

**67 FLRA No. 142**

UNITED STATES  
DEPARTMENT OF THE ARMY  
WHITE SANDS MISSILE RANGE  
WHITE SANDS MISSILE RANGE, NEW MEXICO  
(Agency)

and

NATIONAL FEDERATION  
OF FEDERAL EMPLOYEES  
LOCAL 2049  
(Union)

0-AR-4826

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DECISION

August 29, 2014  
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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

In *U.S. Department of the Army, White Sands Missile Range, White Sands Missile Range, New Mexico (White Sands I)*,<sup>1</sup> the Authority dismissed the Agency's exceptions challenging Arbitrator Diane Dunham Massey's jurisdiction because the exceptions were interlocutory. Following this decision, the Agency filed a motion with the Arbitrator in which it argued that the Union's grievance was not arbitrable for both substantive and procedural reasons. The Arbitrator rejected the Agency's arguments, determining that the parties' collective-bargaining agreement allowed the Union to bring Fair Labor Standards Act (FLSA) claims as a "class/collective action"<sup>2</sup> and that the Agency had waived its right to raise new challenges to the grievance's procedural arbitrability.

The Agency challenges both aspects of the award on multiple grounds. It argues that the portion of the award permitting class/collective actions is deficient on contrary-to-law, contrary-to-public-policy, nonfact, essence, and exceeds-authority grounds. And it alleges that the Arbitrator's procedural-arbitrability determination – that the Agency had waived its right to challenge the procedural arbitrability of the grievance –

should be set aside on nonfact, essence, contrary-to-law, exceeds-authority, and bias grounds. Further, it argues that the award now on review is final and binding and, therefore, asks us to consider, on the merits, the exceptions that the Authority dismissed in *White Sands I*. Although we agree that the Agency's exceptions are not interlocutory, we find that they lack merit, and, as such, we deny the Agency's exceptions.

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

Over seven years ago, in June 2007, the Union filed a grievance concerning overtime for up to 1,500 employees.<sup>3</sup> The grievance was not resolved, and the Union requested arbitration. The Agency argued that the grievance was improperly filed, and the parties agreed to hold a hearing on whether the grievance was arbitrable (first hearing). The Arbitrator conducted the first hearing in August 2009, and in December 2009, she issued an award (first award), in which she determined that the grievance was properly filed. After the issuance of the first award, the parties attempted to resolve the grievance through mediation, entering into a Mediation Confidentiality Agreement (MCA) with the Arbitrator; however, this process was unsuccessful.

Between 2009 and 2011, the parties prepared for arbitration, during which time the Arbitrator issued several orders concerning discovery and other procedural issues. In June 2011, the Arbitrator decided that she would be unable to decide the merits of the grievance, but that she would address any remaining prehearing matters. In February 2012, the Arbitrator issued the third in a series of supplemental awards on the procedures that the Agency would follow in interviewing bargaining-unit employees to prepare for the merits hearing.<sup>4</sup> In that award, the Arbitrator concluded that all of the prehearing matters had been resolved, and soon thereafter, she informed the Federal Mediation and Conciliation Service

<sup>3</sup> Member Pizzella notes that the Union asserted that, as of February 2011, the Agency owed the employees \$3 to 3.5 million for unpaid, scheduled overtime. Exceptions, Ex. 5 at 35. In addition, the Union asserted that for non-FLSA-exempt employees the "average affidavit value [was] nearly \$30,000" per employee for unpaid "suffer or permit" overtime, that it had incurred \$700,000 in attorney fees, and that the Agency would also be liable for interest on damages and potential liquidated damages. *Id.* at 35-36. Member Pizzella also notes that the parties have incurred ongoing arbitration costs since the first hearing was held in 2009.

<sup>4</sup> See generally 5 U.S.C. § 7114(a)(2)(A) (requiring agencies to give union representative opportunity to attend "formal discussion[s]" with bargaining-unit employees); *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal.*, 35 FLRA 594, 604 (1990) (interpreting § 7114(a)(2)(A) to require that union be given opportunity to send representative to agency interview of bargaining-unit employee whom union planned to call as witness at arbitration).

<sup>1</sup> 67 FLRA 1 (2012).

