66 FLRA No. 182

BROADCASTING BOARD
OF GOVERNORS
OFFICE OF CUBA BROADCASTING
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1812
(Union)

0-AR-4800

_____

DECISION

September 25, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on Agency exceptions to an award of Arbitrator Suzanne R. Butler under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions. The Arbitrator concluded that the Agency violated the parties' agreement because it did not provide the Union with an opportunity to bargain over the impact and implementation of the Agency's decision to conduct a reduction-in-force (RIF). She also found that the Agency violated several other contractual provisions and that the RIF was not bona fide. The Arbitrator ordered the Agency to rescind the RIF. For the following reasons, we dismiss the Agency's exceptions, in part, and deny them, in part.

II. Background and Arbitrator's Award

The Agency is a component of the Broadcasting Board of Governors. Award at 13. Congress reduced the Agency's 2010 fiscal year budget by $4.2 million. Exceptions at 9 (citations omitted). Although the Agency reduced its operation costs, *id.* at 8-10, it ultimately determined that a RIF was necessary, *id.* at 10. The Agency informed the Union of the impending RIF, but told the Union that it would not engage in impact and implementation bargaining over the RIF because the parties' agreement did not require such bargaining. *See* Award at 13-14.

The Union filed a grievance alleging that the Agency violated the Statute, the parties' agreement, and the parties' past practice by refusing to negotiate the impact and implementation of the RIF.[1] *See id.* at 20-22 (citation omitted). The grievance was unresolved, and the parties proceeded to arbitration. Because the parties were unable to stipulate the issues, the Arbitrator framed the following issues:

> 1. Is the grievance arbitrable as a whole and/or only in part?
>
> 2. Did the Agency violate the Statute and/or the [parties' agreement], including past practice, in the matter of the . . . RIF?
>
> 3. What shall be the remedy?

Id. at 3-4.[2]

The Arbitrator concluded that the Agency had a contractual duty to bargain over the impact and implementation of RIFs, and that the Agency had violated this duty. *Id.* at 59. Specifically, the Arbitrator found that the parties' bargaining history demonstrated the parties' intent to bargain over the impact and implementation of RIFs. After considering the testimony of Union and Agency witnesses, the Arbitrator found that the parties had agreed that such bargaining would occur notwithstanding the existence of the parties' agreement. *See id.* at 59-63. In making this finding, the Arbitrator drew "an adverse inference" against the Agency because it failed to provide testimony from the Agency's current chief of labor relations (chief) regarding the meaning of the parties' agreement. *Id.* at 59. The Arbitrator further determined that the Union had rejected Agency attempts to modify the language of the parties' agreement and, by doing so, maintained the "status quo" of the agreement. *Id.* at 61-63. The Arbitrator also found that the agreement could not cover all possible appropriate arrangements that the parties could negotiate and that the Agency had negotiated five prior impact and implementation agreements for other RIFs notwithstanding the existence of the parties' agreement. *Id.* at 64.

Consequently, the Arbitrator rejected the Agency's contention that Article 3 – which sets forth the

[1] The relevant portions of the parties' agreement are set forth in the appendix to this decision.

[2] The Arbitrator concluded that the grievance was arbitrable. Because the Agency does not challenge this conclusion, we do not address it further.

definition of "Consultation/Impact Bargaining" – and Article 30, Section 2 – which discusses the Agency's policy of minimizing the effect of RIFs on employees – prohibit impact and implementation bargaining over RIFs. *See id.* at 61. The Arbitrator found that Article 3 applies to "personnel policies and regulations which are not negotiable," *id.* (citation omitted) (emphasis omitted), and that Article 30 covers numerous procedures for RIFs that the parties agreed were negotiable, *id*. Thus, the Arbitrator determined that, under the parties' agreement, other types of RIF procedures were negotiable and that Article 3 requires bargaining over the impact of "changes on the bargaining unit." *Id.* (citation omitted).

The Arbitrator also determined that the Agency violated a past practice of negotiating the impact and implementation of RIFs. *Id.* at 67. In this regard, the Arbitrator found that, during past RIFs, the parties had negotiated five agreements that went "beyond those already negotiated in Article 30." *Id.* at 67-68 (citation omitted).

The Arbitrator also found that the Agency violated several other provisions of the parties' agreement concerning RIFs.

As relevant here, the Arbitrator first found that the Agency violated Article 30, Sections 4(a)(1) and (3) and Sections 4(b),(c), and (e). She found that the Agency made no effort to assign separated employees to vacant positions, retrain them, freeze vacancies, assign employees to other components, or offer separated employees priority consideration for various positions. *See id.* at 79 (citations omitted). Further, with respect to Section 4(b), the Arbitrator noted that the Agency was required to place employees in vacant positions without regard to the Office of Personnel Management's (OPM's) standards and requirements. *Id.*; *see also id.* at 82. The Arbitrator found that the Agency's actions also were inconsistent with an Agency manual (the manual) regarding RIFs. *Id.* at 79 (citation omitted). The Arbitrator determined that the separated employees had a contractual entitlement to priority consideration for other positions, even if those positions were outside of their competitive area. *Id.* at 80, 81. Further, she found that excepted-service employees were entitled to priority consideration for vacant competitive-service positions. *Id.* at 80.

The Arbitrator also found that Article 30, Section 10(d) of the parties' agreement allows the Agency to approve relocation expenses for employees who are separated because of a RIF. *Id.* at 81. Additionally, she determined that the Agency did not satisfy its contractual obligation to place employees in other available positions because the Agency did not conduct a cost study before it conducted the RIF "as allowed" by Article 30, Section 3(a) of the parties' agreement. *Id.* at 83.

