74 FLRA No. 29

UNITED STATES
DEPARTMENT OF THE NAVY
COMMANDER NAVY REGION SOUTHWEST
SAN DIEGO, CALIFORNIA
(Agency)

and

FRATERNAL ORDER OF POLICE
LODGE 12
(Union)

0-AR-5751

_____

DECISION

January 8, 2025

_____

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

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement in connection with the filling of a supervisory position. Arbitrator Kathy Fragnoli issued an award (the final award) finding that the grievance was substantively arbitrable and that the Agency violated the agreement by changing the position's selection criteria without first bargaining with the Union. As a remedy, she directed the Agency to rescind and repost the vacancy announcement in accordance with applicable laws, regulations, Agency policies, and provisions of the agreement.

The Agency filed exceptions to the final award, arguing that the Arbitrator's substantive-arbitrability finding is contrary to law and that the awarded remedy fails to draw its essence from the agreement. For the following reasons, we deny the exceptions.

II. Background and Arbitrator's Awards

The Agency posted a vacancy announcement for a supervisory position, for which all current Agency employees were eligible to apply. The announcement did not mention a minimum educational requirement for the position. However, in selecting candidates for interviews, the Agency considered various educational criteria (among other criteria), and then interviewed only applicants with college degrees.

The Union filed a grievance, alleging that: (1) qualified bargaining-unit members were found ineligible or not given interviews because they did not have a college degree; (2) the vacancy announcement did not include a college degree as a qualification requirement; (3) the Agency had not previously required such a degree in order to qualify for promotion; and (4) the Agency failed to bargain with the Union over the change, and/or the impact and implementation of the change, in requirements. The grievance alleged that the Agency's actions violated Article 3, Section 1 and Article 17, Sections 4, 7, and 8 of the parties' agreement.[1]

The Agency denied the grievance, and it went to arbitration. The Agency moved to dismiss the grievance, claiming it was not substantively arbitrable because it involved a promotion to a non-bargaining-unit position.

On December 22, 2020, the Arbitrator issued an initial award addressing the Agency's motion (the initial award). In that award, the Arbitrator stated that "[w]hether the Agency agreed to extend coverage of the negotiated grievance procedure to the procedures and filling of the supervisory position at issue in this case is the dispositive issue for resolution of the dispute regarding subject[-]matter jurisdiction."[2] In denying the Agency's motion to dismiss, the Arbitrator stated:

[1] *See* Exceptions, Ex. B at 3-4. Article 3, Section 1 provides:

> It is agreed and understood that matters appropriate for negotiation between the PARTIES are personnel policies and practices and matters affecting the terms and conditions of employment of Employees in the unit which are within the discretion of the EMPLOYER. Such negotiations will be in accordance with the requirements of 5 USC 71. The EMPLOYER will not unilaterally change any provisions of this Agreement. The Employer will also not implement any new regulation, policy, or practice that is within the discretion of the EMPLOYER without affording the [Union] the opportunity to bargain concerning the change and/or the impact and implementation of the change.

Exceptions, Ex. K (CBA) at 7. In Article 17 of the parties' agreement, Section 4 discusses priority consideration, *see id.* at 39-40; Section 7 discusses posting of qualifications, *see id.* at 40; and Section 8 discusses recruitment, *see id.*

[2] Exceptions, Ex. F, Decision on Mot. to Dismiss (Initial Award) at 9.

> The question of subject[-]matter jurisdiction and substantive factual issues are so intertwined that the question of jurisdiction is dependent on the resolution of the factual issues going to the merits of the claim. The Union alleges that the Agency violated the [parties' agreement] in the selection procedures applied to the [s]upervisory . . . position at issue to the detriment of bargaining[-]unit employees. Resolution of the Agency's challenge to subject[-]matter jurisdiction in this case is necessarily enmeshed with resolution of the merits of the grievance[,] as both are grounded on the extension of the selection procedures for non-bargaining[-]unit employees to bargaining[-]unit employees, and the right to file a grievance for violation of [the] same.[3]

According to the Arbitrator, the parties' agreement "does not clearly and explicitly state,"[4] one way or the other, whether the grievance procedure extends to the filling of supervisory positions, and the record before her did not contain sufficient evidence regarding the "intent and meaning" of the relevant contract wording.[5] The Arbitrator stated:

> While a deeper exploration of the [parties' agreement], particularly the bargaining history of Articles 3 and 17 and their interplay with bargaining[-]unit and non-bargaining[-]unit merit[-]promotion procedures through sworn testimony from fact witnesses, may buttress the Agency's position [that the grievance procedure does not cover challenges to matters regarding supervisory selections], it may also reveal, as the Union argues, that this is not the case. Clear and convincing evidence of the Agency's election, or non-election, to bargain and reach agreement with the Union extending the grievance procedures to selection and selection procedures of non-bargaining[-]unit positions, is critical to the outcome of this matter.[6]

Thus, the Arbitrator denied the Agency's motion to dismiss the grievance, and the case proceeded to a hearing.

After the hearing, the Arbitrator issued the final award – the award at issue here – on July 12, 2021. The Arbitrator first addressed whether the grievance was substantively arbitrable. She stated that, under Authority precedent, negotiated grievance procedures may not cover selections or selection procedures for non-bargaining-unit positions unless the agency agrees to such coverage.[7] Consequently, she found that "the grievability of disputes over the filling of supervisor positions is a matter of contract interpretation."[8]

The Arbitrator stated that Article 30, Section 2 of the parties' agreement "broadly defines a grievance as 'any complaint' by an [e]mployee or the [Union] involving 'any matter relating to the employment' of the [e]mployee or [e]mployees, or concerning the 'effect or interpretation, or claim of breach, of this collective[-]bargaining agreement; or misapplication of any law, rule, or regulation or policy

[3] *Id.*
[4] *Id.*
[5] *Id.* at 10.
[6] *Id.* at 11.
[7] *See* Final Award at 19 (citing *AFGE, Loc. 1667*, 70 FLRA 155, 157 (2016) (*Loc. 1667*); *AFGE, Loc. 200*, 68 FLRA 549, 550 (2015) (*Loc. 200*); *NFFE, Loc. 1442*, 64 FLRA 1132, 1133-34 (2010) (*Loc. 1442*); *USDA, Rural Dev. Okla., Stillwater, Okla.*, 59 FLRA 983, 985-86 (2004) (*USDA Stillwater*) (Chairman Cabaniss writing separately; Member Pope dissenting in part)).
[8] *Id.* (citing *Loc. 200*, 68 FLRA at 550; *Loc. 1442*, 64 FLRA at 1134).

affecting conditions of employment.'"[9] The Arbitrator found that the Union's grievance fell within the "broad[]" definitions of Sections 2(b) and 2(c),[10] and that Section 2(d) and Article 4, Section 1(a)(1)(C) of the agreement[11] did not bar the grievance.

In addition, the Arbitrator rejected the Agency's argument that Article 3, Section 1 of the parties' agreement did not apply to the parties' dispute. The Arbitrator found that Article 3, Section 1 "addresses personnel policies and practices and matters affecting the terms and conditions of employment of employees in the unit which are within the [Agency's] discretion."[12] According to the Arbitrator, "[b]y its plain terms, Article 3, Section 1 applies to personnel policies, practices[,] and matters within the discretion of the Agency – *like promotion to a non-bargaining[-]unit position* – that affect the terms and conditions of employment of employees in the bargaining unit who can apply for such promotions."[13] The Arbitrator further stated that Agency policy permitted unit employees to apply for the position and that, "[b]y extending the right to apply for promotion to a non-bargaining[-]unit position while they held a bargaining[-]unit position, the policy and its practice affected the terms and conditions of employment of bargaining[-]unit employees who applied and were rejected allegedly due to the Agency's use of improper promotion procedures."[14]

Further, the Arbitrator found it "uncontested" that, before the disputed selection process, a college degree had not been a requirement "or the predominate evaluative factor" for promotions.[15] The Arbitrator determined that, in the disputed selection process, the Agency changed that practice without first giving the Union notice and an opportunity to bargain, in violation of Article 3, Section 1. The Arbitrator also found that the Agency violated its Merit Promotion Plan by using education criteria to screen applicants, and she concluded that the Agency did not properly rank candidates for promotion.