<sup>2</sup> Award at 1.

(FMCS) that her role in the arbitration had ended and that the parties were requesting a new arbitrator. The Agency, however, informed the FMCS that it would not select a new arbitrator because, as set forth below, the Union had failed to timely invoke arbitration.

The Agency did not claim that the original arbitration request was untimely. Rather, the Agency argued that when the Arbitrator determined that the grievance was properly filed, the Arbitrator effectively returned it to the negotiated grievance procedure (NGP). The Agency sent the Union a letter purporting to deny the grievance (denial letter) in February 2011 – over a year after the first award issued. The Union did not respond to the denial letter, later explaining that it saw no need to request arbitration a second time because the parties were already at (and had been actively preparing for) arbitration. But in February 2012 – just short of a year after sending the denial letter – the Agency claimed for the first time that, because the Union did not request arbitration within twenty days of receiving the denial letter, the grievance was not arbitrable.<sup>5</sup> The Agency therefore refused to select a merits arbitrator.

In response to the Agency's refusal to pick an arbitrator, the Union filed an unfair-labor-practice charge (ULP charge)<sup>6</sup> and contacted the Arbitrator for assistance. In April 2012, after giving the parties the option of selecting a new arbitrator to hear the Agency's newly raised challenge to the grievance's arbitrability, the Arbitrator withdrew her recusal. The Agency filed exceptions to the Arbitrator's reassertion of jurisdiction; however, in October 2012, the Authority dismissed the Agency's exceptions, without prejudice, as interlocutory,<sup>7</sup> and the FLRA's Office of the General Counsel dismissed the Union's ULP charge in light of the Authority's decision.

The Agency then filed a new motion with the Arbitrator to dismiss the grievance. The Agency argued, as relevant here, that the parties' agreement did not authorize class/collective actions and that the grievance was procedurally defective because the Union did not request arbitration after receiving the denial letter.

The Arbitrator rejected both of these arguments in the award that is now before us. She concluded that: (1) the issue of returning the grievance to the NGP was not before her at the time of the first award; (2) the

<sup>5</sup> See Award at 8 (quoting Art. 12, § 1 of the parties' agreement) (grieving party must invoke arbitration within twenty days of receiving final grievance decision).

<sup>6</sup> *Id.* at 5; see generally, e.g., *U.S. Dep't of VA, Veterans Canteen Serv., Martinsburg, W. Va.*, 65 FLRA 224, 228 (2010) (VCS) (ULP for party to refuse to participate in arbitration unless grievance is substantively inarbitrable under "clearly established law").

<sup>7</sup> *White Sands I*, 67 FLRA at 3.

Agency waived any remaining procedural arguments by failing to raise them at the first hearing; (3) the parties had not intended for the grievance to be sent back to the NGP if the Union prevailed at the first hearing; and (4) to the extent that the class/collective-action issue was substantive, rather than procedural, the parties' agreement permitted class/collective actions. The Arbitrator ordered the parties to select "a new arbitrator and proceed to arbitration on the merits," but stated that she would "reluctantly continue to serve until the [p]arties c[ould] agree to another arbitrator."<sup>8</sup>

The Agency filed these exceptions, and the Union filed an opposition.

### III. Preliminary Matter: The Agency's exceptions are not interlocutory.

The Authority's Regulations provide that "the Authority . . . ordinarily will not consider interlocutory appeals."<sup>9</sup> Thus, the Authority will not resolve exceptions to an arbitration award "unless the award constitutes a complete resolution of all the issues submitted to arbitration"<sup>10</sup> or a party demonstrates extraordinary circumstances warranting review.<sup>11</sup> When the only issue submitted to an arbitrator concerns a grievance's arbitrability, exceptions to the award are not interlocutory even if the parties contemplate further proceedings on the merits of the grievance.<sup>12</sup>

The Agency argues that its exceptions are not interlocutory because the Arbitrator "completely resolved all of the issues submitted to her."<sup>13</sup> But the Union disagrees, arguing that the "Arbitrator . . . has retained jurisdiction on all pre-merits issues" and that the Agency might raise additional prehearing challenges.<sup>14</sup>

Here, the Arbitrator has directed the parties to select "a new arbitrator and proceed to arbitration on the merits."<sup>15</sup> Moreover, the Union's argument that the Agency might raise additional pre-merits challenges is speculative.<sup>16</sup> Thus, there is no basis for finding that

<sup>8</sup> Award at 21.

