74 FLRA No. 28

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-5644
(72 FLRA 494 (2021))

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DECISION

January 8, 2025

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

I. Statement of the Case

After the Agency selected an employee (the selectee) for a certain position, the Union filed a grievance contesting the Agency's failure to select a Union official (the grievant) for the position. In a series of awards, Arbitrator David M. Gaba resolved procedural issues, sustained the grievance, and directed remedies. The Agency filed exceptions to the awards on essence, exceeded-authority, and nonfact grounds. For the reasons explained below, we dismiss the essence exception, and deny the remaining exceptions.

II. Background and Arbitrator's Awards

The Union filed two grievances concerning the grievant's non-selection for a voluntary-services-specialist position (specialist position). The first grievance was filed on November 26, 2018 (2018 grievance), and challenged the Agency's failure to select the grievant for a permanent placement in the specialist position. The second grievance was filed on July 10, 2019 (2019 grievance), and concerned a temporary detail.

The Agency denied both grievances and the parties submitted them to arbitration separately. At arbitration, the parties stipulated the issue as "the non[-]selection . . . of [the grievant] for the . . . specialist position."[1]

The parties did not agree on which grievance was before the Arbitrator. Therefore, the parties requested the Arbitrator resolve that dispute before holding a merits hearing. In an initial award (the grievance-determination award), the Arbitrator determined the 2018 grievance[2] was the grievance before him and directed the parties to schedule a merits hearing.[3]

Later, in a merits award, the Arbitrator repeated the parties' stipulated issue as "the non[-]selection . . . of [the grievant] for the [specialist] position."[4] He also noted, however, that during the merits hearing the Union "submitted additional issues to be decided, to which the Agency did not stipulate or agree."[5] Relying on Article 44, Section F of the parties' agreement (Article 44(F)),[6] the Arbitrator then "clarif[ied] the record with two . . . additional issues to be decided," which were: "Did the Union establish that the Agency's selection process violated the [parties' agreement] and, . . . [i]f so, what is the appropriate remedy?"[7]

Before filling the specialist position, the Agency had chosen the selectee to serve in a temporary detail to that position. The Arbitrator clarified that the issue before him was limited to "the Agency's non-selection of [the grievant] for the *permanent* vacant [specialist] position," not the temporary detail.[8] However, he noted that he would consider the detail selection as "evidence on the issue of whether the Agency's non-selection of [the grievant for the permanent position] was based on Union animus."[9]

[1] May 14, 2020 Award (Grievance-Determination Award) at 2.
[2] Hereafter, all references to "the grievance" refer to the 2018 grievance, unless otherwise specified.
[3] The Agency filed an interlocutory exception to the grievance-determination award, which the Authority dismissed without prejudice because it did not demonstrate extraordinary circumstances warranting interlocutory review. *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 494, 494-95 (2021) (Chairman DuBester concurring).
[4] April 13, 2023 Award (Merits Award) at 6.
[5] *Id.*
[6] *Id.* In relevant part, Article 44(F) states: "If the parties fail to agree on a joint submission, each shall make a separate submission. The arbitrator shall determine the issue or issues to be heard." *Id.*
[7] *Id.*
[8] *Id.* at 7.
[9] *Id.* at 60 (emphasis omitted).

In order to determine whether the Agency was motivated by anti-union animus, the Arbitrator made various findings about the grievant's union activities and interactions with management. For example, the Arbitrator found that the Agency "frequently denied" the grievant official time,[10] and posited that some of these denials "likely" violated the parties' agreement.[11] Based on his findings concerning the detail-selection process, including an admission by the manager who chose the selectee for the detail,[12] the Arbitrator found that the Agency's detail selection was motivated by anti-union animus.[13] In particular, the Arbitrator credited the manager's testimony that he did not "consider" detailing the grievant because the grievant "was serving on a hundred percent official time as Union president during this time."[14]