However, the Arbitrator rejected the Union's claim that the Agency also violated Article 17, Sections 3, 6, and 7 of the parties' agreement. Specifically, the Arbitrator found those provisions inapplicable because they concern only promotions within the bargaining unit.

In short, the Arbitrator found the grievance substantively arbitrable and she sustained it on the merits. As a remedy, she directed the Agency to rescind and repost the disputed vacancy announcement in accordance with applicable laws, regulations, Agency policies, and provisions of the agreement.

---

[9] *Id.* Article 30, Section 2 of the parties' agreement, defines "grievance," in pertinent part, as:

> any complaint:
> (a) by an Employee concerning any matter relating to the employment of the Employee;
> (b) by the [Union] concerning any matter relating to the employment of the Employee; or
> (c) by any Employee, the [Union], or the Employer concerning:
> 1. The effect or interpretation, or claim of breach, of this collective bargaining Agreement; or a claimed violation, misinterpretation, or misapplication of any law, rule, or regulation or policy affecting conditions of employment.
> (d) Except that it shall not include any grievance concerning:
> . . . .
> 3. Any examination, certification, or appointment; [or]
> . . . .
> 6. The non-selection for promotion from a properly ranked and certified list of candidates.

CBA at 63.

[10] Final Award at 19, 20.

[11] Article 4, Section 1(a)(1)(C) provides, in pertinent part, that management has the right, "with respect to filling positions, to make selections for appointments from . . . [a]mong properly ranked and certified candidates for promotion[] or . . . [a]ny other appropriate source." CBA at 9.

[12] Final Award at 24.

[13] *Id.* (emphasis added).

[14] *Id.*

[15] *Id.*

On August 11, 2021, the Agency filed exceptions to the final award,[16] and the Union filed an opposition on September 8, 2021.

III. Analysis and Conclusions

A. The final award is not contrary to law.

The Agency argues that the Arbitrator's substantive-arbitrability finding is contrary to law.[17] According to the Agency, the parties' contractual definition of "grievance" pertinently "mirror[s]"[18] the definition in § 7103(a)(9) of the Federal Service Labor-Management Relations Statute[19] (the Statute), and the Arbitrator based her arbitrability determination "on this statutory definition alone."[20] The Agency asserts that, under Authority precedent, matters concerning the filling of non-bargaining-unit positions are not included within negotiated grievance procedures unless agencies have agreed to include them.[21] The Agency claims that the parties' agreement "contains no provisions that indicate the parties elected to negotiate selection procedures for filling non-bargaining[-]unit positions."[22]

The Union disputes the Agency's claim that the Arbitrator based her arbitrability decision on the "statutory definition alone."[23] According to the Union, in finding the grievance arbitrable, the Arbitrator considered Article 30's definition of grievance "contextually together with other provisions in the agreement, such as Article 3, which sets forth the agreed[-]upon subjects of bargaining" – including "procedures and filling of supervisory positions" (supervisory selections).[24] Further, the Union asserts that "the grievability of disputes over [supervisory selections] is a matter of contract interpretation and not a question of law,"[25] that the Arbitrator's contract interpretation was reasonable,[26] and that the Authority has upheld arbitration awards finding that particular agreements either permit or exclude such grievances.[27]

Even assuming that statutory standards should apply when interpreting Article 30, Section 2's definition of grievance, we find, for the following reasons, that the Agency has not demonstrated that the Arbitrator's substantive-arbitrability conclusion is contrary to law.

When an arbitrator's substantive-arbitrability determination is based on law, the Authority reviews that

[16] The Union moves to dismiss the Agency's exceptions because the Agency failed to timely serve a copy of its exceptions brief on the Union. Opp'n Br. at 4-6 (citing 5 C.F.R. § 2425.2(b)). The Authority's Regulations state that the "time limit for filing an exception to an arbitration award is thirty . . . days after the date of service of the award." 5 C.F.R. § 2425.2(b). The Authority has held that when exceptions that are timely filed with the Authority have been served on the opposing party after the filing period's expiration, the Authority will consider such service procedurally sufficient unless the opposing party establishes that it was prejudiced by the service. *U.S. Dep't of Transp., FAA, Wash., D.C.*, 63 FLRA 492, 493 (2009). Here, there is no dispute that the Agency timely filed its exceptions brief with the Authority. Further, the Union does not claim that it was prejudiced by the Agency's service, and it did not request an extension of time to file its opposition. Therefore, no prejudice is apparent, and we deny the Union's motion to dismiss the Agency's exceptions. *See OPM*, 61 FLRA 358, 360 (2005) (Member Pope dissenting in part on other grounds) (denying motion to dismiss exceptions for failure to timely serve union where agency timely filed brief with Authority and union was not prejudiced by late service).

[17] Exceptions Br. at 8-10.

[18] *Id.* at 8.

[19] 5 U.S.C. § 7103(a)(9). That section defines "grievance" as

> any complaint—
>
> (A) by any employee concerning any matter relating to the employment of the employee;
>
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> (C) by any employee, labor organization, or agency concerning—
>
> (i) the effect or interpretation, or a claim of breach, of a collective[-]bargaining agreement; or
>
> (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

Id.

[20] Exceptions Br. at 9.

[21] *Id.* at 9-10 (citing *Loc. 1667*, 70 FLRA 155; *Loc. 1442*, 64 FLRA 1132).

[22] *Id.* at 9.

[23] Opp'n Br. at 7 (internal quotation marks omitted).

[24] *Id.* at 8.

[25] *Id.* (citing *Loc. 1442*, 64 FLRA at 1134).

[26] *Id.* at 9-10 (citing *Loc. 1442*, 64 FLRA 1132).

[27] *Id.* at 9 (comparing *U.S. DOD, Def. Commissary Agency, Fort Lee, Va.*, 56 FLRA 855 (2000) (*Fort Lee*) (Chairman Wasserman concurring), with *AFGE, Loc. 3911*, 56 FLRA 480 (2000)).

determination de novo.[28] In applying the de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[29] The Authority repeatedly has held that, in conducting this assessment, the Authority analyzes whether the arbitrator's legal *conclusion* – not the arbitrator's underlying *reasoning* – is consistent with the relevant legal standard.[30]

Section 7103(a)(9) of the Statute sets forth several definitions of "grievance," including "any complaint . . . by any . . . labor organization . . . concerning . . . the effect or interpretation, or a claim of breach, of a collective[-]bargaining agreement."[31] Therefore, if the matter before the Arbitrator involved the effect or interpretation, or a claim of breach, of the parties' agreement, then that matter fell within the plain terms of this definition of grievance[32] – regardless of whether it also fell within any other definitions of that term.

