65 FLRA No. 148

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 648
NATIONAL COUNCIL
OF FIELD LABOR LOCALS
(Union)

and

UNITED STATES
DEPARTMENT OF LABOR
CHICAGO REGIONAL OFFICE
(Agency)

0-AR-4423

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DECISION

April 8, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Anne L. Draznin filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations.[1] The Agency filed an opposition to the Union's exceptions.

The Arbitrator found that the Agency had just cause to suspend the grievant for fourteen days, but she directed the Agency to rescind any additional punishments that the Agency had imposed and to notify the Union and the grievant once it had done so.

For the reasons that follow, we dismiss the Union's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

During a performance progress review meeting between the grievant and her first-line supervisor (the first-line supervisor), the grievant allegedly began "yelling and gesticulating in an 'unprofessional, disruptive and threatening' manner." Award at 5. The first-line supervisor and the grievant's second-line supervisor (the second-line supervisor) both asked the grievant to "calm down[,]" *id.* at 12, and when the grievant allegedly failed to do so, the first-line supervisor called the Federal Protective Service (FPS), which arrested the grievant, *id.* at 5. In addition, the Agency revoked the grievant's government credentials and building pass. *Id.* The second-line supervisor proposed to suspend the grievant for fourteen days for alleged violent and threatening behavior. *Id.* at 5-6.

Subsequently, the grievant hired outside counsel and filed an Equal Employment Opportunity (EEO) complaint alleging discrimination. *Id.* at 6. Then, after the Agency's Deputy Regional Director (Deputy RD) approved the proposed fourteen-day suspension, the grievant filed a grievance, which was unresolved and submitted to arbitration. *Id.*

Prior to the arbitration hearing, "the [g]rievant's attorney submitted a lengthy list of proposed witnesses." *Id.* The Arbitrator then had a pre-hearing conference call with the parties, in which she asked the parties to "limit their presentations to the

1. The Authority issued a deficiency Order on October 10, 2008 to the Union and required a response by October 24. (All dates in this footnote are from 2008.) Subsequently, on October 14, the Authority received a supplemental submission (dated October 2) designating Howard D. Weisman as the Union's representative. When the Union did not timely reply to the deficiency Order, the Authority issued an Order on November 7 directing the Union to show cause why the Authority should not dismiss the exceptions. On November 18, Mr. Weisman timely filed a response to the Order to show cause, asserting that the Authority should not dismiss the exceptions because: (1) he did not receive the Authority's October 10 Order; and (2) the Agency was not harmed by the Union's error. He also corrected the deficiency at issue in the October 10 Order. As (1) the Authority did not serve Mr. Weisman with the October 10 deficiency Order (because the Authority did not receive the designation of representative until October 14), (2) Mr. Weisman timely replied to the Order to show cause and corrected the deficiency, and (3) there is no basis for finding that the Agency would be prejudiced by considering the exceptions, we consider the exceptions. *See, e.g., U.S. DHS, U.S. Customs & Border Prot., U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 4, 4 n.1, *recons. denied*, 61 FLRA 393 (2005) (where party did not timely receive deficiency order, Authority waived expired time limit and allowed filing); *U.S. Dep't of HHS, Appalachian Lab. for Occupational Safety & Health, Nat'l Inst. for Occupational Safety & Health, Ctrs. for Disease Control & Prevention*, 49 FLRA 1150, 1151 (1994) (Authority considered exceptions where party established that it did not receive Authority Order and other party was not prejudiced).

two days set aside for the hearing and modify their lists accordingly as much as possible." *Id.* Subsequently, "[c]ounsel notified the Arbitrator that they had discussed the matter and agreed upon how to handle the witness lists . . . ." *Id.*

At arbitration, the parties "agreed [that] the matter was appropriately before the Arbitrator." *Id.* In addition, they agreed to the following issues: "Whether or not the fourteen (14) day suspension which was given to [the grievant] was for just and sufficient cause and for reasons which will promote the efficiency of the [Agency] and[,] if not[,] what is the appropriate remedy?" *Id.* at 2.

