72 FLRA No. 66

NATIONAL LABOR RELATIONS BOARD
(Agency)

and

NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION
(Union)

0-AR-5602
0-AR-5677

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DECISION

June 9, 2021

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

I. Statement of the Case

The Union filed two grievances alleging that the Agency had engaged in unfair labor practices (ULPs) while negotiating ground rules for a term agreement. The first grievance alleged bad-faith bargaining and the second alleged submission of permissive subjects of bargaining to the Federal Service Impasses Panel (FSIP). The parties consolidated the grievances for arbitration. In an arbitrability award, Arbitrator M. David Vaughn found the grievances procedurally and substantively arbitrable.

Following a hearing, the Arbitrator issued a merits award. He sustained the first grievance, finding that the Agency had violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute[1] (the Statute) by bargaining in bad faith. The Arbitrator denied the second grievance as moot, finding that he had no jurisdiction to resolve it because FSIP had ruled that the relevant ground-rules proposals were not permissive subjects of bargaining.

The Agency filed exceptions to both the arbitrability and merits awards on multiple grounds. The Union filed an exception to the merits award, arguing that the Arbitrator's denial of the permissive-subject grievance was contrary to law. For the reasons that follow, we dismiss, in part, and deny, in part, the Agency's exceptions; grant the Union's exception; and remand the case for further proceedings.[2]

II. Background and Arbitrator's Awards

In late 2018, the parties began negotiating ground rules for a new term agreement. In February 2019, at the prompting of the Agency, they began mediation with the assistance of the Federal Mediation and Conciliation Service (FMCS). In preparation for their third mediation session, the parties agreed that the Union would submit counterproposals by May 8, 2019. The Agency subsequently notified the Union that it would "not agree to further mediation over ground rules" if the Union did not provide the proposals two days earlier than the parties had previously agreed.[3] When the Union did not submit counterproposals by the Agency's deadline, the Agency stated that it would "move forward accordingly."[4]

The Union also did not submit the counterproposals by the original May 8 deadline. A few days later, it filed a grievance alleging that the Agency had committed a ULP by bargaining in bad faith, contrary to the parties' agreement and § 7116(a)(1) and (5) of the Statute. Ten days later, the Agency filed a request with FSIP claiming that the parties had reached impasse over the ground-rules proposals. In response, the Union filed a second grievance alleging that the Agency had submitted permissive subjects of bargaining to FSIP.

The parties consolidated the grievances and submitted the dispute to arbitration. While the consolidated grievances (the grievances) were pending before the Arbitrator, FSIP asserted jurisdiction over the ground-rules proposals and, in November 2019, issued a decision and order.[5] In the order, FSIP rejected the Union's claim that some of the proposals were permissive subjects of bargaining.

Shortly after FSIP issued its decision, the Agency filed a motion to dismiss the grievances with the Arbitrator. It argued that the grievances were inarbitrable because they were untimely and mooted by FSIP's order. In January 2020, the Arbitrator issued an award addressing the Agency's motion (arbitrability award). In

[1] 5 U.S.C. § 7116(a)(1), (5).

[2] In accordance with Authority practice, we consolidate the arbitrability and merits cases for a single decision. *See U.S. Agency for Glob. Media*, 70 FLRA 946, 946 (2018) (*Glob. Media*) (then-Member DuBester dissenting) (consolidating exceptions to interlocutory and final awards); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Bryan, Tex.*, 70 FLRA 707, 708 (2018) (then-Member DuBester dissenting) (consolidating cases that involved the same parties and arose from the same proceeding).

[3] Merits Award at 6.

[4] *Id.* at 7.

[5] *NLRB*, 19 FSIP 045 (2019).

addition to finding the grievances timely, the Arbitrator found that the facts alleged by the Union – which "[we]re taken as true" "for [the] purposes of the instant [m]otion"[6] – supported its allegations against the Agency. The Arbitrator also determined that FSIP's order did not moot the grievances, because FSIP did not resolve the issue of bad-faith bargaining. Thus, the Arbitrator denied the motion to dismiss, maintained jurisdiction, and directed the parties to identify "underlying factual disputes" in preparation for a hearing on the merits.[7]

After a conference call one week later, the Arbitrator issued a "Clarification of Decision and Order."[8] He emphasized that the arbitrability award made no findings of fact or legal determinations concerning the merits of the grievances. Further, the Arbitrator asserted that any reference to disputed facts in the arbitrability award "did nothing more than impose the presumptions against" the Agency "required in assessing [its] dispositive motion[]" to dismiss the grievances.[9]

On February 28, 2020, the Agency filed exceptions to the arbitrability award and the Arbitrator's clarification; on April 3, 2020, the Union filed an opposition to the Agency's exceptions.