The Authority has held that extending a negotiated grievance procedure's scope to cover supervisory selections is a permissive subject of bargaining.[33] Consistent with this principle, negotiated grievance procedures do not cover supervisory selections unless an agency has elected to agree to their coverage.[34]

However, where an agency *has* elected to agree over matters that directly implicate supervisors' or managers' working conditions, the resulting provisions are enforceable through the parties' negotiated grievance procedure unless the provisions are otherwise contrary to law.[35] Further, "the grievability of disputes over [supervisory selections] is ultimately a question of contract interpretation, not law."[36] The Authority thus applies the deferential "essence" standard to review an arbitrator's determination that a grievance concerning supervisory positions is arbitrable.[37]

Here, the Arbitrator found that the Agency elected to negotiate over the procedures for supervisory selections.[38] As the Union argues, the Arbitrator did not base this finding solely on Article 30, Section 2's definition of grievance. Rather, she also found that Article 3, Section 1 – in which the Agency agreed that "matters affecting the terms and conditions of employment of [bargaining-unit] [e]mployees . . . which are within the discretion of the [Agency]" are "matters appropriate for

[28] *Loc. 1442*, 64 FLRA at 1133 (citing *NTEU*, 61 FLRA 729, 732 (2006)).
[29] *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 140 (2022).
[30] *See, e.g.*, *AFGE, Council 222*, 73 FLRA 54, 55 n.19 (2022); *AFGE, Loc. 1441*, 73 FLRA 36, 37 n.15 (2022); *AFGE, Loc. 1441*, 70 FLRA 161, 162, 164 (2017); *GSA*, 70 FLRA 14, 15 (2016); *AFGE, Council of Prison Locs., Loc. 1010*, 70 FLRA 8, 9 (2016); *U.S. DHS, U.S. CBP*, 68 FLRA 276, 277-78 (2015); *SSA*, 67 FLRA 534, 538 (2014) (Member DuBester dissenting in part on other grounds); *AFGE, Nat'l Border Patrol Council, Loc. 2595*, 67 FLRA 361, 366 (2014); *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 432-33 (2010); *NTEU, Chapter 137*, 60 FLRA 483, 487 n.11 (2004) (Chairman Cabaniss concurring); *U.S. Dep't of the Navy, Naval Training Ctr., Great Lakes, Ill.*, 51 FLRA 198, 201 (1995).
[31] 5 U.S.C. § 7103(a)(9)(C)(i).
[32] *See, e.g.*, *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 72 FLRA 541, 545-46 (2021) (*Corpus Christi*) (Member Abbott concurring; Chairman DuBester concurring in part and dissenting in part on other grounds) (finding that grievance met definition in § 7103(a)(9)(C)(i) because it alleged breaches of the agreement and the arbitrator interpreted multiple agreement provisions in the award); *U.S. Dep't of the Treasury, IRS*, 71 FLRA 192, 193 (2019) (*Treasury*) (Member DuBester dissenting on other grounds) (finding that grievance met the statutory definition because it concerned the effect or interpretation, or claim of breach, of an agreement provision).
[33] *Loc. 200*, 68 FLRA at 550; *Loc. 1442*, 64 FLRA at 1134; *NAGE, Loc. R1-109*, 61 FLRA 588, 590-91 (2006); *U.S. DOD, Def. Logistics Agency, Def. Distrib. Ctr., New Cumberland, Pa.*, 55 FLRA 1303, 1306 (2000) (*New Cumberland*).
[34] *Loc. 1667*, 70 FLRA at 157; *Loc. 200*, 68 FLRA at 550; *Loc. 1442*, 64 FLRA at 1133-34.
[35] *See, e.g.*, *U.S. Dep't of the Treasury, IRS*, 59 FLRA 34, 36 (2003) (*IRS*); *U.S. DOD, Def. Commissary Agency, Seymour Johnson Air Force Base, N.C.*, 56 FLRA 1000, 1002-03 (2000); *Fort Lee*, 56 FLRA at 859 (citing *AFGE, Loc. 3302*, 52 FLRA 677, 682 (1996)); *New Cumberland*, 55 FLRA at 1306; *AFGE, AFL-CIO*, 15 FLRA 283, 284 (1984) (*AFGE, AFL-CIO*) (citing *Loc. 1917, AFGE*, 13 FLRA 77, 78 (1983)).
[36] *Loc. 1442*, 64 FLRA at 1134; *see also Loc. 200*, 68 FLRA at 550. We note, in this regard, that the Authority "has unambiguously rejected the argument that awards enforcing provisions resulting from bargaining over permissive subjects concern 'waiver of a statutory right and not contract interpretation.'" *USDA Stillwater*, 59 FLRA at 985-86 (quoting *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 393, 395 (2000)); *see also U.S. DOL*, 60 FLRA 737, 739 (2005) (*DOL*) (Chairman Cabaniss concurring).
[37] *See, e.g.*, *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 61 FLRA 377, 380 (2005) (Chairman Cabaniss concurring) (holding that, in reviewing arbitrator's finding that the agency elected to bargain over selection procedures for detailing bargaining-unit employees to supervisory positions, "the dispositive issue is whether the arbitrator's award as to that matter draws its essence from the parties' agreement"); *DOL*, 60 FLRA at 739-40 (where agency argued that "promotion procedures for non-bargaining[-]unit supervisors [were] negotiable only at the election of the [a]gency[,] . . . the dispositive question [was] whether the [a]rbitrator's application of the [agreement drew] its essence from the parties' agreement") (citing *USDA Stillwater*, 59 FLRA at 986); *AFGE, AFL-CIO*, 15 FLRA at 284 (citing *Overseas Educ. Ass'n*, 13 FLRA 535, 536 (1983)) (rejecting agency's argument that arbitrator's determination that the parties' agreement encompassed supervisory positions because it "constitutes nothing more than disagreement with the [a]rbitrator's interpretation of the agreement").
[38] *See* Final Award at 19-21.

negotiation between the [parties]"[39] – applied to supervisory selections. Although the Agency argues that it never agreed to extend the negotiated grievance procedure to supervisory selections, the Agency has not argued, let alone demonstrated, that the Arbitrator's findings regarding Article 3, Section 1 fail to draw their essence from the parties' agreement. Those findings support the Arbitrator's conclusion that the grievance was substantively arbitrable.[40] Thus, the above standards support a conclusion that the final award is not contrary to law.[41]

The decisions that the Agency cites do not support a contrary conclusion. In *AFGE, Local 1667*[42] the Authority deferred to an arbitrator's findings that a collective-bargaining agreement did not cover the process of promotions to non-bargaining-unit positions "by any aspect" and that the grievance "[did] not implicate any specific provision[] of the [agreement]."[43] In *NFFE, Local 1442*,[44] the arbitrator found "no evidence" that the agency had elected in negotiations to make supervisory selections subject to the parties' agreement, and the union "d[id] not take issue with" that finding.[45] Here, unlike the arbitrators in those cases, the Arbitrator *did* find that the parties extended the agreement to cover supervisory selections.[46]

In short, the Agency has provided no basis for finding that the Arbitrator erred in concluding that the parties agreed, through bargaining, to a contract provision concerning supervisory selections. As such, the Union's challenge to the Agency's application of those contractually mandated processes constitutes a "complaint . . . by a[] . . . labor organization . . . concerning . . . the effect or interpretation, or a claim of breach, of a collective[-]bargaining agreement."[47] In other words, it constitutes a "grievance" under that definition.[48]

The Agency also argues that "[t]he Arbitrator's determination that the Agency violated Article 3, Section 1 . . . is contrary to law."[49] To support this argument, the Agency states:

> The Arbitrator found that the Agency violated Article 3, Section 1[] when it unilaterally changed the selection requirements for the supervisory . . . position . . . without affording the [Union] the opportunity to bargain over the change or its impact prior to implementation.
>
> The Arbitrator identified that Agency policy permitted bargaining[-]unit members to apply for the supervisory . . . position at issue. This is true. By virtue of being federal[-]government employees, bargaining[-]unit members, along with all other federal employees, were eligible to apply. Yet *from that policy alone, the mere right to apply*, the Arbitrator came to the extraordinary conclusion that "[b]y extending the right to apply for promotion to a non-bargaining[-]unit position while they held a bargaining[-]unit position, the policy and its practice affected the terms and conditions of employment of bargaining[-]unit employees who applied and were rejected allegedly due to the Agency's use of improper promotion procedures."[50]

The Agency appears to be arguing that the Arbitrator found an Article 3, Section 1 violation "mere[ly]" because Agency policy permitted unit employees to apply.[51] That is not the case. Rather, the