In evaluating whether the selection for the permanent position was similarly motivated, the Arbitrator cited his findings that: (1) the Agency failed to follow merit-promotion procedures set out in Article 23 of the parties' agreement (Article 23); (2) the grievant was more qualified for the position than the selectee; (3) the management official who chose the selectee for the specialist position was not the designated selecting official, but rather the management official who had discriminated in making the detail selection; (4) the Agency's "[m]erit [r]eferral [l]ist" (the referral list) and "[m]erit [s]election [l]ist" (the selection list) for the specialist vacancy[15] demonstrated the Agency "preselected" the selectee[16]; and (5) the Agency "willfully denied" the Union's request for information concerning the specialist-position selection,[17] and improperly destroyed some of the evidence requested – actions which he found violated the information-request procedures set out in Article 49 of the parties' agreement (Article 49), as well as § 7116(a)(8) of the Federal Service Labor-Management Relations Statute (the Statute).[18] Ultimately, the Arbitrator found the evidence demonstrated that the Agency's selection decision was motivated by anti-union animus, and he concluded that the Agency discriminated on the basis of the grievant's protected activity when it failed to select him. Alternatively, the Arbitrator noted that "even *if*" he had *not* found the Agency was motivated by anti-union animus, he would have sustained the grievance on the basis of the Agency's "*multiple* violations of the [a]greement throughout the selection process."[19]

After receiving supplemental remedial briefs from the parties, the Arbitrator awarded several remedies (remedy award). As relevant here, the Arbitrator directed the Agency to (1) rescind the appointment of the selectee and (2) appoint the grievant to the position (appointment remedy). In determining this remedy, the Arbitrator rejected the Agency's argument that the remedy was contrary to law because it excessively interfered with management's right to assign work under § 7106(a)(2)(B) of the Statute.[20] On this point, the Arbitrator cited § 7106(b) of the Statute,[21] found the Agency "negotiated language" requiring it to follow certain procedures when making selections, and determined the Agency "willfully failed to follow" those procedures.[22] The Arbitrator concluded that "but for" this failure, the Agency would have selected the grievant for the specialist position, resulting in his promotion from a General-Schedule (GS) 7 to a GS-9.[23]

On August 7, 2023, the Agency filed exceptions to the awards. On September 6, 2023, the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's essence exception.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[24] The Agency's essence exception challenges the Arbitrator's conclusion in the grievance-determination award that the 2018 grievance was the grievance before him.[25] Specifically, the Agency alleges this determination conflicts with Section 2 of the agreement's preamble (preamble) and "flies in the face of

[10] *Id.* at 27.
[11] *Id.* at 64.
[12] *Id.* at 34-35 (finding manager credibly testified that he "did not want" the grievant in his department because the grievant "wanted to work in the Union" and the manager had "heard many things about him and . . . knew how difficult he was to work with").
[13] *See id.* at 61-66 (concluding that "the Agency's failure to detail [the grievant] into the . . . [s]pecialist position was based on [the grievant]'s Union affiliation").
[14] *Id.* at 33; *see also id.* at 63; Exceptions, Attach. 1, Tr. at 642-44, 947-48 (grievant explaining how he allocates himself official time under the parties' agreement and stating that, since 2012, he was on one hundred percent official time).
[15] Merits Award at 41-42, 44-45.
[16] *Id.* at 69.
[17] *Id.* at 71 (emphasis omitted).
[18] 5 U.S.C. § 7116(a)(8).
[19] Merits Award at 72.
[20] 5 U.S.C. § 7106(a)(2)(B).
[21] *Id.* § 7106(b).
[22] July 14, 2023 Award (Remedy Award) at 19-20 (emphasis omitted).
[23] *Id.* at 22.
[24] *U.S. DHS, Citizenship & Immigr. Servs.*, 73 FLRA 82, 83-84 (2022) (citing 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Loc. 3627*, 70 FLRA 627, 627 (2018)).
[25] Exceptions Br. at 5-6.

good[-]faith dealings" because it was the 2019 grievance that was submitted to arbitration.[26]

At arbitration, the parties argued about whether the 2018 or 2019 grievance was before the Arbitrator.[27] Therefore, the Agency could have presented its arguments regarding the preamble before the Arbitrator. It did not do so.[28] Accordingly, we dismiss the Agency's essence exception under §§ 2425.4(c) and 2429.5.[29]

