

**73 FLRA No. 33**

NATIONAL FEDERATION  
OF FEDERAL EMPLOYEES  
LOCAL 1998  
(Union)

and

UNITED STATES  
DEPARTMENT OF STATE  
PASSPORT SERVICES  
(Agency)

0-AR-5790

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DECISION

August 9, 2022

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Before the Authority: Ernest DuBester, Chairman, and  
Colleen Duffy Kiko and Susan Tsui Grundmann,  
Members

**I. Statement of the Case**

Arbitrator Marvin E. Johnson issued an award finding that the Agency did not violate the parties' collective-bargaining agreement or the Federal Service Labor-Management Relations Statute (Statute)<sup>1</sup> when the Agency designated employees as mission critical and required them to report to the workplace during the COVID-19 pandemic. The Union filed exceptions to the award on exceeded-authority, contrary-to-law, contrary-to-public-policy, and nonfact grounds. Because the Union's exceptions fail to demonstrate that the award is deficient, we deny them.

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

The Agency is responsible for adjudicating and issuing U.S. passports at offices across the country. The Union represents all Passport Services employees (employees), including specialists. Because the specialists use secure government databases to review passport applications, they cannot perform their work remotely.<sup>2</sup> After COVID-19 was declared a national pandemic in

March 2020,<sup>3</sup> the Agency suspended routine passport adjudication and authorized employees to use weather and safety leave.<sup>4</sup>

In April, the Union submitted proposals to the Agency concerning the employees' return to the office. In early June, the parties discussed the matter and exchanged proposals. On June 20, the parties executed an agreement (June agreement).

Meanwhile, on June 8, the Agency designated the employees as mission critical and notified the Union that employees were required to return to the office unless they were at high risk due to COVID-19. When employees returned to their offices on June 11, management at the Agency's Western Passport Center modified the facility's second-shift hours without first notifying the Union.

Subsequently, on July 8, the Union filed a grievance alleging the Agency violated the parties' agreement when it designated employees as mission critical without notice and an opportunity to bargain over that change. The Agency denied the grievance, and the Union invoked arbitration.

The Arbitrator framed the issues as whether the Agency violated the parties' agreement or "relevant statutes, regulations, and policy" when it designated employees "as mission critical without giving the Union appropriate notice of the change and the opportunity to bargain over the change? If so, what is the proper remedy?"<sup>5</sup>

In deciding the first issue, the Arbitrator stated that § 7103(a)(14) of the Statute and Article 12 of the parties' agreement require the parties to "negotiate over the impact and implementation of changes in personnel policy or practice affecting working conditions."<sup>6</sup> The Arbitrator found that, even though the parties' negotiations over the return to the office began before the Agency designated employees as mission critical, the parties were still bargaining when the Agency notified the Union of this change. The Arbitrator further found that after receiving notice, there was "no evidence in the record that the Union raised additional impact and implementation bargaining issues before the conclusion of the negotiations."<sup>7</sup> The Arbitrator therefore concluded that "[u]nder these circumstances," the June agreement "is evidence that the parties negotiated over the impact and implementation of the working conditions impacted by the Agency's critical

<sup>1</sup> 5 U.S.C. § 7103(a)(14).

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

<sup>3</sup> All dates hereafter refer to 2020 unless otherwise indicated.

<sup>4</sup> Award at 3.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 13 (citing 5 U.S.C. § 7103(a)(14); Art. 12, § 9.a ("Advance Notice: The [Agency] agrees to give reasonable advance written notice to the Union and the opportunity to negotiate any new or change in personnel policy or practice affecting working conditions of bargaining unit employees.")).