While the Agency's exceptions to the arbitrability award were pending before the Authority, the Arbitrator held a hearing on the merits of the grievances. In October 2020, he issued the merits award. As stipulated by the parties, the issues were whether the Agency violated § 7116(a)(1) and (5) of the Statute by (1) engaging in "overall bad[-]faith bargaining" and (2) "submitting to impasse proposals regarding permissive subjects of bargaining."[10]

Addressing the first issue, the Arbitrator noted that allegations of bad-faith bargaining are assessed based on "the totality of the circumstances."[11] To this end, the Arbitrator found several "indicator[s] of bad[-]faith conduct" by the Agency.[12] These included "cho[osing] to request FMCS mediation while bargaining was . . . actively resulting in agreement;"[13] changing the deadline for the Union to submit proposals without consulting the Union;[14] thwarting the proposal-exchange process by stating that it would "move forward accordingly" after the Union failed to submit proposals by the Agency-imposed deadline;[15] and prematurely declaring impasse by "unilaterally" requesting FSIP assistance before being released by the mediator.[16]

The Arbitrator determined that, "[t]aken in totality, the record show[ed] that, at each juncture of the bargaining, mediation[,] and impasse processes, the Agency acted unilaterally to curtail and to thwart the active bargaining process and progress."[17] Accordingly, he found that, under the totality of the circumstances, the Agency violated § 7116(a)(1) and (5) of the Statute.[18]

Concerning the second issue, the Arbitrator noted that, in resolving the parties' dispute over ground rules, FSIP had rejected the Union's allegations that certain proposals constituted permissive subjects of bargaining. The Arbitrator determined that under § 7119(c)(5)(B) and (C) of the Statute, this determination was binding on the parties and "superseded [his] arbitral jurisdiction" to address the grievance.[19] As a result, he denied the second grievance as moot.[20]

On November 24, 2020, the Union filed an exception to the merits award, and, on December 11, 2020, the Agency filed an opposition to the Union's exception. On November 27, 2020, the Agency also filed exceptions to the merits award, and, on December 28, 2020, the Union filed an opposition to those exceptions.

III. Preliminary Matters

A. We deny the requests to file supplemental submissions.

After the Union filed its opposition to the Agency's exceptions to the arbitrability award, the Agency requested leave to file a reply, and the Union requested leave to file a response to the reply. These supplemental submissions concern the timeliness of the Union's opposition.

The Agency served its exceptions to the arbitrability award on February 28, 2020, via first-class mail.[21] Accordingly, under § 2429.22(a) of the Authority's Regulations, the Union had five additional days to file its opposition, beyond the thirty days set forth

[6] Arbitrability Award at 13-14.
[7] *Id.* at 19.
[8] AR-5602, Exceptions, Attach. 8, Clarification of Decision and Order (Clarification) at 1.
[9] *Id.*
[10] Merits Award at 3; *see also* AR-5677, Agency Exceptions, Attach. 4, Hr'g Tr. at 7 (stating that parties were "in agreement" on the issues).
[11] Merits Award at 16 (citing *U.S. Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524, 531 (1990) (*Wright-Patterson AFB*)).
[12] *Id.* at 17.
[13] *Id.*
[14] *Id.* at 18.
[15] *Id.* at 18-19.
[16] *Id.* at 19; *see id.* (finding that the mediator was "an honest broker in ascertaining the status of negotiations").
[17] *Id.*
[18] *Id.* at 20.
[19] *Id.* at 22.
[20] *Id.*
[21] *See* AR-5602, Exceptions Br. at 20.

in § 2425.3(b).[22] Although the Agency's certificate of service indicates that it also provided the Union a "courtesy cop[y] via email" on the same day,[23] there is no evidence that the Union agreed to service by email – which is a prerequisite for email service under Authority Regulations.[24] Therefore, the date of the email delivery did not control the deadline for filing the opposition. And because the Union filed its opposition within thirty-five days of February 28, 2020, the opposition was timely. Having made this finding, we decline to consider the parties' supplemental submissions.[25]

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's contrary-to-law exceptions.