IV. Analysis and Conclusions

A. The Agency does not demonstrate the Arbitrator exceeded his authority.

The Agency argues the Arbitrator exceeded his authority for several reasons.[30] As relevant here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration or disregard specific limitations on their authority.[31] However, arbitrators do not exceed their authority by addressing any issue that is necessary to decide a stipulated issue, or by addressing any issue that necessarily arises from issues specifically included in a stipulation.[32] In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference it accords an arbitrator's interpretation and application of a collective-bargaining agreement.[33] Further, arbitrators have broad discretion to fashion remedies they consider appropriate.[34]

According to the Agency, the "sole" stipulated issue before the Arbitrator concerned the Agency's selection *decision*.[35] The Agency argues the Arbitrator exceeded his authority by expanding the issue to (1) evaluate the Agency's selection *process* and (2) determine a remedy.[36] As noted, the Arbitrator found the parties stipulated to the issue as "the non[-]selection . . . of [the grievant] for the [specialist] position."[37] By considering whether "the Union establish[ed] that the Agency's selection process violated the [parties' agreement] and, . . . [i]f so, what is the appropriate remedy,"[38] the Arbitrator was resolving issues that were closely related to, and arose from, the stipulated issue.[39] As such, the Arbitrator did not exceed his authority by addressing these issues.[40]

To the extent the Agency argues Article 44(F) limited the Arbitrator's authority to consider additional issues,[41] this argument does not compel a different conclusion. As noted, Article 44(F) states that where the "parties fail to agree on a joint submission . . . [t]he arbitrator shall determine the issue or issues to be heard."[42] While the Arbitrator acknowledged the parties stipulated to an issue, he noted the Union "submitted additional issues . . . to which the Agency did not stipulate or agree."[43] Consequently, he found Article 44(F) allowed him to frame additional issues.[44] The Agency has not identified any wording that limited the Arbitrator's authority to consider additional issues. Thus, we reject this argument.[45]

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[26] *Id.* at 5. In the preamble, the parties, in relevant part, recognize that their "relationship must be built on a solid foundation of trust, mutual respect, and a shared responsibility for organizational success." Exceptions, Attach. 2, Ex. 2 at ix.

[27] Grievance-Determination Award at 11 (discussing parties' dispute regarding which grievance was properly submitted to arbitration).

[28] The Agency raised its preamble argument in its interlocutory exception before the Authority, and it later referenced its interlocutory exception to the Arbitrator. However, it never made this argument to the Arbitrator. Exceptions, Attach. 2, Ex. 10, Agency's Motion to Enforce Jointly Stipulated Issue at 3-4. *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 176 (2017) (dismissing exceptions because mere citation of document before arbitrator does not raise related arguments (citing *Indep. Union of Pension Emps. for Democracy & Just.*, 69 FLRA 158, 160 (2016))).

[29] *U.S. Dep't of State, Passport Serv.*, 73 FLRA 201, 202 (2022) (barring essence arguments not raised below).

[30] Exceptions Br. at 11-16.

[31] *SSA*, 73 FLRA 708, 713 (2023) (citing *AFGE, Loc. 3954*, 73 FLRA 39, 42 (2022)).

[32] *Bremerton Metal Trades Council*, 73 FLRA 90, 92 (2022) (citing *Ass'n of Admin. L. Judges, IFPTE*, 72 FLRA 302, 304 (2021) (Member Abbott concurring)); *SSA*, 69 FLRA 208, 211 (2016) (*SSA*) (citing *U.S. DHS, U.S. ICE*, 65 FLRA 529, 532 (2011)).

[33] *AFGE, Loc. 2092*, 73 FLRA 596, 597 (2023) (citing *AFGE, Council of Prisons Locs., Council 33*, 70 FLRA 191, 193 (2017); *Fraternal Ord. of Police, Lodge 12*, 68 FLRA 616, 618 (2015)).

[34] *NTEU*, 73 FLRA 431, 433 (2023) (*NTEU*).