<sup>7</sup> *Id.*

mission decision” as required by the Statute and the parties’ agreement.<sup>8</sup>

Additionally, the Arbitrator rejected the Union’s argument that the Agency violated Article 14 of the parties’ agreement by not memorializing “the mission critical designation in the [specialists’] position descriptions” and not notifying and bargaining with the Union over that alleged change.<sup>9</sup> The Arbitrator determined there was “no evidence” that there was a change in the specialists’ working conditions, and therefore there was no need to modify the position description.<sup>10</sup> The Arbitrator also determined the Agency did not violate Article 27 when it failed to notify and bargain with the Union over the shift modification at the Western Passport Center because the June agreement demonstrated that the Agency had engaged in post-implementation bargaining over the change with the Union and “rectifie[d]” that failure.<sup>11</sup>

Further, the Arbitrator rejected the Union’s arguments that the Agency violated Articles 4 and 7 of the parties’ agreement by not engaging the Union in pre-decisional involvement (PDI) during the pandemic. The Arbitrator determined that Article 4 gives the Agency the discretion to engage the Union in PDI and, if the Agency “chooses to involve the Union,” only then would Article 7 obligate the Agency “to invite the Union to represent its bargaining[-]unit employees in the [PDI] matter.”<sup>12</sup> However, the Arbitrator found that because the Agency chose not to engage the Union, it did not violate the Union’s representational rights under Article 7.

Based on these findings, the Arbitrator concluded that the Agency did not violate the June agreement, the parties’ agreement, or § 7103(a)(14) of the Statute.

Finally, although the Arbitrator noted the number of reported COVID-19 cases among employees, the Arbitrator stated that there was “no evidence” that those cases “resulted directly or indirectly from the employees

working in the Agency’s offices.”<sup>13</sup> Therefore, the Arbitrator determined that “a compensatory remedy [of hazardous-duty pay] for employees who worked in the Agency’s offices during the pandemic [could not] be substantiated.”<sup>14</sup> According to the Arbitrator, “[a]bsent specific contact tracing evidence . . . a finding cannot be made” that employee COVID-19 cases “resulted from the Agency’s critical mission decision.”<sup>15</sup> Thus, the Arbitrator denied the grievance.

The Union filed exceptions to the award on January 12, 2022, and the Agency filed an opposition on February 9, 2022.

### III. Analysis and Conclusions

#### A. The award is not deficient on exceeded-authority grounds.

The Union asserts that the award is deficient on exceeded-authority grounds because the Arbitrator “failed to resolve the issue of hazard[ous] duty pay as a remedy.”<sup>16</sup> As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, or disregard specific limitations on their authority.<sup>17</sup>

Here, the Arbitrator framed the issues as whether the Agency violated the parties’ agreement or “relevant statutes, regulations, and policy” when it designated employees “as mission critical without giving the Union appropriate notice of the change and the opportunity to bargain over the change? If so, what is the proper remedy?”<sup>18</sup> The Arbitrator resolved these issues, finding the Agency committed no violation and determining that the Union was not entitled to a remedy of hazardous-duty pay.<sup>19</sup> Thus, contrary to the Union’s assertion, the Arbitrator resolved the remedy issue, and the Union’s argument does not demonstrate that the award is deficient.<sup>20</sup>

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> *Id.* at 14; *see also id.* at 8 (quoting Art. 14 § 1 (stating in part that “[e]ach bargaining unit employee is entitled to a complete accurate Position Description (PD). The PD shall clearly state and define the major duties of the position.”)).

<sup>10</sup> *Id.* at 14.

<sup>11</sup> *Id.* at 15 (noting that the June agreement states: “[u]ntil normal operations resume, some locations may not be able to support second shift operations given local conditions, available management coverage, or lack of significant interest in those shifts by returning [employees]. In those rare instances, [the Agency] will notify [the Union] of a temporary suspension of the night shift. Any impacted second shift [employees] will be granted maximum scheduling flexibility until resumption of normal operations.”); *see also id.* at 9 (quoting Art. 27 § 1 (“If the Employer proposes to institute a second or night shift in addition to the standard work week addressed in Article 25, the

Employer will notify the Union in accordance with Article 12 (Negotiations). . . . The Union shall be given the opportunity to request negotiations as appropriate.”)).