The Arbitrator found that the decision to suspend was made based solely on information received from the first- and second-line supervisors. *Id.* at 8. As an initial matter, the Arbitrator rejected the Union's reliance on a letter from the second-line supervisor to the grievant (the second-line supervisor's letter) as evidence that the Agency promised the grievant a more thorough investigation. In this regard, the Arbitrator noted that the letter was a form letter that merely notified the grievant that her "credentials had been confiscated and would be returned when a determination had been made . . . as to what happened and what to do about it." *Id.* at 10. In addition, the Arbitrator found that the grievant and the Union had opportunities, but failed, to respond to the proposed suspension. *Id.* The Arbitrator determined that, without a response, the Deputy RD had no reason to investigate further. In addition, the Arbitrator rejected as "questionable[]" the Union's claim that the first- and second-line supervisors' accounts of the incident were unreliable because they were "parties to [the] incident . . . ." *Id.* at 12.

Further, the Arbitrator rejected the Union's attempts to challenge the credibility of the Agency's witnesses. The Arbitrator stated that

> [e]ven granting the Union's claims that [the first-line supervisor's] demeanor on cross examination indicated she was trying to hide something and there were inconsistencies in her story, it is easily conceivable that this was nothing more than witness over preparation and nervousness, a common problem with first time supervisors acting as witnesses about their actions.

Id. at 14. In addition, the Arbitrator noted that the grievant did not testify, and found that the Union's witnesses were not "fully present or knowledgeable" about relevant matters. *Id.* at 16. The Arbitrator determined that although calling the FPS may have been "an over reaction[,]" it provided "corroboration that the [g]rievant's conduct was outside the norms for professional office demeanor[.]" *Id.* at 13. The Arbitrator then determined that "the [g]rievant's actions were sufficiently problematic to provide basis for disciplinary action against her." *Id.* at 14. Accordingly, the Arbitrator concluded that the Agency had "just cause for discipline." *Id.* at 17.

In reaching this conclusion, the Arbitrator addressed the Union's claims that: (1) the Agency had failed to comply with a promise to have a Union steward present when the grievant was receiving performance reviews "in order to help keep the situation calm and to avoid outburst problems[,]" *id.* at 13; (2) the grievant had a "stellar" work record until she began working for the supervisors, *id.* at 15; and (3) the Agency began writing the grievant up for performance and disciplinary problems after the supervisors' arrival, which indicated supervisory "animosity" and a "conspiracy[,]" *id.* With regard to the first claim, the Arbitrator stated that, even assuming that the alleged promise existed, the Union steward (steward) "testified that she was lurking just outside" the first-line supervisor's door during part of the performance review, which the Arbitrator found indicated that the steward had been informed of the negative content of the evaluation beforehand and that both the steward and the first-line supervisor were concerned about how the grievant would respond to the review. *Id.* at 13.

With regard to the second and third claims, the Arbitrator noted that the grievant's work history was not introduced into the record, and she stated that it was "just as logical to assume that new supervisory personnel were brought in to instill a new work ethic in the office and that the spate of performance and disciplinary charges" that followed "were justified by what might be labeled as insubordinate conduct brought about by the animosity of the employee rather than the supervisor." *Id.* at 15. In this regard, the Arbitrator found that the steward's testimony and affidavit from another proceeding described the steward's belief that the new supervisors showed favoritism, but the Arbitrator found that the testimony and affidavit were not "dispositive[]" and that "no evidence was introduced that actually supported this perception." *Id.*

With regard to whether a fourteen-day suspension was the appropriate penalty, the Arbitrator found that the Agency's disciplinary notice cited a prior instance of discipline for similar offenses, and, citing Article 13, Section 1A of the

parties' agreement,[2] she found that a fourteen-day suspension was "the next step in the progressive discipline." *Id.* at 17. Accordingly, the Arbitrator upheld the fourteen-day suspension. *Id.*

