

**73 FLRA No. 177**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
COLMERY-O'NEIL VA MEDICAL CENTER  
TOPEKA, KANSAS  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 906  
(Union)

0-AR-5930

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DECISION

July 8, 2024  
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Before the Authority: Susan Tsui Grundmann, Chairman,  
and Colleen Duffy Kiko, Member

**I. Statement of the Case**

Arbitrator Richard D. Kimbel found the Agency violated the parties' collective-bargaining agreement by failing to maintain records of the time certain employees (the grievants) spent undergoing mandatory COVID-19 testing, and produce the grievants' testing records to the Union. The Union alleged the Agency failed to properly compensate the grievants for time spent undergoing testing, the Arbitrator drew an adverse inference against the Agency due to its failure to maintain and produce the requisite records, and he awarded the grievants backpay. The Agency filed exceptions to the award on contrary-to-law and exceeded-authority grounds. For the reasons explained below, we dismiss the Agency's contrary-to-law exception, and partially dismiss and partially deny its exceeded-authority exception.

**II. Background and Arbitrator's Award**

The grievants work as nurses in an Agency community-living center under the same supervisors

(supervisors). On April 22, 2022, the Agency issued a notice implementing mandatory weekly COVID-19 testing for vaccinated employees (the notice). The notice required employees to undergo testing during "duty hours," and provided that employees who were "unable to obtain a test during . . . duty hours" would be compensated with "normal overtime hours."<sup>1</sup> The notice also required unvaccinated employees, or employees who did not disclose their vaccine status, to be tested every two to three days. The supervisors informed one grievant that "she was not going to be compensated" for testing time outside duty hours.<sup>2</sup>

The Union then filed a request for information with the Agency, seeking information to determine whether any grievant's testing time was uncompensated (the May 2022 request).<sup>3</sup> In June 2022, the Agency declined to produce the testing records, stating it "does not maintain a list of employees who have" undergone testing "outside duty time,"<sup>4</sup> and that the request was "too burdensome."<sup>5</sup> The Union then filed the grievance at issue in this case, which is described further below.<sup>6</sup> The Agency denied the grievance and the Union invoked arbitration.

Before the arbitration hearing, the Union made additional unsuccessful attempts to obtain records of the days and times the grievants were tested from "April 22, 2022[,] to July 8, 2022" (testing period).<sup>7</sup> After the Union filed a supplemental request in April 2023 (the April 2023 request), the Agency produced "some of the requested information[,] but not the testing records" of affected grievants.<sup>8</sup>

The Union's grievance alleged, in relevant part, that the Agency violated Articles 21 and 54 of the parties' agreement concerning overtime compensation (Articles 21 and 54, respectively), the Back Pay Act (BPA),<sup>9</sup> and the Fair Labor Standards Act (FLSA)<sup>10</sup> by failing to pay the grievants for their testing time. As remedies, the grievance requested, in part, that the Agency: (1) provide the information sought in the May 2022 request so the Union could determine affected employees, and (2) "make whole any employee[s]" who were not compensated for their testing time.<sup>11</sup>

At arbitration, the parties did not stipulate an issue. The Arbitrator framed the issues as "[d]id the Agency provide the necessary information requested by the Union to determine if the [grievants'] wages per

<sup>1</sup> Exceptions, Union Ex. 3 (Notice) at 3; *see also* Exceptions, Union Ex. 7 at 1 (quoting Notice).

<sup>2</sup> Award at 9.

<sup>3</sup> Exceptions, Agency Ex. 1 (May 2022 Request) at 1-2 (asking the Agency to identify, among other things, the employees who were tested outside of duty time).

<sup>4</sup> Exceptions, Agency Ex. 2 (Memorandum) at 2.

<sup>5</sup> Award at 12.

<sup>6</sup> Exceptions, Joint Ex. 2 (Grievance) at 1.

<sup>7</sup> Award at 15.

<sup>8</sup> *Id.* at 13 (citing Exceptions, Joint Ex. 4 (April 2023 Request)).

<sup>9</sup> 5 U.S.C. § 5596.