The Arbitrator further found that the Agency violated Article 30, Section 10(a), which she found requires the Agency to maintain a "reemployment priority list" (priority list) for employees separated during a RIF. *Id.* at 81-82. According to the Arbitrator, the Agency is required to hire from this list first for any "appropriate positions coming open during or after the RIF." *Id.* at 81 (citation omitted) (emphasis omitted). She determined that this provision applies to all bargaining unit employees and positions, and that it is not time-limited. *Id.*

The Arbitrator also concluded that the Agency failed to prove that the RIF was conducted for legitimate reasons. She stated that, under 5 C.F.R. § 351.201(a)(2), a RIF is legitimate, or bona fide, if it is conducted because of a shortage of funds or because of a lack of work. *Id.* at 69 (citing 5 C.F.R. § 351.201(a)(2)). She rejected the Agency's claim that the RIF occurred because of a shortage of funds. The Arbitrator noted that the General Accountability Office (GAO) had prepared reports for Congress concerning the Agency's operations and that one of the reports also noted that there were allegations of fraud and abuse. *See id.* at 15-16. Several employees, including bargaining unit employees, spoke to various outside sources about this alleged fraud and abuse. *See id.* at 28-29. Relying primarily on the testimony of Agency employees, the Arbitrator found that the Agency conducted the RIF because the Agency's former director wanted to "get rid of" those employees who had spoken critically about the Agency to the GAO and Congress. *Id.* at 72. The Arbitrator also rejected the Agency's claim that the RIF was conducted because of a lack of work. *Id.* at 73.

Based on the foregoing, the Arbitrator concluded that the Agency violated the Statute and the parties' agreement and sustained the Union's grievance. *Id.* at 94. She ordered the Agency to rescind the RIF and reinstate all affected employees to their previous positions and provide them with backpay in accordance with the Back Pay Act. *Id*. Additionally, she retained jurisdiction "to hear a petition for [a]ttorney [f]ees should one be submitted by the Union." *Id.*

III. Positions of the Parties

A. Agency's Exceptions

1. Contrary-to-Law Exceptions

The Agency argues that the Arbitrator's conclusion that the Agency had a contractual duty to bargain the impact and implementation of the RIF is contrary to law because it conflicts with the covered-by

doctrine. *See* Exceptions at 19. According to the Agency, the covered-by doctrine relieves an agency from its obligation to bargain over a matter if that matter is contained in an agreement or that matter is inseparably bound up with a subject expressly covered by an agreement. *Id.* (citation omitted). The Agency asserts that the Arbitrator erroneously determined that impact and implementation bargaining over RIFs is not covered by Article 30 of the parties' agreement. The Agency contends that this determination is erroneous because Article 30 already has "extensive provisions covering" RIFs. *Id.* at 19-20. Thus, the Agency's argues that the Arbitrator's conclusion is inconsistent with federal court and Authority precedent concerning the covered-by doctrine. *Id.* at 19-20 (citations omitted). Moreover, the Agency contends that, by finding that the Agency had a contractual duty to bargain over the impact and implementation of the RIF, the Arbitrator erroneously determined that the Agency had contractually waived its right to assert a covered-by defense. *See id.* at 21-22.

The Agency next asserts that the Arbitrator misapplied Authority case law when she concluded that the parties had not ended a past practice of allowing the Union to bargain over the impact and implementation of RIFs. *Id.* at 22 (citation omitted). According to the Agency, the record establishes that the Agency ended this practice several years prior to the RIF in this case without any Union objection. *Id.* at 22-23.

Additionally, the Agency contends that the Arbitrator erroneously concluded that, under Article 30, Section 4 of the parties' agreement, the Agency was required to give excepted-service employees priority consideration for competitive-service positions. *Id.* at 23. The Agency contends that this conclusion is contrary to 5 C.F.R. § 351.705(b)(6), which the Agency asserts is incorporated into the parties' agreement.[3] *Id.* The Agency argues that this regulation prevents excepted-service employees from being placed in competitive-service positions. *See id.* at 23-24.

The Agency also asserts that the award is contrary to 5 U.S.C. § 2302(b)(9) (the Whistleblower Act) because the Arbitrator erroneously found that the Agency retaliated against employees who had spoken critically of the Agency. *Id.* at 24. The Agency contends that the Whistleblower Act applies to individual employees rather than to unions. *See id.* at 24-25. According to the Agency, because the grievance requested relief solely for the Union, the Whistleblower Act was inapplicable. *Id.* at 25.

Further, the Agency argues that the Arbitrator's decision to draw an adverse inference against the Agency because it did not provide testimony from the chief is contrary to the National Labor Relation Board's (the Board's) "missing witness" rule. *Id.* at 25-26. According to the Agency, the Board has held that, under this rule, an adverse inference may not be drawn against a party because of that party's failure to call a witness if the witness was available to both parties. *See id.* at 25 (citations omitted). The Agency contends that, because the chief was available to both parties, the Arbitrator improperly drew an adverse inference against the Agency. *Id.* at 26.

Finally, the Agency contends that, by finding that the RIF was not bona fide, the Arbitrator "abrogate[d] the Agency's right to determine its budget and its right to assign work under § 7106(a)" of the Statute. *Id.* at 29.

2. Exceeded-Authority Exceptions

The Agency contends that the Arbitrator exceeded her authority by making findings regarding the "bona fides of the RIF as they pertain[ed] to individual bargaining unit members" because that was not one of the framed issues. *Id.* at 26 (citation omitted). The Agency contends that no portion of the Statute or the parties' agreement permits a challenge to the bona fides of the RIF, particularly in relation to individual employees. *Id.* at 26-27. Relatedly, the Agency contends that the Arbitrator's determination that the Agency should have allocated its resources to avoid the RIF was not part of the issue submitted to arbitration. *Id.* at 27, 29.