However, the Arbitrator found that additional punishment of the grievant was not warranted. *Id.* In this regard, she found that the Agency improperly denied reinstating the grievant's building pass and credentials, and she "order[ed] that [they] be returned to her immediately[,]" and that any issues resulting from the lack of credentials could "not be used as a basis for negative performance evaluation or discipline . . . ." *Id.* at 19. In addition, the Arbitrator noted that, in a letter (Congressional letter) responding to an inquiry from a member of Congress, the Agency implied that the grievant had engaged in misconduct, without acknowledging that a grievance had been filed and that arbitration proceedings were ongoing. *Id.* The Arbitrator "order[ed] that the Agency review all of the actions taken with respect to the [g]rievant," including the Congressional letter, with the goal to eliminate "inappropriate extra-contractual punishment." *Id.* at 21. Finally, the Arbitrator directed that once any extra-contractual punishment is "retracted, rescinded and/or stopped[,] . . . [c]onfirmation of such action shall be given to the Union and the [g]rievant . . . ." *Id.* at 22.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the Agency violated 5 U.S.C. § 2302(b)(9) (§ 2302(b)(9)),[3] and that "[o]nce the Arbitrator was informed of the civil rights investigation and the prohibited personnel practice of retaliation . . . the Arbitrator had the legal duty to address and resolve these issues . . . ." Exceptions at 7. In this connection, the Union asserts that the Arbitrator "would not allow the Union to introduce pertinent and material evidence" regarding this issue. *Id.*

In addition, the Union argues that the Arbitrator lacked jurisdiction over the grievance under both the parties' agreement and § 7121(d) of the Statute (§ 7121(d)).[4] *Id.* at 2-4. In this regard, the Union claims that the grievant's amended EEO complaint involved, among other things, the proposed suspension. *Id.* at 3. The Union contends that, when the suspension was made final, the proposed suspension "merged" with the final suspension. *Id.* In addition, the Union asserts that the parties' negotiated grievance procedure (NGP) excludes grievances over EEO matters. *Id.* at 4.

The Union also argues that the award is contrary to law in several respects. First, the Union contends that the Arbitrator's direction that the Agency review whether it imposed additional punishment and "submit additional material ex parte[,]" and her failure to grant a remedy for the failure to timely return the grievant's credentials, are contrary to law. *See id.* at 4-5 (citing *Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc.*, 607 F.2d 649 (5th Cir. 1979); *Chevron Transp. Corp. v. Astro Vencedor Compania Naviera, S.A.*, 300 F.Supp. 179 (S.D.N.Y. 1969); *Katz v. Uvegi*, 187 N.Y.S.2d 511, 518 (N.Y.Sup. 1959), *aff'd*, 205 N.Y.S.2d 972 (N.Y.A.D. 2 Dep't 1960); *Giove v. Dep't of Transp.*, 230 F.3d 1333 (Fed. Cir. 2000) (*Giove*)). Second, the Union argues that, when the Agency imposed discipline, the Agency failed to consider the factors set forth by the Merit Systems Protection Board (MSPB) in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981) (*Douglas*), and that the Arbitrator "erroneously shifted the burden of applying the *Douglas* factors to the [g]rievant." Exceptions at 9-10 (citing *Devine v. Pastore*, 732 F.2d 213 (D.C. Cir. 1984); *Eichner v. U.S. Postal Serv.*, 83 M.S.P.R. 202 (1999)). Third, the Union claims that the Arbitrator improperly shifted the rebuttal burden to the grievant. *Id.* at 8 (citing *Kissner v. OPM*, 792 F.2d 133, 134-35 (11th Cir. 1986) (*Kissner*)). Fourth, the Union contends that, in

2. Pertinent wording from the parties' agreement is set forth below.

3. Section 2302(b)(9) provides, in pertinent part, that certain employees shall not "take or fail to take, or threaten to take or fail to take, any personnel action against any employee . . . because of-- (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation[] . . . ."

4. Section 7121(d) provides, in pertinent part:

> An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first . . . .

making credibility determinations, the Arbitrator failed to consider numerous factors required by the MSPB. *Id.* at 11-13 (citing *Hillen v. Dep't of Army*, 35 M.S.P.R. 453, 458 (1987) (*Hillen*); *Barrett v. Dep't of Interior*, 65 M.S.P.R. 186, 194 (1994), *review reinstated*, 65 F.3d 187 (Fed. Cir. 1995) (*Barrett*)). Fifth, citing *NFFE, Local 615*, 17 FLRA 318 (1985), *petition for review denied*, 801 F.2d 477 (D.C. Cir. 1986) (*Local 615*), the Union claims that the Arbitrator failed to recognize "the difference between no investigation and a non-thorough investigation." Exceptions at 14.

