66 FLRA No. 62

UNITED STATES
DEPARTMENT OF THE AIR FORCE
442ND FIGHTER WING
WHITEMAN AIR FORCE BASE, MISSOURI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2361
(Union)

0-AR-4394

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DECISION

November 16, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Michael D. Gordon filed by the Agency 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 by requiring Air Reserve Technicians (technicians) to wear uniforms while they are in civilian status. For the reasons that follow, we dismiss the Agency's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

The Agency employs technicians, who are dual-status employees as defined in 10 U.S.C. § 10216.[1] Award at 6. During the work week, technicians are full-time civilian Department of Defense (DoD) employees; they have never been required to wear military uniforms on base while they are in civilian status. *Id.* Specifically, Air Force Instruction (AFI) 36-703, enacted in 1999, states that "[m]ilitary grooming and appearance standards do not apply to civilian employees." *Id.* at 7 (quoting AFI 36-703). Technicians also serve as military reservists one weekend each month and undergo at least fourteen training days per year; they wear military uniforms while they are on reserve duty. *Id.* In May 2007, the parties entered into a collective bargaining agreement (parties' agreement). *Id.* The parties' agreement contains no "specific reference" to technician dress standards, *id.*; however, Article 3, Section 1 states that the agreement is "governed by existing . . . [DoD] or Department of the Air Force rules and regulations," *id.* at 3.

Subsequently, the Air Force promulgated a change to AFI 36-703 and other AFIs. As a result, the Agency notified (Agency notification) the Union that all technicians would be required to wear military uniforms while in civilian status once the Agency satisfied its bargaining obligations. *Id.* at 7-8. The Union asserted that the change contravened portions of the parties' agreement and that, under Article 3, Section 2 of the agreement, the Union had no obligation to accept or bargain over the change.[2] *See id.* at 8. The Agency responded (Agency response) that the parties' agreement did not cover the matter and that technician uniforms concerned a permissive subject of bargaining under § 7106(b)(1) of the Statute. *See id.* at 9. The Agency asserted that it would not bargain over this alleged permissive subject; however, it requested to bargain

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[1] 10 U.S.C. § 10216 states, in relevant part:

> (a) In General. - -
>
> > (1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who—
> >
> > (A) is employed under section 3101 of title 5 or section 709 (b) of title 32;
> >
> > (B) is required as a condition of that employment to maintain membership in the Selected Reserve; and
> >
> > (C) is assigned to a civilian position as a technician in the organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

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

impact and implementation pursuant to Article 3, Section 3 of the agreement. *Id.*

Thereafter, the Union presented a grievance, which was unresolved and submitted to arbitration. *Id.* The parties stipulated to the following issues: (1) "Is the grievance untimely; and, if so, non-arbitrable;" and (2) "[did] the [Agency] violate the [a]greement by requiring [technicians] to wear military uniforms while in civilian status performing civilian duties; and, if so, what is the appropriate remedy?" *Id.* at 2. The Agency argued that the parties' agreement did not address technicians' uniforms. *See id.* at 13. However, the Agency also asserted that Article 3, Section 1 of the parties' agreement incorporated all existing DoD and Air Force rules and regulations into the agreement. *See id.* at 14.

The Arbitrator first addressed whether the grievance was timely. *Id.* at 16. The Arbitrator noted that, under the parties' agreement, the Union is required to present a grievance within thirty days of the event that gave rise to the grievance. *See id.* at 13, 17-18. The Arbitrator found that, when the Union received the Agency's notification, the nature of the change was "undefined and uncertain" because "no activity had yet occurred or was squarely scheduled[.]" *Id.* at 17. The Arbitrator determined that "the cor[e] of the dispute" was not developed until the Agency's response, when the Agency informed the Union that technician uniforms were not covered in the parties' agreement and that it would only bargain impact and implementation. *Id.* at 17-18. Accordingly, the Arbitrator determined that the grievance was timely. *Id.* at 18.

Alternatively, the Arbitrator found that, even if the time limit for filing began at the time of the Agency's notification, the grievance was still timely because of a "combination of factors . . . ." *Id.* at 19. The Arbitrator noted that the parties' agreement does not state what happens if a party fails to timely file a grievance; moreover, he noted that the Agency participated in the grievance process, attempted to negotiate with the Union, and failed to raise a timeliness objection until the hearing. *See id.* The Arbitrator determined that these actions "suggest[ed] a waiver of any timeliness defense." *Id.*

The Arbitrator next addressed the merits of the grievance. *Id.* at 24. He stated that the main dispute was whether Article 3, Section 2 or Article 3, Section 3 controlled this matter. According to the Arbitrator, this dispute was similar to, but different from, the Authority's "covered-by" doctrine. *Id.* at 20 (citing *U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004 (1993) (*SSA Balt.*)). The Arbitrator found that Article 3, Section 2 addresses voluntary bargaining that could occur following the adoption of "new or amended directives that 'affect or contradict' existing [a]greement provisions." Award at 19-20. He determined that, under Section 2, original provisions of the agreement "remain intact," and the parties could volunteer to bargain over suggested changes to those provisions. *Id.* at 20. By contrast, the Arbitrator found that Article 3, Section 3 concerns "new policies, practices or procedures 'not currently contained in the [parties' a]greement." *Id.* In such situations, according to the Arbitrator, bargaining is "mandatory." *Id.*

