73 FLRA No. 157

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5836

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DECISION

February 27, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member
(Chairman Grundmann concurring)

I. Statement of the Case

This case concerns customs officers who are regularly scheduled to perform nightwork, and two statutes that authorize premium pay for such nightwork: the Federal Employees Pay Act (FEPA)[1] and the Customs Officer Pay Reform Act (COPRA).[2]

Following a 1995 arbitration award and an associated settlement agreement between the parties, the Agency began providing—without limitation—COPRA premium pay to customs officers when they were on sick, annual, court, or military leave during scheduled nightwork. Several years later, Congress created two new forms of paid leave: parental leave and COVID-19 emergency leave (emergency leave). Subsequently, when an employee used eight or more hours of these new leave types in a pay period, the Agency did not provide COPRA nightwork premium pay for the time spent on such leave. The Union then filed a grievance.

In an award, Arbitrator James W. Mastriani determined the Agency erroneously applied a FEPA premium-pay limitation called the "eight-hour rule"[3] to COPRA nightwork premiums for parental and emergency leave. Accordingly, the Arbitrator directed the Agency to make whole affected employees, and to no longer apply the eight-hour rule in that manner. However, the Arbitrator rejected the Union's unfair-labor-practice (ULP) claims alleging the Agency's failure to pay COPRA nightwork premiums violated the 1995 award and repudiated the settlement agreement. Both parties filed exceptions to the award.

Resolving some of the Agency's exceptions requires the interpretation of Office of Personnel Management (OPM) regulations and guidance. Specifically, the Agency relies on OPM authorities to allege it properly applied FEPA's eight-hour rule. Based on an Authority-requested OPM advisory opinion, we deny those exceptions. Further, the Union argues the Arbitrator erred as a matter of law by rejecting the Union's ULP allegations. Because we agree with the Arbitrator that the Agency complied with a reasonable interpretation of the 1995 award and the settlement agreement, we deny the Union's exceptions. Finally, we conclude the Agency has not established the award is impossible to implement or based on nonfacts.

II. Background and Arbitrator's Award

Federal employees are entitled to premium pay only as authorized by statute.[4] In § 5545 of FEPA,[5] Congress provided a ten-percent premium for regularly scheduled nightwork performed by certain employees.[6] Under a FEPA provision known as the eight-hour rule, employees who are regularly scheduled for nightwork receive nightwork premium pay even while on paid leave, but only if they take fewer than eight hours of leave in a pay period.[7] If an employee takes eight hours or more of leave, then all leave hours will be paid without the premium.[8] Title 5, § 550.122(b) of the Code of Federal Regulations implements FEPA's eight-hour rule.[9]

Congress later enacted COPRA, in 1993, to govern premium pay for customs officers.[10] COPRA authorizes a higher premium rate than FEPA for nightwork

[1] 5 U.S.C. § 5545(a).
[2] 19 U.S.C. § 267.
[3] *See, e.g.*, 5 C.F.R. § 630.1704 (paid parental-leave regulation referring to FEPA regulation 5 C.F.R. § 550.122(b) as the "[eight]-hour rule").
[4] *See, e.g.*, *U.S. Dep't of Transp., FAA*, 52 FLRA 649, 656 (1996) (identifying statutory basis for premium pay and finding award providing nightwork premium pay outside of statutory authorization contrary to law).
[5] 5 U.S.C. § 5545(a).
[6] *Id.* § 5545(a)(2); 5 C.F.R. § 550.101 (explaining coverage of FEPA premium-pay regulations).
[7] 5 U.S.C. § 5545(a)(2).
[8] 5 C.F.R. § 550.122(b).
[9] *Id.* ("An employee is entitled to a night pay differential for a period of paid leave only when the total amount of that leave in a pay period, including both night and day hours, is less than [eight] hours.").
[10] Pub. L. No. 103-66, 107 Stat. 312, 668-72 (1993) (codified at 19 U.S.C. § 267).

—fifteen to twenty percent, as opposed to ten percent.[11] In addition, unlike FEPA, COPRA does not contain an eight-hour rule.[12]

After Congress enacted COPRA, the parties disagreed about whether FEPA's eight-hour rule applied to COPRA nightwork. That dispute went to arbitration. In a 1995 arbitration award (the 1995 award), an arbitrator found FEPA's eight-hour rule did not apply to COPRA nightwork premium pay for sick, annual, court, or military leave.[13] Under an associated settlement agreement (the settlement agreement), the Agency began paying COPRA nightwork premiums for all such leave.[14]

In 2020, the Federal Employee Paid Leave Act began providing paid parental leave to federal employees.[15] The following year, the American Rescue Plan Act of 2021 established paid emergency leave for federal employees based on certain COVID-19-related qualifying circumstances.[16] OPM subsequently issued regulations "to govern the granting of paid parental leave to covered employees,"[17] and guidance about the payment of emergency leave.[18] Both the parental-leave regulation and the emergency-leave guidance state that their respective leave types are payable as permitted under "the [eight]-hour rule in 5 C.F.R. [§] 550.122(b)."[19]

The Agency began applying the eight-hour rule when any officer used eight or more hours of parental or emergency leave in a pay period. The Union grieved, alleging the Agency failed to comply with the 1995 award, repudiated the settlement agreement, and violated COPRA, along with other paid-leave statutes and regulations. The grievance went to arbitration.

