66 FLRA No. 67

BROADCASTING BOARD OF GOVERNORS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1812
(Union)

0-AR-4669

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DECISION

November 25, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to a merits award and a remedy award of Arbitrator George E. Marshall, Jr. filed by the Agency 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.[2]

The Arbitrator found that the Agency violated the parties' agreement and 22 U.S.C. § 1474 (§ 1474).[3] *See* Remedy Award at 1; Exceptions, Attach. 2, Tab 1 at 3, 7-9 (Merits Award). For the reasons that follow, we dismiss in part and deny in part the Agency's exceptions.

II. Background and Arbitrator's Awards

The Agency produces news and other programs for a global audience in over forty languages. *See* Merits Award at 2. Under § 1474, the Agency may employ non-U.S. citizens fluent in at least one of those languages if "suitably qualified United States citizens are not available." 22 U.S.C. § 1474. In the 1980s, the Agency began to interpret this limitation to mean that "[n]on-U.S. citizens may be appointed when there are no equally or better qualified U.S. citizens available." Merits Award at 3, 4 (internal quotation marks omitted). The Agency set forth this interpretation in its Manual of Operations (MOA), which states, in pertinent part, that § 1474 "authorizes employment of non-U.S. citizens . . . when equally or better qualified U.S. citizens are not available," and that "[a] non-U.S. citizen may be employed or promoted only if no equally or better qualified U.S. citizen is available to perform the duties of the position." *Id.* at 3 (quoting MOA) (emphasis omitted).

Subsequently, the Union filed a grievance alleging that the Agency violated the parties' agreement and § 1474 by hiring non-U.S. citizens instead of qualified U.S. citizens. *See* Exceptions, Attach. 2, Tab 11, Institutional Grievance at 1-2, 5 (Grievance). As relevant here, the Union requested a remedy that the Agency "remove . . . non-citizens and replace them with a qualified U.S. citizen" under certain circumstances. *Id.* at 5. The grievance was unresolved and submitted to arbitration.

In the merits award, the Arbitrator noted that the parties did not stipulate to the issues to be resolved. Merits Award at 6-7. The Arbitrator set forth the first two issues as "[w]hether the Agency . . . violated the [parties' agreement] and [§ 1474]" by: (1) "interpreting . . . the . . . term 'suitably qualified' to mean 'equally or better qualified;'" and (2) "requiring U.S. citizen employees to be 'equally or better qualified than a non-U.S. citizen for a vacant position[.']" *Id.* He also set

[1] Member Beck's dissenting opinion is set forth at the end of this decision.

[2] In addition, an attorney (Petitioner) filed a petition to intervene and/or file an amicus curiae brief on behalf of a group of U.S. citizens who applied for positions at the Agency. *See* Pet. for Leave to Intervene and/or File Amicus Curiae Br. at 1. The Petitioner also filed an amicus brief. *See* Mem. of Intervenors/Amici Curiae in Opp'n to Agency Exceptions at 1 (amicus brief). Further, the Agency requested leave to file a reply to the Union's opposition, *see* Agency's Reply to Union's Opp'n to Agency's Exceptions to Arbitration Award at 2 (Agency's Reply), and submitted a reply to the Union's opposition, *see id.* The Union requested leave to file a motion to strike the Agency's reply, *see* Mot. for Leave to File Mot. to Strike Agency's Reply to Union's Opp'n to Agency's Exceptions to Arbitration Award, and filed the motion to strike, *see* Union's Mot. and Mem. in Supp. of its Mot. to Strike Agency's Reply to Union's Opp'n to Agency's Exceptions to Arbitration Award (Union's Motion to Strike). We discuss all of these submissions below.

[3] Section 1474 states, in pertinent part, that the Agency may:

> [E]mploy, without regard to the civil service and classification laws, aliens within the United States and abroad for service in the United States relating to the translation or narration of colloquial speech in foreign languages or the preparation and production of foreign language programs when suitably qualified United States citizens are not available when job vacancies occur[.]

forth a third issue regarding whether the Agency's interpretation "establishes a past practice binding upon the Agency and the Union." [4] *Id.*

With regard to § 1474, the Arbitrator determined that "the term suitably qualified" means that "as long as a U.S. citizen applicant is well fitted or appropriate for a position in the [A]gency, then he or she must be given preference over any non-U.S. citizen, irrespective of the non-citizen's qualifications." *Id.* at 8 (internal quotation marks omitted). The Arbitrator found that the Agency's different interpretation was contrary to the "intent of Congress to give preference to U.S. citizens over non-U.S. citizens." *Id.* Additionally, the Arbitrator found that § 1474 did not authorize the Agency to "compare the qualifications of a U.S. citizen against the qualifications of a non-U.S. citizen." *Id.*

With regard to the parties' agreement, the Arbitrator stated:

> Although the parties have not argued a violation of the [parties' agreement], it would appear an erroneous interpretation of [§ 1474] would have an impact on Article 14 of the [parties' agreement] and would constitute a violation of Agency policy to promote from within wherever possible (Section 2), and Section 10 where Ranking Panels are not properly or improperly convened or when the appropriate number of candidates are not referred for consideration and selection by the selecting official. [5]

Id. at 10.