The Union asserts that the Authority should not consider one of the Agency's contrary-to-law exceptions because the Agency did not present it to the Arbitrator.[26] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider an argument that could have been, but was not, presented to the arbitrator.[27] This includes arguments that differ from, or are inconsistent with, a party's arguments to the arbitrator.[28]

In the relevant exception, the Agency argues that the merits award is contrary to §§ 7116 and 7119 of the Statute because requesting the services of FMCS and FSIP "cannot, as a matter of law, be used as evidence of bad[-]faith" bargaining.[29] However, at arbitration, the Agency failed to argue that the Statute barred consideration of these requests when analyzing the totality of the circumstances surrounding the parties' negotiations. Rather than arguing, as it does here, that requests for assistance from FMCS or FSIP are immaterial in the context of bad-faith-bargaining ULPs, the Agency's arbitration arguments implied that these requests had a bearing on the issue by presenting evidence that it made the requests in good faith.[30] These arguments are inconsistent with each other.[31] Accordingly, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar this contrary-to-law exception and we do not consider it.[32]

C. The Agency's arbitrability exceptions are not interlocutory.

The parties disputed whether the Agency's exceptions to the arbitrability award were interlocutory.[33] However, following the issuance of the merits award, the interlocutory status of the arbitrability-award exceptions is moot.[34] As the Agency's arbitrability exceptions are not interlocutory, we consider them.

IV. Analysis and Conclusions

A. The Agency fails to establish that the arbitrability award is deficient.

The Agency argues that the arbitrability award and the Arbitrator's subsequent clarification are deficient because the Arbitrator improperly addressed the merits of the case in resolving the Agency's motion to dismiss.[35] In so doing, the Agency argues that the Arbitrator exceeded his authority; denied the Agency a fair hearing; made findings contrary to law; and demonstrated bias.[36] However, in deciding the Agency's motion to dismiss, the Arbitrator properly analyzed the factual allegations in the light most favorable to the Union.[37] He stated that the facts alleged by the Union were "taken as true" only

[22] 5 C.F.R. § 2429.22(a) (allowing five additional days to file response to documents served by first-class mail); *id.* § 2425.3(b) (stating that opposition should be filed thirty days following service, except in listed situations).
[23] AR-5602, Exceptions Br. at 20.
[24] *See* 5 C.F.R § 2429.27(b)(6) (providing that service by email is allowed "only when the receiving party has agreed").
[25] *See U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 68 FLRA 976, 978-79 (2015) (declining to consider supplemental submissions where "the record is sufficient for the Authority to resolve the issues").
[26] AR-5677, Union Opp'n Br. at 7.
[27] 5 C.F.R. §§ 2425.4(c), 2429.5.
[28] *Dep't of VA, Edith Nourse Rogers Mem'l VA Med. Ctr., Bedford, Mass.*, 71 FLRA 232, 233 (2019) (then-Member DuBester concurring).
[29] AR-5677, Agency Exceptions Br. at 10.
[30] *See, e.g.*, AR-5677, Agency Exceptions, Attach. 2, Agency Post-Hr'g Br. at 20-21 (arguing that request for FMCS assistance was evidence of good faith); *id.* at 29-30 (arguing the Agency petitioned FSIP because Union declared impasse in first grievance).
[31] *AFGE, Loc. 2145*, 69 FLRA 7, 8 (2015) (stating that Authority will not consider arguments different from or inconsistent with a party's arguments to the arbitrator).
[32] *See id.* (dismissing exception that was inconsistent with a party's argument before the arbitrator).
[33] AR-5602, Opp'n Br. at 2 (arguing exceptions are interlocutory because arbitrability was not the sole issue submitted to arbitration); AR-5602, Exceptions Br. at 3 (arguing exceptions are not interlocutory because arbitrability award resolved all issues presented in motion to dismiss).
[34] *See Glob. Media*, 70 FLRA at 947 n.7 (finding that "the interlocutory status of the exceptions" to an earlier award were moot once the arbitrator issued a final award resolving the dispute's merits).
[35] AR-5602, Exceptions Br. at 1-2.
[36] *See id.* at 8 (exceeded authority); *id.* at 12 (denied fair hearing); *id.* at 13-14 (made factual findings contrary to law that are not entitled to deference); *id.* at 17-18 (demonstrated bias).
[37] *See U.S. Army Corps of Eng'rs, Waterways Experiment Station, ERDC, Vicksburg, Miss.*, 59 FLRA 835, 838-39 (2004) (in considering a motion to dismiss, a complainant's factual allegations must be accepted as true (quoting *Hoover v. Ronwin*, 466 U.S. 558, 565-66 (1984))).

