

67 FLRA No. 132

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS #33
LOCAL 506
(Union)

0-AR-4972

—
DECISION

August 7, 2014

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

After the Agency transferred an inmate (the inmate) from a high-security prison to a medium-security prison, the inmate assaulted and injured three employees. Arbitrator Norman J. Stocker found that the Agency's transfer of the inmate violated the parties' collective-bargaining agreement, and a particular Agency policy on inmate transfers (the transfer policy), and he directed the parties to form a committee to determine: (1) who made the decision to transfer the inmate; (2) why that person (or people) did so without following the transfer policy; and (3) whether the Agency's chief psychologist "committed witness tampering and perjury during her testimony at the [a]rbitration [h]earing."¹

We must determine whether, by awarding this remedy, the Arbitrator exceeded his authority "under . . . the stipulated issue."² Because the stipulated issue authorized the Arbitrator to award a remedy for the Agency's violation of the parties' agreement, we find that the Arbitrator did not exceed his authority.

¹ Award at 16.

² Exceptions at 5.

II. Background and Arbitrator's Award

After the inmate alleged that he was sexually assaulted by another prisoner, the Agency transferred the inmate from a high-security prison to a medium-security prison. Several days after the transfer, the inmate assaulted and injured three Agency employees. The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement by "improperly" transferring the inmate without following the transfer policy.³

The grievance went to arbitration, where the parties stipulated to the following issue: "Did the Agency violate the [parties'] agreement[] by transferring [the] inmate . . . to a medium[-]security facility, and, if so, what shall be the remedy?"⁴

At arbitration, several witnesses testified that the Agency did not comply with the transfer policy's procedures for determining whether the inmate met the requirements for transfer to the medium-security prison. These witnesses testified that, despite having concerns about the propriety of the transfer, they nevertheless effectuated the transfer because their supervisors – including the chief psychologist – directed them to do so.

The issue of witness intimidation also surfaced at the arbitration hearing. Some of the witnesses who testified that they had concerns about the transfer also testified that they were concerned about the Agency retaliating against them for their testimony at the hearing. And one such witness said that she was afraid of retaliation from the chief psychologist specifically.

In contrast, the Agency argued that it had complied with the transfer policy. Although the Agency acknowledged that it did not complete certain paperwork (the referral packet), the Agency asserted that completing it "would not have changed the outcome."⁵ But the Arbitrator rejected that argument and found that if the Agency had complied with the transfer policy, then the Agency would not have transferred the inmate. In particular, the Arbitrator found that the Agency's failure to complete the referral packet and conduct a required interview before directing the transfer was the "key element[] in this entire case."⁶ In this regard, he found that "[t]he very reason [the transfer policy] . . . [was] established (to protect the employees) was ignored," and that the inmate "was transferred without keeping the staff in mind."⁷

³ Award at 5.

⁴ *Id.* at 2.

⁵ *Id.* at 12-13 (internal quotation mark omitted).

⁶ *Id.* at 14.

⁷ *Id.*

Additionally, addressing the intimidation issue, the Arbitrator noted that he had never before witnessed “employees so concerned about reprisal for giving their testimony,” and stated that he believed that a “certain administrative person[]” had “abused [his or her] executive authority and created an atmosphere of fear in employees.”⁸

Based on the foregoing, the Arbitrator found that the Agency violated the transfer policy and the parties’ collective-bargaining agreement.

The Union asked for a variety of remedies. In particular, the Union asked the Arbitrator to: “remind[]” the Agency to adhere to its own transfer policy when placing an inmate in the medium-security prison; require the Agency to compensate the injured employees for certain medical expenses and “for pain and suffering”; and restore the injured employees’ leave.⁹ In addition, specifically regarding the witness-intimidation issue, the Union asked the Arbitrator to direct the Agency to investigate the chief psychologist “for potential witness tampering.”¹⁰ Finally, the Union asked the Arbitrator generally to award “any and all other just and proper relief as determined by the Arbitrator.”¹¹

Conversely, focusing on the injured employees, the Agency argued to the Arbitrator that the injured employees had filed claims under the Federal Employees’ Compensation Act (FECA), and that FECA provides the exclusive remedy for these employees’ injuries.¹²

The Arbitrator declined the Union’s request for compensation for the injured employees, but “agree[d] to the request for a complete and thorough investigation.”¹³ Specifically, he directed the parties to form a committee to determine: (1) who made the decision to transfer the inmate; (2) why that person (or people) did so without following the transfer policy; and (3) whether the chief psychologist “committed witness tampering and perjury during her testimony at the [a]rbitration [h]earing.”¹⁴ In addition, he directed the Agency to submit the committee’s findings to the Federal Bureau of Prisons and the Federal Bureau of Investigation.

