**73 FLRA No. 99**

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5762

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DECISION

April 27, 2023

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

## I. Statement of the Case

Arbitrator Ann Breen-Greco issued an award finding a grievance arbitrable and concluding that the Agency violated the parties' agreement and various laws and regulations by failing to provide an employee (the grievant) with a reasonable accommodation and by obstructing the grievant's attempts to seek workers' compensation.

The Agency filed exceptions to the award, arguing: (1) the award is contrary to law and an Agency regulation, fails to draw its essence from the agreement, is contrary to public policy, and is incomplete, ambiguous, or contradictory, making implementation of the award impossible; and (2) the Arbitrator exceeded her authority, denied the Agency a fair hearing, and was biased. For the following reasons, we partially dismiss and partially deny the exceptions.

## II. Background and Arbitrator's Award

On May 28, 2019, the Union filed a grievance (Grievance I)[1] arguing the Agency failed to provide the grievant with a safe working environment and a reasonable accommodation.

While Grievance I was pending, the Union filed an unfair-labor-practice (ULP) charge.[2] The charge argued that the Agency: continued to not provide the grievant a reasonable accommodation or pay him; refused to arbitrate Grievance I, in violation of § 7121 of the Federal Service Labor-Management Relations Statute (the Statute);[3] and retaliated against the grievant in response to his protected disclosures. The charge also asserted that the Agency violated various subsections of § 7116(a) of the Statute.[4]

On March 11, 2020, the Union filed the grievance at issue in this case (Grievance II),[5] again alleging the Agency failed to provide the grievant with a safe working environment and a reasonable accommodation, and claiming the Agency retaliated against the grievant. On April 2, 2020, the Union withdrew the ULP charge.

Before the arbitration hearing, the Agency moved to dismiss Grievance II, arguing, among other things, that § 7116(d) of the Statute[6] barred it. The Arbitrator acknowledged the motion but declined to rule on it until after the hearing.[7]

The parties failed to stipulate the issues for arbitration, so the Arbitrator framed them as follows:

> Whether the Agency violated the Master Agreement . . . [and] applicable laws, rules, and regulations by failing to provide a safe workplace, failing to offer the [g]rievant a reasonable accommodation; failing to offer an interim reasonable accommodation after the [g]rievant made known his health issues, failing to assist the [g]rievant with completing the necessary Office [of] Workers[']Compensation Program[s] [forms], and causing the [g]rievant to suffer needlessly and suffer

[1] Exceptions, Attach. 19 (Grievance I).
[2] Exceptions, Attach. 1 (ULP).
[3] 5 U.S.C. § 7121.
[4] *Id.* § 7116(a).
[5] Exceptions, Attach. 2 (Grievance II).
[6] 5 U.S.C. § 7116(d) ("issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures").
[7] We note the Agency filed interlocutory exceptions to the Arbitrator's deferral of the Agency's arbitrability claims. *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 684, 684 (2022) (Chairman DuBester concurring). The Authority dismissed the exceptions because the Arbitrator's deferral did not constitute an "award" to which exceptions could be filed under § 2425.2(a) of the Authority's Regulations. *Id.* at 685.

> a loss of wages, benefits[,] and insurance because of his disability.[8]

Before the Arbitrator, the Agency argued Grievance II was not arbitrable because it "was previously filed under another number, the Union failed to select an arbitrator during the ten-day time period[,] and then [the Union] filed the same grievance with a different case number."[9] The Arbitrator found the parties had a past practice of going outside the ten-day timeframe for selecting arbitrators and that the Agency failed to demonstrate "it was deprived of the opportunity to investigate and address the allegations" in Grievance II or "that the intent of the parties as expressed in the contract was disregarded."[10] Thus, the Arbitrator found the grievance arbitrable. However, she did not address the Agency's claim that § 7116(d) of the Statute barred the grievance.

