66 FLRA No. 27

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 215
(Union)

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
FALLS CHURCH, VIRGINIA
(Agency)

0-AR-4528

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DECISION

September 21, 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 Barry E. Shapiro filed by the Agency and the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions, and the Agency filed an opposition to the Union's exceptions.[1]

The Arbitrator sustained in part, and denied in part, a grievance concerning asserted irregularities in the awarding of recognition of contribution (ROC) awards (the awards grievance). He also sustained a grievance alleging that the Agency had improperly reallocated unspent awards funds (the reallocation grievance). For the reasons that follow, we dismiss in part and deny in part the Union's exceptions and deny the Agency's exceptions.

[1] The Union also filed a motion to dismiss the Agency's opposition. As the Union failed to request leave under § 2429.26 of the Authority's Regulations to file this supplemental submission, we do not consider the motion. *See AFGE, Local 1738*, 63 FLRA 485, 485 n.l (2009) (rejecting motion to dismiss where moving party failed to request permission to file under § 2429.26).

II. Background and Arbitrator's Award

As relevant here, the parties negotiated a memorandum of understanding (MOU) to address awards for the 2006 fiscal year (FY 2006). Award at 2. Item 7 of the MOU provides that the Agency would use "the same award criteria, processes, procedures, and practices" that were used in the 2005 fiscal year (FY 2005).[2] *Id*. at 3. For the 2007 fiscal year (FY 2007) awards, the parties negotiated another agreement, the "ROC Agreement and Award Handbook" (the Handbook). *Id*.

Following the Union's audit of the Agency's FY 2007 ROC awards, the Union filed two grievances alleging violations of the MOU and the Handbook with respect to FY 2007 awards. When the parties could not resolve the grievances, they submitted them to arbitration.

A. Awards Grievance

As to the awards grievance, the Arbitrator adopted the Union's formulation of the issue, which he framed, in pertinent part, as: "Did [the Agency] violate law, regulations, rules, the negotiated terms and conditions of the [MOU] and/or the [Handbook] . . . in deciding to approve, deny or reject ROC award nominations . . . ? If so, what is the appropriate remedy . . . ?" *Id.* at 5.

As relevant here, the Arbitrator found that the Agency violated the requirement in the Handbook that all award nominations be submitted on an approved form.[3] *Id.* at 14. He found that no remedy was warranted,

[2] Item 7 of the MOU provides, in pertinent part:

> The [p]arties agree that each component will use the same award criteria, processes, procedures and practices that were used within each component for FY 2005, noting that some minimal changes may be required to update the procedures, as well as the award panel guidelines and functions. . . .
>
> The [p]arties further agree that the ROC award criteria, processes, procedures, practices and allocations as to the percentage of funding (55%) for FY 2006 will be used for FY 2007. . . .

Union's Exceptions, Attach., Ex. 4 at 2.

[3] This portion of the Handbook states, in pertinent part, that: "The significance of the employee's contribution and accomplishments must be described on the [Agency] Award Nomination Form . . . and must adequately justify this type of recognition. . . . NO OTHER FORM OR DOCUMENT WILL BE ACCEPTED FOR A NOMINATION. If a nomination is not submitted on the [Agency] Award Nomination Form . . . , it will be rejected." Award at 13 (emphasis omitted).

however, because the information submitted on the incorrect forms was "identical" to the information submitted on the correct forms. *Id.* at 14.

The Arbitrator also found that the Agency had violated the Handbook in offices where Hearing Office Directors (HODs) had made awards decisions instead of Hearing Office Chief Administrative Law Judges (HOCALJs). *Id.* at 12. In this connection, the Arbitrator determined that these were not "merely clerical or technical error[s]," because the parties had "clearly intended" that HOCALJs should make the awards determinations. *Id.* Under the circumstances of this case, he found that the Union's requested remedy of a complete rerun of the FY 2007 awards process "would be disruptive and would likely result in few, if any[,] changes." *Id.* As a remedy, he directed the Agency to submit all of the nominations that had been approved or rejected by the HODs to the appropriate HOCALJ for review and appropriate action. *Id.* at 12-13.