<sup>9</sup> 5 C.F.R. § 2429.11.

<sup>10</sup> *White Sands I*, 67 FLRA at 2 (citing *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Carswell, Tex.*, 64 FLRA 566, 567-68 (2010); *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 60 FLRA 247, 248 (2004); *U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs.*, 57 FLRA 924, 926 (2002)).

<sup>11</sup> *White Sands I*, 67 FLRA at 2.

<sup>12</sup> *U.S. EPA, Region 2*, 59 FLRA 520, 524 (2003) (citing *Library of Cong.*, 58 FLRA 486, 487 (2003); *AFGE, Local 1760*, 37 FLRA 1193, 1200 (1990); *U.S. Info. Agency*, 32 FLRA 739, 744 (1988)).

<sup>13</sup> Exceptions at 22.

<sup>14</sup> *Opp'n* at 7.

<sup>15</sup> Award at 21.

<sup>16</sup> See *U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 537 (2010) (finding award final where

there are or will be any additional issues for the Arbitrator to resolve. Accordingly, under the circumstances, we find that the Agency's exceptions are not interlocutory.

#### IV. Analysis and Conclusions

- A. The Arbitrator did not err in concluding that the collective-bargaining agreement authorizes class/collective grievances.
1. The award is not contrary to law.

In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award *de novo*.<sup>17</sup> In applying a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.<sup>18</sup>

The Agency argues that the Arbitrator's determination that the parties' agreement permits class/collective actions is contrary to three recent Supreme Court decisions<sup>19</sup> that concern "class arbitration"<sup>20</sup> under the Federal Arbitration Act (Arbitration Act).<sup>21</sup> The Agency asserts that parties must consent to class arbitration and that "an arbitration agreement that [i]s silent with respect to class arbitration [cannot] be construed to allow arbitration by a class of plaintiffs."<sup>22</sup> Thus, the Agency claims that the Supreme Court has held that an arbitrator may not order class arbitration unless "(1) the parties agreed that the arbitrator should decide whether their contract authorized class arbitration; and (2) the arbitrator determined, based

on textual analysis, that the arbitration clause itself authorized class arbitration."<sup>23</sup>

We do not find the Agency's contrary-to-law arguments persuasive. First, even if the Arbitration Act precludes an arbitrator from deciding whether a contract authorizes class arbitration, absent a request from the parties (an issue that the Court expressly declined to decide<sup>24</sup>), it is of no moment because this case concerns labor arbitration under the Federal Service Labor-Management Relations Statute (the Statute). And, unlike the Arbitration Act, the Statute "provid[es] that all questions of arbitrability not otherwise resolved shall be submitted to arbitration."<sup>25</sup>

Moreover, the Agency ignores the fact that the Statute provides "an exclusive representative the right, in its own behalf or *on behalf of any employee in the unit represented by the exclusive representative*, to present and process grievances."<sup>26</sup> Thus, the grievance in this case is neither a class action nor a collective action because there is only one "plaintiff": the Union, which represents all bargaining-unit employees as a matter of law.<sup>27</sup> Accordingly, the Agency has not established that the cited Supreme Court precedent applies here and therefore fails to establish that the award is contrary to the cited cases.

As such, we deny the Agency's contrary-to-law exception.

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arbitrator ordered agency to rerun selection process and retained jurisdiction so that union could renew discrimination claim in event grievant not selected because "whether a discrimination claim will exist and/or be submitted to arbitration [wa]s purely speculative").

<sup>17</sup> *AFGE, Local 2595, Nat'l Border Patrol Council*, 67 FLRA 190, 191 (2014) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (*Chapter 24*)).

<sup>18</sup> *Id.* (citing *Chapter 24*, 50 FLRA at 332).

<sup>19</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

<sup>20</sup> Exceptions at 6.

<sup>21</sup> 9 U.S.C. §§ 1-16.

