73 FLRA No. 167

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
(Agency)

0-AR-5895

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DECISION

April 24, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member
(Chairman Grundmann concurring)

I. Statement of the Case

After the Agency announced that it was hiring for two human-resources vacancies, a Union steward (the grievant) applied for both vacancies. The Agency filled one of the vacancies but closed the application process for the other vacancy without filling the position (the unfilled position). The Union filed a grievance alleging the Agency retaliated against the grievant for his work as a Union steward by (1) not selecting him for the filled position and (2) cancelling the second posting rather than selecting him. Arbitrator Rafael Gely issued an award denying the grievance.

The Union filed contrary-to-regulation, nonfact, contrary-to-law, and exceeded-authority exceptions to the award. Because the Union failed to raise its contrary-to-regulation arguments before the Arbitrator, but could have, we dismiss those exceptions under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.[1] For the reasons explained below, we deny the Union's remaining exceptions.

II. Background and Arbitrator's Award

The grievant began working for the Agency in 2015 and became a Union steward in 2016. Starting in 2019, he applied for multiple human-resources and labor-specialist positions, but the Agency did not select him for those positions. In some instances, the Agency cancelled the postings without filling the positions. In 2021, the Agency posted the job announcement at issue here, which stated there were two vacant labor-specialist positions. The grievant applied for both positions.

One month after applying, the grievant asked a human-resources official for a status update. The official informed the grievant that one of the vacancies remained open, but the Agency had cancelled the other. Subsequently, the Agency informed the grievant that it selected another applicant for the non-cancelled vacancy. When the grievant requested information concerning the selection decision, the Agency informed him that the selection committee found him "basically eligible and referred [him] to the selecting official for consideration," but he was "not among the best[-]qualified" applicants.[2]

The Union filed a grievance, alleging the Agency discriminated against the grievant in its selection decision on the basis of his Union role. The Union alleged the Agency violated Article 17 of the parties' collective-bargaining agreement and § 7116 of the Federal Service Labor-Management Relations Statute (the Statute).[3] Article 17(g) provides, "An employee who exercises any statutory or contractual right shall not be subjected to reprisal or retaliation[] and shall be treated fairly and equitably."[4] The grievance proceeded to arbitration, and the Arbitrator framed the issue as whether the Agency "violate[d] the provisions of the collective[-]bargaining agreement when it failed to consider or select the grievant for the [labor-specialist] position."[5] Before the arbitration hearing, the Agency moved to dismiss the grievance for lack of procedural and substantive arbitrability, but the Arbitrator denied the motion. Then, following the Union's presentation of its case-in-chief, the Agency moved for a directed verdict. The Arbitrator also denied that motion.

In his award, with respect to the merits of the Union's discrimination claim, the Arbitrator noted that "the parties fundamentally agree[d]"[6] that the proper framework for evaluating violations of Article 17 was the test the Authority articulated in *Letterkenny Army Depot* (*Letterkenny*).[7] Under that test, the party alleging

[1] 5 C.F.R. §§ 2425.4(c), 2429.5.
[2] Award at 9.
[3] 5 U.S.C. § 7116(a)(2) ("it shall be an unfair labor practice for an agency . . . to . . . discourage membership in any labor organization by discrimination in connection with hiring . . . [or] promotion").
[4] Award at 3.
[5] *Id.* at 2.
[6] *Id.* at 26.
[7] 35 FLRA 113, 118 (1990).

discrimination must first demonstrate that (1) an employee was engaged in a protected activity; (2) the agency knew of the employee's protected activity; and (3) the protected activity was a motivating or contributing factor in the agency's treatment of the employee.[8] If the alleging party establishes that prima facie case, then the burden shifts to the agency to demonstrate that it had a legitimate justification for its action and that it would have treated the employee the same way in the absence of the protected activity.[9]

Regarding the first two factors of *Letterkenny*'s prima facie case, the Arbitrator found "[t]here [wa]s no question that the [g]rievant was engaged in protected activit[ies] and . . . the Agency knew about such activities."[10] As for the final prima facie factor, the Arbitrator considered whether the Agency was motivated by those protected activities in deciding whether to select the grievant. In assessing that question, the Arbitrator reviewed the Union's evidence of alleged anti-union bias, including the grievant's history of unsuccessfully applying for other labor-specialist vacancies within the Agency, certain email correspondence between the grievant and Agency officials, and the Agency's selection criteria. Ultimately, the Arbitrator concluded "the evidence falls short of establishing that the [g]rievant's [U]nion activities were a motivating or contributing factor in the Agency's actions towards the [g]rievant."[11] With respect to the unfilled position, the Arbitrator found "[n]o evidence . . . that the [vacancy] cancellation was motivated by anti-union" bias.[12] Thus, the Arbitrator found the Union failed to establish its prima facie case under *Letterkenny*.

Further, the Arbitrator determined the Agency provided compelling documentary and testimonial evidence that the selectee for the labor-specialist position was better qualified than the grievant. Regarding the unfilled position, the Arbitrator determined the Agency's selecting official "credibly testified" that the grievant did not meet the minimum qualifications for an interview.[13] Additionally, the Arbitrator found "no conclusive evidence" to support the Union's contention that "the [g]rievant was[,] in fact[,] qualified" for the unfilled position.[14] For these reasons, the Arbitrator concluded that "the Agency had a legitimate justification" for its actions.[15] Consequently, the Arbitrator found the Agency did not violate Article 17 of the parties' agreement, and he denied the grievance.

The Union filed exceptions on June 19, 2023, and the Agency filed an opposition on July 19, 2023.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Union's exceptions.

