68 FLRA No. 30

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
EUGENE DISTRICT
PORTLAND, OREGON
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1911
(Union)

0-AR-4997

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DECISION

January 8, 2015

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

I. Statement of the Case

The Agency suspended the grievant for ten days for a variety of alleged offenses. The alleged offenses included leaving a meeting at which the grievant was denied the opportunity to obtain Union representation, and giving an Agency contractor information about when the Agency would repair a logging road in a national forest, without authorization. The Union grieved the suspension. Arbitrator Donald E. Olson, Jr., sustained the grievance in most respects and reduced the grievant's ten-day suspension to an informal letter of warning. There are three substantive questions before us.

The first question is whether the award is contrary to law because the Arbitrator erroneously found that the Agency violated the grievant's right to representation under Article 3, Section 2(d) of the parties' agreement, which incorporates § 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute) (the *Weingarten* right).[1] Because the Agency has not shown that the Arbitrator erred in finding that the Agency violated the grievant's *Weingarten* right, the answer is no.

The second question is whether the Arbitrator exceeded his authority by not addressing each charge on which the Agency based its decision to suspend the grievant. Because the Agency does not show that the Arbitrator failed to resolve the stipulated issue submitted to arbitration, the answer is no.

The third question is whether the Arbitrator's award is based on nonfacts. The answer is no, because: (1) one of the Agency's nonfact claims fails to demonstrate that the Arbitrator would have reached a different result but for the alleged factual error; (2) a second nonfact claim misinterprets the award; and (3) a third nonfact claim challenges the Arbitrator's determination of an issue that was disputed at arbitration.

II. Background and Arbitrator's Award

The grievant, a long-time Agency employee, allegedly discussed certain unspecified equal-employment-opportunity (EEO) matters with his co-workers. Knowledge of the grievant's alleged discussions spread, with a number of consequences. The grievant received an email message from an Agency EEO counselor concerning his alleged discussions, and the following day the grievant's supervisor informed the grievant that he was to meet with an upper-level supervisor at 4:00 p.m. that day. The upper-level supervisor also visited the grievant's worksite earlier that day and distributed a copy of an email message from the EEO counselor on EEO investigation procedures. While he was at the grievant's worksite, the upper-level supervisor specifically reminded the grievant of their 4:00 p.m. meeting.

The 4:00 p.m. meeting's location was a one-hour drive from the grievant's worksite. However, the grievant left his worksite an hour early, at 2:00 p.m., so that he could stop and make some phone calls. While the grievant was stopped making his phone calls, he was approached by an Agency contractor – a logger – who asked about some road repairs that the Agency needed to make to a logging road. The grievant told the contractor that the repairs would probably not be done for a few days.

One of the calls the grievant made before going to the meeting was to the local Union president. The Union president told the grievant to ask for Union representation if there was more than one person in the meeting room. So when the grievant entered the upper-level supervisor's office and saw the upper-level supervisor and two other supervisors, the grievant asked whether the meeting could be postponed so that he could obtain Union representation. His request was denied, and the grievant left the office. Further discussions ensued, including a request by the upper-level supervisor for the

[1] *See* 5 U.S.C. § 7114(a)(2)(B); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

grievant to return to the meeting, and he agreed to do so. But before returning to the meeting, the grievant called the Union president again, and the Union president instructed the grievant to wait for Union representation if the Agency asked him to sign anything. The grievant returned to the meeting, asked whether the meeting could be postponed, had his request denied, was asked to sign a paper concerning a safety issue that the record does not identify, and left the meeting again.

A few weeks later, the Agency scheduled a meeting with the grievant and the grievant's Union representative. Although the representative did not have prior notice of the meeting's purpose, he attended the meeting with the grievant. At the meeting, the Agency gave the grievant a letter of counseling regarding his conversations with co-workers about EEO matters. The Agency also gave him a notice of a proposed fourteen-day suspension, which the Agency later reduced to ten days.