[39] *Id.* at 8 (quoting Art. 3, § 1 of the parties' agreement).
[40] *See, e.g.*, *Fort Lee*, 56 FLRA at 858-59 (where arbitrator construed temporary-promotion article to extend to temporary supervisory promotions, unit employee could grieve lack of temporary supervisory promotion); *Loc. R1-185, NAGE*, 25 FLRA 509, 511 (1987) ("[W]here, as here, an agency announces a position vacancy and seeks applications from qualified employees, a grievance alleging a violation of an agency regulation or collective[-]bargaining agreement in the selection process is a 'grievance' within the meaning of [§] 7103(a)(9)" and, absent a specific exclusion in the agreement, "properly may be determined by an arbitrator to be grievable and arbitrable under negotiated grievance procedures.").
[41] *See, e.g.*, *IRS*, 59 FLRA at 35-36 (where agency argued that an award was contrary to law because the agency "*never* agreed to . . . bargaining" over supervisory conditions of employment, the Authority stated that, "[a]s the [a]rbitrator was simply enforcing . . . a contractual election to bargain to bargain" over such conditions, "the award [was] not contrary to law" (citing *SSA, Balt., Md.*, 55 FLRA 1063, 1069 (1999))).
[42] 70 FLRA 155.
[43] *Id.* at 157.
[44] 64 FLRA 1132.
[45] *Id.* at 1134.
[46] *See also Loc. 200*, 68 FLRA at 550 (arbitrator found no contract wording or other evidence that agency agreed to negotiate over procedures for selection of managers, and union did not challenge the arbitrator's factual findings as nonfacts).
[47] 5 U.S.C. § 7103(a)(9)(C)(i).
[48] *See, e.g.*, *Corpus Christi*, 72 FLRA at 545-46; *Treasury*, 71 FLRA at 193.
[49] Exceptions Br. at 10.
[50] *Id.* at 10-11 (emphasis added) (citations omitted).
[51] *Id.* at 11.

Arbitrator found that the selection process violated that provision because the Agency also changed the requirements for the promotion without providing the Union with notice and an opportunity to bargain.[52] As such, the Agency's argument is based on a misinterpretation of the final award. Because such arguments do not demonstrate that an award is deficient,[53] we reject this argument.

Finally, the Agency argues that the Arbitrator's finding that the grievance concerned unit employees' "conditions of employment" within the meaning of Article 30, Section 2(c) conflicts with Authority precedent.[54] However, as discussed above, different wording from Section 2(c) – the wording defining a grievance as involving "[t]he effect or interpretation, or claim of breach"[55] of the parties' agreement – supports the Arbitrator's substantive-arbitrability conclusion, when that wording is read in conjunction with the Arbitrator's interpretation of Article 3, Section 1. As discussed above, in conducting de novo review, the Authority analyzes whether the arbitrator's legal conclusion – not the arbitrator's underlying *reasoning* – is consistent with the relevant legal standard.[56] Therefore, even assuming that the Arbitrator erred in her reasoning regarding one part of Section 2(c), another part of Section 2(c) supports her *conclusion* that the grievance was substantively arbitrable. Therefore, the Agency's argument provides no basis for setting aside that conclusion.

The dissent objects to the majority's reliance on Article 3, and reading it in conjunction with Article 30, because the Arbitrator cited Article 3 in her merits analysis, rather than in her arbitrability analysis.[57] However, neither the Arbitrator nor the parties made such a clear delineation. In the initial award – which was limited to the issue of the grievance's substantive arbitrability – the Arbitrator set forth Article 3 as a relevant provision;[58] the Union argued that "arbitrability [was] found in," among other things, Article 3;[59] and, as discussed in Section II above, the Arbitrator repeatedly found the arbitrability and merits issues were intertwined.[60] Then, in the proceedings that resulted in the final award, both parties made arbitrability arguments that relied on Article 3,[61] and the Arbitrator never clearly stated that the arbitrability and merits issues were separate. Further, as discussed above, § 7103(a)(9)'s definition of "grievance" includes any labor organization's complaint concerning "the effect or interpretation, or a claim of breach, of a collective[-]bargaining agreement."[62] In that sense, *the Statute itself* links the definition of grievance, at least in part, to the substantive terms of a collective-bargaining agreement.

Additionally, the dissent claims that the "plain language" of the parties' agreement "does not support . . . that the Agency *affirmatively elected* to expand the grievance procedure" to include supervisory-selection matters.[63] To the extent the dissent is requiring explicit contractual language demonstrating such an election, that position conflicts with longstanding Authority precedent.

In *U.S. Department of the Treasury, IRS, Saint Louis, Missouri* (*IRS St. Louis*),[64] an arbitrator found that that a collective-bargaining agreement "d[id] not specifically exclude from – *or include* – managerial or supervisory positions" within the scope of the pertinent contract provision.[65] Nevertheless, the arbitrator considered the parties' bargaining history and prior arbitration awards interpreting the provision, and found the provision covered selections for details to supervisory positions.[66] The Authority denied the agency's exceptions which argued that the arbitrator's award was contrary to law for reasons similar to those proffered here. Specifically, the Authority reiterated that, "when the question concerns a permissive matter [of bargaining], the dispositive issue is whether the arbitrator's award as to that matter draws its essence from the parties' agreement" – and, because the Authority denied the agency's essence exception, the award consequently was "consistent with

[52] Final Award at 24.
[53] *See, e.g.*, *AFGE, Loc. 12*, 67 FLRA 387, 389 (2014) (Member Pizzella concurring) ("Exceptions based on misunderstandings of an arbitrator's award do not demonstrate that the award is contrary to law.").
[54] Exceptions Br. at 11 (citing *Int'l Ass'n of Fire Fighters, Loc. F-61*, 3 FLRA 438, 445 (1980); *AFGE, Loc. 12*, 60 FLRA 533 (2004) (*Loc. 12*) (Member Armendariz dissenting)).
[55] CBA at 63.
[56] *See* note 30 above.
[57] Dissent at 19-20.
[58] Initial Award at 3.
[59] *Id.* at 6.
[60] *Id.* at 9 ("The question of subject[-]matter jurisdiction and substantive factual issues are so intertwined that the question of jurisdiction is dependent on the resolution of the factual issues going to the merits of the claim."); *id.* ("Resolution of the Agency's challenge to subject[-]matter jurisdiction . . . is necessarily enmeshed with resolution of the merits of the grievance . . . ."); *id.* at 11 ("[T]he question of subject[-]matter jurisdiction and substantive factual issues are so intertwined that the question of jurisdiction is dependent on the resolution of the factual issues going to the merits of the grievance.").
[61] Final Award at 11 (Union argued that Article 3, Section 1 encompassed promotions inside and outside the bargaining unit); *id.* at 23 (Agency argued that Article 3's "reference to *personnel policies affecting [e]mployees in the unit* precludes application of Article 3, Section 1 to this case because selection procedures for fil[l]ing non-bargaining[-]unit positions do not involve the conditions of employment of bargaining[-]unit employees, and the Agency has not bargained otherwise").
[62] 5 U.S.C. § 7103(a)(9)(C)(i).
[63] Dissent at 17.
[64] 61 FLRA 377.
[65] *Id.* at 377 (emphasis added).
[66] *Id.* at 377-78.

law."[67] By contrast, the dissent does not cite any decisions where the Authority has set aside an arbitrator's finding that a grievance regarding supervisory matters was arbitrable under a negotiated grievance procedure merely because there was no explicit language indicating an election.[68]

For the above reasons, neither the Agency nor the dissent provides any basis for finding the final award contrary to law. Accordingly, we deny the Agency's contrary-to-law exceptions.

B. The final award draws its essence from the parties' agreement.

The Agency argues that the Arbitrator's directed remedy fails to draw its essence from Article 17, Section 3 of the parties' agreement.[69] The Agency acknowledges the Arbitrator's finding that this provision applies only to promotions within the bargaining unit – not to the promotion at issue here.[70] Further, the Agency "does not contest that Article 17 . . . should not apply" here.[71] However, the Agency claims that Article 17, Section 3 demonstrates that "the parties previously agreed upon remedial measures when it is determined an employee was improperly excluded from recruitment consideration" – and that directing the Agency to rescind and repost the vacancy announcement "is not a suitable remedy and does not represent a rational interpretation of the agreement."[72]

The Authority will find that an award fails to draw its essence from a collective-bargaining agreement when the appealing party establishes that 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.[73]

As stated above, the Agency concedes that Article 17 does not apply in this case. Further, the Agency's essence exception does not cite any other contract provision or provide any basis for concluding that the Arbitrator was required to apply Section 3's remedy in the instant context. Thus, the Agency does not demonstrate that the final award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Accordingly, we deny the essence exception.