The Arbitrator then determined the Agency violated Article 29, Section 15 of the parties' agreement (Section 15) by failing to follow its procedures for remediating mold. Section 15(G) states that "[o]nce significant airborne or surface small particles are detected, the [Agency] will conduct sampling [at least every] three months to monitor employee exposure levels."[11] The Arbitrator rejected the Agency's claim that surface mold must be "significant" to trigger the Agency's obligations under this provision and, instead, adopted the Union's "plausible" reading that Section 15(G) requires only that *airborne* mold be significant.[12] The Arbitrator also found that the Occupational Safety and Health Administration (OSHA) and the Centers for Disease Control and Prevention do not require that mold exposure be significant to trigger remediation obligations.

The Arbitrator highlighted a report from an industrial hygienist confirming mold was present at the Agency's facilities. She found the Agency failed to notify the Union of the hygienist's recommendation that "additional investigations should be conducted by a mechanical engineer for the [heating, ventilation, and air conditioning] system that supports the hematology and chemistry labs."[13] The report also stated "[i]ndividual sensitivities to mold spores vary widely across the population" and mold may cause "life-threatening diseases and infections."[14]

The Arbitrator noted OSHA and the Veterans Affairs' office of the medical inspector (OMI) examined the facility and did not report any "unacceptable levels" of mold.[15] However, the Arbitrator emphasized that Agency witnesses testified "[t]here is no OSHA threshold for most mold exposure" and that allergies to mold are "very person specific."[16] The Arbitrator determined the Agency never addressed the hygienist's report's finding of mold and its statement that there were "limitations" that could affect testing.[17] The Arbitrator further noted that multiple Agency witnesses testified mold will return if its source is not corrected.

Next, the Arbitrator addressed whether the grievant is a qualified person with a disability under the Rehabilitation Act (the Act).[18] Quoting the arbitration-hearing transcript, the Arbitrator noted the Agency representative's statement, during the hearing, that "[w]e would agree that any – whatever asthma or, you know, any diagnosis that he may have was caused by his working conditions."[19] The Arbitrator found the Agency conceded that the grievant was a qualified individual with a disability by offering him a reasonable accommodation.

"Nonetheless," the Arbitrator stated, "to ensure that this issue is resolved, the evidence and relevant law are reviewed."[20] The Arbitrator found that several medical reports demonstrated the grievant had medical issues stemming from the mold at the Agency's facilities, and that the Agency offered no evidence to refute the grievant's claims. Further, the Arbitrator analyzed the terms of the Act, its implementing regulations, and an Agency handbook, which states that an employee with asthma – like the grievant – is "covered under the . . . Act as an individual with a disability."[21] The Arbitrator concluded the grievant was a qualified person with a disability.

The Arbitrator then addressed whether the Agency failed to provide the grievant with a reasonable accommodation. The Arbitrator found the Agency offered to provide him with a powered air-purifying respirator (PAPR) – a "large head covering that encloses the face" and filters the air.[22] The Arbitrator determined that accommodation was not reasonable because the PAPR would prevent the grievant from performing his duties, such as answering telephones. The Arbitrator also credited medical reports that stated a PAPR would not be safe for the grievant.

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[8] Award at 3.
[9] *Id.* at 2.
[10] *Id.* at 3.
[11] *Id.* at 4 (quoting Section 15).
[12] *Id.* at 27.
[13] *Id.* at 19.
[14] *Id.* at 18.
[15] *Id.* at 17.
[16] *Id.* at 12.
[17] *Id.* at 35.
[18] 29 U.S.C. §§ 701-96.
[19] Award at 29 (quoting Exceptions, Attach. 29, November 5, 2020 Tr. at 1183).
[20] *Id.* at 36.
[21] *Id.* at 38.
[22] *Id.* at 41.

Instead of a PAPR, the Arbitrator found that the grievant "was entitled to and requested appropriate reasonable accommodations" – either a portable high-efficiency particulate-air (HEPA) filter "or[,] in the alternative[,]" a licensed practical nurse (LPN) position.[23] At other points in the award, the Arbitrator stated that the grievant was entitled to an LPN position, without clearly framing it as an alternative remedy to the HEPA filter.[24] Although the Agency claimed there were not any available LPN positions to offer the grievant as a reasonable accommodation, the Arbitrator rejected that claim, noting the Agency was advertising for LPN positions when the grievant requested a reasonable accommodation.

