the framed issue). To the extent that the exception is premised on a belief that the Arbitrator awarded backpay rather than interest, the Agency mischaracterizes the award. *See U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 70 FLRA 924, 929 (2018) (*IRS*) (then-Member DuBester concurring, in part, and dissenting, in part) (rejecting agency's exceeded-authority arguments that were premised on a misunderstanding of the award).

[24] Exceptions Br. at 3-6.

reached a different result.[25] Disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be given such evidence, provides no basis for finding an award deficient on nonfact grounds.[26]

The Agency first argues that the Arbitrator's finding that the "Agency forbid [the grievant] to talk at musters" is a nonfact.[27] To support this claim, the Agency asserts that the grievant was free to "talk[,] . . . ask questions[,] . . . [and] distribute information" to agents at musters.[28] In a second nonfact exception, the Agency challenges the Arbitrator's conclusion that the Agency unlawfully withheld night-differential pay from the grievant.[29] Specifically, the Agency claims that the Arbitrator disregarded evidence showing that the grievant's "failure to properly submit her . . . time-and-attendance information" was the "sole reason for [the grievant's] delayed pay correction."[30]

Both of the Agency's nonfact exceptions challenge the Arbitrator's evaluation of the record evidence – specifically, evidence concerning the Agency's conduct toward the grievant at musters and evidence related to which party was responsible for the night-differential-payment delay. Because such challenges to the Arbitrator's evaluation of the evidence do not provide a basis for finding the award deficient under the nonfact standard, we deny these exceptions.[31]

C. The award is not contrary to law.

The Agency argues that the award is contrary to law on two grounds. First, it contends that the award is contrary to § 7116(b)(7) of the Federal Service Labor-Management Relations Statute (the Statute)[32] because it permits the Union to engage in a "work slowdown" by allowing Union representatives to speak indefinitely during pre-shift musters, thus allowing the Union to "unilaterally determine" when agents begin their shifts.[33] Second, the Agency argues that the award violates management's right to assign work under § 7106(a)(2)(B) of the Statute[34] by preventing management from exercising discretion to end musters when it is time for agents to begin their shifts.[35]

When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[36] In conducting de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[37] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[38]

Here, the Arbitrator found that the Agency, on several occasions, retaliated against the grievant because of her representational efforts to obtain night-differential pay for herself and other agents.[39] Although the Arbitrator found that certain reprisals were related to the grievant's conduct at musters, the award does not direct the Agency to take any actions specific to musters. Rather, the Arbitrator simply directed the Agency to "immediately cease and desist any harassment, unjustified personnel action or retaliatory behavior and discrimination against the [g]rievant."[40] The Agency does not explain how this remedy will cause a work slowdown or preclude it from exercising its management right to assign work. Instead, the Agency's arguments are based on either a misunderstanding or mischaracterization of the award.[41] Consequently, we deny the Agency's contrary-to-law exceptions.

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

The Agency contends that the award fails to draw its essence from Article 7, Section A.4 of the parties' agreement because it would allow the grievant to

[25] *AFGE, Loc. 1482*, 67 FLRA 168, 169 (2014) (citing *NFFE, Loc. 1984*, 56 FLRA 38, 41 (2000)).
[26] *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 70 FLRA 186, 187 (2017) (citations omitted).
[27] Exceptions Br. at 3-4 (citing Award at 23).
[28] *Id.*
[29] *Id.* at 5 (citing Award at 24).
[30] *Id.*
[31] *See Fraternal Ord. of Police, Lodge No. 168*, 70 FLRA 788, 790 (2018) (rejecting nonfact arguments that attempted to relitigate the arbitrator's factual findings); *Loc. 12*, 70 FLRA at 583 (denying nonfact exception that only challenged the arbitrator's evaluation of the evidence).
[32] 5 U.S.C. § 7116(b)(7) (stating that it is an unfair labor practice for a union to "call, or participate in, a . . . slowdown").
[33] Exceptions Br. at 2-3.
[34] 5 U.S.C. § 7106(a)(2)(B).
[35] Exceptions Br. at 4.
[36] *U.S. DOD Educ. Activity*, 71 FLRA 900, 901 (2020) (Member Abbott concurring; then-Member DuBester dissenting) (citing *Int'l Brotherhood of Elec. Workers, Loc. 2219*, 68 FLRA 448, 449 (2015) (*Loc. 2219*)).
[37] *Loc. 2219*, 68 FLRA at 449-50 (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[38] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).
[39] Award at 23-24.
[40] *Id.* at 25.
[41] *See U.S. DHS, U.S. CBP*, 71 FLRA 243, 245 (2019) (Member Abbott concurring) (denying contrary-to-law exception because the agency misconstrued the award); *U.S. Dep't of the Navy, Naval Training Ctr., Orlando, Fla.*, 53 FLRA 103, 108 (1997) (holding that the agency's claim that the arbitrator unlawfully imposed a remedy was based on a mischaracterization of the award).