The Agency also argues that the Arbitrator disregarded specific limitations on her authority because she modified the parties' agreement. *Id.* at 27. The Agency contends that, by allowing individual employees to seek relief as part of an institutional grievance, the Arbitrator modified Article 30, Section 11, which the Agency asserts permits only individual employees to file grievances. *Id.*

The Agency further argues that the Arbitrator inappropriately awarded relief to non-grievants because she awarded relief to individual employees. *Id.* The Agency asserts that "institutional remedies," such as bargaining orders, were the only types of relief available. *Id.* Similarly, the Agency contends that the Arbitrator went beyond the submitted issues because the issue before her did not involve any claims concerning individual employees. *Id.*

Additionally, the Agency asserts the Arbitrator inappropriately "contemplat[ed] an award of attorney[] fees." *Id.* at 28 (citing Award at 94). According to the Agency, because the Arbitrator erroneously awarded

[3] Section 351.705(b)(6) states that agency provisions adopted pursuant to OPM's RIF regulations "[m]ay not provide for the assignment of an employee in an excepted position to a position in the competitive service." 5 C.F.R. § 351.705(b)(6).

relief to individual employees, the Back Pay Act was inapplicable. *Id.* Thus, the Arbitrator lacked the authority to award fees. *Id.* The Agency also contends that the Arbitrator exceeded her authority, and thereby substituted her judgment for that of management, by concluding that the Agency had the resources to avoid the RIF. *Id.* at 29.

The Agency also challenges the Arbitrator's conclusion that the Agency violated the Whistleblower Act, as well as her finding that the Agency violated the manual. According to the Agency, the Arbitrator exceeded her authority by considering these issues because they were not part of the issues framed at arbitration. *See id.* at 29-30.

3. Essence Exceptions

The Agency argues that the award fails to draw its essence from the parties' agreement because there is no provision in the agreement that permits an arbitrator to decide how the Agency should have budgeted its resources or whether the Agency should have conducted a RIF. *Id.* at 31.

The Agency next contends that the Arbitrator's conclusion that Article 3 and Article 30, Section 2 require the Agency to bargain over the impact and implementation of RIFs does not draw its essence from the agreement. *Id.* The Agency asserts that such bargaining is not required by the agreement. *Id.* at 31-32.

The Agency additionally argues that the Arbitrator's conclusion that the Agency did not satisfy the requirements of Article 30, Sections 3(b), (c), (e), and 4(a)(1) by exploring alternatives to the RIF fails to draw its essence from the agreement. *Id.* at 33. The Agency contends that, contrary to the Arbitrator's conclusion, the record establishes that it explored several alternatives. *See id.* (citations omitted).

The Agency also asserts that the Arbitrator's determination that the Agency was required to give bargaining unit employees priority consideration for positions that become available throughout the entire RIF process does not draw its essence from the agreement. *Id.* at 33-34. The Agency contends that, under Article 30, Section 4(e), such consideration ends once a RIF begins. *Id.* at 33-34.

The Agency further contends that the Arbitrator's interpretation of Article 30, Section 4(b) fails to draw its essence from the parties' agreement. According to the Agency, the Arbitrator's interpretation of this provision is in consistent with 5 C.F.R.§ 351.705(b)(6). *Id.* at 33.

The Agency also asserts that the Arbitrator's conclusion that, under Article 10, Section 10(a) of the parties' agreement, the Agency was required to place separated employees on the priority list fails to draw its essence from the parties' agreement. *Id.* at 34. The Agency asserts that this interpretation is contrary to OPM's RIF regulations. *Id.* Similarly, the Agency argues that the Arbitrator's interpretation of Article 10, Section 10(d) as requiring the Agency to pay relocation expenses for employees fails to draw its essence from the parties' agreement because the Agency lacked "legal authority" to pay such expenses in this case. *Id.* Moreover, the Agency asserts that the Arbitrator's interpretation of Sections 10(a) and (d) would render Article 30, Sections 7 and 8 – which define competitive levels and areas – "meaningless." *Id.* at 34-35.

The Agency also contends that the Arbitrator erroneously concluded that the Agency was required to perform a cost study under Article 30, Section 3 of the agreement before it conducted the RIF. *Id.* at 32. The Agency contends that, although the Agency may conduct a cost study, it is not required to do so. *Id.*

4. Nonfact Exceptions

The Agency argues that the award is based on nonfacts. Specifically, it challenges several of the Arbitrator's findings regarding the Agency's rationale for conducting the RIF and the actions that the Agency took to alleviate the effects of the RIF. *See id.* at 35-39.

B. Union's Opposition

The Union disagrees with the Agency's assertion that the award is contrary to law. According to the Union, none of the Agency's contrary-to-law arguments demonstrates that the award is deficient on this basis. *See* Opp'n at 24-53.

Moreover, the Union asserts that the Agency has not demonstrated that the Arbitrator exceeded her authority. *See id.* at 56-73. The Union additionally argues that the Agency has not established that any of the Arbitrator's interpretations of the parties' agreement fail to draw their essence from the agreement. *See id.* at 73-83.

Finally, the Union contends that the Agency's nonfact exceptions should be denied because they are all based on factual matters that the parties disputed at arbitration. *See id.* at 83-91. Additionally, it asserts that one of the Agency's nonfact exceptions is based on a factual determination that the Arbitrator did not make. *Id.* at 88 (citations omitted).

IV. Preliminary Issue: Several of the Agency's exceptions are barred by the Authority's Regulations.

Under the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator. 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g.*, *U.S. Dep't of Homeland Sec., Customs & Border Prot.*, 66 FLRA 495, 497 (2012) (*CBP*) (citations omitted).[4] Moreover, where a party makes an argument before the Authority that is inconsistent with its position before the arbitrator, §§ 2425.4(c) and 2429.5 bar that argument. *See, e.g., NTEU, Chapter 26*, 66 FLRA 650, 652 (2012) (*NTEU*) (citations omitted).