The Arbitrator also found the Agency obstructed the grievant's attempts to obtain workers' compensation. In addition, the Arbitrator directed the Agency to pay any backpay owed to the grievant.

The Agency filed exceptions to the award on September 8, 2021, and the Union filed an opposition on October 6, 2021.

## III. Analysis and Conclusions

### A. The Agency's arguments regarding the LPN-position remedy are moot.

The Agency claims the Arbitrator exceeded her authority by awarding the grievant an LPN position because it was not established that the grievant is qualified as an LPN.[25] Also, the Agency argues this remedy is contrary to § 7106(a) of the Statute.[26]

As discussed above, the Arbitrator sometimes framed the LPN-position remedy as merely an "alternative" to the HEPA-filter remedy,[27] and sometimes did not.[28] However, the Union interprets the award as directing the LPN-position remedy as merely an alternative to the HEPA-filter remedy.[29]

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.[30] As the Union interprets the award as merely providing the LPN-position remedy as an alternative to the HEPA-filter remedy, we interpret the award the same way. Because the Agency's exceptions interpret the award differently – as mandating an LPN-position remedy – we dismiss those exceptions as moot.

### B. The Agency fails to support two of its exceptions.

Section 2425.6(e)(1) of the Authority's Regulations states that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support" the exception.[31] The Agency claims the award is contrary to public policy and an Agency-wide regulation,[32] but provides no supporting arguments for those claims.[33] Consequently, we deny these exceptions, as unsupported, under § 2425.6(e)(1).[34]

### C. Section 7116(d) of the Statute does not bar the grievance.

The Agency argues the award is contrary to § 7116(d) of the Statute because the Union's earlier-filed ULP charge bars Grievance II.[35] Under § 7116(d), issues may be raised under a negotiated grievance procedure or under the statutory ULP procedure, but not under both procedures.[36] Thus, under § 7116(d), a ULP charge bars a later-filed grievance that involves the same "[i]ssues" as the ULP charge.[37] To determine whether the issues

[23] *Id.* at 43.
[24] *Id.* at 46 ("The [g]rievant must immediately be returned to work, as requested, as an LPN, with full benefits."); *id.* at 49 ("The Agency is directed to . . . immediately return the [g]rievant to work, as requested, as an LPN, with full benefits[.]").
[25] Exceptions at 12.
[26] *Id.*
[27] Award at 43.
[28] *Id.* at 46, 49.
[29] *See* Opp'n at 16 ("The Agency could . . . place a portable HEPA air purifier in the [lab] as a 'reasonable accommodation' and allow the [g]rievant to return to a safe work environment. This would preclude the issue of him being positioned as a LPN.").
[30] *U.S. Dep't of the Air Force, Scott Air Force Base, Ill.*, 72 FLRA 526, 528 (2021) (Chairman DuBester concurring) (citing *U.S. Dep't of VA, VA Long Beach Healthcare Sys., Long Beach, Cal.*, 63 FLRA 332, 334 (2009) (where union agreed to "waive" portion of arbitral remedy, Authority found that remedy was unenforceable and dismissed challenge to it as moot)) (additional citations omitted).
[31] 5 C.F.R. § 2425.6(e)(1).
[32] Exceptions at 7, 14.
[33] *Id.* at 7, 14-24.
[34] 5 C.F.R. § 2425.6(e)(1); *U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys.*, 69 FLRA 608, 610 (2016) (denying an exception when the party failed to provide support).
[35] Exceptions at 7-8.
[36] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 323, 324 (2021) (*Poplar Bluff*) (Chairman DuBester concurring); *U.S. Dep't of Educ.*, 72 FLRA 203, 205 (2021) (Chairman DuBester concurring).
[37] 5 U.S.C. § 7116(d).