The Agency based the suspension on four charges. First, the Agency charged the grievant with failure or delay in carrying out instructions (failure-to-carry-out-instructions charge). The charge related to the grievant's early departure from his worksite to attend the January 26 meeting, and his failure to remain at the meeting when asked to do so by the upper-level supervisor. The second, related charge was that the grievant was absent without official leave (AWOL) for the hour he spent making phone calls on his way to the meeting (AWOL charge). The third charge against the grievant was for discourteous conduct in connection with the January 26 meeting (discourteous-conduct charge). And the fourth charge was for violating standards of ethical conduct by making an unauthorized commitment on behalf of the Agency during the grievant's road-repair conversation with the logger (ethical-conduct charge).

The Union grieved the suspension, which was unresolved and submitted to arbitration. The parties stipulated to the following issues: "Did the Agency suspend the [g]rievant . . . for just and sufficient cause and to promote the efficiency of the service? If not, what shall be the remedy?"[2]

The Arbitrator explained the standards he was applying to resolve the just-cause issue. The Arbitrator stated that "in order for any employer to establish 'just or sufficient cause,' it must be demonstrated by an employer that it investigated all material facts, and provided a grievant with due process."[3] Further, the Arbitrator stated: "[T]he Agency must first prove every element of each charge it brings by a preponderance of the evidence, as well as prove that the charged conduct occurred."[4] And the Arbitrator added: "[T]he Agency must also prove the reasonableness of its chosen penalty in order to carry its burden of proof."[5]

Applying these standards, the Arbitrator concluded that "the Agency did not suspend the [g]rievant for just and [su]fficient cause and to promote the efficiency of the service."[6] In reaching this conclusion, the Arbitrator set aside two of the charges, and most of the third, on which the Agency based the grievant's suspension. Specifically, the Arbitrator set aside the part of the failure-to-carry-out-instructions charge relating to the grievant's failure to remain at the January 26 meeting.[7] The Arbitrator found, in this regard, that the Agency violated the grievant's *Weingarten* right when it refused to postpone the meeting until the grievant could obtain Union representation.[8]

In addition, the Arbitrator set aside the discourteous-conduct charge, finding simply that "the Agency has not proven this charge by the preponderance of the evidence."[9] And the Arbitrator set aside the ethical-conduct charge because "the Agency did not put forth any evidence or credible witness testimony to support the claim."[10]

The Arbitrator also determined that the Agency violated the grievant's due-process rights for two reasons. First, the Arbitrator found that the deciding official "did not fairly or objectively investigate" the grievant's allegedly unethical conversation with the logger.[11] Second, the Arbitrator found that the Agency "violated Article 9, Section 2(a)" of the parties' agreement and the grievant's due process rights in connection with the meeting at which the Agency gave the grievant the notice of proposed suspension.[12] Article 9, Section 2(a) provides, in relevant part, that an "employee may authorize the [Union] to discuss [a disciplinary action] with the supervisor prior to issuance."[13] The Arbitrator found that the Agency did not follow the proper suspension-notice procedures when it failed to notify the grievant's Union representative before the meeting that a notice of proposed suspension would be given to the grievant at the meeting.

[2] Award at 3.
[3] *Id.* at 19-20.
[4] *Id.* at 19.
[5] *Id.*
[6] *Id.* at 28.
[7] *Id.* at 27.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 24.
[11] *Id.* at 23.
[12] *Id.* at 24.
[13] Exceptions, Attach. 1, Parties' Agreement at 17.

Further, the Arbitrator found that the ten-day suspension issued to the grievant was "excessive."[14] The Arbitrator cited the Agency's failure to follow the principle of progressive discipline, as well its failure to consider the factors set forth by the Merit Systems Protection Board (MSPB) in *Douglas v. Veterans Administration*[15] (the *Douglas* factors).[16]

The Arbitrator upheld only the part of the failure-to-carry-out-instructions charge concerning the grievant's early departure from his worksite to attend the January 26 meeting, and the related AWOL charge for the one hour the grievant spent making phone calls.