The Agency filed exceptions to the Arbitrator’s award.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar certain of the Agency’s arguments.

The Agency argues that the Arbitrator exceeded his authority for several reasons. As pertinent here, the Agency contends that, by directing the Agency to conduct an investigation, the Arbitrator disregarded specific limitations on his authority contained in Article 32 of the parties’ agreement.¹⁵ According to the Agency, Article 32 provides, in pertinent part, that “[t]he arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of” the parties’ agreement or “[p]ublished [Agency] policies and regulations.”¹⁶ The Agency asserts that the Arbitrator violated Article 32 by disregarding three Agency policies concerning investigations.¹⁷ However, there is no record evidence that the Agency argued to the Arbitrator that Article 32 or the cited policies limited his authority to direct an investigation as a remedy. The Agency should have known to do so because an investigation was one of the remedies the Union requested from the Arbitrator.¹⁸

We note that FECA, on the one hand, and Article 32 and the Agency policies, on the other, address different matters. Thus, contrary to the dissent’s assertion,¹⁹ the Agency’s argument to the Arbitrator that FECA “is the exclusive remedy for federal employees who are injured on the job”²⁰ did not preserve the Agency’s right to argue, for the first time in its exceptions, that the Arbitrator’s remedy conflicts with Article 32 and certain Agency policies. For the same reason, the dissent’s reliance²¹ on the U.S. Court of Appeals for the District of Columbia Circuit’s decision in *NTEU v. FLRA*,²² is misplaced. In that decision, the court held that a party could, in its appeal of an Authority decision, “narrow[]” an argument that it made before the Authority;²³ it did not hold that a party could make a *different* argument to the Authority than it made to an arbitrator.

We note further that determining what is, and is not, properly before the Authority for adjudication is far from what the dissent characterizes as a “mere technicalit[y].”²⁴ To the contrary, it is a fundamental step in fair and impartial decision-making. In this regard, we

⁸ *Id.* at 12.

⁹ *Id.* at 15.

¹⁰ *Id.*

¹¹ *Id.* (internal quotation mark omitted).

¹² *See id.* at 10; Exceptions, Attach. B, Agency Post-Hearing Brief (Agency Post-Hr’g Br.) at 4-5, 9.

¹³ Award at 15.

¹⁴ *Id.* at 16.

¹⁵ Exceptions at 5-13.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 6-13.

¹⁸ Award at 15.

¹⁹ Dissent at 10.

²⁰ Agency Post-Hr’g Br. at 4.

²¹ Dissent at 10.

²² No. 12-1199, 2014 U.S. App. LEXIS 11208 (D.C. Cir. June 17, 2014).

²³ *Id.* at *21 (emphasis added).

²⁴ Dissent at 10.

must take the record as it is, not as we (or the dissent) would like it to be.

Because §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar parties from raising arguments that they did not make, but could have made, at arbitration, the Agency may not argue that Article 32 and certain Agency policies limited the Arbitrator's remedial authority for the first time on exceptions.²⁵ Accordingly, we dismiss the portions of the Agency's exceptions that make those arguments.

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

The Agency argues that the Arbitrator exceeded his authority "under . . . the stipulated issue"²⁶ because his remedy "exceeded and disregarded . . . the parameters of the issues originally before him for arbitration."²⁷ As relevant here, an arbitrator exceeds his or her authority when he or she resolves an issue not submitted to arbitration, or disregards specific limitations on his or her authority.²⁸

Although the Agency argues that the Arbitrator's selection of remedy exceeded his authority under the stipulated issue, the Authority has held that arbitrators have broad discretion to fashion remedies that they consider to be appropriate.²⁹ And there is no dispute that the stipulated issue authorized the Arbitrator to award a remedy if he found that the Agency violated the parties' agreement.³⁰ Further, nothing in the stipulated issue restricted the remedy that the Arbitrator could award for the Agency's violation of the agreement. Accordingly, the Agency has not shown that the Arbitrator's selection of remedy resolved an issue not submitted to arbitration or disregarded specific limitations on his authority under the stipulated issue.³¹