In addition, the Arbitrator found that the Agency had not violated the Handbook by granting awards based on untimely nominations.[4] *Id.* at 15. In this regard, the Arbitrator found the relevant language of the Handbook to be "ambiguous, in that it speaks to both the submission of a nomination by a particular date, and the receipt of that nomination by the first-line supervisor by that same date." *Id.* He further noted that, since the submission deadline was a Friday, nominations "may simply have sat on the receiving official's (or the receiving official's secretary or assistant['s]) desk over the weekend and then marked as received on Monday." *Id.* Based on the foregoing, the Arbitrator concluded that the Union had failed to demonstrate that the nominators -- and not the receiving officials -- were responsible for the untimely nominations, and found no violation of the timeliness requirements of the Handbook. *Id.* He further stated that there was no showing that any employee had received an unfair advantage because the nominations forms may have been received a day or two late, or that any employee was responsible for the lapse. *Id.*

B. Reallocation Grievance

As to the reallocation grievance, the Arbitrator adopted the Union's formulation of the issue, which he framed, in pertinent part, as: "Did [the Agency] comply with [MOU] and/or the [Handbook] . . . [,] as well as established past practices, when it reallocated unspent FY 2007 ROC award funds . . . ? If not, what is an appropriate remedy?" *Id.* at 6.

The Arbitrator found that the Agency had violated the MOU when it unilaterally reallocated unspent FY 2007 ROC award funds. *Id.* at 27. In this regard, he found that, although the Handbook was silent with respect to how unspent funds should be allocated, the parties had negotiated the Handbook within the framework of the MOU, and, in the absence of language to the contrary, the disposition of unspent funds was part of the awards "processes, procedures, practices and allocations" referenced in Item 7 of the MOU. *Id.* In this respect, the Arbitrator credited the Union President's "[un]rebutt[ed]" testimony that, in FY 2006, the Union and the Agency had negotiated how to dispose of the unspent awards money. The Arbitrator found this approach to be consistent with Item 3 of the MOU.[5] *Id.* Thus, the Arbitrator concluded that the Agency violated the Handbook, which did not permit unilateral reallocation of unspent awards funds by Agency officials. As a remedy, he ordered the Agency to negotiate with the Union over the reallocation of the unspent funds, as it had in FY 2006. *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is contrary to 5 C.F.R. § 451.103(c)(1) because it lets stand award nominations approved by HODs who did not have delegated authority to obligate awards funds.[6] Union's Exceptions at 8.

The Union also makes three arguments that the Arbitrator's award fails to draw its essence from the Handbook. As its first essence claim, the Union asserts that the Arbitrator's failure to "reject" award nominations submitted on improper nomination forms is in disregard

[4] This portion of the Handbook states, in pertinent part, that: "All ROC award nomination forms must be submitted to the nominee's first-line supervisor between November 1. . . and November 17 . . . . If a ROC award nomination is received untimely (after November 17th). . . , it will be rejected unless it is accompanied by a detailed explanation to support the extenuating circumstances." Award at 14 (emphasis omitted).

[5] Item 3 of the MOU provides:

> If an award panel does not spend all of its money by August 1, the unallocated money will revert back to the [Union] Council President/Local President . . . and the appropriate management official and/or their designees for reallocation of money or for awarding employees by mutual agreement. Management will provide a report to each Council President on or about August 15, 2006, as to the total money spent for [Commendable Acts of Service/On the Spot (CAS/OTS)] awards within their jurisdiction.

[6] 5 C.F.R. § 451.103(c)(1) provides, in pertinent part, that: "An agency award program shall provide for . . . [o]bligating funds consistent with applicable agency financial management controls and delegations of authority."

of the Handbook and fails to draw its essence from the Handbook's requirement that all employees be treated fairly and equitably. *Id.* at 10-11, 12.

As its second essence claim, the Union argues that the Arbitrator's failure to invalidate the awards that were improperly approved by HODs is inconsistent with the Handbook. According to the Union, the only remedy consistent with the Handbook would be to void those awards. *Id.* at 12-14. In connection with this claim, the Union also argues that the Arbitrator "exceed[ed] his authority" by validating the awards that the HODs approved. *Id.* at 13.