IV. Decision

We deny the Agency's exceptions.

---

[67] *Id.* at 380.

[68] *See, e.g.*, *Loc. 12*, 60 FLRA at 538 (noting Authority precedent holding that proposed procedures for filling non-bargaining-unit positions are negotiable at an agency's election, and stating that "[b]ecause parties are free to agree to such procedures, the Authority has *consistently upheld* [arbitration] awards finding that particular contracts permit, or exclude, such grievances") (emphasis added). *Cf. AFGE, AFL-CIO*, 15 FLRA at 284 (Authority did not look for affirmative wording that supported the award, but merely found that "with the [a]rbitrator having expressly determined that the [parties' negotiated merit-promotion] plan encompasses supervisory positions and having directed the [a]gency to meet its negotiated obligations, the [a]gency's exception fail[ed] to establish that the award [was] contrary to law," and further stated that "[t]he [a]gency's contention, that the agreement language fails to evidence a clear and unmistakable intention on the part of the [a]gency to have supervisory positions encompassed by the negotiated merit[-]promotion plan, constitute[d] nothing more than disagreement with the [a]rbitrator's interpretation of the agreement and provide[d] no basis for finding the award deficient"). We note that *Loc. 1667*, 70 FLRA 155, is not to the contrary. As noted above, the arbitrator in that case, unlike the Arbitrator here, found the parties did *not* extend the agreement to cover supervisory selections. *Id.* at 156. In denying union exceptions to the arbitrator's award, the Authority stated the parties' "general grievance language" did not indicate the agency's election to negotiate over supervisory selections, so the Authority needed to "look outside language that mirror[ed] the Statute" to resolve whether the agreement covered such matters. *Id.* at 157. The Authority then stated that it would "defer to the [a]rbitrator's interpretation of whether the [a]gency elected to include this matter in the negotiated grievance procedure unless the [u]nion [could] demonstrate that the [a]rbitrator's interpretation fail[ed] to draw its essence from the parties' agreement." *Id.* The Authority then denied the union's essence exception. *Id.* at 158. *Loc. 1667* did not hold that, as a matter of law, arbitrators must point to explicit wording in the parties' agreement demonstrating the parties' intent to include supervisory-selection matters within the scope of their grievance procedure. In fact, reading *Loc. 1667* in that manner would mean that the Authority departed from *IRS St. Louis* without distinguishing, or even acknowledging, that precedent. We decline to read *Loc. 1667* that broadly.

[69] Exceptions Br. at 12-13.

[70] *Id.* at 12.

[71] *Id.* at 13.

[72] *Id.*

[73] *Bremerton Metal Trades Council*, 73 FLRA 212, 213 (2022).

Chairman Grundmann, concurring:

I agree with the decision in all respects. However, the dissent raises an issue that I believe warrants highlighting. Specifically, the dissent states that, where parties "include articles in their collective-bargaining agreements that mirror, or are otherwise intended to be interpreted in the same manner as, the Statute[,] . . . the Authority applies statutory standards in assessing the application of the relevant contract articles."[1]

However, as I noted in my concurrence in *AFGE, Local 2338*, "it seems that the Authority has been inconsistent with regard to when it will apply statutory standards to assess arbitrator's contract interpretations"[2] – and has sometimes required more than just the presence of "mirroring" wording in order to apply statutory standards.[3] In other words, the Authority's practice in this regard is not as cut-and-dried as the dissent presents it to be. Nevertheless, for the reasons stated in today's decision, I agree that, "[e]ven assuming that statutory standards should apply" here, "the Agency has not demonstrated that the Arbitrator's substantive-arbitrability conclusion is contrary to law."[4] As such, it is unnecessary to resolve the apparent inconsistencies in the Authority's "mirroring" precedent in this case.

Therefore, I concur.

[1] Dissent at 15-16.
[2] 73 FLRA 845, 851 (2024) (Concurring Opinion of Chairman Grundmann).
[3] *Id.* at 852 (noting that the Authority "sometimes has held or implied" that mirroring principles apply only "where one party assert[s], and the other party [does] not dispute, that the contract provision reiterate[s] the statutory provision"); *id.* at 854 (noting that the Authority "has often also looked to what the *arbitrator* found – or did not find").
[4] Decision at 6.

Member Kiko, dissenting:

Upholding the Arbitrator's substantive-arbitrability determination requires the majority to craft a battered patchwork quilt – stitching together scraps of unconnected analysis from the awards; layering and distorting legal standards to cover logical holes; repurposing strips of contract wording to give them new meaning; and cutting and reassembling Agency arguments in order to reject them. Notwithstanding the majority's attempts to restore and embellish the Arbitrator's faulty arbitrability determination, a foundational legal principal endures: the selection of a supervisor is not grievable absent an *affirmative election* by the Agency to subject its selection procedures to the negotiated grievance procedure.[1] Because there was no such affirmative election here, the awards are inconsistent with Authority precedent and the Federal Service Labor-Management Relations Statute (the Statute).[2] Accordingly, I dissent.

In its grievance, the Union claimed the Agency violated the parties' collective-bargaining agreement by requiring a college degree for an open supervisory position without first bargaining with the Union over that requirement.[3] At arbitration, the Agency challenged the arbitrability of the grievance because the open position was supervisory, and, therefore, outside the bargaining unit.[4] Despite noting that the selection process for non-bargaining-unit positions is a permissive subject of bargaining,[5] the Arbitrator issued an award (final award) finding that the parties' use of broad language in the agreement permitted the Union to grieve changes to "any . . . laws, rules, regulations[, or] policies that apply to Agency employees both within and outside of the bargaining unit."[6]

As the majority acknowledges, an agency's selections and selection procedures for filling non-bargaining-unit positions are not subject to the negotiated grievance procedure unless the agency has elected in negotiations to agree to their coverage.[7] While the existence of such an election is generally a question of contract interpretation, parties frequently include articles in their collective-bargaining agreements that mirror, or are otherwise intended to be interpreted in the same manner as, the Statute.[8] In those instances, the Authority applies statutory standards in assessing the application of the relevant contract articles.[9]

Here, the Article 30 provision that the Arbitrator relied upon is identical to § 7103(a)(9) of the Statute in all relevant respects: both Article 30 and § 7103(a)(9) define a grievance as "any complaint" by a union "concerning any matter relating to the employment" of an employee.[10] And the Agency argues that Article 30's wording was intended to mirror the Statute, noting that the only difference is that Article 30 identifies the Union by name, rather than using the Statute's generic "labor organization."[11] Because there is no meaningful difference between this provision of the parties' agreement and the wording of the Statute, the Authority *should* review the Arbitrator's interpretation of Article 30 consistent with applicable legal standards.[12]

[1] *NFFE, Loc. 1442*, 64 FLRA 1132, 1132-33 (2010) (*Loc. 1442*) ("Under Authority case law, an agency's selections and selection procedures for filling non[-]bargaining[-]unit positions are not subject to the parties' negotiated grievance procedure unless the agency has elected in negotiations to agree to their coverage." (citing *NAGE, R1-109*, 61 FLRA 588, 590 (2006) (*NAGE*); *NTEU*, 25 FLRA 1067, 1079 (1987) (*NTEU*))).

[2] 5 U.S.C. § 7103(a)(9)(B) ("'[G]rievance' means any complaint . . . by any labor organization concerning any matter relating to the employment of any employee."); *see also Loc. 1442*, 64 FLRA at 1132-33 (finding grievance over process for filling supervisory positions inarbitrable where there was "no evidence that the [a]gency had elected to make the filling of the contested positions subject to the parties' negotiated grievance procedure" (internal quotation marks omitted)).

[3] Final Award at 3, 6.

[4] *Id.* at 14-15.

[5] *Id.* at 19.

[6] *Id.* at 20 (internal quotation marks omitted).