involved in a ULP charge and a grievance are the same, the Authority examines whether: (1) the ULP charge and the grievance arose from the same set of factual circumstances, and (2) the theories advanced in support of the ULP charge and the grievance were substantially similar.[38]

The Agency maintains that the central complaint of the ULP and Grievance II are the denial of the grievant's reasonable-accommodation request.[39] For support, the Agency notes that the ULP charge and Grievance II both detail the factual circumstances surrounding the denial of that request and allege the grievant was not offered a reasonable accommodation.[40]

Before the Union filed either the ULP charge or Grievance II, it filed Grievance I – challenging the Agency's denial of the accommodation request – under the parties' negotiated grievance procedure.[41] Thus, for purposes of § 7116(d), the Union's filing of Grievance I constituted its choice of forum – the parties' negotiated grievance procedure – for challenging the reasonable-accommodation denial.[42] Consequently, when the Union subsequently filed the ULP charge, it could not bar Grievance II to the extent it raised the same accommodation-denial issue that Grievance I raised.[43] Further, even assuming Grievance II raised *additional* issues that the ULP charge would bar, the Arbitrator did not actually address any additional issues.

For these reasons, the ULP charge does not provide a basis for finding that § 7116(d) barred the Arbitrator from resolving the reasonable-accommodation issue.[44] Therefore, we deny the Agency's exception.

D. The award is not based on nonfacts.

The Agency argues that the award is based on nonfacts.[45] To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[46] 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.[47] Further, the Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[48]

According to the Agency, the OSHA and OMI reports vindicate the Agency's position that it provided a safe workplace.[49] The Agency argues the award is based on a nonfact because the Arbitrator "disregard[ed]"[50] these reports and inappropriately speculated that the reports "may have had . . . limitations."[51] The Arbitrator did not disregard those reports; she merely found them less relevant than the internal hygienist's report.[52] Moreover, the parties disputed at arbitration whether unsafe quantities of mold were present at the Agency's facilities.[53] Thus, the Agency's argument provides no basis for finding the award is based on a nonfact,[54] and we deny this exception.

[38] *NLRB*, 72 FLRA 644, 646 (2022) (*NLRB*) (Chairman DuBester concurring; Member Abbott concurring).
[39] Exceptions at 8.
[40] *Id.*
[41] Grievance I at 1-2.
[42] *Ass'n of Civilian Technicians, N.Y. State Council*, 61 FLRA 664, 665-66 (2006) (*N.Y. State Council*) ("The essential feature of these choice-of-forum provisions in the Statute is the confirmation that certain claims can be pursued under a negotiated grievance procedure or another statutory procedure and that aggrieved parties must choose only one procedure under which to pursue their claim."); *see Poplar Bluff*, 72 FLRA at 324 ("Here, the [a]gency argues that the grievance was barred by an earlier-filed grievance . . . . [W]e also note that the Union raised issues only under 'the grievance procedure . . . not under both grievance and ULP procedures.'").
[43] *N.Y. State Council*, 61 FLRA at 665-66.
[44] *NLRB*, 72 FLRA at 646 ("When applying § 7116(d), the Authority evaluates the individual issues raised in a grievance, not the grievance as a whole.").
[45] Exceptions at 9-10.
[46] *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022).
[47] *NTEU, Chapter 298*, 73 FLRA 350, 351 (2022) (*Chapter 298*).
[48] *Id.*; *NTEU*, 69 FLRA 614, 619 (2016); *see also AFGE, Nat'l Border Patrol Council, Loc. 2455*, 69 FLRA 171, 172 (2016) (*Loc. 2455*) (Member Pizzella concurring).
[49] Exceptions at 9-10.
[50] *Id.* at 9.
[51] *Id.* at 10 (quoting Award at 35); *see also* Award at 35 (noting caveat, in internal hygienist's report, that there were "limitations for conducting testing" and stating "OSHA and OMI may have had similar limitations").
[52] Award at 35 (stating that it was "unclear as to what conditions" OSHA and OMI "were able to inspect and the parameters of the inspection" and emphasizing that the Agency did not take the follow-up actions recommended by the internal hygienist's report).
[53] *Loc. 2455*, 69 FLRA at 172 ("Even assuming that the [a]rbitrator's assertion concerning nexus is a factual finding, the existence of a nexus was disputed before the [a]rbitrator.").
[54] *Chapter 298*, 73 FLRA at 351 ("Although the [u]nion disagrees with the conclusions that the [a]rbitrator drew from the evidence presented, the [u]nion's arguments provide no basis for finding the award based on a nonfact.").