Before the Arbitrator, the parties stipulated the Agency did not pay COPRA premiums to "any employee covered by COPRA who is regularly scheduled for nightwork and has taken eight or more hours" of parental or emergency leave in a pay period.[20] The parties further stipulated the Agency's payroll-system timekeeping codes for parental and emergency leave do not permit the payment of any nightwork premiums.[21]

The Arbitrator framed the issues as whether the Agency "violate[d] the parties' agreement, applicable law, regulation, policy, or the terms of [the 1995 award] when it applied the eight-hour rule to the payment of [parental and emergency leave]? If so, what shall be the remedy?"[22]

Addressing the Union's failure-to-comply allegation, the Arbitrator found the 1995 award did not obligate the Agency to pay nightwork premiums for parental or emergency leave because those leave types "did not exist at the time."[23] Similarly, regarding the settlement agreement, the Arbitrator concluded the issue of whether the eight-hour rule applies to parental and emergency leave is "newly presented and therefore cannot form the basis for a retroactive ULP for repudiation."[24] Further, the Arbitrator observed the Agency continued to pay COPRA nightwork premiums for sick, annual, court, and military leave consistent with the 1995 award and the settlement agreement. Accordingly, the Arbitrator rejected the Union's ULP claims.

Nonetheless, the Arbitrator found the Agency "misapplied the eight-hour rule" to COPRA nightwork premiums for parental and emergency leave.[25] The Arbitrator reasoned that COPRA itself does not include an eight-hour rule, and if "Congress wished to carry the eight-hour rule over from FEPA into COPRA, it would have explicitly done so."[26] In addition, the Arbitrator determined the Agency's misapplication of the eight-hour rule resulted in employees receiving less than the "full amount of paid leave[,] charged at the COPRA night[]work rate[,]" to which they were "entitled."[27]

As remedies, the Arbitrator directed the Agency to "cease and desist" from applying the eight-hour rule to COPRA nightwork premium pay for parental and emergency leave, and to make any affected employees

[11] 19 U.S.C. § 267(b)(1); 19 C.F.R. § 24.16(g)(3).
[12] *See generally* 19 U.S.C. § 267(c).
[13] Agency's Exceptions, Ex. G.4 (1995 Award) at 8 (discussing leave provided under 5 U.S.C. §§ 6303, 6307, 6322, 6323).
[14] Agency's Exceptions, Ex. G.5 (1996 Settlement Agreement) at 1 ("[T]o comply with the [1995] arbitration award," the Agency "will make every reasonable effort . . . to pay employees the night differential for periods of leave in excess of [eight] hours.").
[15] 5 U.S.C. § 6382(d)(2).
[16] American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 4001, 135 Stat. 4, 77 (2021) (establishing Emergency Federal Employee Leave Fund to provide paid leave for absences arising from the COVID-19 pandemic).
[17] 5 C.F.R. § 630.1701(a).
[18] OPM, Guidance on COVID-19 Emergency Paid Leave (Section 4001 of the American Rescue Plan Act of 2021), Attach. 2 (Apr.29, 2021), https://chcoc.gov/sites/default/files/Attachment%202%20Guidance%20on%20COVID-19%20Emergency%20Paid%20Leave.pdf (Emergency-Leave Guidance).
[19] *Id.*; 5 C.F.R. § 630.1704(b).
[20] Award at 3-4.
[21] *Id.*
[22] *Id.* at 16.
[23] *Id.* at 26.
[24] *Id.*
[25] *Id.* at 30.
[26] *Id.* at 26.
[27] *Id.* at 30.

whole by paying them the premium rate they would have received had the Agency not applied that rule.[28]

The Union and the Agency each excepted to the award on September 12, 2022, and filed oppositions on October 12, 2022.

III. OPM's Advisory Opinion

In its exceptions, the Agency makes several arguments that require the interpretation of OPM regulations and guidance. Those arguments include: FEPA's structure, and its implementing regulation, establish that the eight-hour rule applies to COPRA nightwork premium pay;[29] OPM's parental-leave regulation expressly applies the eight-hour rule to parental-leave payments;[30] and OPM-issued guidance about emergency leave expressly applies the eight-hour rule to emergency-leave payments.[31]

On May 16, 2023, under § 7105(i) of the Federal Service Labor-Management Relations Statute (the Statute),[32] the Authority requested an advisory opinion from OPM concerning the proper interpretation of the relevant regulations and guidance. Specifically, we asked OPM whether the eight-hour rule, as set forth in FEPA and its implementing regulation, applies to customs officers whose nightwork premium pay is authorized by COPRA and who are taking parental or emergency leave. After the Authority notified the parties of our request to OPM, the parties each submitted briefs to OPM addressing the presented question.[33]

On September 1, 2023, OPM responded with a detailed advisory opinion. Starting with the FEPA regulations, OPM noted that customs officers are generally covered by FEPA.[34] However, OPM observed that 5 C.F.R. § 550.101(d) "explicitly *exclude*[*s*]" from FEPA's coverage "night . . . services for which additional pay is provided by . . . [COPRA]."[35] According to OPM, that regulatory wording "clear[ly]" excludes COPRA nightwork from "the entire subpart" of FEPA's premium-pay regulations.[36] Because the eight-hour rule is contained within that regulatory subpart (at 5 C.F.R. § 550.122(b)), OPM opined that FEPA's eight-hour rule "does not apply to leave payments for employees receiving COPRA night pay."[37]