The Union argues the award conflicts with three portions of the Agency's regulations concerning promotion procedures, claiming the Agency violated those regulations in conducting the selection process.[16] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments or evidence that could have been, but were not, presented to the arbitrator.[17]

At arbitration, the Union argued the Agency violated the parties' agreement by discriminating against the grievant in the selection process.[18] As the parties disputed the propriety of that process at arbitration, the Union could have argued the process failed to comply with the Agency's promotion-procedure regulations. However, the Union did not raise these arguments to the Arbitrator.[19] Because the Union could have raised its contrary-to-regulation arguments at arbitration, but did not, we dismiss those arguments under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.[20]

[8] *Id.*
[9] *Id.*
[10] Award at 27.
[11] *Id.*
[12] *Id.* at 29.
[13] *Id.* at 30 n.3.
[14] *Id.* at 29.
[15] *Id.* at 30.
[16] Exceptions Form at 4-6.
[17] 5 C.F.R. §§ 2425.4(c), 2429.5.
[18] Award at 15-18.
[19] Exceptions, Attach. 1, Union's Post-Hr'g Br. at 45-69 (detailing Union's various merits arguments without relying on, or citing, the Agency's regulations).
[20] *See U.S. DHS, U.S. CBP, U.S. Border Patrol, San Diego Sector*, 68 FLRA 642, 642-43 (2015) (dismissing exception where the excepting party did not raise the underlying argument before the arbitrator, but could have).

IV. Analysis and Conclusions

A. The Union does not establish that the award is based on a nonfact.

The Union argues the award is based on a nonfact because the Arbitrator improperly inferred that the Agency had a legitimate reason for cancelling the posting for the unfilled position.[21] According to the Union, the Agency provided no evidence upon which the Arbitrator could have relied to find the Agency had a non-discriminatory reason for the cancellation.[22] To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[23] Disagreement with an arbitrator's evaluation of the evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.[24]

According to the Union, the Agency's decision to cancel the selection process for the unfilled position demonstrated anti-union bias because, "[w]ith one position remaining open, and a qualified candidate available, there was no legitimate reason not to fill the position" with the grievant.[25] However, the Arbitrator found that an Agency witness "credibly testified" the grievant did not meet the threshold requirements for an interview.[26] Moreover, the Arbitrator found the Union presented no conclusive evidence that the grievant was qualified for the position or that the Agency was motivated by anti-union bias when it cancelled the vacancy.[27] Thus, contrary to the Union's contention, the Agency provided evidence of a legitimate justification for cancelling the vacancy, and the Arbitrator relied on that evidence—and the lack of conclusive, contrary Union evidence—in rejecting the Union's claim of union animus in the Agency's cancellation of the vacancy.[28] The Union's disagreement with the Arbitrator's evaluation of the evidence does not establish that the award is based on a nonfact, so we deny the nonfact exception.[29]

B. The Union does not establish that the award is contrary to *Letterkenny*.

The Union argues that the award is contrary to law because it is inconsistent with *Letterkenny*.[30] The Authority applies the *Letterkenny* framework in cases alleging discrimination based on protected activity in violation of the Statute.[31] According to the Union, the Arbitrator was required to apply the *Letterkenny* framework in analyzing the Agency's alleged contractual violation because Article 17 of the parties' agreement is "identical to § 7116(a)(2) of the Statute in all relevant aspects."[32]

The Authority has applied statutory standards in assessing the application of contract provisions that mirror, or are intended to be interpreted in the same manner as, the Statute.[33] The Union contends that Article 17 mirrors the Statute and that the *Letterkenny* framework applies to allegations of anti-union discrimination under Article 17.[34] The Agency agrees

[21] Exceptions Form at 7. Member Kiko notes that an agency's selections and selection procedures for filling non-bargaining-unit positions are not subject to the parties' negotiated grievance procedure unless the agency has affirmatively elected to expand the scope of the grievance process. *E.g.*, *AFGE, Loc. 1667*, 70 FLRA 155, 157-58 (2016) (upholding arbitrator's finding that the agency did not elect to include selection to non-bargaining-unit positions under grievance procedure's coverage); *AFGE, Loc. 200*, 68 FLRA 549, 550 (2015) ("Extending a negotiated grievance procedure's scope to cover the filling of supervisory positions is a permissive subject of bargaining."). In this regard, the Agency argued—and the Arbitrator rejected—that "the collective[-]bargaining agreement does not cover non-selection decisions [regarding] non-bargaining[-]unit positions." Award at 23. However, as the Agency does not file exceptions challenging the Arbitrator's substantive-arbitrability determination, she acknowledges that this question is not before the Authority.

[22] Exceptions Form at 7.

[23] *USDA, Food Safety & Inspection Serv.*, 73 FLRA 683, 685 (2023) (*USDA*).

[24] *NTEU, Chapter 46*, 73 FLRA 654, 656 (2023) (*Chapter 46*) (citing *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018) (*Loc. 12*)).

[25] Exceptions Form at 7.

[26] Award at 30 n.3.

[27] *Id.* at 29.

[28] *Id.*; *id.* at 30 n. 3.

[29] *See Chapter 46*, 73 FLRA at 656 (denying nonfact exception arguing the arbitrator erred in not finding evidence sufficient because the excepting party "merely disagree[d] with the [a]rbitrator's evaluation of the evidence"); *Loc. 12*, 70 FLRA at 583 (denying nonfact exception arguing that arbitrator made incorrect finding by not properly assessing relevant facts because the exception "merely challenge[d] the [a]rbitrator's evaluation of the evidence").

[30] Exceptions Form at 9.

[31] *AFGE, Nat'l Council 118*, 70 FLRA 63, 70 (2016) (Member Pizzella concurring on other grounds).

[32] Exceptions Form at 12.