The dissent contends that "[b]ecause the subject matter of the grievance falls exclusively under the coverage of FECA, the Arbitrator had no authority to

entertain the merits of the grievance."³² However, there is no FECA issue before us. The Agency does not even mention FECA in its exceptions, let alone argue that "the Arbitrator had no authority to entertain the merits of the grievance" under FECA.³³ In fact, the Agency expressly acknowledges that the Arbitrator "ha[d] authority to devise a remedy for his finding that the Agency violated the parties' agreement."³⁴ Further, even before the Arbitrator, the Agency did not claim that the Arbitrator lacked jurisdiction: While it argued that the injured employees had already been compensated "to the fullest extent possible" by virtue of having filed FECA claims,³⁵ it *conceded* the Arbitrator's jurisdiction by stipulating that he should both determine whether the Agency violated the parties' agreement and award a remedy if he found a violation.³⁶ By raising and resolving issues that the Agency has not even raised – at any stage of this case – the dissent abandons its role as a neutral adjudicator and embraces the role of Agency advocate.

In addition, the dissent's determination to resolve this decision under FECA by focusing on the Union's allegedly redundant pursuit of "compensat[ion]" for employees' "injuries"³⁷ ignores two important points: (1) the Arbitrator *did not award* monetary compensation; and (2) the Union also sought two non-monetary remedies that would benefit the bargaining unit as a whole. In this regard, the Union asked the Arbitrator to "remind[]" the Agency to adhere to its own transfer policy, and direct the Agency to investigate the chief psychologist "for potential witness tampering."³⁸ The Arbitrator's awarded remedy – an investigation into both the Agency's failure to follow the transfer policy and the possible witness tampering of the chief psychologist – is directly responsive to these requests and, as discussed below, does not implicate FECA.

Finally, even if a FECA argument were properly before us – which it is not – it would lack merit. In this connection, in *NTEU, NTEU Chapter 51 (NTEU)*,³⁹ the Authority (based on an opinion letter from the Department of Labor's Office of Workers' Compensation Programs, which is responsible for interpreting and administering FECA⁴⁰) found that FECA deprived an arbitrator of authority to award certain *medical costs*,⁴¹ but did not deprive the arbitrator of authority to direct

²⁵ E.g., *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 357 (2014); *U.S. DOL*, 67 FLRA 287, 288 (2014); *U.S. Dep't of Agric., Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.4 (2011).

²⁶ Exceptions at 5; *see also id.* at 7, 11.

²⁷ *Id.* at 5.

²⁸ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 66 FLRA 388, 391 (2011) (*DOJ*).

²⁹ *Id.*; *see U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 861 (2012) (*BOP*).

³⁰ Award at 2; *see also* Exceptions at 12 (acknowledging that the Arbitrator had "authority to devise a remedy for his finding that the Agency violated the parties' agreement").

³¹ *See, e.g., BOP*, 66 FLRA at 861-62; *DOJ*, 66 FLRA at 391.

³² Dissent at 8-9 (citation omitted).

³³ *Id.*

³⁴ Exceptions at 12 (emphasis added).

³⁵ Agency Post-Hr'g Br. at 9; *see also id.* at 5.

³⁶ Award at 2.

³⁷ Dissent at 8.

³⁸ Award at 15.

³⁹ 40 FLRA 614 (1991).

⁴⁰ *Id.* at 624.

⁴¹ *Id.* at 629-34.

leave restoration, because FECA does not provide an exclusive procedure for receiving a *non-monetary remedy*.⁴² And in the U.S. Court of Appeals for the Sixth Circuit's decision in *Jones v. Tennessee Valley Authority*⁴³ – cited by the dissent⁴⁴ – the court did not address non-monetary remedies, but held only that a plaintiff's claim for intentional infliction of emotional distress was barred by FECA's exclusive jurisdiction over "remedies with respect to an injury or death."⁴⁵ Here, the Arbitrator *denied* the Union's request for compensation to the injured employees for certain medical expenses and pain and suffering;⁴⁶ the *only* remedy that he directed was an investigation.⁴⁷ *NTEU* supports finding that the Arbitrator had authority to issue this remedy, and *Jones* provides no basis for reaching a contrary conclusion. Accordingly, even if an issue regarding FECA were before us, the award would not be deficient.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