The Agency asserts that Article 22, Section 8 of the parties' agreement prohibits an arbitrator from awarding individual relief as part of an institutional grievance. Exceptions at 27. At arbitration, the Agency argued that, under Article 21, Section 7(a) of the parties' agreement, the Union could not present claims concerning individual employees as part of an institutional grievance. *See* Exceptions, Ex. 55, Agency's Post-Hearing Brief (Agency's Post-Hearing Brief) at 7. However, the Agency did not argue that such claims were limited by Article 22, Section 8. Because the Agency did not raise this challenge at arbitration, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar it from doing so now. *Cf. CBP*, 66 FLRA at 497 (dismissing essence claim based on contract provision that agency could have, but did not, raise at arbitration).

The Agency argues that, by considering whether the RIF was bona fide, the Arbitrator exceeded her authority in two ways. First, the Agency contends that the Arbitrator exceeded her authority because the issue of whether the RIF was bona fide was not before the Arbitrator. Exceptions at 26-27. Second, the Agency argues that, by considering whether the RIF was bona fide, the Arbitrator exceeded her authority because she substituted her judgment for that of management officials. *Id.* at 29. However, at arbitration, the Agency argued that the parties' agreement incorporates OPM's RIF regulations and that the RIF was bona fide because the Agency complied with these regulations. *See* Agency's Post-Hearing Brief at 15-19. These positions are inconsistent. Therefore, we find that the Agency's exceptions are barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations. *See, e.g.*, *NTEU*, 66 FLRA at 652 (citations omitted) (union's exception was barred because it was inconsistent with position union took at arbitration).

The Agency also contends that, by finding that the RIF was not bona fide, the Arbitrator "abrogate[d] the Agency's right to determine its budget and its right to assign work under § 7106(a)" of the Statute. Exceptions at 29. As discussed above, the Agency disputed at arbitration whether the RIF was bona fide. However, the record contains no indication that the Agency argued that, if the Arbitrator found that the RIF was not bona fide, she would abrogate the foregoing management rights. Because the Agency could have made this argument at arbitration, but did not do so, we find that it is barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations. *See, e.g.*, *CBP*, 66 FLRA at 497 (citations omitted) (dismissing exception regarding management rights under §§ 2425.4(c) and 2429.5).

The Agency further asserts that the Arbitrator exceeded her authority because she awarded relief to individuals who were not a part of the grievance. Specifically, the Agency contends that, because the grievance was institutional in nature, the Arbitrator could not grant individual employees any form of relief. At arbitration, the Union requested several remedies, including status quo ante relief and individual relief for employees. *See* Award at 22, 49, 53-54. Although the Agency objected to the Union's request for status quo ante relief, *see* Agency's Post-Hearing Brief at 35-39, it did not object to the Union's request for individual relief. Because the Agency could have, but did not, raise its objection below, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations prohibit it from doing so now. *See U.S. Dep't of Veterans Affairs, Black Hills Health Care Sys., Hot Springs, S.D.*, 65 FLRA 1022, 1022 n.* (2011) (*Black Hills*) (dismissing exceeded authority claim that was not raised below).

The Agency also asserts that the Arbitrator's finding that the Agency violated the manual was outside the scope of the issues submitted to arbitration. Exceptions at 30 (citing Award at 78-79). The Union raised issues regarding the Agency's failure to comply with the manual at arbitration, and the Agency raised no objection at that time. *See* Opp'n, Ex. 8 at 102, 106, 109. Further, in its post-hearing brief, although the Agency argued that several alleged statutory and contractual violations raised in the Union's grievance were not properly before the Arbitrator, *see* Agency's Post-Hearing Brief at 4-8, it did not raise such an argument with respect to the manual. The Agency was aware that the Union had raised issues regarding the Agency's compliance with the manual, and the Agency had opportunities to object to the appropriateness of those issues. Because the Agency did not raise any such objection before the Arbitrator, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations prohibit it

[4] Section 2425.4(c) provides that exceptions may not rely on any "evidence [or] arguments . . . that could have been, but were not, presented to the arbitrator." Section 2429.5 provides that the "Authority will not consider any evidence [or] . . . arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator."

from doing so now. *See Black Hills*, 65 FLRA at 1022 n.* (dismissing exceeded-authority claim that was not raised below).

The Agency further argues that the award fails to draw its essence from Article 30, Section 4(e) of the parties' agreement. The Agency contends that this section prohibits priority consideration once a RIF begins. Exceptions at 33-34 (citation omitted). Although the Agency raised several challenges regarding the Union's claim that employees were entitled to priority consideration, the record contains no indication that the Agency argued below that the Union's claim conflicted with Section 4(e). Because the Agency could have raised this argument below, but did not do so, we find that this claim is barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations. *See CBP*, 66 FLRA at 497 (barring essence claim that could have been raised below).

V. Analysis and Conclusions

A. The award is not contrary to law, rule, and/or regulation.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id*.

1. The award is not contrary to Authority precedent concerning past practices.

The Agency argues that the Arbitrator erroneously concluded that the parties had not ended its past practice regarding whether the parties could bargain over the impact and implementation of RIFs. According to the Agency, this conclusion is inconsistent with the Authority's legal framework for assessing whether a past practice exists. Exceptions at 22 (citing *U.S. Dep't of Justice, Exec. Office for Immigration Review, Bd. of Immigration Appeals*, 55 FLRA 454, 456 (1999) (*DOJ*)). However, *DOJ* concerns the framework for determining whether a past practice exists within the context of an unfair labor practice case. Within the context of arbitration, even in cases where an arbitrator has resolved an unfair labor practice allegation, the Authority addresses issues as to whether a past practice exists under the nonfact framework. *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 976 (2010) (Member DuBester dissenting in part as to other matters) (citation omitted). Where the issue concerns whether the arbitrator improperly interpreted a past practice, the Authority considers the issue under the essence framework. *Id*. (citation omitted). Although the Agency disputes the Arbitrator's conclusion regarding the existence of a past practice, the Agency does not assert that it is based on a nonfact. Accordingly, the Agency has not established that the Arbitrator's finding is deficient, and we deny this exception.