OPM reinforced its regulatory interpretation by reviewing the FEPA statute itself. Section 5545 of FEPA sets forth the statutory eight-hour rule and applies it to nightwork.[38] OPM observed that § 5545 of FEPA—within the same subsection that contains the eight-hour rule—explicitly states that it does "not modify . . . [any] other statute authorizing additional pay for nightwork."[39] As COPRA is such a statute, OPM determined FEPA does not modify COPRA to include the eight-hour rule. In OPM's view, under FEPA's "plain text," the eight-hour rule "does not apply to nightwork under COPRA,"[40] and "[t]he fact that . . . officers are on [parental] or [emergency leave] does not alter this basic analysis."[41]

Next, OPM turned to its regulation and guidance pertaining to parental leave and emergency leave, respectively, to assess whether either required application of the eight-hour rule. OPM recognized that both the parental-leave regulation and the emergency-leave guidance reference the eight-hour rule.[42] In fact, both state that their respective leave types are payable as permitted under "the [eight]-hour rule in 5 C.F.R. [§] 550.122(b)."[43] However, OPM found this wording inconclusive because, as noted above, the eight-hour rule in § 550.122(b) applies only to FEPA-covered nightwork, and FEPA's regulations exclude COPRA nightwork from its coverage.

OPM also observed that both the parental-leave regulation and the emergency-leave guidance require agencies to pay these leave types at the same rate as "annual leave."[44] Since the Agency "established a policy" of paying COPRA nightwork premiums for annual leave without applying the eight-hour rule,[45] OPM reasoned that the Agency was precluded from applying the eight-hour rule to parental and emergency leave.[46]

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[28] *Id.* at 31.
[29] Agency's Exceptions Br. at 20-23.
[30] *Id.* at 14-15.
[31] *Id.* at 17-18.
[32] 5 U.S.C. § 7105(i) ("[T]he Authority may request from the Director of the [OPM] an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the [OPM] in connection with any matter before the Authority.").
[33] OPM Opinion at 2 nn.1-2 (noting each party "submitted its views to OPM regarding the subject of" the Authority's request).
[34] *Id.* at 6 (citing 5 C.F.R. § 550.101(a)).
[35] *Id.* (alterations in original) (quoting 5 C.F.R. § 550.101(d)(1)).
[36] *Id.*
[37] *Id.*
[38] 5 U.S.C. § 5545(a).
[39] OPM Opinion at 6 (alterations in original) (quoting 5 U.S.C. § 5545(a)).
[40] *Id.*
[41] *Id.* at 1.
[42] *Id.* at 4-5.
[43] *See id.*
[44] *Id.* at 6 (quoting 5 C.F.R. § 630.1704(a) ("The pay an employee receives when using paid parental leave shall be the same pay the employee would receive if the employee were using annual leave.")); *id.* at 6-7 (quoting Emergency-Leave Guidance § E.3(a) (requiring agencies to pay emergency leave "at the same hourly rate as annual leave")).
[45] *Id.* at 6-7.
[46] *Id.* at 7. However, OPM stated that nothing in OPM's regulations would "limit" the Agency from prospectively changing its annual-leave policy. *Id.* at 7 n.6.

For these reasons, OPM advised the Authority that FEPA's eight-hour rule "does not apply to leave payments for [customs] officers who are receiving COPRA night pay and who are taking [parental or emergency leave]."[47]

We provided the parties an opportunity to respond to OPM's advisory opinion. On September 11, 2023, the Union submitted a response. The Agency did not respond.

IV. Analysis and Conclusions

A. Neither the Agency nor Union establish the award is contrary to law.

Both parties filed contrary-to-law exceptions to the award. In resolving a contrary-to-law exception, the Authority reviews any question of law raised by an exception and the award de novo.[48] 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.[49] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[50]

1. The Agency does not establish that FEPA's eight-hour rule applies to COPRA nightwork premium pay.

As noted above, the Agency relies on FEPA and its implementing regulation,[51] OPM's parental-leave regulation,[52] and OPM's emergency-leave guidance[53] to argue the Arbitrator erred in concluding the Agency misapplied the eight-hour rule.

In its advisory opinion, OPM addressed each of the authorities upon which the Agency relies. OPM found (1) FEPA's regulations "explicitly *exclude*" COPRA-covered nightwork from FEPA's eight-hour rule;[54] (2) after setting forth the eight-hour rule, § 5545(a) of FEPA expressly states that it does "not modify" COPRA;[55] (3) neither the parental-leave regulation nor the emergency-leave guidance requires application of the eight-hour rule to COPRA nightwork premiums;[56] and (4) both the parental-leave regulation and the emergency-leave guidance suggest the Agency may not apply the eight-hour rule to COPRA nightwork premiums for parental or emergency leave, because the Agency does not do so for annual leave.[57]

The Authority has held that it will find OPM's interpretation of its own regulation controlling unless the interpretation is "'plainly erroneous or inconsistent' with the language of the regulation."[58] The Agency did not respond to OPM's advisory opinion and, thus, does not argue that opinion is plainly erroneous or inconsistent with regulation. Further, we find OPM's interpretations in the advisory opinion are consistent with the plain wording of FEPA and its implementing regulation, as well as the parental-leave regulation and emergency-leave guidance.[59] Additionally, it is undisputed that COPRA itself does not contain an eight-hour rule. For these reasons, we defer to OPM's advisory opinion.[60]

Consistent with OPM's opinion, we find FEPA's eight-hour rule does not apply to COPRA nightwork premium pay for parental or emergency leave. The Arbitrator's finding—that the Agency misapplied the eight-hour rule to COPRA nightwork premiums for parental and emergency leave—is consistent with OPM's undisputed opinion. Thus, we deny the Agency's exceptions that challenge the legality of the Arbitrator's finding.