As its third essence claim, the Union contends that the Arbitrator's failure to reject awards nomination forms received after the deadline is inconsistent with the Handbook. *Id.* at 14.

Moreover, the Union asserts that the award is based on two nonfacts. As its first nonfact claim, the Union argues that the Arbitrator erroneously failed to award a rerun of the awards process because it would result in the same outcome. *Id.* at 19-20 (citing *U.S. Dep't of Def., The Adjutant General, Nat'l Guard Bureau, Tenn. Air Nat'l Guard*, 56 FLRA 588 (2000) (*Nat'l Guard*)). According to the Union, if the Arbitrator had ordered a rerun of the awards process, the "universe of award candidates" would change. *Id.* at 20. As its second nonfact claim, the Union asserts that the Arbitrator's finding that nomination forms received after the deadline were not untimely because they may have sat on the receiving officials' desk for several days after their receipt is not supported by the record. *Id.* at 21-22.

B. Agency's Opposition

The Agency argues that § 2429.5 of the Authority's Regulations bars the Union's claim that the award is contrary to 5 C.F.R. § 451.103(c)(1) because it could have been, but was not, raised to the Arbitrator. Agency's Opp'n at 14.

As to the Union's first essence claim, the Agency argues that the Arbitrator considered the relevant provisions of the Handbook and determined that it did not require any particular remedy for the violation. *Id.* at 5-7. As to the Union's second essence claim, the Agency contends that the Union mischaracterizes the award because the Arbitrator made no such finding that he was "validating awards made by HODs," as the Union asserts. *Id.* at 8. As to the related exceeds authority argument, the Agency contends that the issue of whether award decisions were made by the wrong deciding official was an issue properly before the Arbitrator and he awarded a remedy that was responsive to that issue. *Id.* at 8-9. As to the Union's third essence claim, the Agency asserts that the Arbitrator interpreted the timeliness provision in the Handbook and found that the Union failed to present sufficient evidence to support its contention that the nomination forms were untimely. *Id.* at 13.

Further, the Agency disputes the Union's nonfact claims. As to the first nonfact claim, the Agency asserts that the Arbitrator evaluated the evidence and determined that a rerun would not return different results. In addition, the Agency asserts that the Union's reliance on *Nat'l Guard* is misplaced because that case does not address a nonfact claim and applies a framework that is not applicable here. As to the second nonfact claim regarding the Arbitrator's failure to find the nomination forms untimely, the Agency argues that the Union has not established that a central fact underlying the award is clearly erroneous. *Id.* at 20.

C. Agency's Exceptions

The Agency argues that the Arbitrator's decision to sustain the reallocation grievance fails to draw its essence from the MOU in three respects. As its first claim, the Agency argues that the Arbitrator erroneously relied solely on Item 7 of the MOU, and ignored Items 3 and 9. According to the Agency, the Arbitrator should have read the MOU "as a whole." Agency's Exceptions at 18-20 (citing *Ass'n of Civilian Technicians, N.Y. State Council*, 56 FLRA 868, 870 (2000) (*ACT*)). By relying only on Item 7, the Agency contends that the Arbitrator failed to acknowledge that it was impossible for the Agency to comply with the MOU in FY 2007 because the award panels and Commendable Act or Service/On the Spot (CAS/OTS) awards no longer existed. *Id.* at 19. Further, the Agency claims that the Arbitrator ignored an Agency official's testimony regarding the meaning of Item 7, as well as Items 3 and 9 of the MOU.[7] *Id.* at 18-19.

As its second essence claim, the Agency argues that the Arbitrator erred in concluding that, because the parties followed the MOU for disposing of the unspent funds in FY 2006, they were required to follow the same procedures in FY 2007. *Id.* at 21. In support, the Agency reiterates its claim that the mechanisms for disposing of the FY 2006 unspent award funds -- award panels and

[7] Item 9 of the MOU provides:

> Management agrees to provide a status report to each Council President/Local President 1923 on or before July 15, 2006 regarding unspent ROC award allocation funds within their jurisdiction. Such funds will be reallocated to the CAS/OTS award funds. This provision is dependent upon the parties at the component level completing the activities on the minimal changes outlined in [I]tem 7 above.