Accordingly, as indicated above, the Arbitrator concluded that "the Agency did not suspend the [g]rievant for just and [su]fficient cause and to promote the efficiency of the service."[17] Concerning the remedy, the Arbitrator reduced the grievant's ten-day suspension to an informal letter of warning. The Arbitrator also ordered that one hour's pay be deducted from the backpay due to the grievant, for the one hour that he was AWOL.

The Agency filed exceptions to the Arbitrator's award. The Union filed an opposition to the Agency's exceptions.

III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's first and second contrary-to-law exceptions.

The Agency claims in its first contrary-to-law exception that "the [A]rbitrator's conclusion that the Agency violated Article 9, [Section] 2 [of the parties' agreement], and thereby violated the grievant's [right to due process], provides more process than the grievant is entitled [to] under statute or regulation."[18] In support of its claim, the Agency asserts that the right to due process under Article 9, Section 2 "is a contractual requirement [that] cannot afford additional due[-]process rights beyond those required under 5 U.S.C. § 7503."[19]

Similarly, the Agency claims in its second contrary-to-law exception that the Arbitrator's conclusion, as stated above, "would mean that the Agency could not sustain discipline for any charge" if the Agency did not notify the employee of the proposed disciplinary action in advance.[20] "Such a conclusion," the Agency claims, "would violate the Agency's right to discipline under 5 U.S.C. § 7106(a)(2)."[21]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented before the Arbitrator.[22]

The record reflects that the Union argued at arbitration that the Agency "violat[ed] [Article 9, Section 2] when [it gave the grievant] the proposed notice of suspension, which was a violation of his [right to due process] and thus, a violation of the just[-]cause standard."[23] Because the Union alleged the violation of due process at arbitration, the Agency was on notice and had the opportunity to raise its contrary-to-law arguments to the Arbitrator. The record reflects that the Agency argued that it met its responsibilities under Article 9, Section 2, and that any error was harmless.[24] But the record does not demonstrate that the Agency raised the applicability of § 7503 or management's right to discipline under § 7106(a)(2) in the proceeding before the Arbitrator.

Accordingly, we dismiss the Agency's first and second contrary-to-law exceptions because the Agency could have, but did not, make these claims to the Arbitrator.

IV. Analysis and Conclusions

A. The Arbitrator's award is not contrary to law.

The Agency alleges that the Arbitrator's *Weingarten* finding – that the Agency improperly denied the grievant Union representation – is contrary to law. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[25] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[26] In making that assessment, the Authority defers to the arbitrator's

[14] Award at 25.
[15] 5 M.S.P.R. 280, 305-06 (1981).
[16] Award at 25.
[17] *Id.* at 28.
[18] Exceptions at 11-12.
[19] *Id.* at 12.
[20] *Id.*
[21] *Id.*
[22] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also U.S. DOL, Bureau of Labor Statistics*, 67 FLRA 77, 79-80 (2012); *AFGE, Local 3627*, 66 FLRA 207, 209 (2011).
[23] Opp'n, Attach., Tab 4, Union's Post-Hr'g Br. at 15.
[24] *Id.*, Attach., Tab 5, Agency's Post-Hr'g Br. at 15-17.
[25] *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[26] *See U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

underlying factual findings unless the excepting party establishes that they are nonfacts.[27]

The *Weingarten* right is triggered when four elements are present: (1) the meeting at issue must be an examination of an employee by a representative of the agency; (2) the examination must be in connection with an investigation; (3) the employee must reasonably believe that the examination may result in disciplinary action against the employee; and (4) the employee must request representation.[28] The determination of whether an employee's belief that disciplinary action may result is reasonable rests on objective factors.[29]

Because the Agency's exception challenges only the third element, we address only that element. The Agency argues that "the grievant could not reasonably have believed that discipline might result from the . . . meeting,"[30] because he was told that the meeting was for "safety concerns" and was non-disciplinary.