2. The award is not contrary to 5 C.F.R. § 351.705(b)(6).

The Agency contends that the award is contrary to 5 C.F.R. § 351.705(b)(6) because the Arbitrator erroneously concluded that, under Article 30, Section 4(e) of the parties' agreement, the Agency was required to give excepted-service employees priority consideration for vacant competitive-service positions. Exceptions at 23. The Agency argues that this portion of the award is contrary to § 351.705(b)(6) because this regulation prohibits the Agency from assigning excepted-service employees to competitive-service positions. *Id.* The Agency's argument is misplaced because the Arbitrator did not find that the Agency was required to make any such *assignments*. Rather, she found that, under Article 30, Section 4(e) of the parties' agreement, the Agency was required solely to give employees *priority consideration* for vacant positions. Award at 80. Thus, the Agency has not established that the Arbitrator's award concerning Article 30, Section 4(e) is contrary to law, and we deny this exception.

3. The award is not contrary to the Whistleblower Act.

The Agency argues that the Arbitrator's award conflicts with the Whistleblower Act because the Act does not apply to institutional grievances. Exceptions at 24-25. Although the Arbitrator found that the RIF was motivated by the Agency's desire to separate employees who had expressed concerns about the Agency, the award contains no indication that the Arbitrator relied on the Whistleblower Act to reach this determination. Thus, contrary to the Agency's assertion, the Arbitrator did not rely on this Act. Accordingly, we deny this exception.

4. The award is not contrary to the "missing witness rule."

The Agency argues that the award is contrary to the Board's "missing witness" rule because the Arbitrator inappropriately drew an adverse inference against the Agency for not offering the chief as a witness to testify as to the meaning of the parties' agreement. Exceptions

at 25-26. The Agency contends that the Arbitrator had no basis to draw such an inference because the chief was available to both parties.

The Board's "missing witness" rule states that, "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *Int'l Automated Machines, Inc.*, 285 NLRB 1122, 1123 (1987) (*IAM*) (citations omitted). The Authority has clarified further that, under the Board's rule, if a "missing witness" is associated with a particular party, "it can be assumed that the witness would be favorably disposed toward [that party], [and] an adverse inference is warranted even if the witness was, technically, equally available to be called by either party." *IRS, Phila. Serv. Ctr.*, 54 FLRA 674, 682 (1998) (citing *IAM*, 285 NLRB at 1123). The Agency does not dispute that the missing witness in dispute – the chief – is an Agency official. Thus, even if the chief was, "technically, equally available" to both parties, *id.*, the Arbitrator did not err by drawing an adverse inference against the Agency because it failed to offer the chief's testimony, *see id.* (adverse inference against agency was warranted because of agency's failure to have a management official testify). Accordingly, we deny this exception.

B. The Arbitrator did not exceed her authority.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). Absent a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. *See U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).

The Agency argues that, because the Arbitrator exceeded her authority by considering the claims of individual employees within the context of an institutional grievance, the award is deficient "by contemplating an award of attorney[] fees" for these employees. Exceptions at 28 (citing Award at 94). The Agency's exception is premature. The Arbitrator did not consider whether an award of attorney fees was warranted. Rather, she retained jurisdiction to provide the Union with an opportunity to submit a petition for attorney fees if it desired to do so. *See* Award at 94. The Arbitrator, therefore, merely permitted the Union an opportunity to argue why it was entitled to attorney fees. Because the Arbitrator did not award attorney fees, we dismiss the Agency's exception without prejudice. *See, e.g., U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 244 (2011) (citations omitted) (dismissing contrary-to-law exception regarding attorney fees without prejudice because arbitrator only granted union an opportunity to file an attorney fee petition).

The Agency also asserts that the Arbitrator exceeded her authority by considering whether employees were separated during the RIF in violation of the Whistleblower Act. Exceptions at 29-30. However, as stated previously, the Arbitrator did not consider this Act as part of her award. Thus, we find that the Agency's exception does not establish that the award is deficient and deny this exception.

C. The award draws its essence from the parties' agreement.

The Agency challenges the Arbitrator's interpretation of several provisions of the parties' agreement. In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 collective bargaining 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. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Agency first contends that the award fails to draw its essence from Article 22, Section 8 of the parties' agreement – which prohibits the Arbitrator from adding to the agreement or modifying it – because the Arbitrator did not cite any provision of the parties' agreement that allowed her to decide how the Agency should have allocated its financial resources to avoid a RIF. Exceptions at 31. However, the Agency does not cite any language in the parties' agreement that prohibited the Arbitrator from making such a finding. The Agency also has not explained how the Arbitrator's finding conflicts with any specific language in the agreement. Accordingly, the Agency has not established that the Arbitrator's interpretation of Section 8 is irrational, unfounded, implausible, or evidences a manifest disregard of the parties' agreement.

The Agency next contends that the Arbitrator incorrectly found that Article 3 and Article 30, Section 2 of the parties' agreement require the Agency to bargain over the impact and implementation of RIFs. Exceptions at 31. The Agency asserts that this interpretation fails to draw its essence from the parties' agreement because Article 30, Section 2 merely states that the "Agency will . . . consider the ideas of the Union to avoid and/or mitigate the impact of a RIF[.]" Award at 6; Exceptions at 31 (citation omitted).