<sup>10</sup> 29 U.S.C. §§ 201-219.

<sup>11</sup> Grievance at 5; *see also* Award at 12.

Article 21 [and] Article 54 . . . were negatively impacted by the [Agency’s] notice regarding the mandatory [COVID] testing program” during the relevant time period, and, “[i]f not[,] what shall be the remedy?”<sup>12</sup>

The Arbitrator first addressed an Agency argument that the grievance was not procedurally arbitrable because it had been filed at the step applicable to a “group grievance” and the grievance named only a single grievant.<sup>13</sup> The Arbitrator rejected that argument, citing references to “[e]mployees” throughout the grievance, and crediting the Union president’s un rebutted testimony that the Union attached one grievant’s emails with one of the supervisors concerning testing compensation as “demonstrative evidence only.”<sup>14</sup>

The Arbitrator also rejected an Agency argument that § 7116(d) of the Federal Service Labor-Management Statute (Statute)<sup>15</sup> barred the grievance. Specifically, he concluded that, although the Union filed two unfair-labor-practice (ULP) charges concerning the April 2023 request,<sup>16</sup> those charges were filed after the grievance and did not “raise the same issues” as the grievance.<sup>17</sup> In support of the latter conclusion, the Arbitrator explained that, “unlike the ULP charges, the grievance [was] not alleging a violation of § 7114(b)” of the Statute<sup>18</sup> for failure to respond to information requests, but instead concerned the “fair and proper compensation for employees who were required to receive COVID testing.”<sup>19</sup> Regarding the April 2023 information request, he explained that the “issue in the grievance [was] not the Agency’s refusal to turn over information; that would in fact be impossible, as the grievance was written eleven months before the information request at issue in the ULP charges was filed.”<sup>20</sup>

On the merits, the Arbitrator found the grievants “performed their testing obligations,”<sup>21</sup> the Agency had agreed “to make [bargaining-unit employees] whole”<sup>22</sup> once the Union identified affected employees, and the

Agency “neglected to show any proof”<sup>23</sup> that the grievants did not report for testing. He also determined that the Agency admitted it failed to maintain accurate “records of the date and time of employee” medical visits, even though the FLSA, an Agency directive, and various regulations required the Agency to maintain accurate records of employees’ testing and work hours.<sup>24</sup> The Arbitrator found the Agency’s failure to maintain “adequate [COVID] testing records” made it “impractical” for the grievants “to acquire the compensation due for the [required] testing.”<sup>25</sup> The Arbitrator further found that the Agency’s failure to maintain the required records did not excuse it from paying the overtime to which the grievants were entitled under the parties’ agreement and the FLSA.<sup>26</sup>

Based on the Agency’s failure to maintain and provide testing records, the Arbitrator drew an “[a]dverse [i]nference,” and found the grievants were entitled to recover backpay.<sup>27</sup> The Arbitrator concluded the Agency violated the agreement as alleged, which he concluded was an “unjustified personnel action” under the BPA.<sup>28</sup> Consequently, the Arbitrator directed the Agency to pay each grievant two hours of overtime for each three-day testing interval during the testing period.<sup>29</sup>

On November 15, 2023, the Agency filed exceptions to the award. On December 19, 2023, the Union filed an opposition to the Agency’s exceptions.

### **III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Agency’s contrary-to-law exception, and partially bar the exceeded-authority exception.**

Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any evidence

<sup>12</sup> Award at 5.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Id.* (citing Exceptions, Attach. 1, Tr. (Tr.) at 51-52).

<sup>15</sup> 5 U.S.C. § 7116(d) (“issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice . . . , but not under both procedures”).

<sup>16</sup> See Award at 14 (finding the Union filed a ULP charge on May 22, 2023, and another on August 1, 2023, and that both concerned the Agency’s failure to turn over information the Union sought in the April 2023 request).

<sup>17</sup> *Id.*

<sup>18</sup> 5 U.S.C. § 7114(b) (describing statutory duty to, as relevant here, furnish certain types of information to the exclusive representative upon request).

<sup>19</sup> Award at 14 (internal quotation mark omitted).