<sup>22</sup> Exceptions at 5 (citing *Stolt-Nielsen*, 559 U.S. 662). *But see Stolt-Nielsen*, 559 U.S. at 668-69 ("Counsel for AnimalFeeds explained to the arbitration panel that the term 'silent' did not simply mean that the clause made no express reference to class arbitration. Rather, he said, '[a]ll the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue.'") (emphasis added).

<sup>23</sup> *Id.* at 6 (citing *Oxford Health*, 133 S. Ct. at 2067).

<sup>24</sup> *Oxford Health*, 133 S. Ct. at 2068 n.2; *see also Stolt-Nielsen*, 559 U.S. at 699 (Ginsburg, J., dissenting) ("[T]he Court does not insist on *express* consent to class arbitration.") (emphasis added).

<sup>25</sup> VCS, 65 FLRA at 228 (quoting *DOL, Emp't Standards Admin./Wage & Hour Div., Wash., D.C.*, 10 FLRA 316, 319 (1982)).

<sup>26</sup> 5 U.S.C. § 7121(b)(1)(C)(i) (emphasis added); *see also id.* § 7103(a)(9) ("'grievance' means any complaint . . . by any labor organization concerning any matter relating to the employment of any employee").

<sup>27</sup> *See U.S. Dep't of the Navy, Naval Explosive Ordnance Disposal Tech. Div., Indian Head, Md.*, 57 FLRA 280, 284-87 (2001) (Chairman Cabaniss dissenting) (holding that neither Fed. R. Civ. P. 23 (concerning class actions) nor 29 U.S.C. § 216(b) (concerning collective actions under Fair Labor Standards Act) applies to arbitration under the Statute); *see also, by analogy, Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014) (where state is only named plaintiff, suit including claim for restitution for injuries suffered by state's citizens not a class action or mass action under Class Action Fairness Act of 2005).

2. The award is not contrary to public policy.

The Agency relies on similar arguments to support its claim that the award is contrary to public policy. The Authority construes public-policy exceptions “extremely narrow[ly].”<sup>28</sup> The Authority will not find an award deficient on this basis unless the asserted public policy is “‘explicit,’ ‘well defined,’ and ‘dominant,’”<sup>29</sup> and the violation is “‘clearly shown.’”<sup>30</sup> In addition, the appealing party must identify the policy “by reference to the laws and legal precedents and not from general considerations of supposed public interests.”<sup>31</sup>

Here, the Agency argues that the Arbitrator’s award authorizing class/collective arbitration is contrary to the public policy “that employers must be protected against being forced into class arbitration without clear contractual language authorizing it.”<sup>32</sup> As discussed above, at least insofar as labor arbitration under the Statute is concerned, the Agency has not demonstrated that such a public policy exists.

We therefore deny the Agency’s contrary-to-public-policy exception.

3. The award draws its essence from the parties’ agreement.

The Agency also claims that the award fails to draw its essence from Article 12, Section 8 of the parties’ agreement,<sup>33</sup> which prohibits an arbitrator from

<sup>28</sup> *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 459 (2012) (alteration in original) (quoting *NTEU*, 63 FLRA 198, 201 (2009)).

<sup>29</sup> *Id.* (internal citation omitted) (quoting *W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber Workers of Am.*, 461 U.S. 757, 766 (1983)).

<sup>30</sup> *Id.* (internal citation omitted) (quoting *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987)).

<sup>31</sup> *Id.* (internal citation omitted) (quoting *NTEU*, 63 FLRA at 201).

<sup>32</sup> Exceptions at 10.

<sup>33</sup> Article 12, Section 8 of the parties’ agreement provides as follows:

The arbitrator shall have no authority to add to, change, modify, alter, or delete any provision of this agreement. The authority of the arbitrator will extend to the interpretation of agency regulations, provisions of law, or regulations of appropriate authorities outside the agency. The arbitrator will make no findings of fact, recommendations, or interpretations of this agreement except to the extent necessary to resolve the issue(s) submitted or determined.