<sup>12</sup> *Id.* at 16-17; *see also id.* at 6-7 (quoting Art. 4), 7-8 (quoting Art. 7).

<sup>13</sup> *Id.* at 17.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Exceptions Br. at 9.

<sup>17</sup> *AFGE, Loc. 2052, Council of Prison Locs. 33*, 73 FLRA 59, 61 (2022) (*Local 2052*) (citing *U.S. DHS, U.S. CBP, L.A., Cal.*, 72 FLRA 411, 412 (2021)).

<sup>18</sup> Award at 6.

<sup>19</sup> *Id.* at 13-18.

<sup>20</sup> *Local 2052*, 73 FLRA at 61 (denying exceeded-authority exception where, contrary to excepting party’s assertion, arbitrator resolved issue).

Accordingly, we deny the exceeded-authority exception.

- B. The award is not deficient on contrary-to-law or contrary-to-public-policy grounds.

The Union argues that the award is deficient on contrary-to-law and contrary-to-public-policy grounds because the Arbitrator did not properly analyze and resolve whether the employees were entitled to hazardous-duty pay as a remedy for the Agency's actions.<sup>21</sup> It is well-established, however, that when an arbitrator decides the merits of a dispute and finds no violation of law or contract, the arbitrator has no authority to issue a remedy.<sup>22</sup> Indeed, the Authority has vacated awards where the arbitrator issued a remedy after finding no violation of law or contract.<sup>23</sup>

Here, the Union's contrary-to-law and contrary-to-public-policy exceptions are premised on its claim that the employees were entitled to the specific remedy of hazardous-duty pay for the Agency's contractual and statutory violations.<sup>24</sup> However, as noted previously, the Arbitrator found that the Agency "did not violate" the parties' agreement or the Statute.<sup>25</sup> In the absence of a violation, the Arbitrator had no authority to award hazardous-duty pay to the employees.<sup>26</sup> Therefore, the Arbitrator did not err by failing to analyze whether the employees were entitled to that remedy.

<sup>21</sup> Exceptions Br. at 2-6 (citing 5 U.S.C. §§ 5545(d), 5596; 29 U.S.C. § 207; 5 C.F.R. § 550.901-550.907; 5 C.F.R. Pt. 550, Subpt. I, App'x A).

<sup>22</sup> *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 65 FLRA 969, 973 (2011) (*Womack*) (citing *SSA, Balt., Md.*, 64 FLRA 516, 518 (2010); *U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr., Ogden, Utah*, 63 FLRA 195, 197 (2009)).

<sup>23</sup> *U.S. Small Bus. Admin.*, 70 FLRA 745, 746-47 (2018) (*SBA*) (finding an award contrary to law when the arbitrator awarded backpay after finding no violation of law or the parties' agreement); *Womack*, 65 FLRA at 973 (finding arbitrator exceeded authority, in part, by awarding a remedy after finding no violation of law or contract).

<sup>24</sup> Exceptions Br. at 9 (asserting that the Arbitrator "failed to resolve the issue of hazard[ous]-duty pay as a remedy"); *id.* at 3 (asserting that Arbitrator's denial of the Union's requested remedy without performing the required legal analysis for entitlement to hazardous-duty pay renders the award contrary to law); *see also id.* at 4-6 (same); *id.* at 6-7 (asserting that additional compensation should have been provided to employees designated as critical mission as they were at risk for COVID-19 exposure). The Union also cites the Backpay Act, 5 U.S.C. § 5596, as a basis for the award being contrary to law. *Id.* at 2. However, entitlement to backpay requires a finding that an agency committed an unjustified or unwarranted personnel action, such as by violating the law or a collective-bargaining agreement. *See SBA*, 70 FLRA at 746-47. Here, the Arbitrator found no such violation.