Additionally, the Union contends that the Arbitrator exceeded her authority. In this regard, the Union argues that the Arbitrator failed to determine whether: (1) there was just cause for the suspension, *id.* at 9; (2) the delay in returning the grievant's credentials constituted "punishment, retaliation, or other misconduct", *id.* at 5; and (3) the Congressional letter harmed the grievant, *id.* at 5-6. In addition, the Union asserts that the Arbitrator exceeded her authority by "interpos[ing] her personal interpretations" of the second-line supervisor's letter, and by failing to note contradictions in the second-line supervisor's statements in the letter and in her testimony. *Id.* at 13.

Further, the Union challenges the Arbitrator's decision not to rely on certain testimony. *Id.* at 12. The Union also challenges the Arbitrator's decision not to discredit the supervisors' testimony, and asserts that the Arbitrator improperly found that inconsistencies in the testimony could be attributable to "witness overpreparation and nervousness" when "[a]n equally valid conclusion is that [the supervisor] was lying . . . ." *Id.*

Moreover, the Union asserts that although the Arbitrator acknowledged that Article 16, Section 5C of the parties' agreement requires that the record be kept open only in "unusual situations," the Arbitrator kept the record open without finding an unusual situation. *Id.* at 4. The Union also asserts that although Article 13, Section 1C of the parties' agreement requires that discipline be for just cause, the Arbitrator erroneously applied a "sufficiently problematic" standard, which does not equate to just cause. *Id.* at 9. In addition, the Union contends that the Arbitrator "wrongly applied" Article 13, Section 1A of the agreement when she found that the fourteen-day suspension was the next step in progressive discipline. *Id.* at 10.

The Union also asserts that the Arbitrator was biased. *Id.* at 14. In this regard, the Union asserts that the Arbitrator's statement that the steward was "lurking" outside the first-line supervisor's door casts doubt on the Arbitrator's objectivity. *Id.* at 15. In addition, the Union asserts that the Arbitrator routinely credited the Agency's witnesses over the Union's witnesses. *Id.* at 13. Further, the Union asserts that the Arbitrator exhibited bias when she "sided with" the Agency and found that the call to FPS "corroborat[ed]" the Agency's claim that the grievant acted improperly. *Id.* at 15.

Finally, the Union argues that the Arbitrator "ma[de] up evidence" and found that there was a non-thorough investigation, when there was "conflicting . . . evidence . . . as to whether an investigation was actually conducted." *Id.* at 14. The Union also argues that the Arbitrator "created . . . evidence" when she rejected the Union's claim regarding new management targeting the grievant. *Id.* at 12.

B. Agency's Opposition

The Agency argues that the Authority should not consider the Union's exception regarding § 2302(b)(9) because the Union did not raise its argument before the Arbitrator. Opp'n at 22-23. As for the Union's claim that the Arbitrator did not permit relevant witnesses in connection with the § 2302(b)(9) claim, the Agency asserts that the parties agreed on witness lists prior to the hearing and that the Union does not identify any witnesses that were not permitted to testify. *Id.* at 27.

The Agency also claims that the Arbitrator had jurisdiction to resolve the grievance. *Id.* at 14. As an initial matter, the Agency claims that § 7121(d) did not bar the grievance because that wording applies only when an NGP covers EEO matters, and the parties' NGP excludes such matters. *Id.* at 14-15. Even assuming that § 7121(d) applies, the Agency argues that it does not bar the grievance because the grievant never included the fourteen-day suspension as an issue in her EEO proceeding. *Id.* at 15.

In addition, the Agency contends that the award is not contrary to law. *Id.* at 27. In particular, the Agency argues that MSPB precedent does not apply because the Arbitrator was resolving a fourteen-day suspension. *Id.* at 30.

The Agency also argues that the Arbitrator did not exceed her authority because she resolved the issues submitted. *Id.* at 21-22. Further, the Agency argues that the Union's allegation of future "ex parte" receipt of evidence is "baseless[]" because the

Arbitrator expressly directed the Agency to advise the Union and the grievant of its determinations regarding any additional punishment that had been imposed. *Id.* at 18.