"for [the] purposes of the instant [m]otion."[38] The Arbitrator also explained that the parties should present the "underlying factual disputes" for resolution during the merits hearing,[39] which they ultimately did.[40]

Because the Arbitrator did not make dispositive factual findings or determine the merits of the grievances in the arbitrability award or the clarification, we deny these Agency exceptions.[41]

B. The Agency fails to establish that the merits award is based on a nonfact.

The Agency argues that the merits award is based on a nonfact.[42] To establish a nonfact exception, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[43]

The Agency contends that the Arbitrator erred in finding that the Agency "'unilaterally' contacted the FMCS."[44] Although the record establishes that the Union – not the Agency – first contacted FMCS,[45] there is no dispute that the Union opposed FMCS's involvement in the parties' negotiations[46] and contacted FMCS only because the Agency had announced its intention to pursue mediation.[47] Moreover, the Arbitrator found that the "indicator of bad[-]faith conduct" was the Agency's "*choice* to request FMCS mediation while bargaining was . . . actively resulting in agreement."[48] This finding does not rely on the Arbitrator's erroneous statement that the Agency unilaterally contacted FMCS. And the Agency does not contest, as a nonfact, that it announced its intention to pursue mediation before the Union contacted FMCS. Accordingly, the Agency has not demonstrated that, but for the Arbitrator's mistake, he would have reached a different result.[49] We deny this exception.

C. The Agency fails to establish that the Arbitrator exceeded his authority in the merits award.

The Agency argues that the Arbitrator exceeded his authority by making a finding contrary to FSIP's decision.[50] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, or disregard specific limitations on their authority.[51]

The parties' first stipulated issue was whether the Agency violated the Statute by engaging in bad-faith bargaining.[52] In considering this issue, the Arbitrator found that the parties' ground-rules negotiations were not at impasse when the Agency requested the assistance of FSIP.[53] The Agency does not explain how this finding shows the Arbitrator's (1) failure to resolve the stipulated issue or (2) resolution of an issue that the parties did not