Accordingly, we deny the Union's contrary-to-law and contrary-to-public-policy exceptions.<sup>27</sup>

- C. The award is not based on nonfacts.

The Union argues that the award is based on nonfacts concerning "contact tracing" and the June agreement.<sup>28</sup> To establish that an award is based on a nonfact, the excepting 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>29</sup> As relevant here, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not establish that an award is based on a nonfact.<sup>30</sup> Moreover, the Authority rejects nonfact exceptions that challenge alleged findings that an arbitrator did not actually make.<sup>31</sup>

The Union argues that a central fact underlying the award is the Arbitrator's finding that the June agreement was intended to resolve all issues related to employees' return to work.<sup>32</sup> However, the Arbitrator did not make such a finding. Rather, the Arbitrator determined that the June agreement "is evidence that the parties negotiated over the impact and implementation of the working conditions impacted by the Agency's critical mission decision."<sup>33</sup> Because the Union's nonfact exception challenges an alleged finding that the Arbitrator

<sup>25</sup> Award at 19 (emphasis added); *see also id.* at 14 (no violation of Art. 12 and § 7103(a)(14) of the Statute); *id.* at 15 (no violation of Art. 12); *id.* at 16 (no violation of Art. 27); *id.* at 17 (no violation of Art. 4), *id.* at 17-18 (no violation of Art. 7).

<sup>26</sup> *Cf. SBA*, 70 FLRA at 746-47.

<sup>27</sup> *Id.*; *Womack*, 65 FLRA at 973; *see also AFGE, Loc. 1441*, 73 FLRA 36, 38 (2022) (denying public-policy exception premised on denied contrary-to-law exception (citing *U.S. Dep't of Educ.*, 72 FLRA 203, 205 n.30 (2021) (Chairman DuBester concurring); *U.S. Dep't of Educ., Off. of Fed. Student Aid*, 71 FLRA 1105, 1109 n.58 (2020) (Chairman Kiko dissenting on other grounds); *U.S. Dep't of VA, Nashville Reg'l Off., Nashville, Tenn.*, 71 FLRA 1042, 1044 (2020) (Member Abbott concurring)).

<sup>28</sup> Exceptions Br. at 7-8.

<sup>29</sup> *AFGE, Loc. 3954*, 73 FLRA 39, 41 (2022) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 201 (2016) (Member Pizzella dissenting in part)).

<sup>30</sup> *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 67, 70 (2022) (VA *Pershing*) (Member Kiko concurring) (citing *Fed. Educ. Ass'n, Stateside Region*, 72 FLRA 724, 725 (2022); *Int'l Bhd. of Boilermakers, Loc. 290, Bremerton Metal Trades Council*, 72 FLRA 694, 696 (2022) (*Boilermakers*); *NTEU*, 69 FLRA 614, 619 (2016)).

<sup>31</sup> *SSA, Off. of Hearing Operations*, 71 FLRA 177, 178 (2019) (*SSA*) (citing *U.S. EPA*, 68 FLRA 139, 141 (2014)).

<sup>32</sup> Exceptions Br. at 7-8.

<sup>33</sup> Award at 13.

did not make, this argument provides no basis for finding the award deficient.<sup>34</sup>

The Union also argues that the Arbitrator “ignored” a Union-submitted exhibit that allegedly showed employees were exposed to COVID-19 at the Agency’s offices.<sup>35</sup> This argument merely disputes the Arbitrator’s evaluation of the evidence. Therefore, it does not provide a basis for finding that the award is based on a nonfact.<sup>36</sup>

Accordingly, we deny the Union’s nonfact exceptions.

#### **IV. Decision**

We deny the exceptions.

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<sup>34</sup> SSA, 71 FLRA at 178.

<sup>35</sup> Exceptions Br. at 8 (referring to “Union-Exhibit 8”).

<sup>36</sup> VA *Pershing*, 73 FLRA at 70-71 (citing *Boilermakers*, 72 FLRA at 696).