[7] Majority at 7 (citing *AFGE, Loc. 1667*, 70 FLRA 155, 157 (2016) (*Loc. 1667*); *AFGE, Loc. 200*, 68 FLRA 549, 550 (2015) (*Loc. 200*); *Loc. 1442*, 64 FLRA at 1133-34).

[8] *Pro. Airways Sys. Specialists*, 64 FLRA 474, 478 n.11 (2010) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 63 FLRA 351, 354 (2009) (*Coleman*)).

[9] *Coleman*, 63 FLRA at 354; *NLRB*, 61 FLRA 197, 199 (2005) (*NLRB*).

[10] *Compare* Exceptions, Ex. K, CBA at 63 ("A grievance is defined as any complaint . . . [b]y the [Union] concerning any matter relating to the employment of the [e]mployee."), *with* 5 U.S.C. § 7103(a)(9)(B) ("'[G]rievance' means any complaint . . . by any labor organization concerning any matter relating to the employment of any employee.").

[11] Exceptions at 8 (citing 5 U.S.C. § 7103(a)(9)(B)).

[12] *See Coleman*, 63 FLRA at 354 (reviewing award under statutory principles where "the contract provision relied on by the [a]rbitrator . . . is identical to . . . the Statute in all relevant aspects"); *NLRB*, 61 FLRA at 199 (reviewing award under statutory standards where the contract provision was "identical to . . . the Statute in all relevant aspects"); *AFGE*, 59 FLRA 767, 769-70 (2004) (finding that a contract provision's "specific references [to] the Statute" established that the issue before the Authority was "statutory in *intent and nature*" (emphasis added) (citations omitted)); *see also AFGE, Loc. 1633*, 70 FLRA 519, 520 (2018) (reaffirming that the Authority has applied statutory standards in assessing the application of contract provisions that mirror, or are otherwise intended to be interpreted in the same manner as, the Statute).

The result of such a review is clear: the Authority has held that an agency does not elect to expand the negotiated grievance procedure to the selections and selection procedures for filling non-bargaining-unit positions merely because the parties include "the general grievance language" from § 7103(a)(9) in the parties' agreement.[13] Therefore, Article 30's identical language cannot, as a matter of law, be interpreted to extend coverage of the grievance procedure to selections for the supervisory position at issue.[14]

Moreover, even if the wording of Article 30 did not mirror the Statute, the Arbitrator failed to find that the Agency *elected* to extend the coverage of the grievance procedure. In addressing the Agency's pre-hearing motion to dismiss the grievance as substantively inarbitrable (initial award), the Arbitrator stated that, "[c]lear and convincing evidence of the Agency's election, or non-election, to bargain and reach agreement with the Union extending the grievance procedures to selection and selection procedures of non-bargaining[-]unit positions, is *critical to the outcome of this matter*."[15] But in her ultimate arbitrability analysis, rather than relying on "[c]lear and convincing evidence of the Agency's election[] or non-election,"[16] the Arbitrator presumed that the grievance-procedure must cover supervisory positions because, "[h]ad the parties desired to limit the reach of [Article 30] . . . to bargaining[-]unit promotions only[,] they could have easily done so; they did not."[17] Reasoning that the Agency had "not offered substantive extrinsic evidence" to *refute* arbitrability,[18] the Arbitrator based her arbitrability determination on the absence of wording "that could be reasonably interpreted to exclude . . . selection procedures for a non-bargaining[-]unit position."[19] In finding the parties did not *exclude* supervisory selections from the grievance procedure, the Arbitrator reversed the applicable statutory standard by essentially finding an election by omission.[20] But the record is devoid of any evidence – the Arbitrator did not find, and the plain language of Article 30 does not support – that the Agency *affirmatively elected* to expand the grievance procedure.[21] In fact, the Arbitrator found in the initial award that:

> The [parties' agreement] does not clearly and explicitly state that the grievance process extends or does not extend to the selection or selection procedures for non-bargaining[-]unit positions. Neither party has pointed to language in the [parties' agreement] or elsewhere that clearly and unequivocally demonstrates that the Agency exercised its option, bargained, and reached agreement with the Union to subject the selection and selection procedures of non-bargaining[-]unit employees to the grievance procedures of Article 30, or did not.[22]

Absent an affirmative election, the Arbitrator's conclusion that the grievance was arbitrable is clearly contrary to Authority precedent.[23] Consequently, I would vacate the final award because the Arbitrator's determination that the grievance is arbitrable is contrary to law.[24]

But the majority is not satisfied with this clear result. The majority purports to conduct de novo review, examining "whether the arbitrator's legal *conclusion* – not the arbitrator's underlying *reasoning* – is consistent with the relevant legal standard."[25] However, the majority's quilt still has a glaring hole to patch: the lack of the affirmative election. So, the majority gets to work cutting

---

[13] *Loc. 1667*, 70 FLRA at 157.
[14] *See id.* (finding wording of parties' collective-bargaining agreement that mirrored § 7103(a)(9) did "not itself indicate that the [a]gency elected" to extend coverage of the grievance procedure to the agency's selections and selection procedures for filling non-bargaining-unit positions).
[15] Initial Award at 11 (emphasis added).
[16] *Id.*
[17] Final Award at 20.
[18] *Id.*
[19] *Id.* at 19.
[20] *See id.* at 19-20.
[21] *See, e.g.*, *Loc. 200*, 68 FLRA at 550 (upholding arbitrator's finding that agency had not elected to bargain over selection procedures for non-bargaining-unit positions where there was "'no language' from the parties' agreement by which the [a]gency 'agreed to negotiate with the [u]nion on procedures for selection of managers'"); *Loc. 1442*, 64 FLRA at 1132-33 (upholding arbitrator's finding that there was "no evidence that the [a]gency had elected in negotiations to make the filling of [supervisory] positions subject to the [parties' collective-bargaining agreement]" (internal quotation marks omitted)).
[22] Initial Award at 9.
[23] *See Loc. 1667*, 70 FLRA at 157 (finding that "the general grievance language" in the parties' agreement that mirrored § 7103(a)(9) of the Statute did not indicate that the agency had elected to expand the scope of the negotiated grievance procedure to include selection procedures for filling non-bargaining-unit positions).
[24] *See U.S. DOL, Bureau of Lab. Stat.*, 66 FLRA 282, 284 (2011) (holding that an award "cannot stand if [the arbitrator] lacked jurisdiction to resolve the [grievance] in the first place").
[25] Majority at 7.

out the Arbitrator's inconvenient findings and sewing together disparate elements of the awards in order to rewrite her contract interpretation and arrive at an ostensibly legal conclusion.

As the majority obliquely acknowledges,[26] the Arbitrator's determination that the grievance concerned unit employees' conditions of employment relied on a definition of "conditions of employment" that conflicts with Authority precedent.[27] But the majority neatly excises that error, replacing it with a section of contract wording the Arbitrator did not apply. According to the majority, while the Arbitrator may have relied on an unlawful definition in her interpretation of Article 30, "*different wording* from [Article 30] . . . supports the Arbitrator's substantive-arbitrability conclusion."[28] In other words, the Arbitrator misinterpreted the contract, attributing a meaning that conflicts with our precedent. But the majority preserves her *contractual conclusion* by conducting its *own* interpretation of "different wording" within Article 30 that allegedly supports the Arbitrator's arbitrability determination.[29] It is unclear to me why the Authority would conduct its own independent contract analysis in order to replace an Arbitrator's clearly unlawful contract interpretation – or how such an effort demonstrates that the Arbitrator's "legal conclusion . . . is consistent with the relevant legal standard."[30]

However, notwithstanding the majority's impressive effort to darn this frayed portion of the final award, the majority still lacks the crucial piece to salvage the Arbitrator's arbitrability determination: an affirmative election to expand the grievance procedure. The majority addresses this missing piece in two ways: (1) by arguing that it was permissible for the Arbitrator to find an election to expand the grievance procedure by omission, and (2) by relying on the Arbitrator's interpretation of another provision of the agreement—Article 3—in the merits portion of the award.[31]