The Arbitrator also found that "the erroneous interpretation may have impacted upon the failure of the Agency to hire applicants [C.G., M.H., and A.V.], thereby violating their promotional opportunities under the [parties' agreement]." *Id.* In addition, the Arbitrator rejected the Agency's past practice claim, finding that the Agency did not demonstrate that the Union acknowledged or accepted the Agency's interpretation, and that "silence . . . cannot constitute . . . acceptance of an erroneous interpretation." *Id.*

Based on the foregoing, the Arbitrator sustained the grievance and remanded the matter to the parties to determine a remedy. The Arbitrator retained jurisdiction to resolve any matters that the parties could not resolve.[6] *See id.*

The parties could not agree on a remedy, and the Arbitrator directed the parties to file briefs as to what the remedy should be. *See* Remedy Award at 1. In its brief, as relevant here, the Union requested relief for employees C.G., M.H., and A.V. *See* Exceptions, Attach. 2, Tab 18, Br. on Issue of Remedy at 9-10 (Union's Remedy Brief). The Agency disputed the Union's arguments in this

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[4] The Arbitrator also rejected the Agency's claim that the grievance was not procedurally arbitrable. *See* Merits Award at 6-7. As the parties do not challenge that finding, we do not consider it further.

[5] Section 2 of Article 14 states, in pertinent part:

> It is Agency policy to provide for the promotion of employees under these procedures on the basis of competitive merit selection . . . . It is also Agency policy to promote from within wherever possible, consistent with the needs of the service. However, nothing in this Article shall restrict the Agency's right to determine the appropriate source or sources of recruitment to meet Agency mission objectives, contribute fresh ideas and new viewpoints, and meet the Agency's affirmative action goals; consider candidates in any sequence from appropriate sources; and select or non-select from any appropriate source of candidates at any point in the selection process.

Exceptions, Attach. 2, Tab 6 at 20 (CBA).

Section 10 of Article 14 states, in pertinent part:

> e. Ranking Panels
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> 1. When more than ten applicants are eligible for a position . . . the [Agency] will convene a ranking panel. . . .
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> 2. When a ranking panel is convened . . . not more than the five best qualified applicants . . . will be referred by the [Agency] for consideration. If ten or fewer applicants are eligible for a position . . . the [Agency] will refer all of the qualified applicants.
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> f. Selection Certificates
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> 2. [The Agency] will prepare and issue selection certificates. . . . Unless unusual circumstances . . . prevail, no more than the five highest ranked applicants . . . will be referred for consideration at an advertised grade level . . . . If ten or fewer applicants are eligible for a position . . . all qualified applicants will be referred. . . .
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> . . . .

Id. at 26-27.

[6] The Agency filed exceptions to the merits award, *see* Oct. 23, 2007 Order to Show Cause at 1-2 (in Case No. 0-AR-4298), and the Authority dismissed the exceptions as interlocutory, *see* Mar. 31, 2008 Order Dismissing Exceptions at 3 (in Case No. 0-AR-4298).

regard. *See* Exceptions, Attach. 2, Tab 17, Agency's Proposed Remedy, at 3-5 (Agency's Remedy Brief).

In his remedy award, the Arbitrator reiterated that the Agency violated the parties' agreement and § 1474, and directed the Agency to comply with the parties' agreement and § 1474. Remedy Award at 1. Also, as relevant here, the Arbitrator granted relief to C.G., M.H., and A.V., finding that they were qualified for the positions for which they applied, and that the Agency improperly chose non-U.S. citizens instead of them. *See id.* at 1-2.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the awards fail to draw their essence from the parties' agreement in five respects. Exceptions at 32. First, the Agency argues that Article 14, Section 1 (Article 14-1) indicates that Article 14 applies to U.S. citizens who apply for a job in the competitive civil service, and that because Article 14 applies only to U.S. citizens, "no employment action . . . of a non-U.S. citizen . . . can violate Article 14."[7] *Id.* at 35. Second, the Agency claims that the awards fail to draw their essence from Article 14, Section 2 (Article 14-2) because the awards "disregard[] the Agency's right to consider candidates in any sequence from appropriate sources and select or non-select from any appropriate source . . . at any point in the selection process."[8] *Id.* at 36-37.