The Agency contends that the Union's challenges to the Arbitrator's credibility determinations do not demonstrate that the award is deficient. *Id.* at 30-31. The Agency also contends that the Arbitrator was not biased. *Id.* at 32-33. Finally, with regard to the Union's assertion that the Arbitrator "made[]up" facts, the Agency contends that disagreement with the Arbitrator's evaluation of evidence and the weight to accord that evidence is insufficient to demonstrate that the award is deficient. *Id.* at 31-32 (quoting Exceptions at 14).

IV. Preliminary Issues

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue [] which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5 (§ 2429.5).[5] Under § 2429.5, the Authority will not consider any issue that could have been, but was not, presented to the arbitrator. *E.g., U.S. DHS, U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008). In addition, where a party makes an argument before the Authority that is inconsistent with its position before the arbitrator, the Authority applies § 2429.5 to bar the argument. *E.g., U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 328 (2009).

There is no record evidence that the Union raised its argument regarding § 2302(b)(9) before the Arbitrator. Although the Union asserts that the Arbitrator precluded it from introducing evidence on this issue, the Union does not cite any record evidence that supports this assertion. In fact, the Arbitrator found the parties had "agreed upon how to handle the witness lists[,]" Award at 6, and there are no exceptions to that finding. As there is no evidence that the Union raised § 2302(b)(9) before the Arbitrator, and no basis for finding that it was improperly precluded from doing so, we dismiss the Union's exception regarding § 2302(b)(9).

With regard to the Union's claims that the Arbitrator lacked jurisdiction under both the parties' agreement and § 7121(d), the Authority has applied § 2429.5 to bar arguments challenging an arbitrator's contractual jurisdiction if those arguments were not raised before the Arbitrator. *See U.S. Dep't of the Air Force, Okla. Air Logistics Ctr., Tinker Air Force Base, Okla.*, 58 FLRA 760, 761 (2003). As the Union not only failed to argue before the Arbitrator that the parties' agreement precluded him from exercising jurisdiction but also expressly conceded that the grievance was properly before the Arbitrator, we find that § 2429.5 bars the Union from challenging the Arbitrator's contractual jurisdiction, and we dismiss the exception.

As for the Union's claim regarding § 7121(d), the Authority has declined to apply § 2429.5 to bar arguments challenging an arbitrator's *statutory* jurisdiction. *E.g., U.S. Dep't of Agric., Food & Consumer Serv., Dallas, Tex.*, 60 FLRA 978, 980-81 (2005) (then-Member Pope dissenting in part on other grounds) (resolving merits of claim that arbitrator lacked jurisdiction under § 7121(c)(5) of the Statute, despite party's failure to raise claim to arbitrator). The Authority has applied this principle to the election of remedies provision in § 7121(d). *See U.S. DOJ, INS, El Paso, Tex.*, 40 FLRA 43, 49-52 (1991) (the Authority found claim regarding § 7121(d) was properly raised in exceptions despite excepting party's failure to raise it below). *Cf. U.S. Dep't of the Navy, Naval Air Eng'g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1111 (2010) (considering argument regarding election-of-remedies provision in § 7116(d) of the Statute despite party's failure to raise it before arbitrator). There are significant factual distinctions between the cited precedent and this case.[6] However, even assuming

5. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Union's exceptions were filed before that date, we apply the earlier Regulations.

6. In the above-cited Authority decisions, the excepting parties -- unlike the Union here -- did not expressly concede jurisdiction before the arbitrators and were not the parties that invoked arbitration. We note, in this regard, that had this case arisen in the private sector, the Union's actions at arbitration would have precluded it from challenging the Arbitrator's jurisdiction on appeal. *See, e.g., United Indus. Workers v. Gov't of the Virgin Is.*, 987 F.2d 162, 168 (3rd Cir. 1993) ("[o]nce . . . parties have mutually agreed to refer a matter to an arbitrator, they are bound by his decision and may not later challenge his authority to resolve the claim"); *Howard Univ. v. Metro. Campus Police Officers Union*, 512 F.3d 716, 720 (D.C. Cir. 2008) (citations omitted) (absent "excusable ignorance of a predicate fact," a party that does not object to an arbitrator's jurisdiction during the arbitration may not later do so in court); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (party was estopped from claiming that his

that the Union's § 7121(d) claim is properly before us, we find, for the reasons discussed further below, that § 7121(d) does not apply in this case.