E. The Agency does not demonstrate that the award fails to draw its essence from the parties' agreement.

The Agency argues the award fails to draw its essence from the parties' agreement.[55] The Authority will find an arbitration award fails to draw its essence from a collective-bargaining agreement when the appealing party establishes 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 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.[56] Mere disagreement with the arbitrator's interpretation and application of an agreement does not provide a basis for finding an award deficient.[57]

The Agency contends Section 15(G) of the parties' agreement does not require the Agency to act unless *both* surface *and* airborne mold are present in significant amounts.[58] Section 15(G) states, "Once significant airborne or surface mold particles are detected, the [Agency] will conduct sampling at intervals of no greater than three months to monitor employee exposure levels."[59] The Arbitrator adopted the Union's interpretation that "significant" modifies only *airborne* mold particles and that *surface* mold need not be "significant" to trigger the Agency's obligations.[60] The Agency merely disagrees with the Arbitrator's interpretation of Section 15(G) and, as such, does not demonstrate that the award fails to draw its essence from the agreement.[61]

The Agency also contends the award fails to draw its essence from the parties' agreement because the Arbitrator did not address the Agency's claims that § 7116(d) barred the grievance and that the Union was prohibited from filing multiple grievances.[62] The Agency does not explain how the Arbitrator's not addressing its § 7116(d) claim fails to draw its essence from the agreement,[63] and, as discussed above, we have found § 7116(d) did not bar Grievance II.

As to the Agency's remaining procedural claim, the Arbitrator addressed – and rejected – the argument that the Union cannot file multiple grievances over the same issues.[64] The Agency alleges that – in the processing of Grievance I – the Union violated the agreement's requirement that the parties select an arbitrator within ten days of invoking arbitration.[65] The Agency also cites a contract provision stating that the parties "encourage cooperative labor-management relationships at all levels."[66] However, even if the Arbitrator had found the Union untimely invoked arbitration of Grievance I, which she did not, the Agency has not established this would require the cancellation of Grievance II. Neither of the provisions that the Agency cites addresses whether the Union can file multiple grievances over the same issue.[67] Consequently, the Agency's claim does not demonstrate that the award fails to draw its essence from the parties' agreement.[68]

We deny the Agency's essence exceptions.

F. The award is not contrary to the Act.

The Agency argues the award is contrary to the Act because the Arbitrator erred in finding the grievant is a qualified individual with a disability.[69] When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[70] 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.[71] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[72]

Under the Act, an agency commits unlawful discrimination by failing to reasonably accommodate a qualified individual with a known disability unless the agency demonstrates that such accommodation would

[55] Exceptions at 8-10.
[56] *NTEU*, 73 FLRA 315, 320 (2022) (*NTEU I*) (Chairman DuBester concurring); *NAGE*, 71 FLRA 775, 776 (2020) (citing *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017)).
[57] *NTEU I*, 73 FLRA at 320.
[58] Exceptions at 10.
[59] Exceptions, Attach. 21, Collective-Bargaining Agreement (CBA) at 156.
[60] *See* Award at 27.
[61] *NTEU I*, 73 FLRA at 320-21 (denying an essence exception where the party merely argued for its preferred interpretation of the parties' agreement); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 1262, 1264 (2020) (Member DuBester concurring).
[62] Exceptions at 8-9.
[63] *See U.S. Dep't of State, Passport Serv.*, 73 FLRA 201, 203 (2022) (*Passport Serv.*) (denying essence exception that failed to demonstrate inconsistency between award and agreement).
[64] Award at 2-3.
[65] Exceptions at 8 (citing Art. 44, § 2(A)); *see also* CBA at 234 ("The parties shall meet within [ten] calendar days after receipt of [a list of arbitrators] to select an arbitrator . . . .").
[66] Exceptions at 8 (citing Art. 3, § 3).
[67] *Id.*
[68] *See Passport Serv.*, 73 FLRA at 203.
[69] Exceptions at 10.
[70] *NTEU I*, 73 FLRA at 318.
[71] *Id.*
[72] *Id.*