Third, the Agency alleges that the awards fail to draw their essence from Article 6, Section 1 (Article 6-1) because the awards are "contrary to the [MOA]."[9] *Id.* at 33. Fourth, the Agency asserts that the awards fail to draw their essence from Article 6, Section 2 (Article 6-2) because the awards conflict with "management['s] . . . unfettered right to hire employees."[10] *Id.* at 34. Fifth, the Agency asserts that the awards fail to draw their essence from Article 21, Section 2(b)(4) (Article 21-2(b)(4)), because that provision "excludes from the grievance procedure[] any examination, certification or appointment."[11] *Id.* at 37 (internal quotation marks omitted).

The Agency also asserts that the Arbitrator exceeded his authority in three respects. *Id.* at 38. First, the Agency argues that by addressing the claims of C.G., M.H., and A.V., *see id.* at 39, the Arbitrator "ruled on issues that were not submitted to arbitration," *id.* at 38. Second, the Agency argues that the Arbitrator exceeded his authority because the awards "change[] the very terms of the [parties'] [a]greement," in violation of Article 22, Section 8 of the parties' agreement (Article 22-8),[12] because the awards "violate[]" Article 6-1. *Id.* at 41. Third, the Agency asserts "pursuant to the holding in" *United States Department of Treasury, United States Customs Service v. FLRA*, 43 F.3d 682 (D.C. Cir. 1994) (*Customs Service*), the Arbitrator "exceeded his authority in ruling on" § 1474 because § 1474 was "not intended to regulate or affect employees' working conditions." Exceptions at 41.

Further, the Agency asserts that the merits award is contrary to law, *id.* at 20, arguing that the Arbitrator should have deferred to the Agency's interpretation of the term "'suitably qualified'" in § 1474, *id.* at 25. In this regard, the Agency asserts that the term "'suitably qualified' is ambiguous," *id.*, and that this ambiguity indicates that Congress "left it up to the Agency to craft its own interpretation," *id.* at 28. In addition, the Agency contends that its "interpretation of . . . 'suitably qualified' is reasonable." *Id.* The Agency also argues that its role in foreign affairs is another reason the Arbitrator should have deferred to the Agency's interpretation of § 1474. *See id.* at 24. Further, the Agency asserts that the award is contrary to law because the Arbitrator declined to find that the Agency's interpretation of suitably qualified constituted a past practice. *See id.* at 31. Additionally,

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[7] Article 14-1 states, as relevant here, that "Agency promotions are effected under the authority contained in" 5 C.F.R. § 335 *et seq.* Exceptions, Attach. 2, Tab 6 at 20 (CBA).

[8] The wording of Article 14-2 is set forth at note 5, *supra*.

[9] Article 6-1 states, in pertinent part:

> In the administration of all matters covered by the Agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities; by published [Agency] policies and regulations in existence at the time the Agreement was approved; and by subsequently published [Agency] policies and regulations required by law or by the regulations of appropriate authorities.

CBA at 8.

[10] Article 6-2 states, in pertinent part, that "[s]ubject to subsection (b) of 5 USC 7106 and Section 3 of this Article [(Article 6-3)], nothing in this Agreement shall affect the authority of any management official of this agency . . . to hire . . . employees[.]" CBA at 8. Article 6-3 states, in pertinent part, that "nothing in this Section and/or Section 7106(a)" of the Statute "shall preclude the Agency and the Union from negotiating . . . appropriate arrangements for employees adversely affected by the exercise of any authority under those Sections by such management officials." *Id.* at 8-9.

[11] Article 21 is entitled "Negotiated Grievance Procedure." CBA at 63. Article 21-2(b)(4) states, in pertinent part, that complaints regarding "any examination, certification or appointment" are "specifically excluded from this negotiated procedure . . . [.]" *Id.*

[12] Article 22-8 states, in pertinent part, that an arbitrator "shall have no authority to add or to modify any terms of this Agreement." CBA at 70.

the Agency argues that the remedy award is contrary to law because it "re-writes the plain language of [§ 1474] from 'suitably qualified' to 'qualified.'" *Id.* at 32.