Relying on the parties' intent, the Arbitrator found that the Agency had a contractual duty to bargain over the impact and implementation of the RIF. Award at 59. Specifically, she found that, when the parties initially bargained over the agreement, their intent was that the agreement would permit impact and implementation bargaining over RIFs notwithstanding the other provisions of the agreement that address RIF procedures. *See id.* at 60. The Arbitrator found that this determination was supported by the parties' testimony concerning their initial negotiations. *See id.* at 59-63. Additionally, she found that, because the Union rejected subsequent Agency attempts to modify the language of Article 3 and Article 30, Section 2, the Union had successfully maintained the "status quo" of these provisions. *Id.* at 61-63. Further, she found that, despite the existence of these provisions, the parties' had agreed to five prior impact and implementation agreements for different RIFs. *See id.* at 67-68.

The Arbitrator also rejected the Agency's assertion that the language of the parties' agreement foreclosed bargaining in this case. The Arbitrator found that Article 3 did not excuse the Agency from its bargaining obligation because it applies to personnel policies and procedures that are *not* negotiable. *Id.* at 61. By contrast, she found that, because Article 30 concerns negotiated procedures that govern RIFs, it followed that the parties believed that other such procedures *would* be negotiable. *Id.* She further found that Article 3 requires the Agency to provide the Union with notice and an opportunity to bargain over the "impact of the changes on the bargaining unit." *Id.* (citation omitted) (emphasis omitted). Thus, the Arbitrator concluded that the language of the parties' agreement supported a finding that the Agency was required to bargain over the impact and implementation of the RIF.

The Agency has not demonstrated that the Arbitrator's interpretation of Article 3 and Article 30, Section 2, which is based on the parties' intent and the language of the agreement, is irrational, unfounded, implausible, or evidences a manifest disregard of the parties' agreement. Accordingly, we deny this essence exception.[5] *See, e.g., Broad. Bd. of Governors*, 66 FLRA 380, 385 (2011) (Member Beck dissenting as to other matters) (citation omitted) (denying essence claim because party did not establish that arbitrator's interpretation was irrational, unfounded, implausible, or evidenced a manifest disregard of the parties' agreement); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Ashland, Ky.*, 37 FLRA 1261, 1267 (1990) (party failed to establish that arbitrator's interpretation did not draw its essence from the parties' agreement where his interpretation was based on the parties' intent).

The Agency also argues that the Arbitrator's conclusion that the Agency did not adhere to Article 30, Sections 4(a) and 3(b), (c), and (e) cannot be derived from the parties' agreement because the Agency took steps to alleviate the effects of the RIF. Exceptions at 33. According to the Agency, it eliminated vacancies and management positions first. *Id.* Moreover, it contends that no relevant excepted- or competitive- service positions were available to bargaining unit employees. *See id*. The Agency's challenges go to the Arbitrator's factual findings regarding whether the Agency had complied with the agreement, not her interpretation of the agreement itself. The Authority has held that a party's disagreement with an arbitrator's factual findings in the course of applying an agreement at arbitration does not demonstrate that an award fails to draw its essence from the agreement. *Soc. Sec. Admin., Balt., Md.*, 66 FLRA 569, 572 (2012) (Member DuBester dissenting in part as to other matters) (citations omitted). Thus, we deny this exception.

The Agency challenges the Arbitrator's determination that the Agency violated Article 30, Section 4(b), Exceptions at 33, which states that the Agency will, "[t]o the maximum extent consistent with the needs of the service," place employees in positions "without regard to OPM's standards" if certain conditions are satisfied, Award at 7, 79. The Arbitrator found that

[5] The Agency also argues that the Arbitrator's interpretation of Article 3 and Article 30, Section 2 is contrary to law because it is inconsistent with the covered-by doctrine. *See* Exceptions at 19-22. Although the Arbitrator stated that the Agency violated the Statute, *see* Award at 94, it is unnecessary to address the Agency's exception. The Arbitrator's contractual interpretation of these provisions of the parties' agreement serves as a separate and independent basis for the award, and the Agency has not established that this basis is deficient. Thus, we need not address any claims regarding an alleged statutory violation. *See, e.g., Broad. Bd. of Governors*, 66 FLRA 380, 385-86 (2011) (Member Beck dissenting) (finding it unnecessary to address contrary-to-law exceptions because party did not establish that arbitrator's contract interpretation, which was a separate and independent basis for the award, was deficient). We further note that the Agency does not argue that the award is deficient because Article 3 and Article 30, Section 2 of the parties' agreement are contrary to law.

the Agency did not comply with this language because the Agency did not "ma[k]e reasonable efforts" to fill positions "without regard to OPM's standards and requirements." *Id.* at 79. The Agency contends that this interpretation is an "implausible" interpretation of the phrase "needs of the service." Exceptions at 33. However, the Agency does not explain why this interpretation is implausible. Thus, this argument does not provide a basis for finding the Arbitrator's interpretation of Section 4(b) deficient, and we deny this exception.

Relying on its arguments regarding 5 C.F.R. § 351.705(b)(6), discussed above in Section V.A.2, the Agency also argues that the Arbitrator misinterpreted Section 4(b) to the extent she found that it requires the Agency to place excepted-service employees in competitive-service positions. Exceptions at 33. Similarly, the Agency argues that the Arbitrator's interpretation of Article 10(d), which allows the Agency to offer employees relocation expenses when it relocates employees, is also deficient to the extent the Arbitrator found that 10(d) applies to excepted-service employees that are relocated to competitive-service positions. *Id.* at 34. However, as set forth above, we have rejected the Agency's arguments regarding § 351.705(b)(6) because the Arbitrator did not order the Agency to assign excepted-service employees to competitive-service positions. Accordingly, we similarly deny these essence claims. *See U.S. Dep't of the Interior, Bureau of Indian Affairs, Fort Totten Agency, Fort Totten, N.D.*, 65 FLRA 843, 847 (2011) (denying essence claim concerning OPM regulations because it was related to agency's denied claim that award was contrary to OPM's RIF regulations).