In related exceptions, the Agency argues: the Arbitrator misapplied caselaw concerning the eight-hour rule's compatibility with COPRA;[61] the award violates the Antideficiency Act by requiring payments that exceed what FEPA's eight-hour rule permits;[62] the Arbitrator misinterpreted caselaw concerning entitlement to premium pay while on paid leave notwithstanding the explicit limitation in FEPA's eight-hour rule;[63] and the Arbitrator based the award on a nonfact by failing to acknowledge

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[47] *Id.* at 1.
[48] *AFGE, Loc. 3254*, 73 FLRA 325, 326 (2022).
[49] *Id.*
[50] *Id.*
[51] Agency's Exceptions Br. at 20-23.
[52] *Id.* at 14-15.
[53] *Id.* at 17-18.
[54] OPM Opinion at 6.
[55] *Id.*
[56] *Id.* at 6-7.
[57] *Id.*
[58] *Nat'l Ass'n of Agric. Emps.*, 51 FLRA 843, 849 (1996) (quoting *FLRA v. U.S. Dep't of the Treasury, Fin. Mgmt. Serv.*, 884 F.2d 1446, 1454 (D.C. Cir. 1989)); *see U.S. Dep't of HUD*, 73 FLRA 287, 289 (2022) (then-Member Grundmann concurring; Chairman DuBester dissenting).
[59] *See, e.g.*, OPM Opinion at 6 (explaining how regulatory interpretation comports with "plain text" of FEPA statute).
[60] *See U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 60 FLRA 46, 49 (2004) (Chairman Cabaniss concurring; Member Pope concurring) (deferring to OPM advisory opinion where party failed to establish that the opinion was plainly erroneous or inconsistent with regulation).
[61] Agency's Exceptions Br. at 25-27 (citing *Bull v. United States*, 479 F.3d 1365 (Fed. Cir. 2007)).
[62] *Id.* at 27-28 (citing 31 U.S.C. §§ 1301, 1341).
[63] Agency's Exceptions Br. at 23-25 (citing *Lanehart v. Horner*, 818 F.2d 1574 (Fed. Cir. 1987); *Armitage v. United States*, 991 F.2d 746 (Fed. Cir. 1993)).

that both the parental-leave regulation and the emergency-leave guidance require application of the eight-hour rule.[64] Each of these exceptions assumes that FEPA's eight-hour rule applies to COPRA nightwork premium pay for parental and emergency leave. As discussed above, OPM's advisory opinion, to which we defer, establishes that the eight-hour rule does not apply in that manner. Therefore, we deny these Agency exceptions.[65]

2. The Agency does not establish the remedy is contrary to the Back Pay Act.

The Agency argues[66] the make-whole remedy is contrary to the Back Pay Act (the BPA).[67] To justify an award of backpay under the BPA, an arbitrator must find that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of any employee's pay, allowances, or differentials.[68] A violation of an applicable law, rule, regulation, or provision of a collective-bargaining agreement constitutes an "unjustified or unwarranted personnel action."[69] The loss of a pay differential constitutes a withdrawal or reduction of an employee's pay, allowances, or differentials for purposes of the BPA.[70]

The Agency first argues the Arbitrator did not identify an unjustified or unwarranted personnel action.[71] However, the Arbitrator found the Agency improperly applied FEPA's eight-hour rule to employees who "were entitled to the full amount of paid leave charged at the COPRA night[]work rate."[72] As established above, FEPA's eight-hour rule does not apply to COPRA nightwork premium pay for parental or emergency leave. The Authority has found the failure to provide the appropriate premium pay is an unjustified personnel action under the BPA.[73] Accordingly, the Arbitrator's findings satisfy the BPA's first requirement.

The Agency next contends the Arbitrator did not establish a causal connection between the Agency's actions and the employees' loss.[74] At arbitration, the parties stipulated that the Agency "has not paid night[work premium pay] to any employee covered by COPRA who is regularly scheduled for nightwork and has taken eight or more hours" of parental or emergency leave in a pay period.[75] The Arbitrator found the Agency's actions constituted a misapplication of FEPA[76] that deprived employees of pay to which they were otherwise "entitled."[77] He then directed the Agency to make those affected employees whole.[78] These findings sufficiently establish a causal connection between the Agency's violation and employees' diminished pay.[79]

Attempting to refute this causal connection, the Agency argues the employees' losses are due solely to the coding of the Agency's payroll system.[80] Although the parties stipulated that the payroll system's codes for parental and emergency leave do not permit the payment of nightwork premiums,[81] the Agency does not allege it would be impossible to create or change payroll coding to meet its regulatory requirements. Ultimately, it is the Agency's obligation to ensure that it pays its employees in accordance with law.[82] Therefore, we reject this argument.