[35] Exceptions Br. at 12.

[36] *Id.* at 12-13, 15-16.

[37] Merits Award at 6.

[38] *Id.*

[39] *See SSA*, 69 FLRA at 211 (denying exceeded-authority exception where arbitrator addressed stipulated issue of whether the agency violated a contract provision by deciding whether certain agency actions interfered with proper application of that provision).

[40] *AFGE, Loc. 3911, AFL-CIO*, 68 FLRA 564, 570 (2015) (*Local 3911*) (holding excepting party did not demonstrate arbitrator exceeded his authority by addressing matters not expressly included in stipulated issue where the matters were "consistent with[,] and flow[ed] from[,] the central question" before him).

[41] Exceptions Br. at 12.

[42] Merits Award at 19 (quoting Art. 44(F)).

[43] *Id.* at 6.

[44] *Id.* at 19.

[45] *E.g.*, *SSA*, 57 FLRA 530, 537 (2001) (arbitrator did not disregard specific contractual limitation on his authority by "merely interpreting the relevant terms of the agreement").

The Agency further argues the Arbitrator exceeded his authority by addressing twenty-two issues not before him.[46] These "issues" consist of the Arbitrator's findings and conclusions based on the Agency's actions related to: (1) the selection process to fill the specialist position; (2) the grievant's official-time requests; (3) the grievant's non-selection for the detail; and (4) the Union's information request concerning the specialist-position selection.[47] The Agency argues the Arbitrator exceeded his authority by addressing these issues because they were "beyond the scope of the parties' jointly stipulated issue and beyond any [issues] submitted in the Union's grievance."[48]

As stated above, the stipulated issue concerned the grievant's non-selection for the specialist position, and – as interpreted by the Arbitrator and reflected in the additional framed issues – whether the non-selection violated the parties' agreement. The Arbitrator's findings regarding the selection process for the specialist position were necessary to resolve the stipulated issue. Additionally, in its grievance, the Union asserted that the Agency discriminated against the grievant as a "representative of bargaining[-]unit employees" when it failed to select him for the specialist position.[49] In order to determine whether the Agency's selection was improperly motivated by union animus as alleged, the Arbitrator necessarily made findings about the grievant's union activities and interactions with management. Thus, the Arbitrator's findings concerning the detail, the Agency's denial of the grievant's official-time requests, and the Union's information request concerning the specialist position all relate to his determination of whether the Agency's failure to select the grievant for the specialist position was based on union animus.[50] For these reasons, the findings upon which the Agency bases its exceeded-authority exception were necessary to decide the stipulated and additional framed issues. As such, the Agency does not demonstrate the Arbitrator exceeded his authority by addressing those issues.[51]

We similarly conclude the Arbitrator did not exceed his authority by finding the Agency violated § 7116(a)(8) of the Statute for failing to properly respond to the Union's request for information related to the specialist position. The Agency argues the Arbitrator was not authorized to consider this issue because no unfair-labor-practice (ULP) allegation was before him.[52] However, as discussed above, the Arbitrator considered the Agency's actions related to the Union's information request to determine whether the Agency acted with union animus in failing to select him for the specialist position. Thus, even though the stipulated issue did not expressly include a ULP allegation, the Arbitrator's findings were necessary to resolve the allegation that the Agency failed to select the grievant *because* of his protected activity.[53]

For similar reasons, we also reject the Agency's argument that the Arbitrator exceeded his authority by considering "any issues concerning the [specialist-position detail]" because they "are expressly beyond the scope of the stipulated issue and are patently untimely."[54] The Arbitrator expressly stated that he would *not* "directly address" the Agency's detail selection "other than as probative evidence of the Agency's alleged union animus."[55] Thus, the Arbitrator's discussion of the detail was "consistent with[,] and flowed from[,]" the central question before him concerning the selection for the permanent position.[56]