Award at 27; Union's Exceptions, Attach., Ex. 4 at 2.

CAS/OTS awards -- no longer existed in FY 2007. *Id.* at 21-22.

Finally, the Agency claims that the Arbitrator erroneously "supplied language" as to the process for reallocation of unspent FY 2007 award funds "where he admitted none existed." *Id.* at 24. Specifically, the Agency challenges the Arbitrator's finding that, "[i]n the absence of any other language to the contrary, . . . the same processes, procedures, practices[,] and allocations used for the FY 2006 program were to be used for FY 2007," *id.* (quoting Award at 27 (quoting Item 7 of MOU)) (internal quotation marks omitted), by reiterating that the mechanisms for disposing of the FY 2006 unspent award funds no longer existed.

D. Union's Opposition

The Union asserts that the Agency has failed to demonstrate that the Arbitrator's determination regarding the reallocation grievance is deficient under the Authority's essence standard. Union's Opp'n at 2. In this connection, the Union asserts that the Arbitrator's interpretation of Item 7 of the MOU is consistent with the plain language of the MOU, which requires the parties to follow in FY 2007 the established past practices for disposing of unspent awards allocations established in FY 2006. *Id.* at 3. The Union also argues that directing the parties to negotiate regarding how to dispose of the unspent awards allocations is consistent with the MOU. *Id.* at 3-4.

IV. Preliminary Issue

The Union argues that permitting awards decisions approved by HODs, who it asserts do not have the delegated authority to obligate Agency funds for awards, is contrary to 5 C.F.R. § 451.103(c)(1). Union's Exceptions at 16-18.

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.[8] Under § 2429.5, the Authority will not consider any issue that could have been, but was not, presented to the arbitrator. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 64 FLRA 841, 843 (2010) (*CBP*). There is no indication in the record that the Union argued before the Arbitrator, as it does in its exceptions, that allowing awards approved by the HODs to stand violates 5 C.F.R. § 451.103(c)(1). In this regard, the Union consistently argued that the Agency had allowed "improper management officials" to act as deciding officials. Agency's Exceptions, Ex. 2 at 2 (Grievance); *see also* Agency's Exceptions, Ex. 6 (Union's Post-Hearing Brief); Award at 11. However, although it could have, there is no evidence that the Union ever argued to the Arbitrator that such action constituted a violation of 5 C.F.R. § 451.103(c)(1). *See, e.g.*, Agency's Exceptions, Ex. 9 (Transcript); Agency's Opp'n, Ex. 4 (Transcript); Agency's Exceptions, Ex. 6 (Union's Post-Hearing Brief). Consequently, as the Authority will not consider issues that could have been, but were not, presented to the Arbitrator, the Union cannot raise these issues now. *CBP*, 64 FLRA at 843. Accordingly, we dismiss the Union's exception.

V. Analysis and Conclusions

A. The award draws its essence from the parties' agreements.

In reviewing an arbitrator's interpretation of a CBA, 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)(2); *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 CBA 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 collective bargaining 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) (*DOL*). 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. Moreover, where an arbitrator interprets an agreement as imposing a particular requirement, the fact that the agreement is silent with respect to that requirement does not, by itself demonstrate that the arbitrator's award fails to draw its essence from the agreement. *U.S. Dep't of Def., Def. Contract Mgmt. Agency*, 66 FLRA 53, 57 (2011) (*DCMA*) (citing *U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003)).

1. The award draws its essence from the Handbook.

The Union's first and second essence exceptions challenge the Arbitrator's failure to award the remedy

[8] 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 Agency's exceptions were filed before that date, we apply the prior Regulations.

sought by the Union -- a complete rerun of the FY 2007 awards process -- for the violations of the Handbook regarding the use of improper nomination forms and HODs approving nominations. Union's Exceptions at 10-13.