Lastly, the Agency claims: (1) the remedy is not covered by the BPA's waiver of sovereign immunity because it exceeds the pay permitted under the eight-hour

[64] *Id.* at 34-35.
[65] *See Indep. Union of Pension Emps. For Democracy & Just.*, 68 FLRA 999, 1010 (2015) (denying exceptions premised on arguments previously denied).
[66] Agency Exceptions Br. at 30-32.
[67] 5 U.S.C. § 5596.
[68] *U.S. Dep't of the Air Force, 11th Wing, Joint Base Andrews, Md.*, 72 FLRA 691, 692 (2022).
[69] *U.S. DOD, Def. Logistics Agency, Def. Distrib. Region W., Stockton, Cal.*, 48 FLRA 221, 223 (1993).
[70] *AFGE, Loc. 3854*, 71 FLRA 951, 952 (2020) (*Loc. 3854*).
[71] Agency's Exceptions Br. at 30.
[72] Award at 30.
[73] *Loc. 3854*, 71 FLRA at 952 (stating that the arbitrator "correctly found" that the improper denial of environmental differential pay was an "unjustified personnel action").
[74] Agency's Exceptions Br. at 31-32.
[75] Award at 3-4.
[76] *Id.* at 31.
[77] *Id.* at 30.
[78] *Id.* at 31 (directing Agency to pay affected employees "the rate that they would have received had the eight-hour rule not been applied").
[79] *See U.S. Dept. of the Navy, Naval Air Depot, Cherry Point, N.C.*, 61 FLRA 38, 40 (2005) ("[W]hen arbitrators correct an unwarranted or unjustified personnel action, they are authorized, under the [BPA], to order the payment of any compensation, allowances, or differentials that the affected employee normally would have earned or received during the period, if the personnel action had not occurred."); *U.S. Dep't of VA, Med. Ctr., Marion, Ill.*, 38 FLRA 270, 274 (1990) (finding requisite causal connection where arbitrator's make-whole remedy consisted of "the premium pay [the grievant] would have received had he worked his regular tour" if agency had not improperly detailed him).
[80] Agency's Exceptions Br. at 31.
[81] *See* Award at 3-4.
[82] *See, e.g.*, *AFGE, Loc. 987*, 66 FLRA 143, 145-46 (2011) (rejecting arbitrator's determination that agency was not liable for underpayments allegedly caused by its payroll processor, noting "an employing agency's general liability to its employees for any failures to properly compensate them as required by law or contract").

rule;[83] (2) the award is incomplete because the Arbitrator failed to identify a violation to support his backpay remedy under the BPA;[84] and (3) the Arbitrator based the award on the nonfact that the Agency caused employees' loss of premium pay rather than the payroll system's "required coding."[85] Because each of these exceptions is based on claims we have already considered, and rejected, we deny these exceptions.[86]

3. The Union does not establish the Arbitrator erred in denying the Union's ULP allegations.

In resolving a grievance that alleges a ULP under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (ALJ).[87] In a grievance that alleges a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence.[88] As in other arbitration cases, in determining whether the award is contrary to the Statute, the Authority defers to the arbitrator's findings of fact.[89]

a. The Union does not establish the Agency failed to comply with the 1995 award.

The Union asserts that, as a matter of law, the Agency's application of the eight-hour rule constituted a failure to comply with the 1995 award.[90] Failing to comply with a final and binding arbitration award constitutes a ULP in violation of § 7116(a)(1) and (8) of the Statute.[91] The Authority's standard for determining whether an agency has complied with a final and binding award is whether the agency's action is consistent with a reasonable construction of the award.[92]

According to the Union, the Arbitrator erred because the 1995 award "unambiguously held that the eight-hour rule does not apply to COPRA-covered employees, regardless of the type of leave at issue."[93] Alternatively, the Union argues that, if the 1995 award is ambiguous, then the Agency acted unreasonably by treating parental and emergency leave different from the leave at issue in the 1995 award.[94] In either case, the Union asserts the Arbitrator erred by failing to find the Agency committed a ULP.

The Arbitrator found the 1995 award's "explicit terms" concerned only four types of paid leave—annual, sick, court, and military—and did not address parental or emergency leave, which "did not exist at the time."[95] He also found the Agency continues to pay COPRA nightwork premiums for those four leave types.[96] For these reasons, the Arbitrator concluded that the Agency's application of the eight-hour rule to parental and emergency leave did not fail to comply with the 1995 award.[97]

The Union correctly notes[98] that the 1995 award uses the general term "leave" in assessing the eight-hour rule's application.[99] However, we find the Agency could have reasonably construed that term as referencing only the types of paid leave that the 1995 award involved—annual, sick, court, and military.[100] Thus, we agree with the Arbitrator's conclusion that the Agency did not fail to