"pursue representational activities without obtaining authorization to use official time."[42] Section A.4 states, in relevant part, that Union representatives "will be authorized official time" for "labor-management relations matters."[43]

Here, the Arbitrator did not discuss or interpret Article 7 in the award. Thus, the Agency is not challenging any interpretation of Article 7, Section A.4. Moreover, the Agency does not demonstrate, nor is it apparent, that the Arbitrator made any findings that are in manifest disregard, or conflict with the plain wording, of this article. For example, in directing the Agency to cease retaliating against the grievant, the Arbitrator did not – as the Agency argues[44] – direct the Agency to disregard the parties' negotiated official time procedures. Accordingly, we deny the exception.[45]

E. The award is not ambiguous or contradictory.

The Agency alleges that the award is ambiguous and contradictory.[46] To establish that an order is deficient as incomplete, ambiguous, or contradictory, the excepting party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain.[47]

As a remedy, the Arbitrator directed the Agency to stop enforcing a "nonexistent payroll polic[y]" and "immediately follow all applicable federal payroll laws, guidelines and procedures."[48] The Agency claims that this remedy is ambiguous because it "fails to identify the policy that . . . does not exist."[49] But the award explicitly describes the unofficial policy as one that required the grievant to submit her time-and-attendance information "on the last day of [the] work week but no later than Saturday."[50] Because the relevant payroll policy is clear from the award as a whole, we find that this part of the awarded remedy is not ambiguous or contradictory.[51]

The Agency also contends that the award places the Agency in an untenable position because it prevents the Agency from "reminding employees to submit their time-and-attendance information on time," while simultaneously penalizing it for "not timely paying employees."[52] We find this argument unconvincing because the award's plain language simply does not preclude the Agency from reminding employees to timely submit their time-and-attendance information. Instead, the award directs the Agency to stop enforcing the "nonexistent" payroll policy, identified above, to retaliate against the grievant.[53] Moreover, the award does not arbitrarily punish the Agency for failing to timely pay the grievant but, rather, directs the Agency to abide by applicable payroll rules and regulations, including those

[42] Exceptions Br. at 4. The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting 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 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. *Libr. of Cong.*, 60 FLRA 715, 717 (2005) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)). The Authority has denied essence exceptions when the arbitrator did not discuss or interpret the cited contract provisions. *See Nat'l Nurses United*, 70 FLRA 166, 168 (2017) (denying essence exception because the arbitrator did not rely upon the cited contract provisions, and the union failed to demonstrate that the arbitrator's dispositive finding conflicted with any of those provisions); *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 63 FLRA 553, 557 (2009) (rejecting argument that the arbitrator's failure to find contractual violations raised an essence exception because the arbitrator did not interpret or apply the cited provisions).

[43] CBA at 13.

[44] Exceptions Br. at 4 (arguing that "the award would allow [the grievant] to pursue representational activities without obtaining authorization to use official time despite the [a]greement's requirement to do so").

[45] *See U.S. DHS, U.S. Citizenship & Immigr. Serv., S.F. Asylum Off.*, 66 FLRA 693, 695 (2012) (denying essence exception where the agency did not establish that the arbitrator's interpretation of the parties' agreement was irrational, unfounded, implausible, or in manifest disregard of the agreement).

[46] Exceptions Br. at 6-7.

[47] *U.S. Dep't of the Air Force, March Air Rsrv. Base, Cal.*, 71 FLRA 906, 908 (2020) (*Air Force*) (then-Member DuBester concurring) (citations omitted); *AFGE, Loc. 2338*, 71 FLRA 371, 372 (2019) (citing *U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 105 (2019)).

[48] Award at 25. According to the Union, the Agency's time-and-attendance policy required employees to submit their time-and-attendance information by the end of the day on Tuesday rather than Saturday. Union's Post-Hr'g Br. at 43-44.

[49] Exceptions Br. at 6.

[50] Award at 10-11; *see also id.* at 8 (noting that the counseling memo cited the grievant for failing to submit her time-and-attendance information "by the end of [her] last day of work for the pay period, but no later than Saturday morning").

[51] *See SSA, Off. of Disability Adjudication & Rev., Region 1*, 65 FLRA 334, 336 (2010) ("[T]he Authority interprets the language of an award in context, without undue focus on isolated statements."); *AFGE, Loc. 3911*, 56 FLRA 480, 481 n.5 (2000) (determining the contract provision at issue by looking to "the award as a whole"). We disagree with our dissenting colleague that the Arbitrator's award is deficient because it is "nonsensical." Dissent at 12. The Arbitrator was simply directing the Agency to stop applying conditions for approving the grievant's time-and-attendance forms that are not set forth in its actual policies. In our view, this aspect of the award is easily understood.