Finally, the Agency asserts that the awards are contrary to public policy because they: (1) "violate[] the [d]octrine of [l]aches," *id.* at 43; (2) could "potentially forc[e] [the Agency] to discharge several non-citizens," *id.*; (3) are contrary to the proposition that "[c]ourts should not second-guess agencies in areas of foreign policy," *id.* at 46; and (4) "impose a standard for [Agency] employment that is lower than the best available," and that consequently is contrary to the Voice of America (VOA) Charter,[13] *id.* at 45.

B. Union's Opposition

The Union argues that the awards do not fail to draw their essence from the parties' agreement. Opp'n at 23. Specifically, the Union contends that the Arbitrator did not err by applying Article 14 to the grievants. *See id.* at 25. In this regard, the Union claims that the grievants are "employees who [applied] for positions in the competitive civil service." *Id.* Additionally, the Union contends that the Arbitrator correctly interpreted Articles 14-2, 6-1, 6-2, and 21-2(b)(4) to be consistent with § 1474. *See id.* at 23-26.

The Union also argues that the Arbitrator did not exceed his authority. *Id.* at 26. First, the Union asserts that the Arbitrator was "free to establish his own formulation of the issue," *id.*, and that the Union requested that the Arbitrator award relief to C.G., M.H., and A.V., *id.* at 28. Second, with regard to Article 6-1, the Union contends that the Arbitrator's interpretation "does not rewrite the parties' agreement." *Id.* at 32. Third, the Union argues that the Arbitrator had jurisdiction to resolve the grievance because § 1474 "concern[s] a condition of employment[.]" *Id.* at 29. *See also id.* at 30-31 (citing Authority decisions for support).

With regard to the Agency's contrary to law arguments, the Union asserts that the Arbitrator's "analysis of the plain meaning of 'suitably qualified' was correct." *Id.* at 12. In addition, the Union disputes the claim that the Arbitrator should have deferred to the Agency's interpretation of § 1474 because of the Agency's role in foreign affairs. *See id.* at 11 (citing *Salleh v. Christopher*, 85 F.3d 689 (1996) (D.C. Cir. 1996) (*Salleh*)). With regard to the Agency's past practice argument, the Union asserts that the "nonexistence of a past practice is the province of the arbitrator" and is a matter of contract interpretation. *Id.* at 20.

Finally, with regard to the Agency's public policy claims, the Union asserts that the Agency failed to raise its laches defense to the Arbitrator, and that in any event, that defense does not support setting aside the awards. *See id.* at 33. The Union also disputes the Agency's remaining public policy exceptions. *See id.* at 35-38.

IV. Preliminary Matters

A. We deny the Petitioner's request to intervene.

The Petitioner does not cite a regulation permitting him to intervene in this matter, and nothing in the Authority's Regulations permits such an intervention. *Cf. U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 58 FLRA 747, 747 n.4 (2003) (Chairman Cabaniss concurring) (Authority's Regulations do not provide for grievants to intervene in arbitration cases); *AFGE, Local 1017*, 55 FLRA 1302, 1302 n.1 (2000) ("Because a grievant has no statutory right to become a party in arbitration, there is no basis to become a party through intervention."). Accordingly, we deny the Petitioner's request to intervene.

B. We do not consider the Agency's reply to the Union's opposition.

The Authority's Regulations do not provide for the filing of a response to an opposition, or a reply to such a response, *NTEU, Chapter 98*, 60 FLRA 448, 448 n.2 (2004) (Chairman Cabaniss dissenting as to other matters) (*Chapter 98*), and do not provide for the filing of other supplemental submissions, *e.g.*, *U.S. Dep't of Veterans Affairs Med. Ctr., Kan. City, Mo.*, 65 FLRA 809, 811 (2011) (*Veterans Affairs*). However, 5 C.F.R. § 2429.26 (§ 2429.26) provides that the Authority may, in its discretion, grant a party leave to file "other documents" as deemed appropriate. *E.g.*, *Cong. Research Emps. Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004). A filing party must demonstrate why its supplemental submission should be considered. *Chapter 98*, 60 FLRA at 448 n.2. The Authority has granted such leave where, for example, the supplemental submission responds to arguments raised for the first time in an opposition. *E.g.*, *U.S. Dep't of Def., Dep't of Def. Dependents Schs., Europe*, 65 FLRA 580, 581 (2011).

[13] According to the Agency, the VOA Charter provides that:

> The long-range interests of the United States are served by communicating directly to the people of the world by radio[.] To be effective, [VOA] must win the attention and respect of listeners . . . [.] VOA will serve as a consistently reliable and authoritative source of news[.] VOA news will be accurate, objective, and comprehensive.