[83] Agency's Exceptions Br. at 32-34.
[84] *Id.* at 40 (arguing "it is impossible for [the Agency] to implement the [a]ward because it is unclear which violation(s), if any, [the Agency] committed to justify backpay under the [BPA]").
[85] *Id.* at 38.
[86] *See U.S. DHS, U.S. CBP*, 68 FLRA 253, 258 (2015) ("When a party's sovereign-immunity claim depends on an argument that an arbitration award is contrary to the BPA, and the Authority finds that the award is consistent with the BPA, the Authority denies the sovereign-immunity claim."); *U.S. DHS, U.S. CBP*, 68 FLRA 184, 187 (2015) (denying nonfact argument premised on previously rejected claim that award was contrary to the BPA).
[87] *U.S. DHS, U.S. CBP*, 64 FLRA 916, 920 (2010).
[88] *Id.*
[89] *Id.*
[90] Union's Exceptions Br. at 12-17.
[91] *U.S. Dep't of the Treasury, IRS, Austin Compliance Ctr., Austin, Tex.*, 44 FLRA 1306, 1315 (1992) (citing *U.S. Dep't of the Air Force, Carswell Air Force Base, Tex.*, 38 FLRA 99, 105 (1990)).
[92] *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 53 FLRA 55, 60 (1997) (*Marion Penitentiary*).
[93] Union's Exceptions Br. at 15.
[94] *Id.* at 16-17.
[95] Award at 26; *see also* 1995 Award at 8 (specifying leave created by 5 U.S.C. §§ 6303, 6307, 6322, 6323).
[96] Award at 24 (stating Union "confirmed" Agency has not applied eight-hour rule for these kinds of leave).
[97] *Id.* at 26-27.
[98] Union's Exceptions Br. at 15.
[99] *See, e.g.*, 1995 Award at 15 (directing compensation for employees who did not receive COPRA nightwork premium pay while "on leave").
[100] *See Marion Penitentiary*, 53 FLRA at 61 (where there were two competing—and *reasonable*—constructions of an arbitration award, Authority did not need to assess whether the respondent's construction was *correct* in order to deny failure-to-comply ULP charge); *Okla. City Air Logistics Ctr., Okla. City, Okla.*, 46 FLRA 862, 868 (1992) (upholding ALJ's dismissal of failure-to-comply charge where respondent's construction of ambiguous award was reasonable).

comply with the 1995 award in applying the eight-hour rule to parental and emergency leave.[101]

Based on the above, we deny this exception.

b. The Union does not establish that the Agency repudiated the settlement agreement.

The Union contends the Arbitrator erred by failing to find the Agency repudiated the settlement agreement.[102] In analyzing a repudiation allegation, the Authority examines two elements: (1) the nature and scope of the alleged breach of the agreement – i.e., was the breach clear and patent?; and (2) the nature of the agreement provision allegedly breached – i.e., did the provision go to the heart of the parties' agreement?[103] With regard to the first element, if the meaning of a particular agreement term is unclear and a party acts in accordance with a reasonable interpretation of that term, then that action will not constitute a clear and patent breach of the agreement.[104]

The settlement agreement states that, "to comply with the [1995] . . . award," the Agency "will make every reasonable effort . . . to pay employees the night differential for periods of leave in excess of [eight] hours."[105] The settlement agreement does not define the term "leave," and it was reasonable for the Agency to conclude that it applies only to the types of leave specified in the corresponding 1995 award – particularly given that parental leave and emergency leave did not exist when the parties entered into the settlement agreement.[106] Moreover, the Union conceded that the Agency continues to pay COPRA nightwork premiums for the leave types at issue in the 1995 award.[107] For these reasons, we find the Agency acted in accordance with a reasonable interpretation of the settlement agreement.[108] Therefore, we deny this exception.[109]

B. The Agency does not establish that the remedy is incomplete, ambiguous, or impossible to implement.

The Agency argues the remedy is incomplete, ambiguous, and impossible to implement.[110] In order to prevail on this ground, the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain.[111]

The Arbitrator directed the Agency to make affected employees whole by paying them the nightwork premiums they would have received had the Agency not applied the eight-hour rule to parental and emergency leave.[112] The Agency contends it cannot implement this remedy because the Arbitrator did not discuss the effect of COPRA's annual cap on premium-pay earnings.[113]

COPRA caps customs officers' annual overtime and premium-pay earnings.[114] Section 24.16(h) of COPRA's implementing regulations specifies that "compensation awarded to a [c]ustoms [o]fficer for work not performed, which includes . . . awards made in accordance with back[]pay settlements, shall not be applied to any applicable pay[-]cap calculations."[115] The Agency—as the promulgator of this COPRA regulation—has interpreted § 24.16(h) as "exempt[ing]" backpay

[101] *See Marion Penitentiary*, 53 FLRA at 61 (respondent did not commit failure-to-comply ULP because its construction of the award was reasonable). Although the Union also argues the Arbitrator erred by failing to apply or cite Authority standards for failure-to-comply ULPs, Union's Exceptions Br. at 13-14, we note that the Arbitrator's failure to expressly reference the Authority's ULP standard does not provide a basis for finding the award contrary to law. *See U.S. Dept. of the Interior, Bureau of Mines, Pittsburgh Rsch. Ctr.*, 53 FLRA 34, 40 (1997) (finding award without extensive rationale was not contrary to law where findings were consistent with legal requirements); *AFGE, Nat'l ICE Council 118*, 73 FLRA 309, 310 n.12 (2022) (Chairman DuBester dissenting) (to extent excepting party challenged arbitrator's failure to "explicitly apply" Authority's two-prong covered-by test, Authority stated that an award is not "deficient solely because an arbitrator failed to apply a particular legal analysis," and Authority assessed whether arbitrator's conclusion was consistent with the covered-by standard (emphasis omitted)); *U.S. Dep't of Com., Pat. & Trademark Off.*, 52 FLRA 358, 362 (1996) (although arbitrator misstated methodology, award established that arbitrator properly applied relevant legal framework).

[102] Union's Exceptions Br. at 17-21.