[33] *NLRB Prof'l Ass'n*, 73 FLRA 50, 51 (2022); *AFGE, Loc. 1667*, 70 FLRA 155, 157 (2016) (citing *Ass'n of Civilian Technicians, Show-Me Army Chapter*, 58 FLRA 154, 155 (2002)); *see also U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 4, 6 n.5 (2005) ("The Authority has [applied statutory standards in assessing the application of contract provisions] where one party asserted, and the other party did not dispute, that the contract provision reiterated the statutory provision." (citing *NFFE, Loc. 2010*, 55 FLRA 533, 534 (1999)).

[34] Exceptions Form at 8-9.

with both contentions.[35] Additionally, the Arbitrator applied that framework to resolve the parties' contractual dispute.[36] In these circumstances, we apply statutory standards and review the Union's exception de novo.[37]

In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[38] In applying the standard of de novo review, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[39] More specifically, when assessing an arbitrator's application of *Letterkenny*, the Authority defers to the arbitrator's factual finding concerning an employer's motivation for the allegedly discriminatory action.[40]

The Union argues the award is inconsistent with *Letterkenny* because the Arbitrator did "not draw a reasonable inference, in the [g]rievant's favor, that the [g]rievant's [Union] activity was a motivating factor" in the selection decision.[41] The Arbitrator found the Union did not meet its prima facie burden under *Letterkenny*, because "the evidence falls short of establishing that the [g]rievant's union activities were a motivating or contributing factor in the Agency's actions towards the [g]rievant."[42] The Union disagrees, arguing the "evidence supports a reasonable and compelling conclusion that . . . [the grievant's protected] activity was a motivating factor in the [A]gency's treatment of the [grievant]."[43] However, the Union does not cite any precedent or other legal authority that compelled the Arbitrator to find that union animus motivated the Agency's decision not to select the grievant. As an employer's motivation is a factual finding to which the Authority defers, the Union's mere disagreement with the Arbitrator's finding of no union animus is insufficient to establish that the award is deficient as alleged.[44] Consequently, we deny this exception.

C. The Union does not establish that the Arbitrator exceeded his authority.

The Union argues the Arbitrator exceeded his authority.[45] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[46]

First, the Union argues the Arbitrator failed to "explicitly apply the *Letterkenny* framework"[47] but does not identify how that alleged failure meets the above standard for demonstrating that an arbitrator exceeds their authority.[48] Moreover, contrary to the Union's claim, the Arbitrator cited and applied each step of the *Letterkenny* framework in evaluating the Union's discrimination claim.[49] In this regard, the Arbitrator found: (1) the grievant engaged in protected activities; and (2) the Agency knew about such activities;[50] but (3) the Union did

[35] Award at 26 (finding that "the parties fundamentally agree" the *Letterkenny* framework applies to claims of anti-union discrimination under the parties' agreement); Opp'n Br. at 16 (arguing that the Arbitrator properly applied the *Letterkenny* framework); *id.* at 17 (arguing that Article 17 "mirrors [the S]tatute").
[36] Award at 26-30.
[37] *See, e.g.*, *NLRB*, 61 FLRA 197, 199 (2005) (applying the *Letterkenny* framework where the contract provision was "identical to . . . the Statute in all relevant respects," "the [u]nion specifically argued before the [a]rbitrator that the [a]gency" violated the Statute, "the [a]gency ma[de] statutory (not contractual) objections to the award," and "neither party contend[ed] that the [a]rbitrator applied contractual standards to the dispute").
[38] *AFGE, Council 222*, 73 FLRA 54, 55 (2022).
[39] *Id.*
[40] *NTEU, Chapter 90*, 58 FLRA 390, 393 (2003) (*Chapter 90*) (deferring to arbitrator's factual finding that agency decision not to select grievant for a vacancy was for reasons other than anti-union bias). *Cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993) (holding that the question of whether the proffered reason for an employer's action against an employee was pretextual is factual one); *U.S. Dep't of the Air Force, 60th Air Mobility Wing, Travis Air Force Base, Cal.*, 59 FLRA 632, 636-37 (2004) (upholding judge's "factual finding" that employee's protected activity was a motivating factor in employer's treatment of employee).
[41] Exceptions Form at 9.
[42] Award at 27; *see also id.* at 29 (finding "[n]o evidence . . . that the cancellation [of the unfilled position] was motivated by anti-union" bias).
[43] Exceptions Form at 9.
[44] *See U.S. Dep't of VA, VA Puget Sound Health Care Sys., Seattle, Wash.*, 72 FLRA 441, 444 (2021) (Chairman DuBester concurring) (denying contrary-to-law exception that "constitute[d] mere disagreement with the [a]rbitrator's evaluation of the evidence and testimony"); *Chapter 90*, 58 FLRA at 393 (deferring to arbitrator's factual finding that agency was not motivated by anti-union bias when it did not select a union steward for a position).
[45] Exceptions Form at 8-14.
[46] *USDA*, 73 FLRA at 684.
[47] Exceptions Form at 9.
[48] *See AFGE, Loc. 3917*, 72 FLRA 651, 654 n.39 (2022) (*Loc. 3917*) (Chairman DuBester concurring) (denying exceeded-authority exception where appealing party did "not address the standard for determining whether arbitrators exceeded their authority"); *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 357 (2014) (denying exception where excepting party "asserted that an arbitrator exceeded his authority by issuing an award that was contrary to law, but the party did not provide any arguments pertinent to the standard for evaluating an exceeded-authority exception").
[49] Award at 26-28.
[50] *Id.* at 27.

not demonstrate that "the [g]rievant's union activities were a motivating or contributing factor in the Agency's actions towards the [g]rievant."[51] For these reasons, the Union does not establish the Arbitrator exceeded his authority by allegedly failing to apply *Letterkenny*.[52]

Second, the Union contends that, by denying the Agency's prehearing motion to dismiss and its mid-hearing motion for a directed verdict, the Arbitrator effectively found the Union established its prima facie case of discrimination.[53] According to the Union, the doctrine of functus officio then "bar[red the] arbitrator from reversing [this] prior decision in [the] subsequent award."[54] Under the functus-officio doctrine, once an arbitrator resolves matters submitted to arbitration, the arbitrator is generally without further authority unless they retain jurisdiction or receive permission from the parties.[55]

In its prehearing motion to dismiss, the Agency alleged the Union's grievance was procedurally and substantively inarbitrable.[56] The Arbitrator denied that motion without considering the grievance's merits.[57] Thus, in denying the motion, the Arbitrator did not address whether, let alone hold that, the Union satisfied its prima facie burden.