Finally, the Agency argues the Arbitrator exceeded his authority by directing the Agency to rescind the selected employee's appointment and ordering the appointment remedy. To support this argument, the Agency contends the Arbitrator "abuse[d] his authority" by basing these remedies on his finding that the Agency "willfully failed to follow" procedures it negotiated under the Statute, where those procedures "were not before him at arbitration."[57] However, as discussed above, we have rejected the Agency's argument that the Arbitrator exceeded his authority by considering whether the Agency violated these procedures. The awarded remedies necessarily arose from the stipulated issue.[58] Accordingly,

[46] Exceptions Br. at 14-15.
[47] *Id.*
[48] *Id.* at 16.
[49] Exceptions, Attach. 2, Ex. 3 (Grievance) at 1.
[50] Merits Award at 61 (emphasis omitted) (considering the specialist-position detail "solely for purposes of determining whether the Agency's non-selection was impermissibly based on the Agency's union animus"); *id.* at 66 (considering the grievant's official-time requests, and the Union's information requests concerning the specialist position, as part of the "unrebutted evidence establishing that the Agency demonstrated animus against [the grievant] due to his Union affiliation when it chose [the selected employee], and not [the grievant] for the [specialist position]"). We further note that the grievance also explicitly referenced the grievant's non-selection for the specialist-position detail. Grievance at 1-2.
[51] *Local 3911*, 68 FLRA at 570.
[52] Exceptions Br. at 13-15.
[53] *Local 3911*, 68 FLRA at 569.
[54] Exceptions Br. at 16.
[55] Merits Award at 7; *see also id.* at 61-66 (discussing findings supporting ultimate conclusion that "the Agency's failure to detail [the grievant] into the . . . [s]pecialist position was based on [the grievant]'s Union affiliation").
[56] *Local 3911*, 68 FLRA at 570.
[57] Exceptions Br. at 13.
[58] *NTEU*, 73 FLRA at 434 (holding arbitrator had broad discretion to fashion remedies to cure violations before him).

the Agency does not demonstrate the Arbitrator exceeded his authority by resolving this issue.[59]

We deny the Agency's exceeded-authority exceptions.

B. The awards are not based on nonfacts.

The Agency contends that, for several reasons, the merits and remedy awards are based on nonfacts.[60] 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.[61] The Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[62] Further, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.[63]

The Agency challenges two findings underlying the Arbitrator's conclusion that the Agency's failure to select the grievant was based on union animus.[64] First, the Agency argues the Arbitrator erred in determining that a management official who was not the selecting official made the final selection for the specialist position.[65] At arbitration, the parties disputed which management official actually made the selection.[66] Therefore, the Agency's argument provides no basis for finding that the award is based on a nonfact.[67]

Next, the Agency contends the Arbitrator erred by finding the Agency "preselected" the selectee for the specialist position.[68] Specifically, the Agency argues the Arbitrator misinterpreted certain evidence – in particular, the Agency's referral list and selection list – to support his preselection finding.[69] However, the Agency's mere disagreement with the Arbitrator's evaluation of the evidence fails to demonstrate the award is based on a nonfact.[70]

The Agency also argues the Arbitrator erred by finding the parties failed to submit a joint submission and, consequently, expanding the stipulated issue to resolve issues not before him.[71] This argument is premised on the same claim as the Agency's exceeded-authority exception, which we have rejected above. Because we have rejected that claim, we also reject the nonfact argument.[72]

We deny the Agency's nonfact exceptions.

V. Decision

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

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[59] We note the Agency does not argue the awarded remedies are contrary to law, so we do not address that question. Specifically, because the Agency does not separately challenge the awarded remedies as contrary to management's rights under the Statute, we do not apply the test articulated in *Consumer Fin. Prot. Bureau*, 73 FLRA 670 (2023), for resolving such an argument. *AFGE, Loc. 1738*, 73 FLRA 339, 341 (2022) (declining to consider whether award was contrary to law where excepting party only challenged relevant portion of award on essence grounds, and noting Authority will not construe parties' exceptions as raising grounds the exceptions do not raise); *see also U.S. Dep't of the Treasury, IRS*, 68 FLRA 329, 333 (2015) (where excepting party's argument would have been more appropriately raised in support of a contrary-to-law exception, but was raised in support of essence exception, Authority would not construe exception as raising contrary-to-law ground).