impose an undue hardship on the agency.[73] Under the Act, an individual is "qualified" if they demonstrate that they can perform the essential functions of the job, with or without a reasonable accommodation.[74]

The Agency argues the grievant requested the "impossible" – an environment completely free of mold.[75] According to the Agency, neither of the awarded accommodations – a portable HEPA filter or an LPN position – will provide the grievant with a completely mold-free workplace.[76] Consequently, the Agency argues the grievant is not a "qualified" individual under the Act because he has not demonstrated he can perform his job functions even with the awarded accommodations.[77]

However, at arbitration, the grievant testified he was not seeking a mold-free environment.[78] In addition, the Arbitrator credited the grievant's statements that he does not experience any negative symptoms when using a portable HEPA filter.[79] We defer to the Arbitrator's finding that a portable HEPA filter alleviates the grievant's symptoms because the Agency has not argued it is a nonfact.[80] This finding supports the Arbitrator's conclusion that the grievant "is capable of performing [his] job duties" *with* a reasonable accommodation – a HEPA filter.[81] Therefore, the Agency's arguments provide no basis for concluding that the grievant is not a qualified individual with a disability under the Act. Accordingly, we deny this exception.

G. The Arbitrator did not deny the Agency a fair hearing.

The Agency argues that, for several reasons, the Arbitrator denied it a fair hearing.[82] An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.[83]

First, the Agency contends the Arbitrator failed to address its claims that the Union cannot file multiple grievances over the same issues and that the ULP charge barred Grievance II.[84] The Arbitrator acknowledged the Agency's claim regarding multiple grievances but then went on to find Grievance II arbitrable;[85] thus, she did not fail to address the Agency's claim. As for the Agency's argument regarding the ULP charge, the Agency is correct that the Arbitrator did not address it. However, as discussed above, that claim lacks merit. As a result, the Agency does not demonstrate that the Arbitrator's failure to address that claim prejudiced it.[86]

Second, the Agency argues that – in finding the Agency conceded the grievant is a qualified individual with a disability – the Arbitrator took its representative's hearing statements out of context and inaccurately quoted the representative.[87] Notwithstanding the Arbitrator's finding of a concession, she also analyzed all the evidence "to ensure that the facts and record on this matter are established,"[88] and she found separate and independent grounds for concluding the grievant is a qualified individual with a disability.[89] The Agency has not established that these separate and independent grounds are deficient. As a result, the Agency does not demonstrate

[73] *U.S. DOJ, Fed. BOP, Fed. Corr. Ctr., Petersburg, Va.*, 72 FLRA 477, 478 n.3 (2021) (Chairman DuBester concurring; Member Abbott concurring); *AFGE, Loc. 2145*, 71 FLRA 818, 819 (2020) (citing *AFGE, Loc. 1992*, 69 FLRA 567, 568 (2016) (Member Pizzella concurring)).

[74] *AFGE, Loc. 2923*, 62 FLRA 109, 111 (2007); *see also* 29 C.F.R. § 1630.2(m) ("The term 'qualified,' with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.").

[75] Exceptions at 11.

[76] *Id.*

[77] *Id.*

[78] Exceptions, Attach. 30, November 23, 2020 Tr. (Nov. 30 Tr.) at 1595 (denying that he was asking for the entire facility to be mold free, but requesting "a room with a[n] air purifier" because he does not "get sick when [he has] it around"); *see also* Grievance II at 1-2.