Award at 9.

modifying the agreement.<sup>34</sup> Specifically, the Agency argues that the Arbitrator’s conclusion that the agreement authorizes class/collective actions is unsupported by the agreement and therefore violates Article 12, Section 8 by “creating a new type of . . . grievance.”<sup>35</sup>

In reviewing an arbitrator’s interpretation of a collective-bargaining agreement, the Statute provides that the Authority apply the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.<sup>36</sup> 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.<sup>37</sup> 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.”<sup>38</sup>

As discussed above, the Arbitrator determined that the NGP permitted class/collective grievances based on her interpretation of the parties’ agreement. The Agency does not cite any language in the parties’ agreement that prohibits the Arbitrator from making such a finding.<sup>39</sup> Nor has the Agency explained why the Arbitrator’s interpretation of the NGP is irrational, unfounded, implausible, or in manifest disregard of the parties’ agreement. Accordingly, the Agency has not established that the award fails to draw its essence from the parties’ agreement.

We therefore deny the Agency’s essence exception.

4. The Arbitrator did not exceed her authority.

The Agency argues that the Arbitrator “exceeded her authority by disregarding the specific limitation on her authority established by [the] Supreme Court”<sup>40</sup> in the above-cited decisions. As relevant here, arbitrators exceed their authority when they disregard

<sup>34</sup> Exceptions at 11 n.8.

<sup>35</sup> *Id.*

<sup>36</sup> See 5 U.S.C. § 7122(a)(2).

<sup>37</sup> See *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

<sup>38</sup> *Id.* at 576.

<sup>39</sup> See *Broad. Bd. of Governors, Office of Cuba Broad.*, 66 FLRA 1012, 1018 (2012), *pet. for review denied*, 752 F.3d 453 (D.C. Cir. 2014).

<sup>40</sup> Exceptions at 11.

specific limitations on their authority.<sup>41</sup> We have rejected the Agency's argument that the Supreme Court decisions it cites limit the Arbitrator's authority to decide whether the parties' agreement permits class arbitration. Consequently, the Agency fails to establish that the Arbitrator exceeded her authority on that basis.<sup>42</sup>

The Agency also claims that the Arbitrator disregarded the limitations imposed by Article 12, Section 8<sup>43</sup> of the parties' agreement.<sup>44</sup> This exception essentially restates the Agency's essence exception. As we have rejected the Agency's claim that the Arbitrator's determination that the NGP permits class/collective grievances fails to draw its essence from the parties' agreement, the Agency likewise fails to show that the Arbitrator exceeded her authority by improperly modifying the parties' agreement.<sup>45</sup>

Accordingly, we deny the Agency's exceeds-authority exception.

5. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>46</sup>

The Agency argues that the Arbitrator determined that it "consented to [class/collective] arbitration of grievances,"<sup>47</sup> and that she based this determination on her finding that the parties "negotiated express provisions excluding certain causes of action

from the NGP,"<sup>48</sup> and class/collective arbitration was not among those exclusions.<sup>49</sup> The Agency claims that the Arbitrator's determination rests "on a clearly erroneous fact – that the issues excluded from the NGP listed in Section 3 of Article 11 of the [agreement] were a result of the '[p]arties [having] negotiated express provisions excluding certain causes of action from the NGP.'"<sup>50</sup> Rather, it asserts that the subjects excluded by Article 11, Section 3(a)-(h), (j), and (l) are non-grievable as a matter of law, and, as such, the parties did not negotiate over their exclusion.<sup>51</sup>

However, the Arbitrator did not find that the parties negotiated over any of the exclusions contained in Article 11, Section 3. Rather, the award states:

if the [p]arties wanted to have a bar to such actions, then . . . the [p]arties would need to include express language barring collective actions under FLSA or any other applicable law. An example of such an express exclusion is contained in the [p]arties' own [agreement]. *Article 21, Equal Employment Opportunity, Section 4*, provides:

*Allegations of discrimination have been excluded from coverage by the provisions of the negotiated grievance procedure in Article 11. Bargaining unit employees may pursue allegations of discrimination through the statutory EEO complaint system . . . .*

Thus, the [p]arties have negotiated express provisions excluding certain causes of action from the NGP.<sup>52</sup>

Therefore, the Arbitrator did not make the factual finding that the Agency claims to be erroneous. Accordingly, the Agency has not established that a central fact underlying the award is clearly erroneous.