[60] Exceptions Br. at 16-20.

[61] *NTEU, Chapter 46*, 73 FLRA 654, 655-56 (2023) (*Chapter 46*) (citing *AFGE, Loc. 4156*, 73 FLRA 588, 590 (2023)).

[62] *Id.* (citing *Int'l Bhd. of Boilermakers, Loc. 290*, 72 FLRA 586, 588 & n.28 (2021); *AFGE, Loc. 1698*, 70 FLRA 96, 99 (2016)).

[63] *Id.* (citing *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018)).

[64] Exceptions Br. at 18-20.

[65] *Id.* at 18-19.

[66] *See* Merits Award at 71.

[67] *Chapter 46*, 73 FLRA at 656.

[68] Exceptions Br. at 19-20.

[69] *Id.* at 19.

[70] *Chapter 46*, 73 FLRA at 656.

[71] Exceptions Br. at 16-18.

[72] *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 140 n.30 (2022) (denying nonfact exception because it was based on same premise as denied exception and failed to explain how award was deficient).

Member Kiko, concurring:

I agree with denying the Agency's exceptions, but several aspects of this case trouble me. Essentially, this award will remove an employee from the voluntary-services-specialist position (specialist position) who has been performing the vital duties of that position so that he can be replaced by someone who – according to his track record – is unlikely to perform any of those duties, due to his longstanding 100%-official-time schedule.[1] In itself, that result is very troubling.

Initially, I note that the parties agreed, and signed meeting notes to confirm, that the Arbitrator was selected to address a grievance concerning the grievant's "detail,"[2] but the Union later changed its position to argue (successfully) that the Arbitrator was selected to address the grievant's non-selection for a permanent position. Obviously, a permanent position is not a detail, so the Agency's discontent with this bait-and-switch tactic is understandable. The Arbitrator stated that, in the future, the Union should employ a "proper naming convention" to uniquely identify grievances.[3] The Arbitrator added that "[t]he Union should also assign a grievance number to each separate grievance and keep track of the status of each grievance through a tracking system, for which the *Union* should be responsible."[4] I agree with the Arbitrator that the Union's failure to properly identify grievances and to clearly indicate which grievance was assigned to the Arbitrator *at the time of the Arbitrator's selection* led to unnecessary confusion that needlessly prolonged this dispute.

In addition, parts of the Arbitrator's analysis are problematic. Although they do not provide a basis for modifying or setting aside the award, I want to discuss them in order to dispel potential misconceptions and highlight some unaddressed implications.

First, when surveying evidence of potential anti-union animus, the Arbitrator noted that an Agency official described the grievant's position as "double encumbered" because the grievant was working on 100% official time,[5] and a second employee performed the prescribed duties of the grievant's position (as opposed to official-time duties). The Arbitrator found that the use of the word "encumbered" showed that the Agency "obviously considered" the grievant a "burden" on the Agency, and the Arbitrator found this word usage was evidence of anti-union animus.[6] But the Arbitrator misunderstood a word with specialized meaning in federal personnel operations. The word "encumber" is frequently used to signify nothing more than that a position is occupied.[7] And the Agency's use of "encumber" in this case was consistent with that specialized meaning – not evidence of anti-union animus.

Second, as our decision states, the Agency challenges as a nonfact the Arbitrator's conclusion that certain evidence was proof of preselection for the specialist position.[8] I agree that we must deny this challenge because it does not satisfy our standard of review for nonfacts.[9] However, I also agree with the Agency that the Arbitrator erred in his evaluation of this evidence.[10] The Arbitrator relied on a certificate of eligible candidates (certificate) that showed the date it was "[*i*]*ssued*."[11] Later, when a selection was made, the Agency updated the electronic record of the certificate to indicate the selectee. Because there is only one date on the certificate – the issuance date – the Arbitrator concluded that the *selection* occurred on that date.[12] Thus, the Arbitrator found that the Agency chose the selectee before either candidate was even interviewed.[13] This finding reflects another misunderstanding of federal personnel operations – and, perhaps, of electronic records generally. A certificate issues *before* a selection occurs; indeed, in this personnel action, the issuance was a prerequisite for selection.[14] To ensure proper records management, after a selection occurs, the Agency cannot – and should not – change the certificate's issuance date to the date of the selection. It is regrettable that a misunderstanding of electronic records led to this error, but the nonfact standard