Regarding the Arbitrator's election-by-omission determination, the majority cites *U.S. Department of the Treasury, IRS, Saint Louis, Missouri* (*IRS*),[32] as an example of the Authority upholding an arbitrator's finding that an agency elected to expand a provision to cover supervisory positions based on the parties' failure to clearly *exclude* supervisory positions from that provision's coverage.[33] However, in *IRS*, the arbitrator found an election because bargaining-history evidence demonstrated the agency "had not insisted on contract language reflecting its right to exclude . . . supervisory . . . positions" from the coverage of that provision *despite* two previous arbitrators interpreting that provision as covering supervisory positions.[34] Because the agency did not seek to alter the provision's wording to avoid this *established* interpretation when given the opportunity, the arbitrator found the agency made the requisite election when it "acquiesc[ed to] the arbitral interpretations."[35]

Conversely, without considering bargaining history, the Arbitrator here simply found the Agency elected to expand the grievance procedure by not specifically excluding supervisory positions.[36] But without prior awards establishing that the grievance procedure already encompassed supervisory positions, the circumstances here share little resemblance to the knowing "acquiesce[ance]" in *IRS*.[37] Because grievance procedures do not cover supervisory positions *unless* an agency elects

[26] *Id.* at 10 (noting that, "even assuming that the Arbitrator erred in her reasoning," the question is whether her ultimate legal conclusion is correct).
[27] *Compare* Final Award at 20 (interpreting Article 30's reference to "conditions of employment" to include any "laws, rules, regulations[, or] policies that apply to Agency employees both within and outside of the bargaining unit"), *with Veterans Admin. & Veterans Admin. Med. Ctr., Lyons, N.J.*, 24 FLRA 64, 68 (1986) ("While an agency can elect to negotiate about the procedure for filling a supervisory position, . . . negotiation does not convert the procedure into a condition of employment.").
[28] Majority at 10 (emphasis added).
[29] *Id.*
[30] *Id.* at 7 (emphasis omitted).
[31] Noting that the statutory definition of a "grievance" includes complaints concerning "the effect or interpretation, or a claim of breach, of a collective[-]bargaining agreement," the majority posits that arbitrators can properly rely on the substantive terms of an agreement – here Article 3 – to alter the scope of the grievance procedure. Majority at 11. However, the majority cites no support for this proposition, and the Arbitrator did not rely on this proposition to find the grievance arbitrable. *See* Final Award at 18-21. More importantly, as discussed further below, the Arbitrator's finding that the Agency elected to include supervisory positions in its Article 3 bargaining obligations is based on *another* omission, rather than an affirmative election. Thus, instead of supporting the Arbitrator's arbitrability determination, the Arbitrator's merits interpretation of Article 3 compounds the deficiency.
[32] 61 FLRA 377 (2005).
[33] Majority at 11 (citing *IRS*, 61 FLRA at 377-78).
[34] *IRS*, 61 FLRA at 379.
[35] *Id.*
[36] Final Award at 20 ("Had the parties desired to limit the reach of [Article 30] . . . to bargaining[-]unit promotions only[,] they could have easily done so; they did not.").
[37] *IRS*, 61 FLRA at 379.

to expand the grievance procedure,[38] contractual silence alone is not sufficient evidence of an election to permit such grievances. By upholding the Arbitrator's finding that the Agency consented to incorporate a permissive subject into the agreement by omission, the majority advocates for an untenable proposition: that agencies must negotiate contract language specifically excluding every conceivable permissive subject of bargaining to ensure that they have not accidentally acquiesced to any terms by omission.

Regarding the merits portion of the final award, the majority relies on the Arbitrator's interpretation of Article 3—the scope-of-bargaining provision—for support.[39] To justify stitching the Arbitrator's Article 3 findings into the arbitrability analysis, the majority claims that "the Arbitrator never clearly stated that the arbitrability and merits issues were separate."[40] However, the Arbitrator did not cite Article 3 in the section where she discussed the grievance's arbitrability.[41] And in the discussion following the words "[o]n the merits," she noted in support of her interpretation of Article 3 that "the Arbitrator has *already found* that the parties bargained in Article 30 to include as a proper subject of a grievance claims of non-selection for promotion."[42] Thus, rather than relying on Article 3 in the arbitrability analysis, she actually relied on her *independent* Article 30 arbitrability determination to support her merits determination.

Setting aside that the Arbitrator did not cite Article 3 in her *arbitrability* analysis,[43] the majority asserts that its own interpretation of Article 30 "when . . . read in conjunction with the Arbitrator's interpretation of Article 3" supports her conclusion that the grievance was substantively arbitrable.[44]

Article 3 defines "matters appropriate for negotiation" as including "matters affecting the terms and conditions of employment of [e]mployees in the unit which are within the discretion of the [employer]."[45] The Authority has long held that matters concerning promotion procedures for supervisory positions do *not* involve the conditions of employment of bargaining-unit employees and are, therefore, negotiable only at the election of the agency.[46] Thus, absent an affirmative election in Article 3 to bargain over the process for filling supervisory positions, the Agency had no such bargaining obligation.[47]

Yet the Arbitrator's interpretation of this provision suffers from some of the same flaws as her interpretation of the grievance procedure in Article 30. As an initial matter, her finding that the Agency elected to negotiate over supervisory positions is once again premised on an omission, rather than an affirmative election.[48] The Arbitrator found that the "plain language [of Article 3] *does not limit* the affected terms and conditions of employment of employees in the bargaining

[38] *Loc. 1442*, 64 FLRA at 1132-33 ("[A]n agency's selections and selection procedures for filling non[-]bargaining[-]unit positions are not subject to the parties' negotiated grievance procedure unless the agency has elected in negotiations to agree to their coverage.").

[39] Majority at 8; *see also* Final Award at 21 (having resolved arbitrability, turning to the merits allegations), 24 (finding the Agency "violated Article 3, Section 1").

[40] Majority at 11.

[41] Final Award at 18-21.

[42] *Id.* at 23 (emphasis added).

[43] Treating the parties' arbitrability and merits arguments interchangeably, the majority states that, "in the proceedings that resulted in the final award, both parties made arbitrability arguments that relied on Article 3," before citing exclusively to the parties' *merits arguments* concerning whether the Agency agreed to extend its Article 3 notice-and-bargaining obligations to include supervisory positions. *See* Majority at 10-11 (citing Final Award at 11 (reciting Union argument that Article 3, Section 1 encompassed promotions inside and outside the bargaining unit), 23 (reciting Agency argument that Article 3's "reference to *personnel policies affecting [e]mployees in the unit* precludes application of Article 3, Section 1 to this case because selection procedures for fil[l]ing non-bargaining[-]unit positions do not involve the conditions of employment of bargaining[-]unit employees")). But the issue of whether the Agency agreed to extend the grievance procedure in Article 30 is a threshold question that is separate from whether, in Article 3, it agreed to bargain over changes to supervisory-selection procedures; the majority conflates them to uphold the final award.

[44] *Id.* at 10.

[45] Final Award at 8.

[46] *NAGE,* 61 FLRA at 590 (noting that the "Authority has long held that matters concerning promotion procedures for supervisory positions do not involve the conditions of employment of bargaining[-]unit employees and are, therefore, outside the statutory duty to bargain," but that they are "negotiable at the election of the agency"); *AFGE, Loc. 12*, 60 FLRA 533, 538 (2004) (*Loc. 12*) ("[T]he Authority has held that any proposal that 'would subject the selections and selection procedures for non[-]bargaining[-]unit positions to the parties' negotiated grievance procedure' is outside the duty to bargain." (quoting *NTEU*, 25 FLRA at 1079)).

[47] I would also note that the Agency official "included a college degree as an evaluative criterion [because it was] germane to an individual's knowledge, ability to research[,] and ability to write." Final Award at 17. The official cited the position's substantial research and writing responsibilities, including preparing "employee evaluations," "incident complaint reports" and "policy documents." Agency's Post-Hr'g Br. at 8. Based on these responsibilities, the Agency determined that educational achievement—while not a requirement for the position—was relevant to a prospective employees' ability to perform in the role. *Id.* Moreover, according to the Agency, the Union "did not produce any evidence that a bargaining[-]unit member is less likely to have a college degree than a non-bargaining[-]unit member." *Id.* at 7. I find it troubling that the Arbitrator, and the majority, are so willing to prevent the Agency from implementing such a neutral, common-sense consideration for evaluating candidates for leadership absent *any* indication that the Agency agreed to negotiate over the process.