Judicial and Authority precedent hold, in this regard, that the right to union representation exists whenever the facts and circumstances surrounding an investigatory examination make it reasonable for the employee to believe that his or her answers might lead to discipline.[31] Even assuming the Agency told the grievant that the meeting was for safety concerns and was non-disciplinary – which the Arbitrator did not find in his award – there are a number of additional objective factors, found by the Arbitrator, of which the grievant was aware. These additional objective factors include: (1) the grievant's awareness of the Agency's concern with his EEO activities; (2) the upper-level supervisor's visit to the grievant's worksite that day to discuss EEO policy; (3) the supervisor's specific reminder to the grievant about their scheduled meeting; and (4) the presence of three supervisors at the meeting, which surprised the grievant.[32] On this record, the Arbitrator concluded that "[t]here is no doubt . . . that the [g]rievant felt threatened that discipline might be assessed at [the] meeting."[33] Considering all of the circumstances, in our view, the Arbitrator's conclusion is consistent with the Authority's case law concerning the third *Weingarten* element.[34]

The Authority case law on which the Agency relies is not to the contrary. The Agency cites *SSA, Albuquerque, New Mexico* (*SSA*)[35] and the concurrence in *Department of the Navy, Norfolk Navy Base, Norfolk, Virginia* (*Navy*),[36] for the proposition that once an employee is informed of a meeting's non-disciplinary nature, it is unreasonable for an employee to fear disciplinary action.[37] But the Agency's reliance on *SSA* and *Navy* is misplaced.

In *SSA*, an Authority Administrative Law Judge (ALJ) consolidated two cases for decision, but exceptions were filed in only one case.[38] The Agency's legal claim – that a reasonable person would not fear disciplinary action upon notification that a meeting is non-disciplinary[39] – derives from the ALJ's findings in the case to which no exceptions were filed. As the Authority "adopt[ed the ALJ's findings in that case] without precedential significance,"[40] *SSA* does not offer precedential support for the Agency's claim that the Arbitrator's *Weingarten*-right ruling is contrary to law.

In *Navy*, the Authority affirmed an ALJ's finding that an employee reasonably believed that discipline might result from an interview despite being told by management "that no disciplinary action was contemplated, and that [management] just wanted to talk to [the employee]."[41] In his decision, the ALJ found a number of additional objective factors of which the employee was aware. These factors included: (1) the employee's awareness of the serious nature of the alleged insubordination; (2) that a coworker had been admonished earlier for similar conduct; (3) that the employee had never before been summoned to his second-level supervisor's office; and (4) that a different supervisor warned him not to attend the meeting without union representation.[42] Because this case and *Navy* are similar in this regard, *Navy* actually supports the Arbitrator's conclusion rather than the Agency's position. Therefore, *SSA* and *Navy* do not preclude the Arbitrator

[27] *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012).
[28] *See* 5 U.S.C. § 7114(a)(2)(B); *U.S. DOJ, Fed. BOP, Fed Corr. Complex Coleman, Florida*, 63 FLRA 351, 354 (2009).
[29] *See Dep't of the Navy, Charleston Naval Shipyard, Charleston, S.C.*, 32 FLRA 222, 229 (1988).
[30] Exceptions at 8.
[31] *See, e.g., IRS, Wash., D.C.*, 4 FLRA 237, 250-51 (1980) (*IRS*), *aff'd*, 671 F.2d 560 (D.C. Cir. 1982).
[32] Award at 9, 11.
[33] *Id.* at 27.
[34] *See, e.g., Dep't of the Navy, Norfolk Naval Base, Norfolk, Va.*, 14 FLRA 731, 739-40, 746 (1984) (*Navy*); *IRS*, 4 FLRA at 250-51.
[35] 56 FLRA 651, 655-57 (2000).
[36] 14 FLRA 731(Concurring Opinion of Chairman Mahone).
[37] Exceptions at 9-10 (citing *SSA*, 56 FLRA at 655-57); *see id.* at 10 (citing *Navy*, 14 FLRA at 733) (Concurring Opinion of Chairman Mahone)).
[38] *SSA*, 56 FLRA at 651-53.
[39] Exceptions at 9.
[40] *SSA*, 56 FLRA at 651 n.1.
[41] *Navy*, 14 FLRA at 741.
[42] *Id.* at 739-40, 746.

from determining that the grievant reasonably believed that the meeting might result in disciplinary action.