Exceptions at 45 (citing Foreign Relations Authorization Act, Fiscal Year 1977, Pub. L. No. 94-350 § 206, 90 Stat. 823 (1976) (as amended, codified in relevant part at 22 U.S.C. § 6202)).

However, where a party's supplemental submission raises issues that the party could have raised in a previous submission, the Authority has denied a request to consider the supplemental submission. *E.g., U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 589 (2010) (*IRS, Bloomington*).

As stated previously, the Agency requested leave to file a reply to the Union's opposition and filed a reply. *See* Agency's Reply at 2. The Agency asserts that its reply is "necessary" because the Union's opposition "relies on arguments which are not supported by applicable law." *Id.* However, the Agency's reply raises issues that the Agency either raised or could have raised in its exceptions.[14] As such, there is no basis for granting the Agency's request. *See IRS, Bloomington*, 64 FLRA at 589. *See also U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enforcement*, 65 FLRA 529, 532 (2011) (*DHS*) (denying agency's request after finding that agency could have raised argument in its exceptions). Accordingly, we deny the Agency's request and do not consider its supplemental submission on the merits.

As stated previously, the Union filed a motion to strike the Agency's reply. *See* Union's Motion to Strike at 1. Where the Authority declines to consider a document, the Authority also declines to consider a subsequent response to that document because the response is moot. *See DHS*, 65 FLRA at 532. Consistent with this practice, we decline to consider Union's motion to strike.

C. Section 2429.5 of the Authority's Regulations bars the Agency's public policy exceptions and one of the Agency's essence exceptions.

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."[15] 5 C.F.R. § 2429.5 (§ 2429.5). Under § 2429.5, the Authority will not consider an issue that could have been, but was not, presented to the arbitrator. *See, e.g., U.S. Dep't of Agric., Forest Serv.*, 64 FLRA 931, 933 (2010).

The record indicates that at the hearing, the Agency was aware of the issues that it now challenges on public policy grounds. With regard to laches, the Agency was aware that the grievance challenged a long-standing Agency interpretation of § 1474. *See* Merits Award at 5. With regard to second-guessing the Agency's foreign policy-related decisions, the Agency was aware that the Arbitrator could rule in favor of the Union and thereby render a decision that the Agency believes is "second-guessing" the Agency's foreign policy-related decisions. With regard to remedy, the Union's grievance put the Agency on notice that the Arbitrator might direct the Agency to modify its hiring standards and possibly discharge non-U.S. citizen employees. *See* Grievance at 5. Although the Agency was aware of these issues at the time of the hearing, the Agency did not make public policy arguments to the Arbitrator.[16] *See* Exceptions, Attach. 2, Tab 2, Agency's Br. at 5-10; Agency's Remedy Brief at 5. As the Agency could have, but did not, present these arguments to the Arbitrator, we find that § 2429.5 bars the Agency's public policy exceptions.

The Agency argues that the awards fail to draw their essence from Article 21-2(b)(4), which, as noted

[14] Specifically, the Agency argues in its reply that: (1) the Agency is an instrument of United States foreign policy, *see* Agency's Reply at 4; (2) the Agency's interpretation of § 1474 is entitled to deference because of the Agency's role in foreign policy, *see id.*, and under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *see* Agency's Reply at 8-9; (3) the awards "intru[de] into the foreign policy prerogatives of the United States," *id.* at 3; (4) the Union's reliance on *Salleh*, 85 F.3d 689, does not support the Union's arguments, *see* Agency's Reply at 6; (5) the awards violate the doctrine of laches, *see id.* at 9; (6) the decisions that the Union cites to support its claim that § 1474 concerns a condition of employment, *see* Opp'n at 30-31, are inapplicable, *see* Agency's Reply at 10-11; (7) hiring "actions covered by the Arbitrator's [awards]" should not result in relief to grievants because those actions were "new appointments to the federal government," *id.* at 11; (8) the awards conflict with 22 U.S.C. § 6202, *see id.* at 11-12; (9) the awards will require the Agency to place employees in positions for which they are not qualified, *see id.* at 13; (10) the Union's argument conflicts with the Agency's right to hire under § 7106 of the Statute, *see id.* at 14; (11) the Union's "theory of why the VOA Charter supports the hiring of U.S. [c]itizens has no merit[,]" *id.*; and (12) the Union's argument that non-U.S. citizens are "disfavored in the security clearance process" is erroneous because "none of these jobs require a security clearance," *id.*

[15] The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including 5 C.F.R. § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency's exceptions in this matter were filed before that date, we apply the prior Regulations. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 978, 982 n.5 (2011).