<sup>20</sup> *Id.* at 15.

<sup>21</sup> *Id.* at 19.

<sup>22</sup> *Id.* at 12 (citing Exceptions, Joint Ex. 3 (Step 3 Grievance Resp.)); see also Step 3 Grievance Resp. at 3 (“The Agency agrees to make employees who were negatively impacted whole, once they can be identified and it is verified that they were indeed tested while off duty or on leave.”).

<sup>23</sup> Award at 18.

<sup>24</sup> *Id.* at 17; see also *id.* at 15.

<sup>25</sup> *Id.* at 17.

<sup>26</sup> *Id.* at 18-19 & n.47 (citing Article 49 pertaining to records; Articles 21 and 54 as pertaining to overtime).

<sup>27</sup> *Id.* at 19 n.48; see also *id.* at 17-18 (finding that the grievants “should not be punished for Agency management’s negligence and lack of compliance” with regulations and its own policies, and the Agency should therefore “be required to make [the grievants] whole”).

<sup>28</sup> *Id.* at 19 (citing 5 U.S.C. § 5596).

<sup>29</sup> *Id.*

or arguments that could have been, but were not, presented to the arbitrator.<sup>30</sup>

The Agency argues the award is contrary to the BPA because the Arbitrator awarded backpay without finding the grievants suffered an “actual loss” of pay.<sup>31</sup> In its exceptions form, the Agency admits it did not raise this argument to the Arbitrator, but asserts it could not have known to do so because it “did not know [the Arbitrator] would base [the] award” on the BPA.<sup>32</sup> However, in its grievance, the Union expressly alleged a violation of the BPA, and requested backpay.<sup>33</sup> Additionally, the parties disputed whether the Agency owed any employees backpay at arbitration.<sup>34</sup> Therefore, the Agency should have known to raise its argument regarding the BPA to the Arbitrator. As it did not do so, it cannot raise the argument now.<sup>35</sup> We therefore dismiss the Agency’s contrary-to-law exception.<sup>36</sup>

The Agency also argues the Arbitrator exceeded his authority by awarding relief to all grievants even though, in the grievance, “the Union specifically restricted its grievants and requested remedy to ‘employee[s] who [were] illegally required to obtain mandatory COVID testing without compensation . . .’ and to employees ‘required to obtain mandatory testing outside of their duty hours.’”<sup>37</sup> In its opening statement at arbitration, the Union – based on the Agency’s failure to maintain and provide the Union with the information necessary to determine the specific hours each grievant reported for the required testing – expressly requested the Arbitrator to draw an adverse inference that each grievant was entitled to compensation for time spent on their COVID testing.<sup>38</sup> The Agency neither addressed the Union’s request in its subsequent opening statement,<sup>39</sup> nor filed a post-hearing

brief,<sup>40</sup> and there is no other record evidence that the Agency argued to the Arbitrator that he would exceed his authority if he granted the Union’s request. As the Agency could have done so, but did not, it cannot raise this exceeded-authority argument now. We therefore partially dismiss the exceeded-authority exception.<sup>41</sup>

#### IV. Analysis and Conclusion: The Arbitrator did not exceed his authority.

The Agency argues the Arbitrator exceeded his authority by resolving an issue not submitted to arbitration.<sup>42</sup> Arbitrators exceed their authority when they resolve an issue not submitted to arbitration.<sup>43</sup> When parties do not stipulate to the issues, arbitrators have the discretion to frame them, and the Authority accords the arbitrator’s formulation substantial deference.<sup>44</sup> The Authority has held that arbitrators do not exceed their authority where the award is directly responsive to the formulated issues.<sup>45</sup> In formulating and resolving the issues before them, arbitrators may rely on the arguments that the parties raise in the proceeding.<sup>46</sup>

The Agency asserts the parties did not ask the Arbitrator to decide whether the Agency violated the agreement by failing to provide the Union with the information it requested.<sup>47</sup> To support this assertion, the Agency maintains the Arbitrator’s resolution of that issue contradicts his statement that “the issue in the grievance is not the Agency’s refusal to turn over information.”<sup>48</sup> However, as noted above, the Arbitrator made this statement in the context of determining that the issues raised by the grievance and the ULPs were distinct for purposes of applying § 7116(d) of the Statute, and not for purposes of defining or limiting the scope of his authority

<sup>30</sup> *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 73 FLRA 82, 83-84 (2022) (citing 5 C.F.R. §§ 2425.4(c), 2429.5).