[103] *U.S. Dep't of Com., Pat. & Trademark Off.*, 65 FLRA 290, 296 (2010) (citing *Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 858, 862 (1996)).

[104] *Id.* (citing *SSA, N.Y.C., N.Y.*, 60 FLRA 301, 204 (2004)).

[105] 1996 Settlement Agreement at 1.

[106] *See Pension Benefit Guar. Corp., Wash., D.C.*, 73 FLRA 386, 387 (2022) (*PBGC*) (finding agency did not repudiate agreement whose language "could reasonably be interpreted to support either of the contrary views offered in th[e] case").

[107] Award at 24 (stating the Union "confirmed" the Agency did not apply the eight-hour rule to annual, sick, court, and military leave).

[108] *See PBGC*, 73 FLRA at 387 (denying exception challenging ALJ's denial of repudiation ULP where agency's actions followed reasonable interpretation of agreement).

[109] *See id.* at 387 n.17 (finding no need to apply second part of repudiation test where first part was not met).

[110] Agency's Exceptions Br. at 40-41.

[111] *AFGE, Loc. 2516*, 72 FLRA 567, 570 (2021) (*Loc. 2516*).

[112] Award at 31.

[113] Agency's Exceptions Br. at 40-41.

[114] 19 U.S.C. § 267(c)(1).

[115] 19 C.F.R. § 24.16(h).

awards from pay-cap calculations.[116] The Authority has previously deferred to the Agency's publicly articulated interpretation of this regulation,[117] and we continue to do so here. Accordingly, we find that the cap is not a bar to implementation of the award, and we deny this exception.[118]

C. The Agency does not establish the award is based on nonfacts.

In addition to those we have denied above,[119] the Agency raises several more nonfact exceptions.[120] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[121] A challenge to an arbitrator's legal conclusion does not provide a basis for finding an award is deficient on nonfact grounds.[122]

The Agency contends the Arbitrator erroneously stated that parental and emergency leave are "[pay] allowances, like COPRA."[123] The Arbitrator's reference to parental and emergency leave as "pay allowances," instead of paid leave, is immaterial to his conclusion that the Agency erred by applying the eight-hour rule to COPRA nightwork.[124] Thus, the Agency does not establish that this misstatement is central to the award.[125]

Next, the Agency asserts the Arbitrator mistakenly likened COPRA to paid-leave statutes when he noted "COPRA's similarity to the 'leave with pay' statutes" and stated that employees take "paid leave . . . under COPRA."[126] However, these statements are part of the Arbitrator's legal analysis of FEPA, FEPA regulations, COPRA, and certain paid-leave regulations.[127] Regardless of the accuracy of the Arbitrator's statements, the Agency's exception challenging the Arbitrator's legal analysis does not provide a basis for finding the award deficient on nonfact grounds.[128]

Finally, the Agency notes the Arbitrator directed it to "cease and desist from applying the eight-hour rule with respect to paid leave taken from night[]work by COPRA-covered employees."[129] The Agency relies on the Arbitrator's general use of the phrase "paid leave" to argue that the Arbitrator "erroneous[ly] assum[ed]" the Agency applied the eight-hour rule to annual and sick leave.[130] However, the Union—referencing the same sentence from the award—asserts the Arbitrator "did *not* assume that [the Agency] ha[d] applied the eight-hour rule to types of leave other than" parental and emergency.[131]

When an opposing party agrees to interpret an award so as to avoid a deficiency alleged by an excepting party, the Authority has recognized the agreed-to interpretation of the award as binding, and has dismissed, as moot, any objections to the award based on a different interpretation.[132] Because the Union has agreed to interpret the award in a manner that avoids the alleged deficiency, we recognize this agreed-to interpretation of the award as binding. In accordance with that interpretation of the award, we dismiss this exception as moot.

Based on the above, we partially dismiss and partially deny the Agency's nonfact exceptions.

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[116] Pay Reform for Customs Inspectional Services, 59 Fed. Reg. 46,752, 46,754 (Sept. 12, 1994) (noting that final COPRA regulation § 24.16(h) "correctly conveys the fact that [backpay awards and settlements] are exempt" from pay cap calculations).

[117] *See U.S. DHS, U.S. CBP, Seattle, Wash.*, 70 FLRA 180, 182 (2017) (giving deference to Agency's regulatory interpretation as found in the Federal Register, which was "publicly articulated" and made prior to litigation); *see also U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 560 (1999) (rejecting assertion that backpay award that might exceed pay cap was contrary to COPRA and its implementing regulation).

[118] *See Loc. 2516*, 72 FLRA at 570 (denying exception where party failed to demonstrate implementation would be impossible).

[119] *See* section IV.A.1. (denying nonfact exception challenging Arbitrator's application of the eight-hour rule); section IV.A.2. (denying nonfact exception challenging Arbitrator's finding that the Agency caused the grievants' loss of premium pay).

[120] Agency's Exceptions Br. at 34-39.

[121] *AFGE, Loc. 3954*, 73 FLRA 39, 41 (2022).

[122] *Id.*

[123] Agency's Exceptions Br. at 35-36 (quoting Award at 27); *see also* Award at 27-28 (stating that the parental- and emergency-leave statutes are "like COPRA" in that they "are silent" as to whether FEPA's eight-hour rule applies to COPRA nightwork premium pay).