V. Analysis and Conclusions

A. The award is not contrary to law.

The Authority reviews questions of law *de novo*. *See 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)). In applying a standard of *de novo* review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Union claims that the award is contrary to § 7121(d), which provides that "[a]n aggrieved employee affected by a prohibited personnel practice under [§] 2302(b)(1) of this title *which also falls under the coverage of the negotiated grievance procedure* may raise the matter under a statutory procedure or the negotiated procedure, but not both." 5 U.S.C. § 7121(d) (emphasis added). Article 15, Section 2 of the parties' agreement excludes from the parties' NGP "a matter which is subject to a statutory appeal procedure . . . outside the [Agency] under law or the regulations of the . . . [Equal Employment Opportunity Commission] including . . . EEO [d]iscrimination[,]" for which the "[a]vailable [p]rocedure" is that set forth in "29 C[.]F[.]R[.] [part] 1614." Exceptions, Attach., Collective Bargaining Agreement at 35. Thus, the allegation of unlawful discrimination does not "fall[] under the coverage" of the NGP, within the meaning of § 7121(d). As a result, § 7121(d) does not apply and, consequently, cannot provide a basis for barring the grievance and finding that the award is contrary to law.[7]

In addition, the Union argues that the award is contrary to precedent prohibiting "ex parte" communications. Exceptions at 5. However, the Arbitrator directed that confirmation of the Agency's subsequent actions "be given to the Union and the [g]rievant[,]" Award at 22, and, thus, she did not direct any ex parte communications. With regard to the Union's reliance on *Giove*, 230 F.3d 1333, and its claim that the Arbitrator did not provide a remedy for the failure to timely return the grievant's credentials, the Arbitrator did provide a remedy by directing the Agency to restore the credentials. Accordingly, the premises of these legal arguments are inaccurate and do not provide a basis for finding the award contrary to law.

With regard to the Union's reliance on the *Douglas* factors, those factors are applied by the MSPB in evaluating whether a particular disciplinary action should be mitigated. *U.S. DHS, U.S. Customs & Border Prot.*, 65 FLRA 373, 375 (2010) (Member Beck dissenting in part on other grounds) (*CBP*). With regard to the Union's citation to *Kissner*, 792 F.2d 133, that Federal Circuit decision involved the burdens of proof that the MSPB applies when reviewing a removal action. Arbitrators are bound by the same substantive standards as the MSPB only when resolving grievances concerning actions covered by 5 U.S.C. §§ 4303 and 7512. *CBP*, 65 FLRA at 375. As suspensions of fourteen days or less are not covered by §§ 4303 and 7512, the Union's exception does not provide a basis for finding the award contrary to law. For the same reason, the Union's reliance on MSPB precedent regarding the factors that the MSPB applies in making credibility determinations and reviewing its administrative judges' credibility determinations is misplaced and provides no basis for finding the award deficient.

In addition, the Union, citing *Local 615*, 17 FLRA 318, asserts that the Arbitrator erred by failing to distinguish a non-thorough investigation from the failure to conduct any investigation. However, *Local 615* did not hold that agencies are required to take any particular actions in investigating proposed discipline and, thus, that decision does not provide any basis for finding that the award is contrary to law.

For the foregoing reasons, we deny the contrary-to-law exceptions.

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lack of signature on written contract precluded enforcement of contract's arbitration clause when he had consistently maintained that other provisions of same contract should be enforced to benefit him). Nevertheless, in view of our determination that § 7121(d) does not apply in this case, it is unnecessary to decide whether the Union's § 7121(d) claim should be barred. *Cf. Pan. Area Mar./Metal Trades Council, AFL-CIO (M/MTC)*, 55 FLRA 1199, 1200 (1999) (Authority assumed, without deciding, that it had jurisdiction).

7. We note that the issue before the Arbitrator was whether the suspension was for just cause, not whether the suspension constituted unlawful discrimination.

B. The Arbitrator did not exceed her authority.

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. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In addition, the Authority has held that arbitrators have great latitude in fashioning remedies. *E.g., U.S. Dep't of Veterans Affairs, Montgomery Reg'l Office, Montgomery, Ala.*, 65 FLRA 487, 490 (2011). Thus, an arbitrator is not required to provide a remedy for every violation of a collective bargaining agreement, *Nat'l Ass'n of Air Traffic Specialists, NAGE, SEIU*, 61 FLRA 558, 559 (2006), and the Authority has denied exceptions that constitute an attempt to substitute another remedy for that formulated by the arbitrator, *NAGE, Local R4-45*, 55 FLRA 789, 793 (1999).