[79] Award at 38-39 ("Based on the following, the Arbitrator finds that the [g]rievant is a qualified individual with a disability, as supported by . . . differences in symptoms when no longer working in an environment with mold . . . ."); *see* Nov. 30 Tr. at 1594-95.

[80] *NTEU I*, 73 FLRA at 318.

[81] Award at 37.

[82] Exceptions at 8, 13.

[83] *AFGE, Loc. 2338*, 73 FLRA 229, 230-31 (2022) (*Loc. 2338*); *AFGE, Loc. 1101*, 70 FLRA 644, 646 n.25 (2018) (*Loc. 1101*) (Member DuBester concurring); *AFGE, Council of Prison Locs., Loc. 3828*, 66 FLRA 504, 505 (2012) (*Loc. 3828*).

[84] Exceptions at 8.

[85] Award at 2-3.

[86] *Loc. 1101*, 70 FLRA at 646 (denying fair-hearing exception where excepting party failed to demonstrate how it was prejudiced by the arbitrator's challenged conduct); *Loc. 3828*, 66 FLRA at 505 (same).

[87] Exceptions at 13.

[88] Award at 6.

[89] *Id.* at 38-39.

that the Arbitrator's characterization of the representative's hearing statements prejudiced it.[90]

Third, the Agency argues that the Arbitrator relied on the Union's unsubstantiated assertions to find that the grievant is a qualified individual with a disability.[91] The Agency does not explain how this demonstrates that the Arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.[92] Therefore, the Agency's argument does not demonstrate that the Arbitrator denied it a fair hearing.

Accordingly, we deny the fair-hearing exceptions.

H. The Arbitrator was not biased.

For several reasons, the Agency claims that the Arbitrator was biased.[93] To establish bias, the excepting party must demonstrate that (1) the award was procured by improper means, (2) there was partiality or corruption on the arbitrator's part, or (3) the arbitrator engaged in misconduct that prejudiced the party's rights.[94] A party's assertion that an arbitrator's findings were adverse to that party, without more, does not demonstrate that an arbitrator was biased.[95]

First, the Agency argues the Arbitrator's alleged misreading of Section 15(G) of the agreement is evidence of bias.[96] As discussed above, we have denied the Agency's essence exception regarding Section 15(G). Further, the mere fact that the Arbitrator's interpretation was adverse to the Agency's position does not demonstrate bias.[97] Moreover, the Agency does not allege that: the award was procured by improper means, there was partiality or corruption on the Arbitrator's part, or the Arbitrator engaged in misconduct that prejudiced the party's rights. Therefore, the Agency's argument provides no basis for finding the Arbitrator was biased.[98]

Second, the Agency argues that the Arbitrator relied on the Union's unsubstantiated assertions to find the grievant to be a qualified individual with a disability.[99] As discussed above, the Arbitrator made findings that supported her conclusion on this issue, and the Agency has not alleged that those findings are nonfacts. Further, again, the mere fact that the Arbitrator's findings were adverse to the Agency's position does not demonstrate bias.[100] Moreover, the Agency does not argue that: the award was procured by improper means, there was partiality or corruption on the Arbitrator's part, or the Arbitrator engaged in misconduct that prejudiced the party's rights. Consequently, we reject the Agency's argument.[101]

Third, the Agency argues that – in finding the Agency conceded the grievant is a qualified individual with a disability – the Arbitrator took its representative's hearing statements out of context and inaccurately quoted the representative.[102] The Agency also argues that the Arbitrator "exacerbated the bias issue" by convening a post-hearing Zoom call with the parties, where she: stated she noticed errors in the hearing transcript; asked the parties whether they "thought it was necessary to call the court reporter to the carpet to talk about" those errors; "asked for an email waiving any disputes with the transcription"; and refused to identify her specific concerns with the transcript.[103]