[52] Exceptions Br. at 6.

[53] Award at 23-25.

pertaining to night differential.[54] To the extent the Agency disagrees with the Arbitrator's findings that the Agency enforced a "nonexistent" payroll policy and committed an unjustified personnel action by withholding the grievant's night differential, such arguments do not demonstrate that the award is incomplete, ambiguous, or contradictory.[55]

For the foregoing reasons, we deny these exceptions.[56]

F. The award is not contrary to public policy.

The Agency argues that the award contradicts public policy by allowing the Union to engage in representational activities "without any limitations on time and place."[57] For an award to be found deficient as contrary to public policy, the asserted public policy must be "explicit, well defined, and dominant," and the appealing party must show a clear violation of the policy.[58] Moreover, the policy must be identified "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[59]

The Agency's argument fails to identify any public policy – let alone a public policy that is explicit and well-defined. Nor does the Agency cite any laws or legal precedent to support its exception. To the extent the Agency claims that the award is contrary to public policy based on what it alleges is "[c]ommon sense,"[60] such an argument does not provide a basis for finding that the award conflicts with a public policy.[61] Finally, we note again that the Arbitrator's direction to the Agency to "immediately cease and desist any harassment, unjustified personnel action or retaliatory behavior and discrimination against the [g]rievant"[62] does not direct the Agency to permit employees to engage in representational activities "without any limitations on time and place."[63] Accordingly, we deny the exception.

G. The Agency fails to establish that the Arbitrator was biased.

The Agency argues that the Arbitrator was biased because he allegedly (1) praised the Union effusively;[64] (2) granted a "default decision" against the Agency for failing to explain why it did not respond to the grievance at step two or three;[65] and (3) accepted a "unilateral pre-hearing payment" from the Union.[66] To establish that an arbitrator was biased, a party must demonstrate that the award was procured improperly, the arbitrator was partial or corrupt, or that the arbitrator engaged in misconduct that prejudiced a party's rights.[67] A party's assertion that all of an arbitrator's findings were adverse to that party, without more, does not demonstrate that the arbitrator was biased.[68]

Here, although the Arbitrator made complimentary statements toward the Union in the award,[69] the Authority has found that such statements do not establish that the Arbitrator was biased.[70] Likewise, the Agency's assertion that the Arbitrator exhibited bias by ruling entirely in the Union's favor fails to demonstrate that the Arbitrator was biased.[71]

As for the allegation that the Arbitrator improperly accepted payment from the Union before the

[54] *Id.* at 18.
[55] *See AFGE, Nat'l Border Patrol Council, Loc. 2724*, 65 FLRA 933, 937 (2011) (union's claim that the arbitrator erred in his factual findings did not establish that the award was incomplete, ambiguous, or contradictory).
[56] *See Air Force*, 71 FLRA at 908 (holding that an award was not ambiguous or contradictory because the exceptions did not demonstrate that the award was impossible to implement).
[57] Exceptions Br. at 3.
[58] *Def. Sec. Assistance Dev. Ctr.,* 60 FLRA 292, 293-94 (2004) (citing *SSA*, 32 FLRA 765, 767-68 (1988)).
[59] *Id.*
[60] Exceptions Br. at 3.
[61] *See U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 179 (2017) (denying public-policy exception that lacked a single citation to law or precedent); *NTEU*, 63 FLRA 198, 201-02 (2009) (denying public-policy exception that did not cite to an explicit, well-defined, and dominant policy).
[62] Award at 25.
[63] Exceptions Br. at 3.
[64] *Id.* at 8-9.
[65] *Id.*
[66] *Id.* at 7-8.
[67] *AFGE, Loc. 3438*, 65 FLRA 2, 3 (2010) (citing *U.S. Dep't of VA, Med. Ctr., N. Chi., Ill.*, 52 FLRA 387, 398 (1996)).
[68] *IRS*, 70 FLRA at 929-30; *AFGE, Loc. 3354*, 64 FLRA 330, 332 (2009).
[69] Award at 23 ("The . . . grievance is a work of art seldom seen . . . in almost [forty] years of arbitration work."); *id.* at 23-24 ("[The grievance] is an impressive document . . . perhaps, the Agency was simply overwhelmed by the grievance.").
[70] *See U.S. Dep't of the Air Force, Randolph Air Force Base, Tex.*, 45 FLRA 727, 734 (1992) (*Randolph AFB*) (holding that an arbitrator did not demonstrate partiality or engage in misconduct by complimenting a party's witness); *see also AFGE, Loc. 4044, Council of Prisons Loc. 33*, 57 FLRA 98, 100 (2001) (finding that the arbitrator did not act with bias despite making "clearly intemperate" statements about the grievant); *AFGE, Loc. 4042*, 51 FLRA 1709, 1714-15 (1996) (denying bias exception even though the arbitrator's award contained language "sharply critical" of a party).
[71] *See U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 56 FLRA 381, 385 (2000) (*VA*) (declining to find that the arbitrator was biased simply because "all of his findings went against the [a]gency"); *see also IRS*, 70 FLRA at 930 (determining that the arbitrator was not biased despite making several findings in one party's favor).