Regarding the Agency's mid-hearing motion for a directed verdict, we note that federal courts have generally found that a complainant must establish a prima facie case in order to survive a motion for a directed verdict.[58] However, those courts apply Rule 50 of the Federal Rules of Civil Procedure (FRCP).[59] The Authority has held that arbitration proceedings are not bound by the FRCP,[60] and the Union does not contend otherwise. Therefore, the Arbitrator's denial of the Agency's directed-verdict motion was not, without more, a clear finding that the Union established its prima facie case.[61]

Moreover, the Union does not contend that the Arbitrator's denial of the directed-verdict motion resolved the issue submitted to arbitration: whether the Agency discriminated against the grievant in its selection decision.[62] In fact, as the *Letterkenny* framework provides the Agency an opportunity to rebut a prima facie showing of discrimination, the Arbitrator could not completely resolve the discrimination issue by denying a mid-hearing motion before the Agency presented its case.[63] Therefore,

[51] *Id.* In its exceeded-authority arguments, the Union reiterates its claim that the evidence "compelled [the Arbitrator] to conclude that the Agency didn't select [the grievant] for the [unfilled] position due to his known union activity." Exceptions Form at 12. As we explain in sections IV.A. and IV.B. above, this disagreement with the Arbitrator's weighing of the evidence to challenge his factual findings does not establish that the award is deficient.

[52] *See Loc. 3917*, 72 FLRA at 654 n.39 (denying exceeded-authority exception for failure to address the appropriate standard); *AFGE, Loc. 1667*, 70 FLRA 155, 158 (2016) (same); *AFGE, Council of Prison Locs., Council 33*, 68 FLRA 757, 760 (2015) (denying exceeded-authority exception where arbitrator resolved issues submitted to arbitration).

[53] Exceptions Form at 10.

[54] *Id.* at 11.

[55] *U.S. Dep't of VA, Winston-Salem, N.C.*, 73 FLRA 794, 795 (2024).

[56] Award at 11 ("[T]he Agency filed a pre-hearing Motion to Dismiss for Lack of Procedural and Substantive Arbitrability.").

[57] *Id.* at 26 (finding the grievance procedurally and substantively arbitrable).

[58] *See, e.g.*, *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1193 (11th Cir. 2004) (noting that, in evaluating "discrimination cases [under Rule 50], the factors we should consider include the strength of the plaintiff's prima facie case . . . [and] the proof that the employer's explanation is false" (internal quotation mark omitted)); *Honce v. Vigil,* 1 F.3d 1085, 1089 (10th Cir. 1993) ("To survive a directed verdict, plaintiff must establish a prima facie case of discrimination.").

[59] *See* Fed. R. Civ. P. 50(a)(1) ("If a party has been fully heard on an issue . . . and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . grant a motion for judgment as a matter of law.").

[60] *See, e.g.*, *U.S. Dep't of the Navy, Naval Explosive Ordnance Disposal Tech. Div., Indian Head, Md.*, 57 FLRA 280, 285 (2001) (*Indian Head*) ("[T]he [FRCP] were designed to govern procedures in the United States district courts and do not purport to be applicable in administrative proceedings." (citing *AFGE, Loc. 2004*, 55 FLRA 6, 10 (1998) (*Loc. 2004*))).

[61] *See Loc. 2004*, 55 FLRA at 10 (denying exception arguing that FRCP required arbitrator to grant a legal presumption, because "there is no requirement that arbitration proceedings be governed by the [FRCP]"); *see also U.S. Dep't of VA, VA Hosp. Med. Ctr.*, 72 FLRA 677, 680 n.35 (2022) ("[T]he Authority has long held that the [FRCP] do not apply in federal sector arbitrations." (citing *Indian Head*, 57 FLRA at 285)); *AFGE, Loc. 1501*, 7 FLRA 424, 425 (1981) (denying functus-officio argument where record did not support excepting party's claim that arbitrator issued bench ruling resolving issue submitted to arbitration).

[62] *See* Exceptions Form at 11 (arguing that the Arbitrator reversed his "determinations regarding the Union's establishment of its prima facie case").

[63] *Letterkenny*, 35 FLRA at 118 ("If, in response to a prima facie case established by the General Counsel, the respondent offers evidence, *it is necessary to determine* whether the respondent's evidence rebuts the General Counsel's prima facie showing." (emphasis added)).

the doctrine of functus officio would not apply, and we deny the Union's functus-officio exception.[64]

Finally, the Union contends the Arbitrator exceeded his authority by failing to consider the Union's claims that the Agency committed unfair labor practices (ULPs).[65] Under Authority precedent, if parties do not stipulate the issues, then the arbitrator has the authority to frame them, and arbitrators do not exceed their authority where the award is directly responsive to their formulated issues.[66] When arbitrators frame the issues before them as concerning contractual—rather than statutory—claims, the Authority has held that arbitrators are not obligated to consider alleged ULPs.[67]

As the parties did not stipulate issues for arbitration, the Arbitrator framed the issue as whether the Agency "violate[d] the provisions of the collective[-]bargaining agreement when it failed to consider or select the grievant for the [labor-specialist] position."[68] Although the Arbitrator cited and applied the *Letterkenny* standard—a statutory standard—he did so to resolve whether the Agency violated the parties' *agreement*, not whether the Agency violated the *Statute*. Because the Arbitrator framed the issue as involving only a contractual issue, he was not obligated to separately address the Union's ULP allegations. The Union does not allege that the award fails to directly respond to the Arbitrator's framed issues. Accordingly, the Union does not establish the Arbitrator exceeded his authority, and we deny this exception.[69]

V. Decision

We partially dismiss and partially deny the Union's exceptions.