As stated above, the Arbitrator found bases – separate and independent of her finding of the Agency representative's concession – for concluding the grievant is a qualified individual with a disability.[104] Thus, there is no basis for finding that the Arbitrator's characterization of the Agency representative's hearing statements

[90] *Loc. 1101*, 70 FLRA at 646; *Loc. 3828*, 66 FLRA at 505; *cf. Fraternal Ord. of Police, DC Lodge 1*, 73 FLRA 408, 412 (2023) (*DC Lodge 1*) ("The Authority has repeatedly held that when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient before the Authority will set the award aside."). We note that the Agency requested leave to file, and has filed, a supplemental submission to respond to alleged inaccuracies in the Union's opposition with respect to the Agency representative's statements at the arbitration hearing. Even assuming the Agency's filing is properly before us, it provides no basis for setting aside the award because the Agency has not demonstrated that the separate and independent grounds for the award are deficient.

[91] Exceptions at 13.

[92] *Loc. 2338*, 73 FLRA at 230-31; *Loc. 1101*, 70 FLRA at 646 n.25; *Loc. 3828*, 66 FLRA at 505.

[93] Exceptions at 8-10, 12-13.

[94] *AFGE, Loc. 2052, Council of Prisons, Locs. 33*, 73 FLRA 59, 61 (2022) (*Loc. 2052*) (Chairman DuBester concurring); *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 70 FLRA 924, 929 (2018) (*IRS Austin*) (Member DuBester concurring in part and dissenting in part on other grounds).

[95] *Loc. 2052*, 73 FLRA at 61; *IRS Austin*, 70 FLRA at 929.

[96] Exceptions at 10.

[97] *Loc. 2052*, 73 FLRA at 61; *IRS Austin*, 70 FLRA at 929.

[98] *Loc. 2052*, 73 FLRA at 61; *IRS Austin*, 70 FLRA at 929.

[99] Exceptions at 13.

[100] *Loc. 2052*, 73 FLRA at 61; *IRS Austin*, 70 FLRA at 929.

[101] *Loc. 2052*, 73 FLRA at 61; *IRS Austin*, 70 FLRA at 929.

[102] Exceptions at 13.

[103] *Id.* at 13-14.

[104] Award at 38-39.

"*prejudiced* [the Agency's] rights."[105] Nor does the Agency explain how the Arbitrator's alleged actions and statements during the Zoom call demonstrate that: the award was procured by improper means, there was partiality or corruption on the Arbitrator's part, or the Arbitrator engaged in misconduct that prejudiced the Agency's rights. As such, the Agency has not demonstrated that the Arbitrator was biased in this regard.[106]

Accordingly, we deny the Agency's bias exceptions.

I. The award is not incomplete, ambiguous, or contradictory as to make implementation impossible.

The Agency argues the award is incomplete, ambiguous, or contradictory because the Agency cannot provide the grievant with a completely mold-free workplace.[107] In order for the Authority to find an award deficient as incomplete, ambiguous, or contradictory, 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.[108]

The award does not require the Agency to provide a completely mold-free workplace. Therefore, the Agency's exception is based on a mischaracterization of the award. As such, it provides no basis for finding the award deficient,[109] and we deny the exception.

## IV. Decision

We partially dismiss and partially deny the Agency's exceptions.

[105] *Loc. 2052*, 73 FLRA at 61 (emphasis added); *IRS Austin*, 70 FLRA at 929; *cf. DC Lodge 1*, 73 FLRA at 412 (when an award is based on separate and independent grounds, the excepting party must establish that all of the grounds are deficient before the Authority will set aside the award).
[106] *Loc. 2052*, 73 FLRA at 61; *IRS Austin*, 70 FLRA at 929.
[107] Exceptions at 11-12.
[108] *AFGE, Loc. 2516*, 72 FLRA 567, 570 (2021).
[109] *U.S. Dep't of Interior, Nat'l Park Serv.*, 73 FLRA 418, 420 (2023) (denying exception where it was based on a mischaracterization of the award); *NTEU*, 73 FLRA 101, 104 (2022) (Chairman DuBester concurring) (same).