As noted above, the Arbitrator adopted the Union's statement of the issue, which he framed, in relevant part, as: "Did [the Agency] violate law, regulations, rules, the negotiated terms and conditions of the [MOU] and/or the [Handbook] . . . in deciding to approve, deny or reject ROC award nominations . . . ? *If so, what is the appropriate remedy . . . ?*" Award at 5 (emphasis added). The Authority has held that arbitrators enjoy broad discretion in fashioning remedies, particularly where, as here, the parties specifically authorized the Arbitrator to determine the appropriate remedy for a violation. *U.S. Dep't of Transp., FAA*, 64 FLRA 922, 924 (2010) (*FAA*). Given this broad remedial discretion, the Union provides no basis for finding that, by failing to award a complete rerun of the FY 2007 awards process, the award fails to draw its essence from the Handbook. Moreover, the Union does not cite any provisions of the Handbook that mandate certain remedies. Accordingly, we deny the Union's first and second essence exceptions.

In connection with its second essence claim, the Union also argues that the Arbitrator "exceed[ed] his authority" by failing to invalidate the awards that the HODs approved and rerun the awards process. Union's Exceptions at 13. When the Authority denies an essence exception, and an exceeded authority exception reiterates the same arguments as the essence exception, the Authority denies the exceeded authority exception. *FAA*, 64 FLRA at 924 (citing *AFGE, Local 3354*, 64 FLRA 330, 334 (2009)). As the Union's exceeds authority claim constitutes a reiteration of the Union's essence argument regarding the Arbitrator's failure to award the Union's requested remedy, we deny the exceeds authority exception.

As its third essence claim, the Union challenges as inconsistent with the Handbook the Arbitrator's failure to reject awards nomination forms received after the deadline in the Handbook. Union's Exceptions at 14. Based on his interpretation of the relevant Handbook language, which he found ambiguous, and the facts and circumstances of the case, the Arbitrator found that the Union had failed to demonstrate that the nominators -- and not the receiving officials -- were responsible for the untimely nominations. Award at 15. He also found that the Union had failed to demonstrate that any employee had received an unfair advantage because the nominations forms may have been received a day or two late, or that any employee was responsible for the lapse. *Id.* Based on those findings, he found no violation of the timeliness requirements of the Handbook. *Id.* The Union has provided no basis for finding that the Arbitrator's interpretation is irrational, unfounded, implausible, or in manifest disregard of the Handbook. Accordingly, we deny the Union's third essence exception.

2. The award draws its essence from the MOU.

The Agency's first and second essence exceptions challenge the Arbitrator's alleged failure to read the MOU "as a whole," and argue that his interpretation based solely on Item 7 is inconsistent with Items 3 and 9 of the MOU. Agency's Exceptions at 18 (citing *ACT*, 56 FLRA at 870). In support, the Agency asserts that the Arbitrator ignored an Agency official's testimony regarding the meaning of Items 3, 7, and 9 of the MOU. *Id.* at 18-20, 21-22.

The Agency's reliance on *ACT* as support for its claim that the Arbitrator was required to read the MOU as a whole is misplaced. *ACT* involved a negotiability appeal and the Authority's determination to consider a *proposal* as an integrated whole where the union had not requested to sever the proposal. 56 FLRA at 870. As such, it is not applicable in the arbitration context and, therefore, does not establish that the Arbitrator was required to read the *MOU* as a whole.

Further, the Agency's reliance on an Agency official's testimony as to the meaning of Items 3, 7, and 9, Agency's Exceptions at 18-19, provides no basis for finding the Arbitrator's award deficient. In this regard, it is well established that disagreement with an arbitrator's evaluation of the evidence and testimony, 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 Agency's argument that the Arbitrator's interpretation of Item 7 of the MOU is inconsistent with Items 3 and 9 of the MOU because the award panels and CAS/OTS awards in those provisions no longer existed in FY 2007 is similarly misplaced. In this regard, the Arbitrator specifically rejected the Agency's contention that the MOU did not apply to FY 2007 awards, in light of Item 7, which provides that: "The [p]arties further agree that the ROC award criteria, processes, procedures, practices and allocations as to the percentage of funding (55%) for FY 2006 will be used for FY 2007. . . ." Award at 27 (quoting Item 7 of the MOU). In the absence of any language to the contrary, the Arbitrator determined that "the manner in which unspent award funds were to be used" is "part and parcel" of the "processes, procedures, practices[,] and allocations"