Member Pizzella, dissenting:

This case presents a convergence of "sad[]"¹ events whereby a special-needs inmate (who was diagnosed with schizoaffective and anti-social disorders)² was sexually assaulted by another inmate shortly before his scheduled release date from the Bureau of Prisons (Bureau) Federal Correctional Complex in Coleman, Florida. After that assault, the inmate was transferred to a "more protective" unit,³ where he then assaulted and "seriously injured" three prison guards.⁴

The vision statement of the Bureau affirms its responsibility to protect the "physical safety of all inmates" and to ensure that inmates are "prepared for a productive . . . return to society."⁵ However, the Department of Justice reported that 18,763 inmates were sexually victimized in federal correctional facilities in 2011. (While this case was pending, the Supreme Court determined that the Bureau may be held liable, under the Federal Tort Claims Act, for an assault that occurs on an inmate in a federal correctional facility.)⁶ During the same timeframe, no less than 2,470 "serious" assaults were perpetrated against federal prison staff.⁷

Without a doubt, this case underscores the fact that the daily duties performed by prison guards at federal penitentiaries are among the most inherently dangerous in the Federal government⁸ and reinforces the reality that the correctional environment involves "hazards [that] can never be completely eliminated."⁹ It is not surprising then that these unfortunate realities create a tension for the Bureau as it balances its obligations to create the safest possible environment for its guards and the inmate population alike.¹⁰

In this case, that tension is particularly evident. After the inmate was sexually assaulted, there was some disagreement between lower-level personnel and the

⁴² *Id.* at 627-28; *see also id.* at 631 (Authority stated that holding regarding arbitrator's lack of jurisdiction over payments that are exclusively governed by FECA "should not be interpreted as holding that the [a]rbitrator was not empowered to hear the issues raised in the grievance or that the issues were outside the scope of the negotiated grievance and arbitration procedure.").

⁴³ 948 F.2d 258 (6th Cir. 1991).

⁴⁴ Dissent at 9.

⁴⁵ *Jones*, 948 F.2d at 265.

⁴⁶ *See Award* at 15.

⁴⁷ *Id.* at 15-16.

¹ *See Award* at 12.

² *Id.* at 6.

³ *Id.* at 11.

⁴ *Id.* at 5.

⁵ Federal Bureau of Prisons Fundamentals, Vision Statement (Vision Statement), at 5-6. <http://www.bop.gov/about/agency>.

⁶ *Millbrook v. United States*, 133 S. Ct. 1441, 1447 (2013).

⁷ *Staff Prison Safety*, Federal Bureau of Prisons, http://www.bop.gov/about/statistics/statistics_staff_safety.jsp?month=May&year=2014 (last visited June 10, 2014); E. Ann Carson & William J. Sabol, *Prisoners in 2011*, Bureau of Justice Statistics, <http://bjs.gov/content/pub/pdf/p11.pdf> (last visited June 10, 2014).

⁸ *See Correctional Officers*, Occupational Outlook Handbook, U.S. Department of Labor, Bureau of Labor Statistics, <http://www.bls.gov/ooh/protective-service/correctional-officers.htm> (last visited June 10, 2014).

⁹ *Award* at 3.

¹⁰ Vision Statement at 5-6.

chief psychologist as to what was the best course to take.¹¹ When the inmate began to “quickly decompensat[e],”¹² the chief psychologist determined that a transfer to the “more protective” “[s]kills [u]nit”¹³ (which is designed to prepare inmates for release back to the public)¹⁴ was the “only viable option.”¹⁵ The Warden approved that recommendation and the transfer was effected.¹⁶ Five days later, the inmate assaulted the guards.¹⁷ As a result, the three guards were injured.

There is no dispute that after the assault on the guards, the Agency processed all claims for the guards’ injuries, restoration of leave, and continuation of pay under the federal workers’ compensation program.¹⁸ Nonetheless, the Union argued that the Agency violated the *preamble*, and two other equally-generic provisions of the parties’ master agreement (agreement)¹⁹ and, in its grievance, asked that the “Agency bear any and all medical bills, legal bills[,] and any other expenses” incurred by the guards.²⁰

Arbitrator N.J. Stocker determined that the Agency violated the agreement and a local policy supplement – Complex Supplement 5330.11.01 (Complex Supplement) – that was not a “part of the [parties’] [m]aster [a]greement.”²¹ As a remedy, he directed that the parties jointly “convene” a committee “of no less than six people” (whereby the Union and the Agency would each “select their own representatives”) to “investigat[e]” “who made the decision [to transfer the inmate] without following [the] procedures [of the Complex Supplement].”²² The Arbitrator went on to dictate, even further, that the Agency “[could] not” appoint the chief psychologist to the committee and that the committee must also investigate “whether [the chief psychologist] committed witness tampering”²³ – a question that was not part of the Union’s grievance and that was never presented to the Arbitrator.