[16] We note, with regard to the Agency's laches claim, that the equitable defense of laches bars an action when unreasonable delay in bringing the action has prejudiced the party against whom the action is taken. *Pueschel v. Dep't of Transp.*, 113 M.S.P.R. 422, 425 (2010). The party asserting laches must prove both unreasonable delay and prejudice. *Id.* The record does not indicate that the Agency argued to the Arbitrator that the Union's challenge should be barred by the doctrine of laches, or that the Union's alleged delay was unreasonable and prejudiced the Agency. *See* Exceptions, Attach. 2, Tab 2, Agency's Brief at 8-10. *See also* Exceptions at 42-43.

previously, states, in pertinent part, that "any examination[s], certification[s] or appointment[s]" are "specifically excluded from this negotiated procedure and must be pursued through appropriate alternate procedures." Exceptions, Attach. 2, Tab 6 (CBA) at 63. The Agency asserts that the provision "excludes from the grievance procedure[] 'any examination, certification or appointment.'" Exceptions at 37. The Agency's argument relates to the types of claims that can be grieved under the parties' agreement, and is an argument that the Agency could have presented to the Arbitrator. However, there is no evidence that the Agency did so. Accordingly, we find that § 2429.5 bars this essence exception.

V. Analysis and Conclusions

A. The awards do not fail to draw their 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)(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 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 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) (*OSHA*).

The Agency asserts that the awards fail to draw their essence from Article 14 because Article 14-1 indicates that the Article applies to U.S. citizens who apply for positions in the competitive civil service. *See* Exceptions at 35. However, the record indicates, and the Agency does not dispute, that the grievants are U.S. citizens who applied for positions in the competitive civil service. *See id.* at 35-36. *See also* Opp'n at 25. As such, the Agency does not demonstrate that the Arbitrator's application of Article 14-1 to the grievants was irrational, unfounded, implausible, or evidences a manifest disregard of the agreement. *See OSHA*, 34 FLRA at 575.

The Agency also asserts that the awards fail to draw their essence from Article 14-2, citing wording providing that the Agency has the right to select or non-select from any appropriate source. *See* Exceptions at 36. However, the Agency does not dispute that the Arbitrator found applicable other wording in Article 14-2, *see* Merits Award at 10, that it is "Agency policy to promote from within whenever possible, consistent with the needs of the service," CBA at 20. Thus, examining Article 14 as a whole, the Agency does not demonstrate that the Arbitrator's interpretation was irrational, unfounded, implausible, or evidences a manifest disregard of the agreement. *See OSHA*, 34 FLRA at 575.

In addition, the Agency contends that the awards fail to draw their essence from Article 6-1 because the awards are "contrary to the [MOA]." Exceptions at 33. It is well established that collective bargaining agreements, rather than agency regulations, govern the disposition of matters to which they both apply. *E.g.*, *U.S. Dep't of the Treasury, IRS*, 64 FLRA 720, 722 (2010). Accordingly, the Agency's claim -- that the Arbitrator's interpretation of the parties' agreement is contrary to the MOA -- does not provide a basis for finding that the award is deficient. *See id.* As such, the Agency does not demonstrate that the Arbitrator's interpretation of Article 14 was irrational, unfounded, implausible, or evidences a manifest disregard of the parties' agreement. *See OSHA*, 34 FLRA at 575.

Further, the Agency claims that the awards fail to draw their essence from Article 6-2, arguing that the provision "grants management the unfettered right to hire employees." Exceptions at 34. However, as set forth previously, the Arbitrator effectively interpreted Article 14 as limiting the Agency's right to hire under Article 6-2. *See* Merits Award at 10. The Agency does not demonstrate that the Arbitrator's interpretation of Article 14 was irrational, unfounded, implausible, or evidences a manifest disregard of the parties' agreement, *see OSHA*, 34 FLRA at 575, and does not demonstrate that Article 6-2 barred the Arbitrator's interpretation, *see* Exceptions at 34-35.

Based on the foregoing, we find that the Agency does not demonstrate that the awards fail to draw their essence from the parties' agreement. Accordingly, we deny the Agency's essence exceptions.

B. The Agency's contrary to law exceptions do not provide a basis for setting aside the award.

With regard to the Agency's contrary to law exceptions, the Authority has held that where an arbitrator bases an award on separate and independent grounds, an excepting party must establish that all grounds are deficient in order to demonstrate that the award is deficient. *See, e.g.*, *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000). Here, the Arbitrator determined that the Agency violated the parties' agreement and § 1474. *See* Merits Award at 7, 10. We have denied the Agency's essence exceptions.