[124] *See AFGE, Loc. 1101*, 70 FLRA 644, 646 (2018) (Member DuBester concurring) (denying nonfact exception based on alleged misstatements where party failed to establish that they were central to award).

[125] *Id.*

[126] Agency's Exceptions Br. at 36-37 (quoting Award at 29-30).

[127] *See* Award at 27-30 (evaluating the parties' arguments in light of statutory language and caselaw).

[128] *See NTEU, Chapter 298*, 73 FLRA 350, 351 n.19 (2022) (finding that a challenge to an arbitrator's legal conclusions did not prove a nonfact deficiency).

[129] Agency's Exceptions Br. at 39 (emphasis omitted) (quoting Award at 31).

[130] *Id.*

[131] Union's Opp'n at 28 (emphasis added); *see also* Award at 24 (stating Union "confirmed" Agency has not applied eight-hour rule to annual, sick, jury, or military leave).

[132] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 500 (2023).

V. Decision

We partially dismiss and partially deny the Agency's exceptions, and we deny the Union's exceptions.

Chairman Grundmann, concurring:

I agree with the decision in all respects, but write separately with regard to one issue. The decision accurately sets forth the Authority's extant test – originally set forth in *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois* (*Scott AFB*)[1] – for assessing contract-repudiation allegations. As the decision states, the *Scott AFB* test examines: (1) the nature and scope of the alleged breach of the agreement – i.e., was the breach clear and patent?; and (2) the nature of the agreement provision allegedly breached – i.e., did the provision go to the heart of the parties' agreement?[2]

The first part of this test is consistent with well-established precedent, in both the federal and private sectors, holding that the "mere breach" of a collective-bargaining agreement does not constitute an unfair labor practice.[3] Further, I agree with how the decision applies that part of the test. However, I have reservations about the second part of the test.

As an initial matter, the Authority has never explained the rationale behind it. The "heart of the agreement" wording seems to have first appeared in *DOD, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*,[4] where the Authority stated: "[T]he nature and scope of the [r]espondent's refusal went to *the heart of the agreement* and the collective[-]bargaining relationship itself and, *therefore*, amounted to a repudiation of the obligation imposed by the agreement's terms."[5] Although the Authority periodically employed this wording in subsequent decisions,[6] it did not expressly frame it as part of the *test* for repudiation until *Scott AFB*.[7] However, in doing so, it did not provide any rationale for imposing it. Then, in subsequent cases, the Authority – again, without explanation – stated that this part of the *Scott AFB* test would assess "the importance of the [breached] provision . . . relative to the agreement in which it is contained."[8]

It is not clear to me why the Authority should be deciding for itself how important a contract provision is, relative to other provisions in the contract, when assessing whether a party has committed an unlawful repudiation. A repudiation violates § 7116(a)(5) of the Federal Service Labor-Management Relations Statute (the Statute)[9] because it is inconsistent with the good-faith-bargaining obligation set forth in that section.[10] If one party tells another that it will not comply with – or engages in some other clear and patent breach of – a contract provision the parties have lawfully negotiated, it seems the party has failed to bargain in good faith – regardless of the provision's "importance" relative to other provisions in the contract. Further, I am unaware of any precedent arising under the National Labor Relations Act or Executive Order 11,491 – the predecessor to the Statute – that supports imposing such a requirement in this context.

Nevertheless, as the decision discusses, the Union's repudiation claim fails on the first part of the *Scott AFB* test. As such, the second part of that test is not at issue before us. Although I would be willing to consider the appropriateness of the second part of the test in a future, appropriate case, this is not an appropriate case in which to do so.

Therefore, I concur.

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[1] 51 FLRA 858 (1996).

[2] *Id.* at 862.

[3] *See, e.g., U.S. DOL*, 70 FLRA 27, 31 (2016) (Member Pizzella dissenting on other grounds); *NCR Corp.*, 271 NLRB 1212, 1213 n.6 (1984).

[4] 40 FLRA 1211 (1991).

[5] *Id.* at 1220 (emphasis added).

[6] *See U.S. Dep't of the Interior, Bureau of Reclamation, Wash., D.C. & Mid-Pac. Reg'l Off., Sacramento, Cal.*, 46 FLRA 9, 28 (1992) (*Interior*) (Member Talkin dissenting in part on other grounds) ("The nature and scope of the [r]espondent['s] . . . refusal went to the heart of the agreement and the collective[-]bargaining relationship itself and, therefore, amounted to a repudiation of the obligation imposed by the terms of the parties' respective agreements in violation of [§] 7116(a)(1) and (5) of the Statute."); *Pan. Canal Comm'n, Balboa, Republic of Pan.*, 43 FLRA 1483, 1508 (1992) ("We find that the nature and scope of the [r]espondent's actions constituted more than a mere breach of the terms of the parties' agreements but . . . went to the heart of the agreement[s]." (citation omitted) (internal quotation marks omitted)).

[7] 51 FLRA at 862 (stating the Authority will assess, "in analyzing an allegation of repudiation[,] . . . the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement?)").

[8] *U.S. DOJ, Fed. BOP*, 68 FLRA 786, 788 (2015) (Member Pizzella dissenting in part on other grounds); *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 355, 357 (2009) (Member Beck concurring in part and dissenting in part on other grounds).

[9] 5 U.S.C. § 7116(a)(5).

[10] *Interior*, 46 FLRA at 28.