[38] Arbitrability Award at 13-14; *see also* Clarification at 1 (stating that arbitrability award "did nothing more than impose the presumptions against the moving party").
[39] Arbitrability Award at 19.
[40] Merits Award at 2 (explaining parties' participation in merits hearing and briefing).
[41] *See SSA*, 71 FLRA 57, 58 (2020) (then-Member DuBester concurring) (denying contrary-to-law claim based on misinterpretation of award); *AFGE, Loc. 1415*, 69 FLRA 386, 390 (2016) (denying fair-hearing claim based on misinterpretation of award); *U.S. DHS, U.S. CBP*, 66 FLRA 838, 844 (2012) (denying exceeded-authority claim based on misinterpretation of award). The Agency also alleges that the arbitrability award is inconsistent with Executive Order 13,836 (EO 13836). AR-5602, Exceptions Br. at 14-15 (citing Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining, EO 13836, 83 Fed. Reg. 25,329 (May 25, 2018), revoked by Protecting the Federal Workforce, Exec. Order No. 14,003, 86 Fed. Reg. 7,231 (EO 14003) (Jan. 22, 2021)). However, EO 13836 is no longer in effect. EO 14003, 86 Fed. Reg. at 7231 ("[EO] 13836 . . . is hereby revoked."). The Authority "resolves arbitration cases based on the state of the law at the time that it decides those cases." *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 183, 184 (2019) (then-Member DuBester dissenting) (citing *U.S. Dep't of the Army, U.S. Army Rsrv. Pers. Ctr., St. Louis, Mo.*, 49 FLRA 902, 903 (1994) (*Army Reserve*) (stating that Authority uses current law when deciding arbitration exceptions "absent manifest injustice or statutory direction or legislative history to the contrary")). As this exception does not provide a basis for finding the arbitrability award deficient, we deny it. *See Army Reserve*, 49 FLRA at 903 (denying argument that Authority should have applied law in effect at time of grievance).
[42] AR-5677, Agency Exceptions Br. at 19.
[43] *U.S. DOD Educ. Activity, Pensacola, Fla.*, 55 FLRA 1141, 1144 (1999).
[44] AR-5677, Agency Exceptions Br. at 19-20 (quoting Merits Award at 16).
[45] *See* AR-5677, Agency Exceptions, Attach. 6, Agency Ex. 1 at 1 (emails with FMCS); AR-5677, Union Opp'n Br. at 2 (stating that the Union "reached out to FMCS").
[46] Merits Award at 5 (finding that the Union "did not believe that FMCS assistance was necessary so early in the process"); *see also* AR-5677, Agency Exceptions Br. at 14-15 n.7 ("The Agency is also not seeking, with the exception of his reliance on a non-fact . . . to upend the Arbitrator's factual findings.").
[47] Merits Award at 5; AR-5677, Union Opp'n Br. at 2; AR-5677, Agency Exceptions Br. at 6-7.
[48] Merits Award at 17 (emphasis added).
[49] *See AFGE, Loc. 933*, 70 FLRA 508, 508 (2018) (nonfact exception denied where party failed to establish that fact was "central" to the award).
[50] AR-5677, Agency Exceptions Br. at 16.
[51] *NTEU*, 70 FLRA 57, 60 (2016).
[52] Merits Award at 3.
[53] AR-5677, Agency Exceptions Br. at 17 (quoting Merits Award at 19).

submit to arbitration.[54] Further, the Agency does not identify any specific limitation on the Arbitrator's ability to make findings concerning the relevant ULP allegations. Instead, the Agency argues the Arbitrator should not have considered whether the parties were at impasse because § 7119 of the Statute delegates jurisdiction over negotiation impasses to FSIP.[55] However, for purposes of resolving the bad-faith-bargaining allegation, the Arbitrator had jurisdiction to consider the parties' negotiations, which include any impasse.[56] Moreover, the Arbitrator's determination that the Agency prematurely declared impasse – for purposes of determining whether the Agency engaged in bad-faith bargaining under the totality of the circumstances – did not affect FSIP's assertion of statutory jurisdiction.[57] Therefore, we deny this exception.

D. The Agency fails to establish that the merits award is contrary to law.

The Agency alleges that the merits award is contrary to law.[58] When considering contrary-to-law claims, the Authority reviews the questions of law raised by the award and the party's exceptions de novo.[59] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[60] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[61]

The Agency contends that the merits award erroneously created a "mutuality" requirement for advancing cases to FMCS and FSIP by finding that the Agency's unilateral requests to these entities evidenced bad-faith bargaining.[62] However, the Arbitrator did not determine that any such unilateral requests, on their own, constituted bad-faith bargaining. Instead, he found that, under the particular circumstances of the parties' negotiations, the timing of the Agency's actions indicated bad faith: the Agency pursued FMCS assistance early in the process, while negotiations were "actively resulting in agreement"[63] and requested FSIP assistance before the mediator released the parties.[64] Thus, contrary to the Agency's assertion, the award does not establish that the Arbitrator created a requirement that parties must mutually request FMCS or FSIP assistance. Accordingly, we deny this exception.[65]

The Agency also argues that the Arbitrator failed to perform an appropriate totality-of-the-circumstances analysis because he focused solely on the Agency's actions.[66] But the Arbitrator did consider and reference actions taken by the Union, including its failure to submit counterproposals by the original deadline.[67] And he made extensive findings, which the Agency does not challenge,[68] to support his conclusion that the Agency engaged in bad-faith bargaining. The Authority has long held that disagreement with an arbitrator's evaluation of evidence, and the weight to be accorded such evidence, does not provide any basis for finding an award deficient.[69] Moreover, the Agency has failed to demonstrate that the Arbitrator misapplied the totality-of-the-circumstances