As the Arbitrator's finding of a contractual violation constitutes a separate and independent basis for his awards,[17] we find that the Agency's contrary to law exceptions provide no basis for setting aside the awards. As such, it is unnecessary to consider the Agency's claim that the Arbitrator exceeded his authority by ruling on § 1474.[18]

C. The Arbitrator did not exceed his authority.

An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In the absence of a stipulation, the arbitrator's formulation of the issues is accorded substantial deference. *See U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997). Also, in the absence of a stipulation, an arbitrator is required to address and resolve the issues that he or she framed for resolution; not the unstipulated issues that the parties proposed. *See, e..g., AFGE, Local 3627*, 64 FLRA 547, 550 (2010). In addition, an arbitrator has broad discretion to fashion a remedy that the arbitrator considers to be appropriate. *See U.S. Dep't of Def. Dependents Schs.*, 49 FLRA 658, 663 (1994) (*DOD*).

The Agency argues that by awarding remedies to C.G., M.H., and A.V., the Arbitrator resolved issues that were not submitted to arbitration. *See* Exceptions at 38-39. Contrary to the Agency's claim, the Union requested that the Arbitrator award remedies to C.G., M.H., and A.V. *See* Union's Remedy Brief at 9-10. As the Union's request for remedies was submitted to arbitration, the Arbitrator did not exceed his authority by resolving the request.

The Agency also asserts that the Arbitrator exceeded his authority because he "violated [Article 6-1]" and thereby changed the parties' agreement without authorization, in violation of Article 22-8. This claim relies on the premise that the awards fail to draw their essence from Article 6-1. Where an exceeded authority claim essentially reiterates an essence exception that the Authority has denied, the Authority denies the exceeded authority exception. *See, e.g., FDIC*, 65 FLRA 179, 182 (2010). As we have found that the awards do not fail to draw their essence from Article 6-1, we also deny this exceeded authority exception.

Based on the foregoing, we find that the Arbitrator did not exceed his authority, and we deny the exceeded authority exceptions.

VI. Decision

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

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[17] In connection with the dissent, we note that the Agency does not claim that the Arbitrator exceeded his authority by addressing whether the Agency violated the parties' agreement. The Agency's only challenge to the Arbitrator's authority to "dismiss[]" the Union's proposed issue statement, Exceptions at 38, involves a claim, discussed further below, that the Arbitrator "inexplicably ruled on three employees," *id.* at 39. As such, there is no basis for the dissent to address whether the Arbitrator exceeded his authority in this regard.

We also note that the Agency argues that Congress provided the Agency with discretion to interpret § 1474. *See id.* at 28. However, the Agency does not assert that it is not permitted to exercise this discretion through bargaining and, by finding that the Agency violated the parties' agreement, the Arbitrator effectively found that the Agency did so. *Cf. POPA*, 53 FLRA 625, 648 (1997) (generally, matters concerning conditions of employment are subject to collective bargaining when they are within the discretion of an agency and are not otherwise inconsistent with law). In addition, we note that this matter is distinguishable from *United States Department of Justice, Federal Bureau of Prisons, Washington, D.C.*, 64 FLRA 559 (2010) (*BOP*), *pet. for review granted, decision vacated, and remanded sub nom. Federal Bureau of Prisons v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011) (*BOP v. FLRA*). Specifically, unlike the award at issue in *BOP v. FLRA*, here, the Arbitrator provided separate and distinct analyses with regard to the Agency's contract violation and the Agency's statutory violation. *See* Merits Award at 7-10. Although the Arbitrator stated that an "erroneous interpretation of [§ 1474] would have an [effect] on Article 14" of the parties' agreement, *id.* at 10, the Arbitrator went on to separately address the contractual provisions. Therefore, in context, we do not read the Arbitrator's finding of a contractual violation as dependent on a statutory violation.

[18] We note that the Petitioner's amicus brief challenges the Agency's contrary to law and public policy exceptions. *See* Amicus Brief at 7, 19. As we do not reach the Agency's contrary to law or public policy exceptions, it is not necessary to consider the arguments in the Petitioner's amicus brief or to decide whether it is properly before us. We note, in this regard, that the Authority considers amicus briefs only to the extent they address issues raised by the parties. *See U.S. Dep't of the Treasury, IRS*, 65 FLRA 687, 689 n.5 (2011) (citing *UPS, Inc. v. Mitchell*, 451 U.S. 56, 61 n.2 (1981) (declining to resolve issue raised solely by amicus)). And, as we do not reach the Agency's contrary to law exceptions, we do not address the dissent's discussion of them.