<sup>41</sup> *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

<sup>42</sup> See *FDIC*, 64 FLRA 79, 80 n.4 (2009) (citing *SSA, Balt., Md.*, 57 FLRA 690, 693 n.6 (2002) (*SSA*); *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009) (*Local 1929*)) (denying exceeds-authority exception claiming that arbitrator disregarded limits imposed by contract and external law where Authority rejected contrary-to-law and essence exceptions).

<sup>43</sup> See *supra* note 33 for the text of Article 12, Section 8.

<sup>44</sup> Exceptions at 11.

<sup>45</sup> See *FDIC*, 64 FLRA at 80 n.4 (2009) (citing *SSA*, 57 FLRA at 693 n.6; *Local 1929*, 63 FLRA at 467) (denying exceeds-authority exception claiming that arbitrator disregarded limits imposed by contract and external law where Authority rejected contrary-to-law and essence exceptions); *AFGE, Local 2923*, 61 FLRA 725, 728 (2006) (citing *U.S. Dep't of the Treasury, IRS*, 60 FLRA 506, 508 (2004) (denying exceeds-authority exception claiming that arbitrator disregarded limits imposed by contract where Authority rejected essence exception).

<sup>46</sup> *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014) (*VAMC*) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).

<sup>47</sup> Exceptions at 8 (citing Award at 19).

<sup>48</sup> *Id.* (quoting Award at 19) (internal quotation marks omitted).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (quoting Award at 19).

<sup>51</sup> *Id.* at 8-9.

<sup>52</sup> Award at 19 (quoting Art. 21, § 4 of the parties' agreement) (first two emphases added).

As such, we deny the Agency's nonfact exception.

B. The Arbitrator did not err in finding the grievance procedurally arbitrable.

The Agency challenges the arbitrator's procedural-arbitrability determination – that the Agency waived any remaining procedural challenges it may have had by not raising them earlier in the proceeding – on nonfact, essence, contrary-to-law, and exceeds-authority grounds. The Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural-arbitrability ruling itself.<sup>53</sup> However, the Authority will find a procedural-arbitrability determination deficient on the ground that it is contrary to law.<sup>54</sup> For a procedural-arbitrability determination to be found deficient as contrary to law, the appealing party must establish that the determination is contrary to procedural requirements established by statute that apply to the parties' negotiated grievance procedure.<sup>55</sup> The Authority will also consider challenges to procedural-arbitrability determinations based on grounds that do not directly challenge the determination itself, such as claims that an arbitrator was biased or exceeded her authority.<sup>56</sup>

1. The Agency's nonfact and essence exceptions directly challenge the Arbitrator's procedural-arbitrability determination.

The Agency claims that the Arbitrator's procedural-arbitrability determination is based on a nonfact because counsel for the Agency did not have the authority to waive any procedural requirements under the parties' agreement.<sup>57</sup> It also argues that the award fails to draw its essence from the agreement because the Arbitrator's conclusion that the Agency forfeited its procedural arguments is premised on a misinterpretation of the agreement.<sup>58</sup> Because both of these claims directly challenge the Arbitrator's procedural-arbitrability

determination, neither provides a basis for finding the award deficient.<sup>59</sup>

As such, we deny the Agency's nonfact and essence exceptions to the Arbitrator's procedural-arbitrability determination.

2. The Arbitrator's procedural-arbitrability determination is not contrary to law.

Likewise, the Agency asserts that the award "is contrary to law because it potentially vitiates the agreed-upon mechanism for how such matters are to proceed to arbitration."<sup>60</sup> The Agency has not identified any specific procedural requirements with which the award conflicts in support of this argument. Therefore, we find that the Agency's claim provides no basis for finding the Arbitrator's procedural-arbitrability determination deficient.<sup>61</sup>

Further, the Agency also asserts that the award is contrary to the Authority's decision in *U.S. Department of the Army, Fort Monroe, Virginia (Fort Monroe)*.<sup>62</sup> It claims that *Fort Monroe* "effectively [upheld] an arbitrator's finding that the agency's right to raise an issue of (procedural) arbitrability was not barred and was not waived by the agency's participation in the arbitration hearing."<sup>63</sup> Although the Agency is correct about the result in *Fort Monroe*, it misunderstands the Authority's reasoning, which was that the Authority "will deny exceptions that merely disagree with an arbitrator's determinations regarding the procedural arbitrability of a grievance."<sup>64</sup>

Accordingly, we deny the Agency's contrary-to-law exception to the Arbitrator's procedural-arbitrability determination.