[64] *See NTEU, Chapter 103*, 66 FLRA 416, 417 (2011) (rejecting functus-officio argument where arbitrator's initial award "did not sustain, deny, or otherwise resolve the grievance"); *AFGE, Loc. 2172*, 57 FLRA 625, 628 (2001) (denying functus-officio exception where excepting party claimed arbitrator reversed a bench decision because "nothing in the record indicates that the [a]rbitrator intended his ruling . . . to constitute a final award as to that matter").

[65] Exceptions Form at 13.

[66] *USDA*, 73 FLRA at 684-85.

[67] *E.g.*, *AFGE, Loc. 1822*, 72 FLRA 595, 597 (2021) (Chairman DuBester concurring on other grounds) (finding that arbitrator was not obligated to address ULP allegation where the parties did not stipulate the issues and arbitrator framed the issues to include only alleged violations of contract and agency policy); *see also Ass'n of Civilian Technicians, N.Y. State Council*, 61 FLRA 664, 665-66 (2006) (declining to reconsider Authority's practice of deferring to arbitrators' formulations of the issues even when a party alleges—but an arbitrator does not frame or resolve—a ULP).

[68] Award at 2.

[69] *See Nat'l Weather Serv. Emps. Org.*, 72 FLRA 1, 2 (2021) (Member DuBester dissenting in part on other grounds) (denying exceeded-authority exception where arbitrator declined to consider unstipulated issue of ULP allegation); *NTEU*, 63 FLRA 198, 200-01 (2009) (denying exceeded-authority exception arguing arbitrator erred by not considering ULP allegation where arbitrator framed issue as contractual).

Chairman Grundmann, concurring:

I agree with the decision in all respects. I write separately because this case highlights one area of Authority precedent that calls for clarification: Under what circumstances will the Authority apply *statutory* standards to review arbitrators' contract interpretations?

The answer to this question can have meaningful consequences. If statutory standards apply, then the Authority reviews the arbitrator's contractual findings de novo; if statutory standards do not apply, then the arbitrator's contractual findings are subject to deferential, "essence" review.[1] In some decisions, the Authority has been able to assume that an arbitrator applied statutory standards or resolved statutory issues, because the arbitrators' awards were ultimately consistent with statutory standards.[2] However, in other decisions, the lack of clarity as to whether an arbitrator resolved a contractual or a statutory issue has required the Authority to remand the award for the arbitrator to make additional findings[3] – thereby imposing additional costs on the parties, particularly if they are unable to settle their dispute on remand.

There is something to be said for narrowly restricting the situations in which the Authority applies statutory standards to review arbitrators' contract interpretations, even where the contract wording mirrors statutory provisions. As the Authority stated in one decision:

> [I]n cases where the Authority has reviewed whether an arbitral interpretation of contractual wording is consistent with the Authority's interpretation of the [Federal Service Labor-Management Relations Statute (the Statute)], statutory standards were raised to and/or addressed by the arbitrator. There is no reason advanced that the Authority should extend its review to other cases, especially since finding a statutory unfair labor practice raised every time a contract provision contains wording similar to that describing a statutory obligation could significantly expand the number of decisions subject to judicial review, thereby undercutting Congress' intent that arbitration awards be final.[4]

In this connection, the Authority quoted the U.S. Court of Appeals for the D.C. Circuit's admonition that "[a]n interpretation that permitted judicial review of any labor dispute in which the underlying conduct *could* be characterized as a statutory unfair labor practice drastically limits the finality which Congress intended to attach to arbitral awards."[5]

However, it seems that the Authority has been inconsistent with regard to when it will apply statutory standards to assess arbitrator's contract interpretations. The Authority often has stated it applies statutory

[1] *See U.S. Dep't of the Navy, Marine Corps Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 546 (2014) (Member Pizzella dissenting) (finding that in statutory duty-to-bargain cases, "arbitrators are required to apply statutory burdens of proof," but in contractual duty-to-bargain cases, "the deferential essence standard" applies to the arbitrator's contract interpretation, "unless [the] contract provision mirrors the [Federal Service Labor-Management Relations] Statute" (the Statute)); *AFGE, Loc. 3974*, 67 FLRA 306, 308 (2014) (finding it "critical to ascertain whether the [a]rbitrator addressed only a contractual issue, only a statutory issue, or both issues because, to the extent that he addressed a statutory issue, he was required to apply . . . statutory-duty-to-bargain principles"); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 66 FLRA 978, 981 (2012) (*Lompoc*) (finding that, "if the source of the bargaining obligation" was a contract provision that mirrored the Statute, then the arbitrator's award would be contrary to law, but if the arbitrator was "applying a contract provision that d[id] not mirror the Statute, . . . then the question is one of contract interpretation, and the award would not be contrary to law"); *U.S. DOD, Nat'l Guard Bureau, Adjutant Gen., Kan. Nat'l Guard*, 57 FLRA 934, 936 (2002) (*Kan. Nat'l Guard*) (Chairman Cabaniss dissenting) ("In resolving a grievance alleging . . . a failure [to satisfy a statutory bargaining obligation], an arbitrator must apply the same standards and burdens applied by an administrative law judge in a proceeding under § 7118 of the Statute. . . . By contrast, where a grievance involves only a dispute whether a contractual . . . bargaining obligation has been violated, the issue of whether the parties have complied with the agreement becomes a matter of contract interpretation for the arbitrator. . . . In those circumstances, the Authority applies the deferential 'essence' standard to the arbitrator's contract interpretation." (internal quotation marks omitted)).