[1] *See* Apr. 13, 2023 Merits Award (Merits Award) at 61; *see also* Exceptions, Attach. 1, Tr. (Tr.) at 642-44, 947-48 (explaining how grievant allocates himself official time under the parties' agreement and stating that, since 2012, he was on 100% official time).
[2] May 14, 2020 Grievance-Determination Award at 15.
[3] *Id.* at 17.
[4] *Id.*
[5] Merits Award at 61 (emphasis omitted); *see also* Tr. at 642-44, 947-48 (explaining how grievant allocates himself official time and, since 2012, has been on 100% official time).
[6] Merits Award at 61-62 (relying on dictionary definitions of "encumbered" as meaning to "burden," "hinder," or "impede or hamper the function or activity of").
[7] *See, e.g.*, U.S. OFF. OF PERS. MGMT., *Position Classification*, https://www.opm.gov/services-for-agencies/classification-job-design/position-classification/ (last visited Oct. 15, 2024) ("As part of the classification process, we can provide you an independent, third party analysis of your encumbered positions.").
[8] Decision at 8.
[9] *See id.* at 8 & n.63 ("[D]isagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.").
[10] Exceptions Br. at 19-20.
[11] Merits Award at 41 (emphasis added).
[12] *See id.* at 41-42.
[13] *Id.* at 42.
[14] *Id.* at 41.

does not allow us to correct routine factual mistakes of this type.[15]

Both the first and second points allude to a bigger problem: unfamiliarity with specialized federal personnel matters among arbitrators deciding federal-sector cases. Frankly, many federal employees are themselves unaware of the Byzantine rules that govern federal personnel operations. And arbitrators who may hear private-, state-, local-, and federal-sector disputes have little incentive to develop a working knowledge of distinctive federal procedures on their own time. Consequently, advocates must do better at educating arbitrators about not only the law under the Federal Service Labor-Management Relations Statute (the Statute), but also the more mundane details of how the federal personnel machinery works. Although Congress assumed that arbitrators who are not federal-sector specialists could easily adapt to adjudicating disputes under the Statute, the Authority's experience with arbitration appeals makes me skeptical of that assumption.[16]

Third, the Arbitrator's order to remove the employee who currently occupies the specialist position may be wholly unnecessary. Even after the grievant begins working in the specialist position, if his official-time usage remains the same as it has been for more than a decade,[17] then he will not perform any of the duties of that position, because he will be working on 100% official time. Thus, some other employee will need to perform the prescribed duties of the specialist position. Because the award requires the Agency to remove the employee who currently performs those duties, and to appoint the grievant who will *not* perform those duties (unless he reduces his official-time usage), I am concerned the award will leave the Agency with no one to perform the prescribed duties of the specialist position.

Fourth, it is at least arguable that the requirement to remove the current voluntary services specialist when the work he performs will still be needed violates the Agency's management right to assign work under § 7106(a)(2)(B) of the Statute.[18] The Arbitrator demonstrated a clear misunderstanding of statutory management rights when he analyzed a contract provision allowing an employee's noncompetitive "[p]romotion . . . when directed by authorized authorities."[19] He found, "[b]y agreeing to . . . [that] language, the Agency *ceded* its management right to assign work to the Arbitrator"[20] – which the Statute flatly forbids.[21] But the Agency did not file an exception to renew the management-rights arguments that it offered at arbitration. Consequently, we have no occasion here to determine whether the remedy conflicts with the Agency's management rights.