Member Beck, Dissenting:

Unlike my colleagues, I would conclude that the Arbitrator exceeded his authority when he considered whether the Agency violated Article 14 of the parties' Negotiated Labor-Management Agreement (NLMA).

The issue submitted to the Arbitrator by the Union was confined to one question: whether the Agency violated the Smith Mundt Act of 1948 (the Act) by interpreting the term "suitably qualified" to mean "equally or better qualified." Exceptions, Attach. 2, Tab 3 at 3 (Union Brief). Throughout its Brief and Reply Brief (Exceptions, Attach. 2, Tab 5), the Union never alleged that the Agency violated any provision of the NLMA. In his Award, the Arbitrator acknowledged that the parties "have not argued a violation of the NLMA," Exceptions, Attach. 2, Tab 1 at 10 (Merits Award), and that the Union requested, as relief, an "order that, from this point forward, the Agency interpret the term 'suitably qualified' in [the Act] to mean 'minimally qualified.'" Union Brief at 20.

Even though we typically accord arbitrators significant latitude to frame issues when the parties fail to do so or when the issue is murky (*U.S. Dep't of the Treasury, Internal Revenue Service, Wage and Investment Div.*, 66 FLRA 235, 243 (2011) (citing *U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999)), the issue in this case was clear and unambiguous, and it was limited to an alleged statutory violation, not an alleged contractual violation. Indeed, the Agency specifically challenged the Arbitrator's authority to "dismiss" the Union's articulation of the issue (which addressed only a violation of the Act) and to substitute his own formulation of the issue to include a violation of the NLMA. Exceptions at 38. The Agency was correct; the Arbitrator had no authority to re-frame the issue and expand the scope of the grievance simply because of his paternalistic concern that the Union "does not appear to understand the arbitrator's role . . . and the NLMA." Merits Award at 6.

Consequently, my colleagues' reliance on the Arbitrator's finding of a contractual violation as "a separate and independent basis" for his awards is misplaced.

I would consider the Agency's argument that the Arbitrator erred as a matter of law when he concluded that the Union's silence and inaction "over the years" did not create a binding past practice that bars the Union's grievance. Merits Award at 10.

We have long held that a past practice is established when a practice has been consistently exercised "over a significant period of time . . . [and] followed by one party and not challenged by the other." *U.S. Dep't of Justice, Exec. Office for Immigration Review, Bd. of Immigration Appeals*, 55 FLRA 454, 456 (1999); *see also Cruz-Martinez v. DHS*, 410 F.3d 1366, 1370-1372 (Fed. Cir. 2005) (*Cruz-Martinez*) (union's "acquiescence" to agency's interpretation of policy for 17 years constitutes a past practice and a "binding restriction" that bars the grievance).

The record clearly establishes that, beginning in 1983, the Agency advised the Union that it would modify the process by which it compared the qualifications of citizen and non-citizen candidates and would interpret the term "suitably qualified" in the Act as meaning "equally or better qualified." Merits Award at 3-4. In 1984, the Agency sought comment from the Union on a revised MOU that implemented the Agency's interpretation of the "suitably qualified" language. *Id*. at 4. In 1986, the Agency transmitted to the Union another MOU that contained the "equally or better qualified" language and, in 1988, transmitted internal operating guidelines that reiterated that the Agency "has interpreted the term 'suitably qualified' to mean 'equally or better qualified.'" *Id*. at 5. The Union offered no comment and made no proposals in response to any of these communications. In fact, the Union presented no evidence that it ever challenged the Agency's interpretation of the term "suitably qualified," which the Agency began to apply in 1983 and continued to apply, until the Union filed the instant grievance in 2007. [*]

The Union's silence and inaction for over twenty years is sufficient reason to bar the grievance. *Cruz-Martinez*, 410 F.3d at 1372 (a past practice, like a regulation, statute, or contractual provision, is a binding restriction that bars a grievance from being arbitrable).

[*] The Union President sent a single letter in April 1986 to the Agency in which the Union asserted that it "had not been given the opportunity to negotiate on the impact" of the change implemented in 1983-84, Merits Award at 4, and indicated that proposals would be forthcoming. Exceptions, Attach. 2, Tab 2 at 9 (Agency Brief). No proposals were submitted by the Union to the Agency. *Id*.