<sup>31</sup> Exceptions Br. at 7.

<sup>32</sup> Exceptions Form at 4.

<sup>33</sup> See Grievance at 1, 3, 5.

<sup>34</sup> See, e.g., Tr. at 18-20, 28-29, 47-49 (discussing compensation for employees who were tested without pay).

<sup>35</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mendota, Cal.*, 73 FLRA 474, 475-76 (2023) (*BOP Mendota*) (citing *USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.4 (2011)) (dismissing agency’s exception alleging award was contrary to the FLSA where agency “did not address the [u]nion’s requested FLSA remedies, either at arbitration or in its . . . post-hearing brief”); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 189 (2009) (dismissing agency’s exception alleging overtime award was contrary to the BPA where agency “was aware of the request for overtime at the time of the arbitration hearing” but there was “no indication in the award that the [a]gency raised to the [a]rbitrator its claims regarding the [BPA]”).

<sup>36</sup> *BOP Mendota*, 73 FLRA at 476 (citing *AFGE, Loc. 2338*, 73 FLRA 229, 230 (2022); *U.S. Dep’t of VA, James A. Haley VAMC, Tampa, Fla.*, 73 FLRA 47, 48 (2022)).

<sup>37</sup> Exceptions Br. at 6 (quoting Grievance at 4-5).

<sup>38</sup> Tr. at 26-28.

<sup>39</sup> *Id.* at 28-30.

<sup>40</sup> Award at 4, 7 n.11 (stating that the Agency filed no brief); Opp’n at 12-13 (asserting Agency did not address either the adverse inference request or requested remedy at hearing or by filing a brief).

<sup>41</sup> *SSA*, 73 FLRA 708, 712 (2023) (partially dismissing exceeded-authority exception for failure to raise argument to arbitrator).

<sup>42</sup> Exceptions Br. at 5-6.

<sup>43</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Victorville, Cal.*, 73 FLRA 835, 836 (2024) (*BOP Victorville*) (citing *USDA, Food Safety & Inspection Serv.*, 73 FLRA 683, 684 (2023) (*USDA*)).

<sup>44</sup> *Id.* at 836-37 (citing *USDA*, 73 FLRA at 684-85; *AFGE, Loc. 522*, 66 FLRA 560, 562 (2012)).

<sup>45</sup> *Id.* at 837 (citing *USDA*, 73 FLRA at 685).

<sup>46</sup> *Id.* (citing *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 966 (2015)).

<sup>47</sup> Exceptions Br. at 5-6.

<sup>48</sup> *Id.* at 6 (quoting Award at 15).

to resolve the grievance. Whatever uncertainty remains on this point is resolved by the Arbitrator's explicit framing of the issue before him – specifically, whether the Agency “provide[d] the necessary information requested by the Union” to determine violations of Articles 21 and 54.<sup>49</sup> This framing is wholly consistent with the Union's grievance, which alleged the Agency failed to provide information necessary for it to ascertain which employees were affected by the alleged violations, and requested the Agency provide the information as a remedy.<sup>50</sup> Therefore, the Arbitrator's consideration of that issue is responsive to both the framed issue and arguments raised in the proceedings. As such, the Agency's argument provides no basis for finding the Arbitrator exceeded his authority.<sup>51</sup>

We deny this exception.

## V. Decision

We partially dismiss, and partially deny, the Agency's exceptions.

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<sup>49</sup> Award at 5.

<sup>50</sup> Grievance at 2-3, 5.

<sup>51</sup> *BOP Victorville*, 73 FLRA at 837 (citing *USDA*, 73 FLRA at 684-85) (finding an arbitrator did not exceed his authority by resolving an issue raised in grievance).