At all times, the gravamen of the Union’s grievance was, as noted above, “that the Agency bear any and all medical bills, legal bills[,] and any other expenses

the three [guards] might have accrued *due to injuries sustained in the assault*, to include loss of any overtime that might have been worked had it not been *for those injuries*.”²⁴ It is baffling, therefore, why the Union would pursue this grievance *after* the grievants were fully compensated under FECA for their injuries. Until the Union filed the instant grievance, there never was any question *whether* the guards should be compensated. But now the question is whether this matter *may be raised* under the grievance procedure *after* the grievants filed claims, and were fully compensated, under the Federal Employees’ Compensation Act (FECA).²⁵ The answer to that question is simple - NO.

FECA is, quite simply, the exclusive remedy for workplace injuries. In fact, “[t]he Supreme Court has recognized FECA’s exclusivity and has stated that employees are ‘guaranteed the right to receive immediate, fixed benefits regardless of fault and *without need for litigation*, but in return, they *lose the right to sue the government and [federal agencies]*.”²⁶ In other words, “once [a federal workplace] injury falls within the coverage of FECA, its remedies are *exclusive* and *no other claims can be entertained*.”²⁷

Because the subject matter of the grievance falls exclusively under the coverage of FECA, the Arbitrator had no authority to entertain the merits of the grievance.²⁸

To the extent any portion of this matter is grievable under the parties’ agreement (a presumption with which I do not agree), I would conclude that the Arbitrator exceeded his authority.

The remedy awarded by the Arbitrator – directing the creation of a “committee”²⁹ – is not responsive to the central issue raised by the Union in this grievance. The Union argued that the Bureau’s decision to move the inmate was the “direct cause” of the injuries that the guards received and sought recovery for the guards’ “medical bills, legal bills[,] and any other expenses.”³⁰ Even though I may agree with my colleagues that arbitrators have “broad discretion” to fashion appropriate remedies,³¹ the remedy must still be “reasonably related to . . . the harm being remedied.”³²

¹¹ Award at 8-9, 11.

¹² *Id.* at 11.

¹³ *Id.*

¹⁴ *Id.* at 7 (citing Complex Supplement 5330.11.01, § 11, ¶ 1 at 6).

¹⁵ *Id.* at 11.

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 6.

¹⁸ Exceptions, Attach. B (Agency’s Post- Hr’g Br.) at 3.

¹⁹ Award at 3-4 (citing selected provisions from Art. 27 (Health and Safety) and Art. 36 (Human Resource Management)).

²⁰ Agency’s Post-Hr’g Br. at 4.

²¹ Award at 15.

²² *Id.* at 16.

²³ *Id.*

²⁴ Agency’s Post-Hr’g Br. at 4.

²⁵ 5 U.S.C. §§ 8101-8913.

²⁶ *Jones v. Tenn. Valley Auth.*, 948 F.2d 258, 265 (6th Cir. 1991) (emphases added) (citation omitted).

²⁷ *Id.* (emphases added).

²⁸ *U.S. Dep’t of VA, Cen. Tex. Veterans Health Care Sys. Temple, Tex.*, 67 FLRA 269, 270 (2014).

²⁹ Award at 16.

³⁰ Agency’s Post- Hr’g Br. at 4.

³¹ Majority at 2.

³² *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 107 (2010) (Chairman Pope concurring).

Arbitrator Stocker's remedy in this case bears no relationship whatsoever to the injuries received by guards in the line of duty. In this respect, he exceeded his authority.