<sup>53</sup> *NFFE, Local 1001*, 66 FLRA 647, 648 (2012) (citing *AFGE, Local 3882*, 59 FLRA 469, 470 (2003) (*Local 3882*)).

<sup>54</sup> *AFGE, Council of Prison Locals, Council 33*, 66 FLRA 602, 604 (2012) (citing *Local 3882*, 59 FLRA at 470).

<sup>55</sup> *Id.* (citing *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005)).

<sup>56</sup> *Id.* (citing *U.S. Dep't of VA, Reg'l Office, Winston-Salem, N.C.*, 66 FLRA 34, 37 (2011)).

<sup>57</sup> Exceptions at 15-16.

<sup>58</sup> *Id.* at 18-20.

<sup>59</sup> See *U.S. Dep't of Energy, Sw. Power Admin., Tulsa, Okla.*, 56 FLRA 624, 626 (2000) (denying essence exception as directly challenging procedural-arbitrability determination); *U.S. Dep't of Transp., FAA, Portland, Me.*, 64 FLRA 772, 773 (2010) (denying nonfact exception as directly challenging procedural-arbitrability determination).

<sup>60</sup> Exceptions at 21.

<sup>61</sup> See *U.S. Dep't of the Air Force, 442d Fighter Wing, Whiteman Air Force Base, Mo.*, 66 FLRA 357, 362 (2011) (citing *U.S. Dep't of the Navy, Naval Air Station, Pensacola, Fla.*, 65 FLRA 1004, 1007-08 (2011)).

<sup>62</sup> 35 FLRA 1187 (1990).

<sup>63</sup> Exceptions at 13 n.10.

<sup>64</sup> *Fort Monroe*, 35 FLRA at 1192 (citing *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964)).

3. The Agency's exceeds-authority claim provides no basis for setting aside the Arbitrator's procedural-arbitrability determination.

The Agency claims that the Arbitrator exceeded her authority by interpreting the MCA that the parties and the Arbitrator entered into after she issued the first award.<sup>65</sup> It argues that the Arbitrator relied on the MCA to conclude that the Agency waived its right to receive a timely request for arbitration.<sup>66</sup> And it asserts that, in so doing, the Arbitrator disregarded Article 12, Section 8,<sup>67</sup> which, according to the Agency, forbids the Arbitrator from interpreting anything other than the agreement, laws, rules, and regulations.<sup>68</sup> It also argues that the Arbitrator decided an issue not submitted to arbitration because "the parties only bargained for the [A]rbitrator's interpretation of . . . the parties' agreement . . . and in no way 'assigned' her to determine the intent of the parties outside the language of the [agreement]."<sup>69</sup>

Even assuming that the Agency is correct that the Arbitrator was not permitted to consider the MCA, it would not provide a basis for finding her procedural-arbitrability determination deficient because the Arbitrator's interpretation of the MCA is not essential to her determination that the Agency waived its right to challenge the grievance's procedural arbitrability. Rather, the Arbitrator primarily relied on the remedies discussed at the first hearing and language included in the first award. Specifically, during the first hearing the Agency did not ask the Arbitrator to remand the grievance to the NGP, nor did it object to the Arbitrator's statement in the first award that she "w[ould] set a date for [h]earing the merits in the event the matter d[id] not settle."<sup>70</sup> The Arbitrator thus "conclude[d] that the Agency waived any further questions of procedural arbitrability when the [first] award was rendered."<sup>71</sup>

Although the Arbitrator goes on to discuss the "multitude of other indications that the [p]arties intended to proceed to arbitration on the merits rather than remand the matter to the [NGP],"<sup>72</sup> her award makes clear that she regarded evidence about the parties' post-first-award intent – including the MCA – as superfluous.<sup>73</sup>

<sup>65</sup> Exceptions at 13.