The Union argues that the Arbitrator failed to decide whether there was just cause for the suspension. To the extent that the Union is claiming that the Arbitrator exceeded her authority in this regard, the Arbitrator directly addressed the just-cause issue and found that there was just cause for discipline. *See* Award at 17. Thus, the Union's claim does not demonstrate that the award is deficient. Similarly, we deny the Union's claim that the Arbitrator exceeded her authority by declining to find that the Agency acted improperly by failing to return the grievant's credentials and building pass and by failing to determine whether sending the Congressional letter harmed the grievant. In this connection, the Arbitrator did find that it was improper for the Agency to withhold the grievant's credentials, and she directed that the Agency take actions regarding the credentials and the Congressional letter. *Id.* at 19-22. Thus, the Union does not demonstrate that the Arbitrator failed to resolve issues before her.

Finally, the Union cites Article 16, Section 6A of the parties' agreement -- which states that arbitrators are confined to an interpretation of the agreement and Agency regulations -- and asserts that the Arbitrator credited testimony not in evidence. The Union's assertion does not provide a basis for finding that the Arbitrator failed to resolve an issue submitted, resolved an issue not submitted, disregarded specific limitations on her authority, or awarded relief to individuals not encompassed within the grievance. Accordingly, the assertion provides no basis for finding the award deficient.

For the foregoing reasons, we deny the exceeded-authority exceptions.

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

The Authority will find that an arbitrator denied a fair hearing when the excepting party demonstrates that the arbitrator refused to hear or consider pertinent or material evidence or conducted the proceedings in a manner that so prejudiced a party as to affect the fairness of the proceedings as a whole. *U.S. Dep't of Transp., FAA*, 65 FLRA 320, 323 (2010) (*FAA*). However, arbitrators have considerable latitude in the conduct of hearings, and a party's objection to the manner in which the arbitrator conducted the hearing does not alone provide a basis for finding the award deficient. *Id.* In addition, the Authority has held that disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding an award deficient. *U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 72 (2009).

The Union argues that the Arbitrator erroneously declined to rely on certain testimony. We construe this as a claim that the Arbitrator failed to provide a fair hearing. *See, e.g., id.* (construing challenges to arbitrator's credibility determinations as fair-hearing claims). However, as stated above, the Authority has held that disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding an award deficient. *Id.* Accordingly, we deny the fair-hearing exception.

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

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a

plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context because it is the arbitrator's construction of the agreement for which the parties have bargained. *Id.* at 576.

The Union asserts that, contrary to Article 16, Section 5C of the agreement, the Arbitrator kept the record open to receive additional, ex parte evidence from the Agency regarding whether the Agency imposed additional punishment on the grievant. Article 16, Section 5C of the agreement provides, in pertinent part, that "[e]xcept in unusual situations, the arbitrator will not have the authority to keep the record open in order to hear testimony of additional witnesses." Award at 4. However, the Arbitrator did not keep the record open in order to hear testimony of additional witnesses. Accordingly, the Union's assertion does not demonstrate that the award is deficient.

The Union also asserts that although the Arbitrator found that the grievant's conduct was "[s]ufficiently problematic" to support discipline, Article 13, Section 1C of the parties' agreement requires that discipline be for just cause. Exceptions at 9. Article 13, Section 1C provides: "No bargaining unit employee will be the subject of a disciplinary action except for just and sufficient cause and for reasons which will promote the efficiency of the [Agency]." Award at 2. As the Arbitrator expressly found that the discipline was for "just cause[,]" *id.* at 17, the Union does not provide a basis for finding that the Arbitrator's interpretation of Article 13, Section 1C was irrational, unfounded, implausible, or in manifest disregard of the agreement.