[54] *See NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996) (arbitral authority not exceeded by addressing any issue necessary to deciding a stipulated issue); *Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 519 (1986) (arbitral authority not exceeded by addressing issue that necessarily arises from issues specifically included in a stipulation).
[55] *See* AR-5677, Agency Exceptions Br. at 16 (arguing that the arbitrator "grossly exceeded his authority by reinvestigating and re-adjudicating matters that FSIP previously investigated, adjudicated, and closed"); *see also id.* at 15-17 (raising arguments about FSIP jurisdiction under § 7119 of the Statute).
[56] *See U.S. Dep't of the Navy, Naval Aviation Depot, Jacksonville, Fla.*, 63 FLRA 365, 370 (2009) (upholding administrative law judge finding that a party failed to satisfy its bargaining obligation when it prematurely terminated bargaining); *see also NTEU*, 64 FLRA 443, 446 (2010) (Member Beck dissenting on other grounds) (noting that arbitrator's jurisdiction over an issue that FSIP also addressed arose from ULP grievance).
[57] *See NLRB*, 19 FSIP 045 at *1 (accepting jurisdiction of the parties' dispute).
[58] AR-5677, Agency Exceptions Br. at 11-14.
[59] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[60] *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998).
[61] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).
[62] AR-5677, Agency Exceptions Br. at 13; *see also id.* at 11-12 (arguing that § 7119(a) of the Statute does not require a "joint request" to FMCS and § 7119(b) allows "'either party to request' FSIP assistance" (quoting 5 U.S.C. § 7119(b))).
[63] Merits Award at 17.
[64] *Id.* at 19.
[65] *See U.S. Dep't of Transp., FAA, Wash., D.C.*, 65 FLRA 950, 955 (2011) ("[A] misconstruction of the award does not constitute a basis for finding the award contrary to law."); *U.S. Dep't of the Treasury, IRS, Indianapolis Dist.*, 36 FLRA 227, 231 (1990) (finding that a party that "misconstrues the award . . . fails to establish that the award is contrary to law").
[66] AR-5677, Agency Exceptions Br. at 19 (arguing that the analysis "demands assessment of both parties' conduct throughout negotiations").
[67] Merits Award at 7.
[68] AR-5677, Agency Exceptions Br. at 14-15 & n.7 (noting that the Agency is "not seeking, with the exception of [the Arbitrator's] reliance on a non-fact discussed later, to upend the Arbitrator's factual findings" but is "instead focusing on the impermissibly limited scope of his factual analysis that was driven by [his] misapplication of law"). We have already denied the Agency's nonfact exception.
[69] *U.S. DHS, U.S. CBP*, 65 FLRA 356, 362 (2010) (exceptions that challenge an arbitrator's "determination of the weight to be accorded" evidence do not establish that an award is contrary to law).

test in determining that the Agency engaged in bad-faith bargaining.[70] Therefore, we deny this exception.

E. The Union establishes that the Arbitrator's denial of the second grievance was contrary to law.

The Union argues that the Arbitrator erred as a matter of law when he found that FSIP's decision concerning the ground-rules proposals precluded him from resolving whether the Agency had submitted permissive subjects to FSIP.[71]

Where a party has invoked FSIP proceedings over a permissive subject of bargaining, the Authority has found a violation of the Statute.[72] Under Authority precedent, alleged violations of § 7116 of the Statute, such as those in the Union's permissive-subject grievance, may be raised either as ULP charges under the procedure set forth in § 7118 of the Statute, or as grievances under a negotiated grievance procedure.[73] When resolving a grievance alleging a ULP, an "arbitrator must apply the same standards and burdens that would be applied by an [Administrative Law Judge (ALJ)] in a ULP proceeding under [§] 7118."[74] In essence, under these circumstances, the "arbitrator functions as would an [ALJ]."[75]