Fifth, the Arbitrator correctly found that the Agency could not discriminate against the grievant because he used official time. However, I am concerned that the award implies that the Agency would have discriminated against the grievant merely by showing awareness and recognition that he is unlikely to perform the duties of any position that he occupies. I do not believe the Authority has previously addressed similar discrimination allegations in the context of a 100%-official-time schedule, and agencies need to know how they can effectively manage positions without running afoul of the law. Unfortunately, the Agency's exceptions do not address this issue either. In a future case, with the benefit of fulsome briefing, we should delineate the extent to which an Agency may – in the proper exercise of its position-management responsibilities – lawfully plan for the need to double encumber certain positions to account for employees working 100%-official-time schedules.

Notwithstanding my misgivings about some parts of the award, the Agency's conduct in this case supports

[15] *See U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 594 (1993) ("In reviewing awards alleged to be deficient because they are based on a nonfact, . . . we apply the principles of the Supreme Court in generally refusing to disturb the factual findings . . . of arbitrators . . . .").

[16] *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 74 FLRA 13, 16 (2024) (award directing agency to pay grievant's past and future medical expenses was contrary to the Federal Employees' Compensation Act (FECA) because FECA and its implementing regulations establish the exclusive mechanism for federal employees to obtain certain relief for occupational injuries, including reimbursement of medical expenses); *AFGE, Loc. 3184*, 73 FLRA 715, 716-17 (2023) (even after a previous remand, fee award remained inconsistent with 5 U.S.C. § 7701(g)); *SSA*, 73 FLRA 708, 712 (2023) (punitive-damages award conflicted with Civil Rights Act of 1991 because punitive damages are not available in discriminatory-conduct cases brought against federal agencies); *U.S. Dep't of the Army, Ariz. Dep't of Emergency & Mil. Affs., Ariz. Army Nat'l Guard*, 73 FLRA 617, 618-19 (2023) (award contrary to statutory provision governing employment of National Guard's dual-status civilian technicians); *AFGE, Loc. 3954*, 73 FLRA 39, 43-45 (2022) (backpay, liquidated-damages, and attorney-fee determinations were contrary to the Fair Labor Standards Act).

[17] Tr. at 947-48 (grievant testifying that he has been on 100% official time since 2012).

[18] 5 U.S.C. § 7106(a)(2)(B).

[19] July 14, 2023 Remedy Award at 19.

[20] *Id.*

[21] *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 57 FLRA 158, 162 (2001) (Chairman Cabaniss dissenting as to other matters) ("[M]anagement rights cannot be waived."), *rev'd on other grounds*, *U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 110 (2002) (Chairman Cabaniss and Member Armendariz concurring; Member Pope concurring as to result) (citing *Wash. Plate Printers Union, Loc. No. 2, I.P.D.E.U.*, 31 FLRA 1250, 1255-57 (1988)).

the Arbitrator's ultimate conclusions that the Agency violated both the parties' agreement and the Statute. Some of the Agency's more egregious conduct included: (1) the supervisor for the specialist position bluntly telling the grievant that the supervisor "did not want him" in the specialist position because the supervisor "had heard many [negative] things about him";[22] (2) the supervisor ignoring contractual requirements when appointing members of the selection panel for the specialist position;[23] (3) the Agency's failure to provide the selection panel with any criteria for scoring the candidates;[24] (4) the head of the selection panel changing the numbers on her scoresheet to put the selectee above the grievant, and then testifying that she could not remember why she had done so;[25] and (5) the Agency's "spoilation of evidence" by destroying documents from the selection process, despite the Union's timely request for that information under the agreement.[26] Considering this conduct – apart from the problematic aspects of the award – the Arbitrator supported his conclusions that the Agency committed multiple contractual and statutory violations.

Overall, this dispute might have presented some interesting and complex – but also elucidating – questions about applying the Statute to the difficulties of managing 100%-official-time schedules (and the positions encumbered by employees working such schedules). Nevertheless, the Agency's arguments on exceptions do not adequately present those questions. Further, such complex issues could be better explored in a future case without the taint of clear wrongdoing that we see here.

[22] Merits Award at 35.
[23] *See id.* at 38.
[24] *See id.* at 39.
[25] *Id.* at 43.
[26] *Id.* at 49-50.