Further, the Union contends that the Arbitrator erroneously found that Article 13, Section 1A of the agreement is a table of penalties when, in fact, it merely defines what a disciplinary action is. Article 13, Section 1A provides, in pertinent part: "A disciplinary action, for the purposes of this Article, is defined as an oral admonishment confirmed in writing, a written reprimand or a suspension for [fourteen] calendar days or less." *Id.* at 2. The Arbitrator cited this provision and found that, after the grievant's previous discipline, a fourteen-day suspension was the next step in progressive discipline. The Union provides no basis for finding that it was irrational, unfounded, implausible, or in manifest disregard of the agreement for the Arbitrator to construe Article 13, Section 1A as providing a series of progressive steps of discipline.

For the foregoing reasons, we deny the essence exceptions.

E. The Arbitrator was not biased.

To establish that an arbitrator was biased, the moving party must demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party. *E.g., AFGE, Local 3438*, 65 FLRA 2, 3 (2010). The Authority has denied exceptions based on an arbitrator's remarks indicating concern with a party's conduct. *E.g., AFGE, Local 2382*, 64 FLRA 713, 717 (2010) (*Local 2382*). In addition, a party's assertion that all of an arbitrator's findings were adverse to that party, without more, does not demonstrate that an arbitrator was biased. *E.g., AFGE, Local 3354*, 64 FLRA 330, 332 (2009) (*Local 3354*). Further, where the Authority denies a party's fair-hearing exception, and the party's bias exception is based on its fair-hearing exception, the Authority also denies the bias exception. *E.g., FAA*, 65 FLRA at 323.

The Union argues that the Arbitrator's use of the term "lurking" to describe the steward's actions "brings into question the objectivity of the Arbitrator." Exceptions at 15. To the extent that this is a claim that the Arbitrator was biased because she made remarks that indicated concern with the steward's conduct, as stated previously, such claims do not establish that an arbitrator is biased. *See Local 2382*, 64 FLRA at 717.

Further, the Union argues that the Arbitrator improperly credited all of the Agency's witnesses' testimony while failing to credit the testimony of Union witnesses. To the extent that the Union is claiming that the Arbitrator was biased in this regard, as stated above, the fact that all of an arbitrator's findings are adverse to one party does not, without more, demonstrate that the arbitrator was biased. *See Local 3354*, 64 FLRA at 332. Accordingly, the Union's argument does not demonstrate that the Arbitrator was biased.

Finally, the Union argues that the Arbitrator was biased because she credited certain evidence. In effect, this argument repeats the Union's credibility challenge, which we previously have denied on fair-hearing grounds. As this argument merely repeats

the fair-hearing argument, we also deny this exception. *See FAA*, 65 FLRA at 323.

For the foregoing reasons, we deny the bias exceptions.

F. The award is not based on nonfacts.

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. *E.g.*, *AFGE, Local 3380*, 65 FLRA 390, 393 (2010) (*Local 3380*). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *Id.* In addition, the Authority has denied nonfact exceptions that challenge an arbitrator's credibility determinations, stating that exceptions disputing an arbitrator's evaluation of the credibility of witnesses and the weight to be given their testimony provide no basis for finding an award deficient. *U.S. Dep't of the Treasury, IRS, Kan. City, Field Compliance Serv.*, 60 FLRA 401, 403 (2004).

The Union argues that the Arbitrator "ma[de] up evidence" and found that there was a non-thorough investigation, when there was "conflicting . . . evidence . . . as to whether an investigation was actually conducted." Exceptions at 14. To the extent that the Union is claiming that the award is based on a nonfact, the Union's statement that there was "conflicting . . . evidence" on this factual issue concedes that the issue was disputed before the Arbitrator. *Id.* As such, the Union's argument provides no basis for finding the award based on a nonfact. *See Local 3380*, 65 FLRA at 393-94.

The Union also argues that the Arbitrator "created evidence" when she rejected the Union's claim that new management was targeting the grievant and, instead, found it "just as logical to assume" that management was brought in to instill a new work ethic and that the subsequent disciplinary and performance problems were justified by insubordinate conduct based on employee animosity. Exceptions at 12. To the extent that the Union is arguing that the award is based on a nonfact, the Union's claim does not explain how a central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different result. Thus, the claim does not provide a basis for finding that the award is based on a nonfact. *See Local 3380*, 65 FLRA at 393-94.

For the foregoing reasons, we deny the nonfact exceptions.

VI. Decision

The Union's exceptions are dismissed in part and denied in part.