The Agency further challenges the Arbitrator's finding that the Agency violated Article 30, Section 10(a). The Arbitrator found that Section 10(a) requires the Agency to establish a priority list for employees separated because of a RIF and that the Agency must hire employees from this list before it fills positions with outside applicants. Award at 81. She also found that the priority list applies to all bargaining unit positions and that it is not limited by an employee's competitive area. *Id.* The Agency argues that this interpretation fails to draw its essence from the parties' agreement because OPM's RIF regulations concerning priority lists are incorporated into the agreement, and these regulations prohibit the Agency from relocating employees from one competitive area to a different competitive area. Exceptions at 34 (citations omitted). However, the Arbitrator did not find that the parties intended to incorporate OPM's RIF regulations concerning priority lists into the parties' agreement. Moreover, the Agency does not offer any language from Section 10(a) that would support such a finding. Accordingly, the Agency has not established that the Arbitrator's interpretation of Article 30, Section 10(a) is irrational, unfounded, implausible, or evidences a manifest disregard of the parties' agreement. *See U.S. Dep't of Housing & Urban Dev., Portland, Or.*, 64 FLRA 651, 653 (2010) (Member Beck dissenting) (citation omitted) (denying agency's claim that award failed to draw its essence from a contract provision that allegedly incorporated a statute because agency failed to establish that statutory standard was incorporated into agreement). Therefore, we deny this exception.

Further, the Agency contends that the Arbitrator's interpretations of Article 30, Section 10(a) and (d) of the parties' agreement "effectively negate[]" Article 30, Sections 7 and 8, which define competitive areas and competitive levels, respectively. Exceptions at 34-35. However, the Agency does not explain why her interpretation of Section 10(a) and (d) conflicts with either Section 7 or Section 8. Moreover, the Agency cites no language from Sections 7 or 8 to support such a conclusion. Accordingly, the Agency's argument regarding Article 30, Sections 7 and 8 does not provide a basis for finding the award deficient, and we deny this exception.[6]

D. The award is not based on nonfacts.

The Agency argues that the award is based on several nonfacts. To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *E.g.*, *Soc. Sec. Admin., Dall. Region*, 65 FLRA 405, 407 (2010). The Authority will not find an award deficient on the basis of the arbitrator's determination of any factual matter that the parties disputed at arbitration.

[6] The Agency also argues that the Arbitrator erroneously interpreted Article 30, Section 3(a) of the parties' agreement as requiring the Agency to perform a cost study before it conducts a RIF. Exceptions at 32. Although the Arbitrator found a violation of Section 3(a), *see* Award at 83, it is unnecessary to address the Agency's exception. The Arbitrator's finding regarding Section 3(a) was one of several reasons that she found that the Agency had failed to properly conduct the RIF. *See id.* ("In sum, for all of the aforestated reasons, the Arbitrator finds the [g]rievance meritorious in its entirety."). These reasons – which the Agency has not demonstrated are deficient – provide separate and independent bases for her finding that the RIF was not conducted properly. Because the Agency has not established that these other conclusions are deficient, and because the Arbitrator did not require the Agency to conduct a cost study as a remedy, we need not address the Agency's claim. *See U.S. Dep't of Veterans Affairs, Harry S. Truman Mem'l Veterans Hosp., Columbia, Mo.*, 66 FLRA 856, 857 (2012) (Authority did not resolve agency's exceptions that award was contrary to a master agreement and an agency handbook because agency failed to establish that award was contrary to a local agreement).

E.g., *NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009) (*NAGE*).

The Agency contends that the Arbitrator made the following erroneous factual determinations: the Agency did not eliminate or utilize existing vacancies, Exceptions at 35; Agency officials did not provide RIF-related information to Union officials as required by Article 30, Section 5(b) of the parties' agreement, *id.* at 35-36; information contained in GAO reports establish that the former director intentionally targeted certain bargaining unit members for RIF, *id.* at 36-38; the Agency discouraged excepted-service employees from applying for other positions, *id*. at 38; employees were not provided with adequate information regarding the priority lists, *id.* at 39; and the Agency violated Article 30, Section 6 of the parties' agreement by failing to offer any positions to separated employees, *id*.

The parties disputed each of these facts below. *See, e.g.*, Agency's Post-Hearing Brief at 27 (setting forth actions Agency took regarding vacancies); Exceptions, Ex. 13, Tr. at 31(Agency witness testified regarding whether it provided the Union with necessary RIF-related information); Award at 71-78 (discussing information contained in GAO reports); Opp'n, Ex. 3, Tr. at 236-39 (excepted-service employee offered testimony regarding whether she was discouraged from applying to other positions); Opp'n, Ex. 8, Tr. at 42, 55-77 (witnesses offered testimony regarding whether employees received relevant information concerning the priority lists); Agency's Post-Hearing Brief at 21-22, 28 (offering arguments concerning whether Agency offered positions to separated employees). Because these factual matters were disputed below, we find that they do not provide a basis for concluding that the award is based on nonfacts and deny these exceptions. *See NAGE*, 64 FLRA at 246.

The Agency also argues that the award is based on a nonfact because the Arbitrator erroneously found that the Agency had funding to place eight displaced employees in other positions. Exceptions at 38 (citing Award at 55). However, as the Union explains in its opposition, the Arbitrator did not make such a finding. *See* Opp'n at 88. Rather, the Arbitrator's statement regarding the availability of funding for other positions was part of her summary of the Union's arguments. *See* Award at 55. Indeed, the Agency does not cite any other portion of the award that addresses this statement. We therefore deny this nonfact exception.