[48] Final Award at 24.

unit to policies and practices solely directed to the bargaining unit."[49] Thus, the Arbitrator yet again considered whether the Agency *opted out* of negotiation over supervisory positions, rather than whether the Agency *affirmatively agreed* to such negotiations.[50] But the Arbitrator's finding that the parties "d[id] not limit"[51] negotiation solely to mandatory topics of bargaining is irrelevant; the Agency must clearly agree to negotiate on a topic outside its mandatory duty to bargain. Without an *affirmative election*, the Agency did not have an obligation to bargain over the process it would use to select supervisors.[52] Accordingly, I see nothing in the Arbitrator's flawed interpretation of Article 3 that, "read in conjunction with" the majority's interpretation of Article 30, supports the Arbitrator's faulty substantive-arbitrability determination.[53]

Although the majority goes to great effort to independently reinterpret Article 30 in order to patch over the Arbitrator's unlawful interpretation of that article, it takes a different approach to avoid the legal flaws in the Arbitrator's conclusion that Article 3 created a bargaining obligation. Rather than maintaining its proclaimed focus on whether the Arbitrator's ultimate legal conclusion is consistent with the relevant legal standards, the majority instead addresses the Agency's meritorious contrary-to-law exception under the deferential essence standard the Authority applies to contract interpretations. Despite the Agency arguing that the Arbitrator failed to make the finding of an election the Statute requires to create a bargaining obligation, the majority rejects this argument because "the Agency [does] not argue[], let alone demonstrate[], that the Arbitrator's findings regarding Article 3, Section 1 fail to draw their essence from the parties' agreement."[54] But the Arbitrator's interpretation of Article 3 does not include a finding of an *affirmative election* to which the Authority could defer. And because selection procedures for supervisory positions are excluded from the "conditions of employment" of bargaining-unit employees as a matter of law, and are not subject to bargaining absent an affirmative election, the Agency argues that the Arbitrator's assumption of an election by omission is unlawful. As the Agency demonstrates that the Arbitrator's Article 3 analysis conflicts with longstanding Authority precedent concerning permissive bargaining obligations, I disagree with the majority's decision to reject this contrary-to-law argument for failure to also incorporate an essence argument. I would grant this exception.[55]

Moreover, that is not the only Agency argument the majority distorts and rejects without proper consideration. Although all Agency employees were able to apply for the supervisory position,[56] the Arbitrator found that, "[b]y extending the right to apply for promotion to a non-bargaining[-]unit position while they held a bargaining[-]unit position, the policy and its practice affected the terms and conditions of employment of bargaining[-]unit employees" who were rejected for promotion.[57] Arguing that this finding is contrary to law, the Agency contends that it was an "extraordinary conclusion" to find that the application requirements for the non-bargaining-unit position affect the conditions of employment within the bargaining unit based on the "mere right" of bargaining-unit employees to apply for the position.[58]

Although the Agency accurately describes the Arbitrator's reasoning, the majority latches onto the Agency's use of the word "mere" as a *crucial* flaw in its argument: "[t]he Agency appears to be arguing that the Arbitrator found an Article 3, Section 1 violation 'mere[ly]' because Agency policy permitted unit employees to apply."[59] According to the majority, the use of the word "mere" demonstrates that "the Agency's argument is based on a misinterpretation of the final award" because the Arbitrator *actually* found that the Agency violated Article 3 by "chang[ing] the requirements for the promotion without providing the Union with notice and an opportunity to bargain."[60] On the basis of this

[49] *Id.* (emphasis added).
[50] *Id.*
[51] *Id.*
[52] *See U.S. Food & Drug Admin. Ne. & Mid-Atlantic Regions*, 53 FLRA 1269, 1273-74 (1998) ("As the name implies, parties may, but are not required to, bargain over permissive subjects."); *U.S. Dep't of Com., Pat. & Trademark Off.*, 53 FLRA 858, 870 (1997) (noting that, "absent an election[,] . . . a party is not required to bargain over a permissive subject of bargaining" (quoting *FDIC, Headquarters*, 18 FLRA 768, 771 (1985))).
[53] Majority at 10.
[54] *Id.* at 8.
[55] *See Fed. Educ. Ass'n Stateside Region*, 73 FLRA 32, 34 (2022) (granting contrary-to-law exception where arbitrator's substantive-arbitrability determination conflicted with Authority precedent); *U.S. Dep't of the Air Force, Luke Air Force Base, Ariz.*, 65 FLRA 820, 821-22 (2011) (vacating award where arbitrator's arbitrability finding conflicted with Authority finding that the subject of the grievance was "not grievable or arbitrable as a matter of law").
[56] Final Award at 3.
[57] *Id.* at 24; *see also id.* at 11 ("Article 3, Section 1 . . . encompasses promotions inside and outside of the bargaining unit since the new educational requirement had an effect on employees [applying for] promoti[on] out of the unit.").
[58] Exceptions Br. at 11.
[59] Majority at 9 (quoting Exceptions Br. at 11).
[60] *Id.* at 10.

alleged misunderstanding, the majority "reject[s] this argument."[61]

However, this mischaracterizes the Agency's argument: the word "mere" refers to the Arbitrator's rationale for finding that supervisory-selection procedures affect bargaining-unit employees' conditions of employment, not her finding of a violation of Article 3.[62] As the Agency points out, the Arbitrator found that the application procedures for the supervisory position affected conditions of employment for bargaining-unit employees – such that changes required bargaining under Article 3 –based on their "mere right to apply" for the supervisory position.[63] In the final award, the Arbitrator did not provide any other reason that the procedures affect the bargaining-unit employees' conditions of employment.[64] The majority rejects this argument without contending with its central thesis: the Arbitrator's interpretation of Article 3 is contrary to Authority precedent holding that the procedures for filling supervisory positions are not conditions of employment for bargaining-unit employees.[65]

To uphold the final award, the majority employs a convoluted analysis to obscure the central fault in the award: the Arbitrator's failure to find – as Authority precedent requires[66] – that the Agency affirmatively elected to expand the grievance procedure. Where the Arbitrator relied on an unlawful contract interpretation, the majority – focusing exclusively on what it claims is the Arbitrator's correct legal conclusion – independently interprets other provisions to cover this meaningful error and conflates the arbitrability issue with the Arbitrator's unconnected merits analysis. Where the Arbitrator erroneously assumed elections by omission, the majority mischaracterizes the Agency's arguments or reframes these legal arguments as improperly raised contractual challenges. I disagree with this patchwork approach and this outcome.

Because this decision fails to comply with the Statute, or to fairly evaluate the awards and exceptions before the Authority, I must dissent.

---

[61] *Id.*

[62] Exceptions Br. at 11.

[63] *Id.*

[64] *See* Final Award at 24 ("By its plain terms, Article 3, Section 1 applies to personnel policies . . . within the discretion of the Agency – like promotion to a non-bargaining[-]unit position – that affect the terms and conditions of employment of employees in the bargaining unit who can apply for such promotions.").

[65] Exceptions Br. at 11 (arguing that the final award is contrary to law because "this promotion opportunity did not involve a condition of employment for any bargaining[-]unit employee"); *see also NTEU*, 25 FLRA at 1079 ("The Authority has previously held that proposals which pertain to the filling of non[-]bargaining[-]unit positions do not relate to conditions of employment of bargaining[-]unit employees.").

[66] *E.g.*, *Loc. 12*, 60 FLRA at 538 ("[T]he Authority has held that any proposal that 'would subject the selections and selection procedures for non[-]bargaining[-]unit positions to the parties' negotiated grievance procedure' is outside the duty to bargain." (quoting *NTEU*, 25 FLRA at 1079)).