[2] *See AFGE, Loc. 3506*, 65 FLRA 30, 32-33 (2010) (assuming the arbitrator resolved statutory issues, but finding the excepting party did not establish the award was contrary to law); *AFGE, Loc. 1164*, 64 FLRA 599, 600-01 (2010) (assuming that statutory principles applied to arbitrator's interpretation of agreement, but finding the excepting party did not establish the award was contrary to law).

[3] *U.S. DOD, Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, 43 FLRA 147, 153-54 (1991) (*St. Louis*) (remanding award for clarification where contract provision was "a reiteration of" a provision of the Statute, but the Authority was "unable to ascertain from the award whether the [a]rbitrator applied only the provisions of the agreement, or the provisions of the Statute, as well").

[4] *AFGE, Loc. 507*, 58 FLRA 378, 379-80 (2003) (Chairman Cabaniss dissenting) (citations omitted).

[5] *Id.* (quoting *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 66 (D.C. Cir. 1987)).

standards when the contract provisions at issue "mirror," or are intended to be interpreted in the same manner as, the Statute.[6] The Authority also has stated that, by doing so, it is "exercis[ing] care" to ensure an arbitrator's interpretation of "mirroring" contract wording is consistent with the Statute, as well as the parties' agreement.[7] It appears that, in some decisions, the presence of mirroring contract wording alone has been sufficient for the Authority to treat the contract and the statutory provision as having the same meaning.[8] In fact, the Authority has sometimes held or implied that statutory principles apply even if the contractual wording does not entirely *match* the relevant statutory wording.[9]

However, in other decisions, the Authority has qualified these principles, stating that it will apply statutory standards "where one party asserted, and the other party did not dispute, that the contract provision reiterated the statutory provision."[10] The Authority sometimes has held or implied that this is an *additional* requirement that must be met before the Authority will apply statutory standards to review an arbitrator's interpretation of "mirroring" contract provisions.[11] Consistent with this notion, in some decisions, the Authority has applied statutory principles where provisions mirrored the Statute *and* the parties made statutory arguments about the agreement at arbitration or

[6] *NLRB Prof'l Ass'n*, 73 FLRA 50, 51 (2022) (*NLRBPA*); *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, Red River, Texarkana, Tex.*, 67 FLRA 609, 613 (2014) (Member Pizzella dissenting on other grounds); *Lompoc*, 66 FLRA at 980; *U.S. Dep't of VA, Reg'l Off., Winston-Salem, N.C.*, 66 FLRA 34, 39 (2011); *AFGE*, 59 FLRA 767, 769 (2004) (*AFGE*) (Chairman Cabaniss concurring on other grounds; Member Pope dissenting on other grounds); *U.S. Dep't of the Treasury, U.S. Customs Serv., Port of N.Y. & Newark*, 57 FLRA 718, 721 (2002) (*Newark*), *pet. for review denied sub nom.*, *NTEU, Chapter 161 v. FLRA*, 64 F. App'x 245 (D.C. Cir. Apr. 25, 2003).

[7] *NLRBPA*, 73 FLRA at 51 n.23; *NLRB*, 72 FLRA 644, 646 (2022) (Chairman DuBester concurring; Member Abbott concurring); *AFGE, Loc. 1045*, 64 FLRA 520, 521 (2010) (*Loc. 1045*). *Cf. GSA, Region 9, L.A., Cal.*, 56 FLRA 683, 685 (2000) (*GSA*) (stating that, "where a disputed contract provision restates a provision of the Statute, the Authority must exercise care to ensure that the arbitrator's interpretation is consistent with the Authority precedent interpreting the statutory provision" (internal quotation marks omitted)).

[8] *U.S. Marine Corps, Air Ground Combat Ctr., Twentynine Palms, Cal.*, 73 FLRA 379, 380 n.14 (2022) (Member Kiko dissenting on other grounds) (after resolving contrary-to-law exception, Authority declined to separately address essence exception because contract provision "mirror[ed]" statutory provision); *U.S. Dep't of Com., Nat'l Inst. of Standards & Tech.*, 71 FLRA 199, 200 (2019) (*NIST*) (Member DuBester dissenting on other grounds) (finding statutory standards apply "unless the contract language indicates that the contractual . . . obligations differ substantively from the obligations that the Statute imposes"); *U.S. Dep't of Energy, Rocky Flat Field Off., Golden, Colo.*, 59 FLRA 159, 163-64 (2003) (Chairman Cabaniss concurring on other grounds) (after denying contrary-to-law exception, Authority summarily rejected challenge to arbitrator's interpretation of contract provision that mirrored the Statute); *NAGE, Loc., R14-143*, 55 FLRA 317, 318-19 (1999) (Chair Segal concurring in part and dissenting in part) (after denying essence exception to arbitrator's finding of no contract violation, Authority stated that, because excepting party did not argue that "the contract provide[d] any different bargaining rights than exist under the Statute," and did "not advance[] any argument to show why the [a]rbitrator's findings and conclusions regarding the [excepting party's] failure to prove a violation of the contractual duty to bargain d[id] not encompass the statutory duty, as well," the excepting party "provided no basis for determining that the award [was] contrary to law").