arbitration hearing,[72] the Agency did not raise this matter to the Arbitrator. Under § 2429.5 of the Authority's Regulations, the Authority "will not consider any evidence . . . that could have been, but [was] not, presented in the proceedings before the . . . arbitrator."[73] After the Arbitrator sent his interim invoice to the parties, the Agency had multiple opportunities to raise the issue of the Union's advance payment to the Arbitrator – most notably in its post-hearing brief. The Agency does not claim that it was prevented from raising the issue to the Arbitrator or that "extraordinary circumstances" justify considering this issue for the first time on appeal.[74] Accordingly, we deny the exception.[75]

IV. Decision

We grant the Agency's exceeded-authority exception as to the Arbitrator's findings and remedies concerning assignment trading. Thus, we set aside the portion of the award related to assignment trading and the associated remedies. We deny the Agency's other exceptions.

[72] Exceptions Br. at 7-8.
[73] 5 C.F.R. § 2429.5; *see U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 57 FLRA 417, 422 (2001) (*Navy*) (holding that issues of arbitral conduct will not be considered for the first time on review of an arbitrator's award if the issues could have been raised before the arbitrator, absent exceptional circumstances); *FDA, Cincinnati Dist. Off.*, 34 FLRA 533, 536 (1990) (denying bias claim that could have been, but was not, raised before the arbitrator, and no exceptional circumstances were demonstrated).
[74] *See Navy*, 57 FLRA at 422 (denying bias exception where the facts supporting the exception were known at arbitration and no exceptional circumstances justified consideration of the bias issue for the first time on appeal).
[75] *Id.*; *VA*, 56 FLRA at 385; *Randolph AFB*, 45 FLRA at 734.

Member Abbott, dissenting in part:

I agree with the decision in most respects but reach a different conclusion on the Agency's ambiguity exception.

Parties typically file exceptions to an arbitrator's award because, in their view, the award is contrary to law, does not draw its essence from the parties' agreement, is based on a non-fact, or the arbitrator exceeded her authority. Perhaps it is time to recognize a new exception – one that I would call the nonsense exception. An exception to be used when an arbitrator's award is . . . well . . . nonsensical.

Here, the Arbitrator directs the Agency to "stop enforcing" a "nonexistent policy." The Agency argues that this order is ambiguous. The Agency has a payroll policy that in every sense *actually* exists. It also has a time and attendance policy that exists. Without a doubt, the Agency could be held to account if it violates those policies and, to the extent the Arbitrator found violations of those policies, an order or remedy that enforces them is valid.

The majority reasons that the order is not ambiguous, even though it enforces a non-existent requirement, "because the relevant payroll policy is clear from the award as a whole."[1] That rationale gives me little comfort. Although my colleagues assert that the payroll policy is "*clear*" to them and "easily understood," they are unable to specify whether the "*relevant*" payroll policy is the existent one or the "unofficial" one.[2] Even if we call the *nonexistent* policy an *unofficial* policy, the award and the majority's rationale supporting it are still ambiguous.

But, an order to "stop enforcing" a policy that does not exist is nonsensical. The Smart Lookup dictionary defines "nonsensical" as "having no meaning; making no sense."[3] I suppose other terms – illogical, meaningless, applesauce[4] to name a few – could be used in order to appease my colleagues' offense at the word, but none of these alternatives seem to be more accurate. Because we have no exception that measures sensibility, the Agency's argument that the order is ambiguous has merit.

It is apparent to me that an order that seeks to enforce a nonexistent policy confuses the appropriate remedy for violations of existent policies. Therefore, I cannot join in the part of this decision that enforces an order that is ambiguous or, as in this case, nonsensical.

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[1] Majority at 9.
[2] *Id.*
[3] *Nonsensical*, Microsoft Off. Pro. Smart Lookup (2019).
[4] In this context, "applesauce" is used colloquially to define "nonsense." Supreme Court Justice Antonin Scalia described as "sheer applesauce" and "pure applesauce" majority opinions which he viewed as illogical. *See Zuni Pub. Sch. District No. 89 v. Dep't of Educ.*, 550 U.S. 81, 113 (2007) (Dissenting Opinion of Justice Scalia) and *King v. Burwell*, 576 U.S. 473, 507 (2015) (Dissenting Opinion of Justice Scalia).