<sup>66</sup> *Id.* at 14-15.

<sup>67</sup> See *supra* note 33 for the text of Art. 12, § 8.

<sup>68</sup> Exceptions at 14.

<sup>69</sup> *Id.*

<sup>70</sup> Award at 12.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* ("The Arbitrator concludes that the Agency waived any further questions of procedural arbitrability when the [first]

Accordingly, the Arbitrator's conclusion that, based on the first hearing and first award, the Agency waived any remaining procedural-arbitrability objections is a separate and independent basis for her procedural-arbitrability determination. And because the Agency does not challenge this determination, its exceptions provide no basis for finding the Arbitrator's procedural-arbitrability determination deficient.<sup>74</sup>

We therefore deny the Agency's exceeds-authority exception to the Arbitrator's procedural-arbitrability determination.

4. The Agency fails to support its bias allegation.

The Agency claims that if we were to conduct a "review of the record" we would find "communications by the [A]rbitrator" that "arguably suggest[] a bias by the [A]rbitrator against" the Agency.<sup>75</sup> To the extent that the Agency intended this statement to be an exception on bias grounds, we deny it because the Agency does not support this claim, as required by § 2425.6(e)(1) of the Authority's Regulations.<sup>76</sup>

- C. We deny the Agency's exceptions from *White Sands I*, as incorporated by reference.

The Agency also incorporates by reference its exceptions in *White Sands I*. In *White Sands I*, the Agency argued, as relevant here, that: (1) the Arbitrator's determination that she could withdraw her recusal was based on a nonfact; (2) the Arbitrator exceeded her authority when she withdrew her recusal; and (3) the Arbitrator's withdrawal of her recusal is contrary to public policy favoring the finality of arbitral awards.

Although the Authority dismissed the Agency's exceptions without prejudice because the Arbitrator's letter withdrawing her recusal was not a final and binding award, the Authority did so because it determined that the

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award was rendered. *Nevertheless*, there is a multitude of other indications that the [p]arties intended to proceed to arbitration on the merits rather than remand the matter to the [NGP].") (emphasis added).

<sup>74</sup> See, e.g., *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 86 (2011) (citing *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000)) ("[W]hen an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to have the award found deficient.").

<sup>75</sup> Exceptions at 13.

<sup>76</sup> See *U.S. DHS, U.S. CBP*, 66 FLRA 904, 908 (2012) (citing *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 195 n.2 (1990)).

Arbitrator “explicitly retained jurisdiction over all pre-hearing matters, including those related to arbitrability” and “conditioned” her recusal “on ‘all pre-hearing matters [being] resolv[ed]’ and on the ‘matter [being] ripe to proceed to the merits with a different arbitrator.’”<sup>77</sup>

These findings also go to the merits of the Agency’s exceptions. Indeed, they completely resolve them: Because the Authority found that the Arbitrator’s recusal was conditioned on “all pre-hearing matters [being] resolv[ed],”<sup>78</sup> and the Arbitrator found that the condition was not satisfied, it was not clearly erroneous for her to find that she was permitted to withdraw her recusal. Likewise, because her recusal was conditional, the Arbitrator did not exceed a self-imposed limit on her jurisdiction by withdrawing her recusal,<sup>79</sup> and the withdrawal of her recusal does not implicate the public policy favoring the finality of arbitration awards. And, as the Agency has simply reasserted its exceptions, it does not offer any new facts or arguments that would cause us to reconsider the determination that the Arbitrator “retained jurisdiction over all pre-hearing matters.”<sup>80</sup> Accordingly, we deny the Agency’s exceptions in *White Sands I* as incorporated by reference in these exceptions.

## V. Decision

We deny the Agency’s exceptions.

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<sup>77</sup> *White Sands I*, 67 FLRA at 3 (alterations in original) (internal citation omitted).

<sup>78</sup> *Id.* (alterations in original) (internal citation omitted).

<sup>79</sup> See, e.g., *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 302-03 (2011).

<sup>80</sup> *White Sands I*, 67 FLRA at 3.