[9] *See NIST*, 71 FLRA at 201 (applying statutory standards where the contractual wording "*include[d] references to* the Statute, and use[d] wording that *resemble[d] or* restate[d] statutory wording" (emphasis added)); *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 70 FLRA 924, 926 n.12 (2018) (*Austin*) (Member DuBester concurring in part and dissenting in part on other grounds) (after adjusting remedy based on application of the Fair Labor Standards Act (FLSA), the Authority also adjusted the remedy "[t]o the extent" it was also "based . . . on contractual violations," because "the relevant contract provision *refer[red] to* compensation for overtime work '[u]nder the FLSA'" (emphasis added)); *AFGE*, 59 FLRA at 769 (applying statutory standards where the contract provision "*specifically reference[d]* the Statute" (emphasis added)).

[10] *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 4, 4 n.5 (citing *NFFE, Loc. 2010*, 55 FLRA 533, 534 (1999) (*Loc. 2010*)), *recons. denied*, 61 FLRA 393 (2005); *Ass'n of Civilian Technicians, Show-Me Army Chapter*, 58 FLRA 154, 155 (2002) (where arbitrator did not discuss whether parties intended the contract provision and the statutory provision to be interpreted in the same manner).

[11] *AFGE, Loc. 1667*, 70 FLRA 155, 157 (2016) (stating the Authority will review an arbitrator's interpretation of contract provisions de novo "where the contract provision's language 'mirrors' – is similar or identical to – statutory language, *and in addition*, where one party asserts, and the other party does not dispute, that the parties intended that the contract provision be interpreted in the same manner as the statutory provision" (emphasis added)); *see also AFGE, Loc. 2142*, 52 FLRA 1518, 1521 n.3 (1997) (finding that, despite the contract provision "mirror[ing]" the Statute, there was "no issue before [the Authority] involving the award's consistency with" the Statute where the excepting party did "not claim that the award [was] inconsistent with [the Statute] and there [was] nothing in the record on which to conclude that the award [was] based on an interpretation of" the Statute).

before the Authority.[12] The Authority also has sometimes declined to apply statutory standards where no party claimed that a contract provision mirrored the Statute.[13]

Yet, in still other decisions, the Authority has: relied on the *absence* of a claim that contract provisions differed from the Statute to *apply* statutory standards;[14] implied that the burden is on the parties to affirmatively argue that mirroring contract provisions differ from the Statute, in order to avoid the application of statutory standards;[15] and even applied statutory standards even

[12] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 63 FLRA 351, 354 (2009) (*Coleman*) (applying statutory standards where the contract provision was "identical to . . . the Statute in all relevant aspects," "the [u]nion specifically argued to the [a]rbitrator that the [a]gency had violated both the Statute and the parties' agreement, [and] the [a]gency framed its arguments to the [a]rbitrator in terms of both the Statute and the parties' agreement"); *NLRB*, 61 FLRA 197, 199 (2005) (applying statutory standards where the contract provision was "identical to . . . the Statute in all relevant respects," "the [u]nion specifically argued before the [a]rbitrator that the [a]gency" violated the Statute, "the [a]gency ma[de] statutory (not contractual) objections to the award," and "neither party contend[ed] that the [a]rbitrator applied contractual standards to the dispute"); *Loc. 2010*, 55 FLRA at 534 (applying statutory standards where the contract provision "parallel[led]" the Statute and the opposing party did not dispute the excepting party's claim that the agreement "simply reiterate[d]" the Statute).

[13] *See AFGE, Loc. 2152*, 69 FLRA 149, 151 (2015) (*Loc. 2152*) (declining to apply statutory standards where, among other things, the excepting party did not claim that the contract mirrored the Statute); *AFGE, Loc. 2096*, 67 FLRA 30, 31 (2012) (relying on, among other things, the fact that "there [was] no claim that the pertinent agreement provision mirror[ed] the Statute" to find a grievance alleged contractual claims); *NTEU*, 66 FLRA 577, 581 n.11 (2012) (rejecting excepting party's reliance on statutory standards because excepting party did not argue the contract mirrored the Statute); *U.S. Dep't of the Treasury, IRS*, 66 FLRA 342, 346 n.15 (2011) (*IRS*) (Member Beck dissenting) (noting that the excepting party did not claim that the parties intended the agreements to mirror the relevant regulatory and statutory provisions); *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 240, 240 n.5 (2011) (rejecting excepting party's statutory arguments to challenge arbitrator's finding of contract violation where excepting party did not assert that the contract provisions mirrored the Statute); *Broad. Bd. of Governors, Off. of Cuba Broad.*, 64 FLRA 888, 891 n.4 (2010) (declining to apply statutory principles where the excepting party "d[id] not allege, and there [was] no basis for concluding, that . . . the agreement restate[d] a provision of the Statute"). *Cf. AFGE, Loc. 1633*, 70 FLRA 519, 520 (2018) (*Loc. 1633*) (declining to apply statutory standards where "the [a]rbitrator did not find, the [excepting party did] not claim, and the record d[id] not otherwise demonstrate," that the contractual wording "mirror[ed], or was intended to be interpreted in the same manner as, the Statute"); *U.S. DHS, U.S. CBP*, 66 FLRA 198, 201 n.12 (2011) (Member Beck dissenting in part on other grounds) (noting that, although excepting party correctly claimed one contract provision restated statutory obligations, the party did "not allege, and there [was] no basis for concluding, that" another contract provision on which the arbitrator relied restated statutory obligations); *Kan. Nat'l Guard*, 57 FLRA at 936 n.8 (noting the excepting party did "not allege, and there [was] no basis for concluding, that either [contract provision at issue] . . . restate[d] a provision of the Statute").