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

B. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority "by failing to address all four charges contained in the Agency's [p]roposal and [d]ecision."[43] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[44]

The Agency argues that a review of each charge was a necessary component of analyzing the stipulated issue, and by not addressing each charge individually, the Arbitrator exceeded his authority by failing to resolve the issue submitted to arbitration.[45] Specifically, the Agency argues that the Arbitrator erred because he: (1) did not deny the grievance after finding that the grievant failed to follow his supervisor's instructions to go directly to the meeting;[46] (2) "did not address whether the Agency proved its second specification of [the] failure to follow instructions where the grievant refused to stay for . . . [the] meeting after being told to do so;"[47] (3) "failed to evaluate the AWOL charge;"[48] and (4) "did not . . . state upon what evidence he was relying in making [his] finding" that the Agency did not prove the discourteous conduct charge.[49]

As indicated above, the parties stipulated to the issue at arbitration as whether "the Agency suspend[ed] the [g]rievant . . . for just and sufficient cause and to promote the efficiency of the service? If not, what shall be the remedy?"[50] Here, the Arbitrator "carefully reviewed the entire evidentiary record,"[51] determined that the suspension was not for just cause, and ordered a remedy.[52] Thus, the Arbitrator resolved the stipulated issue submitted to arbitration,[53] and – despite the Agency's argument to the contrary – "an arbitrator's failure to set forth specific findings . . . does not provide a basis for finding an award deficient."[54] Moreover, we note that, contrary to the Agency's claim, the Arbitrator did address each charge individually.[55]

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

C. The Arbitrator's award is not based on nonfacts.

The Agency alleges that the award is based on nonfacts. 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.[56] Disagreement with an arbitrator's evaluation of evidence, including the arbitrator's determination of the weight to be given such evidence, does not provide a basis for finding an award deficient as based on a nonfact.[57]

First, the Agency argues that the Arbitrator's finding that the Agency violated the grievant's *Weingarten* right is based on a nonfact because the Arbitrator did not take into account that the grievant was told that the meeting was for safety concerns and was non-disciplinary.[58]

The Agency's first nonfact exception does not provide any basis for finding that the award is deficient, because it does not demonstrate that the Arbitrator would have reached a different result even if the Arbitrator had expressly taken into account what the grievant was allegedly told about the meeting's purpose. As discussed above regarding the Agency's third contrary-to-law exception, even assuming that the Arbitrator had found that the Agency told the grievant that the meeting was for safety concerns and was non-disciplinary, the Arbitrator also found a number of additional factors of which the grievant was aware that support the Arbitrator's *Weingarten* finding. And Authority precedent holds that a grievant's belief that a meeting might result in disciplinary action may be reasonable, even after being informed that the meeting would be non-disciplinary, where additional factors are present.[59] Here, the

[43] Exceptions at 3.
[44] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[45] *See* Exceptions at 3.
[46] *Id.* at 4.
[47] *Id*.
[48] *Id.* at 5.
[49] *Id.* at 6.
[50] Award at 3.
[51] *Id.* at 18.
[52] *See id.* at 27-29.
[53] *See id.* at 28-30.
[54] *NAGE, Local R1-109*, 46 FLRA 451, 454-55 (1992) (*NAGE*) (citing *U.S. Dep't of Commerce, Patent & Trademark Office*, 41 FLRA 1042, 1049 (1991) (*PTO*)).
[55] *See* Award at 21-24, 27-28.
[56] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*Local 1984*) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry Air Force Base*)).
[57] *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 103 (2012).
[58] Exceptions at 10.
[59] *See Navy*, 14 FLRA at 746-48.