As noted above, the prison environment is inherently dangerous and the hazards associated with that environment "can never be completely eliminated."³³ Therefore, the Bureau has established a comprehensive process by which it investigates incidents, such as here, when inmates are injured or guards are assaulted.³⁴ Those procedures are enumerated in a series of program statements that address when, and by whom, any type of investigation will be convened and how the investigation will be conducted.³⁵

To the contrary, the parties' agreement specifically limits an arbitrator's authority in such matters – an arbitrator *may not* "add to, subtract from, disregard, alter, or modify any . . . [p]ublished [Bureau] policies and regulations"³⁶ – whereas Bureau Statement 1210.21, for example, establishes that:

*[o]nly the Director [of the Bureau] may create a Board of Inquiry, and only a Regional Director or Warden (with Regional Director approval) may create an Inquiry Team. The focus of a Board of Inquiry is to determine the facts of an incident the Director deems significant or unusual enough to warrant a special and higher level of review.*³⁷

These provisions make no allowance for an arbitrator to order the creation of an ad hoc committee to investigate the circumstances (nor would it be appropriate for him to do so) that led to the transfer of an inmate who was sexually assaulted, was decompensating in his current environment, and was recommended for transfer by the chief psychologist of the facility. That is a matter over which only the Director or the appropriate Regional Director could determine an appropriate level of review.

I also do not agree with my colleagues to the extent they ignore the Agency's arguments that the Arbitrator exceeded his authority by directing an investigation because, in their opinion, there is no "evidence that the Agency argued" this point to the Arbitrator.³⁸ To the contrary, the Agency argued, over and over again, that "[FECA] is *the exclusive remedy*"³⁹

and that while "it is unfortunate that [guards] were *injured in performance of their duties* . . . each [guard] involved has been compensated to *the fullest extent possible allowed by law*."⁴⁰ By arguing that FECA is the exclusive remedy and that the guards were fully compensated, the Agency preserved its right to argue (and is not precluded by 5 C.F.R. § 2425.4(c) or § 2429.5 from arguing) in its exceptions that any other award, including the Arbitrator's order to conduct an investigation in a manner that is contrary to the terms of the parties' agreement, is contrary to law or exceeded the Arbitrator's authority.

As I have noted in several recent dissenting and concurring opinions, I am concerned with the majority's willingness to dismiss arguments on mere technicalities⁴¹ rather than grappling with these important issues on their merits. I do not believe that our Statute and our Regulations should be interpreted to whipsaw a party out of the opportunity to present an argument that, in the words of the U.S. Court of Appeals for the District of Columbia Circuit, "[was] *fairly brought* . . . 'to the Authority's attention.'"⁴² It is clear to me that the Agency *fairly brought* forward to the Arbitrator (and now to the Authority) the argument that FECA is the exclusive remedy under these circumstances and that the Arbitrator was without any authority to award any other remedy.

I would conclude, therefore, that the Arbitrator exceeded his authority to the extent he had any authority to address the merits of this grievance.

Thank you.

⁴⁰ Agency's Post-Hr'g Br. at 7 (emphases added).

⁴¹ See, e.g., *AFGE, Local 1897*, 67 FLRA 239, 240 (2014) (Member Pizzella concurring) (*Local 1897*) (Authority finding that union's exception that asserts "using the 'Douglas [f]actors as guidance . . . the agency's five[-]day suspension of [the grievant] is excessive'" does not state a contrary-to-law claim; see also, *AFGE, Local 1738*, 65 FLRA 975, 977 (2011) (Member Beck concurring) (Authority finding that union's exception that asserts an award is "contrary to the plain language of the negotiated agreement" does not establish an essence exception); *AFGE, Local 3955*, 65 FLRA 887, 889 (2011) (Member Beck concurring) (Authority finding that union's exception that asserts arbitrator erred by "relying on article 32 of the parties' agreement" and "citing [*AFGE, Federal Prison Council 33*, 51 FLRA 1112 [1996], in support of his award" does not establish an essence or contrary to law exception).

⁴² *NTEU v. FLRA*, No. 12-1199 2014 U.S. App. LEXIS 11208, at *20 (June 17, 2014) (quoting *U.S. Dep't of Commerce v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993)).

³³ Award at 3.

³⁴ Exceptions, Attach. C (Grievance) at 5-6.

³⁵ *Id.* at 7.

³⁶ *Id.* at 5 (citing Art. 32, § h.2).

³⁷ *Id.* at 6-7 (citing PS 1210.21) (emphases added).

³⁸ Majority at 4.

³⁹ Award at 10; Agency's Post-Hr'g Br. at 2.