addressed in Item 7 of the MOU. *Id.* As such, based on the arguments and evidence before him, specifically the Union President's "[un]rebutt[ed]" testimony that, in FY 2006, the Union and the Agency together decided how to dispose of unspent awards money, he concluded that the Agency's unilateral reallocation of the FY 2007 unspent awards violated the parties' agreement. *Id.* Consistent with these findings, even assuming that the award panels and CAS/OTS awards discussed in Items 3 and 9 of the MOU no longer existed in FY 2007, the Agency has provided no basis for finding that the Arbitrator's interpretation of the MOU is irrational, unfounded, implausible, or in manifest disregard of the MOU. Accordingly, we deny the Agency's first and second essence exceptions.

The Agency's third essence claim alleges that the Arbitrator added language to the MOU where he admitted that none existed. Agency's Exceptions at 24. As set forth above, acknowledging that the Handbook and the MOU were silent as to the disposition of unspent funds in FY 2007, the Arbitrator found that, "[i]n the absence of any other language to the contrary, . . . the same processes, procedures, practices[,] and allocations used for the FY 2006 program were to be used for FY 2007." Award at 27. The Agency fails to establish how this interpretation is irrational, unfounded, implausible, or in manifest disregard of the MOU. Moreover, the fact that the parties' agreements are silent with respect to how unspent awards funds for FY 2007 should be allocated does not, by itself, demonstrate that the Arbitrator's award fails to draw its essence from the agreement. *DCMA*, 66 FLRA at 57. Accordingly, we deny the Agency's third essence exception.

B. 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. *See U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry AFB*). However, the Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration. *Id.* at 594.

The Union challenges as a nonfact the Arbitrator's failure to award a rerun of the awards process based on his alleged finding that it would result in the same outcome. Union's Exceptions at 19-20 (citing *Nat'l Guard*, 56 FLRA 588).

Before the Arbitrator, the parties disputed the appropriate remedy for the Agency's alleged violations, including whether a rerun would change the results of the nominations and awards. Award at 7-8, 9-10, 11-12, 14, 15. As the Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration, the Union's claim does not provide a basis for finding that the award is based on a nonfact. *Lowry AFB*, 48 FLRA at 594. Moreover, the Union's reliance on *Nat'l Guard* is misplaced. That decision involved an agency's claim that an award was contrary to § 7106 of the Statute, a claim that the Agency does not raise here.

As its second nonfact claim, the Union asserts that the Arbitrator's finding that the untimely nomination forms sat on the desk of the receiving official for several days after their receipt is not supported by the record. As such, the Union argues that the Arbitrator erred in finding that the nomination forms were not untimely and that the Agency had not violated the Handbook in that regard. Union's Exceptions at 21-22.

Contrary to the Union's claim, the Arbitrator did not base his conclusion regarding whether the nomination forms were untimely on a finding that the untimely nomination forms sat on the desk of the receiving official for several days. In this regard, the Arbitrator concluded that the Union had failed to demonstrate that the nominators -- and not the receiving officials -- were responsible for the untimely nominations. Award at 15. He also found that the Union had made no showing that any employee had received an unfair advantage because the nominations forms may have been received a day or two late, or that any employee was responsible for the lapse. *Id.* As an *example* of how the short delay may have occurred, the Arbitrator speculated that, since the submission deadline was a Friday, nominations "*may* simply have sat on the receiving official's . . . desk over the weekend and then marked as received on Monday." *Id.* (emphasis added). Thus, even assuming the Arbitrator's speculation regarding the reason for the short delay is erroneous, it does not establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *Lowry AFB*, 48 FLRA at 593. Accordingly, we find that the award is not based on nonfacts and deny the Union's exceptions.

VI. Decision

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