Arbitrator considered the additional factors and concluded that "[t]here is no doubt . . . that the [g]rievant felt threatened that discipline might be assessed at [the] meeting."[60] Consequently, the Agency's exception provides no basis for finding that, but for the Arbitrator's alleged factual error concerning what the grievant was told about the meeting's purpose, the Arbitrator would have reached a different result. Therefore, we deny the Agency's first nonfact exception.

Second, the Agency argues that the Arbitrator's evaluation of the Agency's AWOL charge is based on a nonfact. The Agency claims that the Arbitrator relied on a nonfact when, in considering the Agency's AWOL charge, he found that the Agency "failed to charge the [grievant] with . . . 'theft of time' or some similar 'type of misconduct.'"[61] The Agency argues that its AWOL charge appears in the Agency's table of penalties and is the federal equivalent of "theft of time."[62] On this basis, the Agency asserts that "had the Arbitrator properly evaluated the Agency's charge of AWOL, he would have concluded that the Agency had met its burden of proving the charge."[63]

The Agency's second nonfact exception does not provide any basis for finding the award deficient, because the Agency misinterprets the award. Contrary to the Agency's assertion, the Arbitrator found that the Agency met its burden of proving its AWOL charge. The Agency argued at arbitration[64] that the grievant was AWOL "for one hour . . . and did not request permission from management to leave the crew[']s worksite early."[65] The Arbitrator agreed with the Agency. He found that the grievant "took it upon himself to unilaterally leave the worksite . . . without permission."[66] Further, the Arbitrator ordered that "one (1) hour of the [g]rievant's wages . . . be deducted"[67] from the backpay due to the grievant, on account of his unauthorized one-hour absence, and that he be given an informal letter of warning that included some "forewarning language [that], for example, 'any further unauthorized absences from an assigned worksite without supervisory approval may lead to appropriate *formal* discipline."[68] Because the Agency's second nonfact exception challenges an allegedly adverse arbitral ruling that the Arbitrator did not make, we deny the exception.

Third, the Agency argues that the Arbitrator's finding that the Agency did "not prov[e the discourteous-conduct] charge by the preponderance of the evidence" is based on a nonfact because the Arbitrator did not find that the grievant "turned his back on his third[-]level supervisor and walked out of the room while she was speaking to him."[69] However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[70] Here, the parties disputed at arbitration whether the Agency "demonstrated by a preponderance of evidence that the [g]rievant committed the offenses with which he was charged."[71] As this issue was disputed at arbitration, the Agency's argument provides no basis for finding that the award is based on a nonfact.[72] Therefore, we deny the Agency's third nonfact exception.[73]

Accordingly, we deny the Agency's nonfact exceptions.

V. Decision

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

[60] Award at 27.
[61] Exceptions at 5.
[62] *Id.* at 6.
[63] *Id.*
[64] Award at 14.
[65] *See id.* at 14.
[66] *Id.* at 22.
[67] *Id.* at 28.
[68] *Id.* at 29.
[69] Exceptions at 6-7 (internal quotation marks omitted).
[70] *Local 1984*, 56 FLRA at 41 (citing *Lowry Air Force Base*, 48 FLRA at 593).
[71] Award at 15.
[72] *Local 1984*, 56 FLRA at 41 (citing *Lowry Air Force Base*, 48 FLRA at 593).
[73] Member Pizzella contrasts this case from *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170 (2015) (*VA*), where he noted that he would not apply the nonfact exception "so narrowly" so as to "preclude[such an exception just because] the Authority declares that the exception involves a matter that was 'disputed' before the arbitrator, with no regard for how inconsistent, outrageous, or wrong is the finding, and with no consideration of how significant, or insignificant, is that finding to the arbitrator's ultimate conclusion." *Id.* at 175 (Dissenting Opinion of Member Pizzella). Unlike the Agency in *VA*, the Agency here failed to demonstrate that the Arbitrator's findings are "clearly erroneous, but for which the Arbitrator would have reached a different result." Decision at 9 (citing *Local 1984*, 56 FLRA at 41 (citing *Lowry Air Force Base*, 48 FLRA at 593)).