VI. Decision

The Agency's exceptions are dismissed in part and denied in part.

APPENDIX

ARTICLE 3 DEFINITIONS

> *Consultation/Impact Bargaining*: The process whereby the Agency seeks and considers the Union's views before implementing changes in personnel policies or regulations which are not negotiable. Before changing such policies and regulations the Agency will provide the Union adequate notice (normally ten calendar days) and reasonable opportunity to request negotiations with the Agency on matters relating to the impact of the changes on the bargaining unit.

. . . .

ARTICLE 30 REDUCTION IN FORCE AND TRANSFER OF FUNCTION

SECTION 1. GENERAL

> a. This Article applies to Reduction in Force and Transfer of Function procedures pursuant to 5 CFR 351 and other applicable laws and regulations.
>
> b. Reduction in Force (RIF) means the release of an employee from his or her competitive level by separation, demotion, furlough for more than 30 days, or reassignment of an employee requiring the displacement of another employee when such action is taken due to lack of work or shortage of funds, reorganization, reclassification due to change in duties, or the need to make a place for a person exercising reemployment or restoration rights.

SECTION 2. POLICY

> It is the Agency's policy to minimize the impact of budget shortfalls on the lives and careers of its employees. The Agency will inform all employees as fully and as soon as possible of plans or requirements for reduction in force or transfer of function; consider the ideas of the Union to avoid and/or mitigate the impact of a RIF; and provide assistance to employees adversely affected by a RIF.

SECTION 3. ALTERNATIVES TO REDUCTION IN FORCE

a. *Cost Study*. Prior to conducting a Reduction in Force, the Agency may conduct a cost study to determine whether instituting a furlough or retraining program for affected employees would be more cost-effective than conducting a RIF. If the Agency decides to conduct a cost study it will so inform the Union. Upon completion, a copy of any such conducted study will be provided to the Union.

b. *Consideration of Alternatives*. Prior to effecting a RIF or transfer of function, the Agency will, whenever possible, consider accomplishing the goals otherwise achieved by a RIF through attrition and cost reduction efforts before abolishing positions. The Agency may also consider alternative means of effecting budgetary reductions, including: transferring work from purchase order vendors to bargaining unit employees; furloughs; and job sharing.

SECTION 4. ACTIONS TO REDUCE THE IMPACT OF A RIF. When the need to conduct a RIF is evidence [sic] (normally when notice is given to the Union), the Agency will make a reasonable effort to take the following actions:

a. Utilize existing vacancies, consistent with the needs of the service, to place employees adversely affected by the RIF.

1. Within the affected competitive area, freeze the filling of vacant positions in the Bureau or equivalent organizational element where the RIF is planned until a decision is made as to whether an adversely affected employee can be placed in the position under RIF procedures. If no adversely affected employees can be placed, filling of vacancies may proceed.

2. If more than one Bureau is affected, the Agency may freeze the filling of vacancies for the entire competitive area. In no case will a RIF in one competitive area require a freeze on filling vacancies in another competitive area.

3. The Agency will not fill a vacant bargaining unit position within the organizational unit affected by the RIF . . . until it has compared the qualifications of the employees to be displaced against the requirements of the position. The Agency will also consider redesigning a vacant position.

b. To the maximum extent consistent with the needs of the service, reassign an employee to a vacant position without regard to OPM's standards and requirements for the position if:

1. the employee meets any minimum education requirement for the position; and

2. the agency determines that the employee has the capacity, adaptability, and special skills needed to perform satisfactorily the duties and responsibilities of the position within 90 calendar days of the date of the specific notice.

All waivers of qualification must be properly documented; this documentation will be available to the Union.

c. If the Agency waives qualifications to place an employee into a vacant position, provide the employee with training, which may include either on-the-job or formal training, consistent with Agency resources.

d. Freeze performance appraisals for employees affected by the RIF upon the issuance of general RIF notices, or if no general notices are issued upon issuance of specific notices.

e. Give employees to whom specific notices have been issued priority

consideration in applying for other positions in the bargaining unit at the same grade or with no greater promotion potential in accordance with Article 14, Merit Promotion and Staffing only until the effective date of the RIF.

. . . .

SECTION 7. COMPETITIVE AREAS.

The competitive area for the Agency employees shall be the local commuting area of each locality in which the Agency has one or more offices, such as Washington, D.C., Greenville, N.C., and New York, N.Y. Each competitive area includes all Agency elements in that area.

SECTION 8. COMPETITIVE LEVELS AND RETENTION REGISTERS

a. The Agency shall establish competitive levels and retention registers in accordance with applicable OPM regulations. All lists, records and information pertaining to a RIF shall be maintained by the Human Resources Office for at least one year following the effective date of the RIF.

. . . .

SECTION 10. ASSISTANCE FOR DISPLACED EMPLOYEES

a. Reemployment Priority List. The Agency will establish and maintain a reemployment priority list for employees separated under the provisions of this Article. When the Agency decides to fill vacancies, it will hire first from this list before seeking outside candidates for appropriate positions coming open during or after the RIF. An affected employee's declination of an offer of a particular position will in no way abrogate the employee's right to further consideration under 5 CFR 330.203, for other positions for which he or she may be qualified, unless the employee requests removal from the RPL.

. . . .

d. Relocation. Where applicable, the Agency may agree to grant official time and pay relocation expenses as required by appropriate regulation.

e. Official Time. Affected employees will be provided reasonable official time and access to Agency facilities for the purposes of obtaining employment counseling, preparing resumes or SF 171's and attending job interviews prior to the effective date of the RIF.

Award at 4, 6-11.