Authority precedent holds that ALJs are authorized to make negotiability determinations that are necessary to "decid[ing] whether a ULP has been committed."[76] Likewise, arbitrators have the authority to make negotiability findings when it is required for the resolution of a grievance alleging a ULP.[77] In this case, the Union's second grievance alleged that the Agency violated § 7116(a)(1) and (5) of the Statute by bargaining to impasse over permissive subjects.[78] The Union argued that the relevant proposals were permissive because they waived Union rights.[79] Resolution of this grievance necessarily involves a determination as to whether the proposals were, in fact, permissive subjects of bargaining. Therefore, we find that the Arbitrator had the authority to make these negotiability determinations.[80]

In denying the second grievance as moot, the Arbitrator stated that FSIP's rejection of the Union's permissive-subject arguments superseded his arbitral jurisdiction over the negotiability of the allegedly permissive proposals.[81] However, the Arbitrator is authorized to determine the legality of the Agency's actions in bringing the allegedly permissive subject to FSIP.[82] Therefore, the Union's second grievance, which requires the Arbitrator to make negotiability determinations in order to resolve the Union's ULP allegation, is not moot. Accordingly, we grant the Union's exception, set aside the denial of the second grievance, and remand the case to the parties for consideration, absent settlement, of whether the Agency submitted permissive subjects of bargaining to FSIP.[83]

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions to the arbitrability and merits awards. We grant the Union's exception to the merits award, and remand the case for actions consistent with this decision.

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[70] *Wright-Patterson AFB*, 36 FLRA at 531.

[71] AR-5677, Union Exceptions Br. at 3. The Agency alleges that this argument was not raised below and that we should not consider it. AR-5677, Agency Opp'n Br. at 5. However, both parties presented arguments concerning the negotiability of the allegedly permissive proposals to the Arbitrator. *See* Merits Award at 10-11 (summarizing Union's negotiability arguments); *id.* at 14 (noting that, in its brief, "[t]he Agency review[ed] the substance of each of its proposals in detail"). Accordingly, we consider the argument.

[72] *AFGE, Loc. 3937, AFL-CIO*, 64 FLRA 17, 21 (2009) (citing *FDIC, Headquarters*, 18 FLRA 768, 771-72 (1985)).

[73] *NTEU*, 61 FLRA 729, 732 (2006) (*NTEU*) (citing *NTEU, Chapter 168*, 55 FLRA 237, 241 (1999) (*Chapter 168*)).

[74] *Chapter 168*, 55 FLRA at 241.

[75] *See NTEU*, 61 FLRA at 732.

[76] *Id.* (citing *U.S. Dep't of HHS, SSA, Balt., Md.*, 36 FLRA 655, 669 (1990) (finding it necessary for ALJ to resolve negotiability dispute raised in defense of ULP charge)).

[77] *Id.*

[78] Merits Award at 1.

[79] *Id.* at 10-11.

[80] *See NTEU*, 61 FLRA at 733.

[81] Merits Award at 22. FSIP rejected the Union's permissive subject arguments both implicitly, by accepting jurisdiction over the allegedly permissive provisions, and explicitly in its decision. *NLRB*, 19 FSIP at *1 (noting it had accepted jurisdiction); *id.* at *5 (stating that Union argument was unsupported); *id.* at 7 (same); *id.* at 10 (rejecting Union argument); *id.* at 11 (stating that Union argument was unsupported).

[82] *See NTEU*, 61 FLRA at 732-33 (in grievance over agency's failure to implement FSIP decision, arbitrator was authorized to consider argument concerning lawfulness of ordered provision). We note that FSIP does not have the "authority to resolve . . . legal questions about whether the disputed [proposals] are negotiable," and it may determine negotiability only when it "faces a proposal that is 'substantively identical' to one that the [Authority] already has found to be negotiable." *Antilles Consol. Educ. Ass'n v. FLRA*, 977 F.3d 10, 15-16 (D.C. Cir. 2020); *see also* 5 U.S.C. § 7105(a)(2)(E) (reserving to the Authority the "resol[ution of] issues relating to the duty to bargain in good faith").

[83] *See NTEU*, 61 FLRA at 733 (finding that arbitrator's "determination that he was precluded from addressing the negotiability" of a proposal was contrary to law and remanding case for consideration on the merits).