[14] *Loc. 1045*, 64 FLRA at 521 (applying statutory standards where party did not dispute that contract provision "parallel[led]" the Statute); *Newark*, 57 FLRA at 721 ("[I]n the absence of any claim to the contrary, we find that the contractual notice requirements are intended to be interpreted in the same manner as the statutory notice requirements described above.").

[15] *U.S. Dep't of the Treasury, Customs Serv., Se. Region*, 43 FLRA 921, 924 (1992), *rev'd on other grounds sub nom., U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682 (D.C. Cir. 1994) (stating that, if a contract provision "reiterates a provision in the Statute," and "the parties intend such a provision to be interpreted differently from the Statute, 'that should be made known to the arbitrator, who can then clearly specify the basis for an award'" (quoting *St. Louis*, 43 FLRA at 153)).

where a party *did* dispute that such standards should apply.[16]

In addition to considering what the parties have (or have not) argued, the Authority has often also looked to what the *arbitrator* found – or did not find. For example, the Authority has applied statutory standards where the arbitrator found the agreement was intended to impose statutory requirements.[17] By contrast, the Authority has declined to apply statutory standards where the arbitrator found that a contract provision did *not* mirror, or was *not* intended to be interpreted in the same manner as, the law or regulation at issue.[18] Additionally, the Authority has sometimes declined to apply statutory standards where the arbitrator did not affirmatively find that the contract mirrored the Statute.[19]

Moreover, the Authority sometimes has held or implied that mirroring principles are not limited to contract provisions that mirror the Statute, but extend to other statutes or regulations.[20] In other cases, the Authority has implied the contrary.[21]

I believe that, in an appropriate case, the Authority should clarify its precedent regarding when it will, and will not, apply statutory standards to review arbitrators' contract interpretations. Nevertheless, in this case – where the Arbitrator applied statutory standards and both parties appear to agree that they apply – I believe it is appropriate to review, de novo, whether the award is consistent with those standards.

Therefore, I concur.

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[16] *NLRBPA*, 73 FLRA at 52 (Authority "reject[ed a party's]argument that statutory standards do not govern [the Authority's] review," and applied statutory standards).

[17] *AFGE, Nat'l Council 118*, 69 FLRA 183, 183-84, 187-91 (2016) (Member Pizzella dissenting in part) (applying statutory standards where the arbitrator found a party did not violate the Statute "or provisions of the parties' collective-bargaining agreement that mirror[ed] relevant provisions of the Statute," and where arbitrator "found that the relevant provisions of the parties' agreement 'essentially parallel[led]' the Statute's provisions"). *Cf. GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 73 (2014) (Member Pizzella dissenting) (arbitrator found contract "mirror[ed]" the Statute, and Authority denied exception to that finding because, among other things, the agreement's "plain wording . . . [was] nearly identical to the wording in" the Statute); *Coleman*, 63 FLRA at 354 (applying statutory standards where, among other things, "the [a]rbitrator set forth both the relevant statutory language and the contractual language"); *GSA*, 56 FLRA at 685 (applying Authority precedent involving the Statute where "the [a]rbitrator found that . . . the parties' agreement 'parallel[led]' . . . the Statute").

[18] *AFGE, Loc. 2128*, 66 FLRA 801, 802-03 (2012) (citing *U.S. Dep't of the Army Headquarters, I Corps & Fort Lewis, Wash.*, 65 FLRA 699, 702 (2011) (*Fort Lewis*)). *Cf. Loc. 1633*, 70 FLRA at 520 (declining to apply statutory standards where "the [a]rbitrator did not find, and the [excepting party did] not claim, and the record d[id] not otherwise demonstrate," that the contractual wording "mirror[ed], or was intended to be interpreted in the same manner as, the Statute").

[19] *Loc. 2152*, 69 FLRA at 151 (declining to apply statutory standards where, among other things, "the [a]rbitrator did not find . . . that [the contract] mirror[red] the Statute"); *IRS*, 66 FLRA at 346 n.15 (noting the arbitrator did not find that the parties intended the agreements to mirror the relevant regulatory and statutory provisions); *Fort Lewis*, 65 FLRA at 702 (despite excepting party's claim that contract mirrored the statute and regulation at issue, the Authority declined to apply statutory and regulatory standards because, among other things, the arbitrator did not find the contractor mirrored, or was intended to be interpreted in the same manner as, the statute and regulation at issue); *AFGE, Loc. 3506*, 64 FLRA 583, 584 (2010) (although "some of the cited contractual provisions appear[ed] to mirror statutory provisions" the arbitrator "did not address, and it [was] unclear, whether the parties intended their agreement to mirror the Statute or whether the grievance otherwise involved statutory issues," so the Authority remanded for clarification). *Cf. AFGE, Nat'l Border Patrol Council, Loc. 2595*, 67 FLRA 361, 366 (2014) (assuming, without deciding, that the arbitrator resolved statutory issues where the arbitrator did not cite the Statute or state whether he "considered the . . . issue to be statutory, or purely contractual, in nature," or whether he "viewed . . . the [collective-bargaining agreement] to impose the same requirements as the Statute," and the award was not contrary to the pertinent statutory standards).

[20] *Austin*, 70 FLRA at 926 n.12 (the FLSA); *Antilles Consol. Educ. Ass'n*, 64 FLRA 675, 676 n.2 (the Age Discrimination in Employment Act) (citing *Newark*, 57 FLRA at 721; *U.S. DOJ, Fed. Corr. Facility, El Reno, Okla.*, 51 FLRA 584, 589 n.5 (1995)).

[21] *Fort Lewis*, 65 FLRA at 702 (stating that, "while the Authority has applied statutory standards to contract provisions that 'mirror . . . *the Statute*[,]'" the statute and regulation at issue in the case were not "part of the Statute" (quoting *AFGE*, 59 FLRA at 769)).