The Arbitrator concluded that Article 3, Section 2 controlled this matter. He found that AFI 36-703, as it existed in May 2007, was "absorbed" into the parties' agreement through Article 3, Section 1. *See id.* at 21. By contrast, he found that the proposed change to AFI 36-703 was "'not currently contained' in the [a]greement"' within the meaning of Article 3, Section 3 because it was created after the agreement came into existence. *Id.* The Arbitrator found that the proposed change to AFI 36-703, therefore, directly contradicted the agreement. *See id.* Because the earlier version of the AFI was part of the agreement, the Arbitrator rejected the Agency's claim that the Union was required to accept the change to the AFI and bargain impact and implementation under Section 3. *See id.*

The Arbitrator determined that it was "immaterial that uniforms were not specifically discussed" during the negotiations for the parties' agreement because the parties were satisfied with keeping "existing grooming and appearance rules . . . fixed and stable until the [parties' a]greement expired." *Id.* at 22. The Arbitrator also noted that Article 42 of the agreement provides that the agreement "trumps 'agency and government-wide regulations'" unless "proper negotiation" provides otherwise. *Id.*

The Arbitrator also found that, even if Articles 3 and 42 did not incorporate AFI 36-703 into the agreement, "other provisions, plus relevant circumstances," did. Award at 22. The Arbitrator found that uniforms could "generate lower short-term morale." *Id.* at 22-23. He found that the record contained no "demonstrable evidence" concerning the "practical positive effects" on technicians' "work duties or the [Agency's] mission." *Id.* at 23. Similarly, the Arbitrator also concluded that there was no evidence of a material change in circumstances or compelling exigency necessitating a change in the technicians' uniform policy. *Id.* Additionally, the Arbitrator found that Article 7 of the parties' agreement supported finding that technicians are not required to wear uniforms because it indicates all employees are to be treated as civilian employees. *See id.* Furthermore, the Arbitrator determined that Article 28 of the parties' agreement allows employees to decide if protective footwear is needed and provides employees reimbursement for such footwear. *Id.* at 24. The

Arbitrator found that Article 28's meaning would not "make any sense" unless the parties assumed that employees wear civilian attire rather than a government-issued uniform. *Id.*

The Arbitrator sustained the grievance. *Id.* He ordered the Agency to apply AFI 36-703 as it existed at the time the parties' agreement was enacted and ordered the Agency not to change it "for the life of the [a]greement unless and until the Union agrees to modify the [a]greement to permit those requirements or similar changes." *Id.*

III. Positions of the Parties

A. Agency's Exceptions

As a preliminary matter, the Agency challenges on two grounds the Arbitrator's conclusion that the grievance was timely.

First, the Agency argues that, under the parties' agreement, a grievance must be filed within thirty days of the "triggering event" that gave rise to the grievance. Exceptions at 9. The Agency avers that the Union did not file its grievance within thirty days of the Agency's notification, which was the day of the triggering event. *See id.*

Second, the Agency contends that the Arbitrator's arbitrability determination is based on a nonfact. The Agency avers that the Arbitrator found that the time for filing did not begin at the time of the Agency's notification because the Agency chose to negotiate with the Union rather than immediately change AFI 36-703. *See id.* at 10. However, the Agency contends that the Agency had a duty under the Statute to bargain impact and implementation before it made the change. *See id.* According to the Agency, the Arbitrator's determination that the Agency waived its timeliness defense penalizes the Agency "for complying with the law." *Id.*

Addressing the merits, the Agency argues that the Arbitrator exceeded his authority by concluding that Article 3, Section 1 of the parties' agreement incorporates AFI 36-703, as it existed on May 10, 2007, into the parties' agreement. *See id.* at 11. The Agency avers that the parties never asserted "that all existing laws rules and regulations" became part of the agreement; rather, the parties only agreed that the agreement would be governed generally by existing laws, rules and regulations. *Id.* at 10.

The Agency next contends that that award violates § 7106(a) and (b)(1) of the Statute. The Agency argues that the award "added literally hundreds if not thousands of other laws, rules and regulations to the agreement," which would invariably lead to conflicts with management rights under § 7106(a) and (b)(1). *Id.* at 11-12.

The Agency further avers that the award is based on a nonfact because the Arbitrator erroneously concluded that the relevant provisions of the parties' agreement satisfied the Authority's covered by doctrine. *Id.* at 12 (citing *Soc. Sec. Admin., Region VII, Kan. City, Mo.*, 55 FLRA 536 (1999)). According to the Agency, the Arbitrator erred in his application of the covered by doctrine because: (1) the issue of technician uniforms is not "expressly contained" in the agreement, *id.* at 12; (2) technician uniforms are not a part of Article 28, *id.*; (3) technician uniforms are not a part of Article 7, *id.*; and (4) the parties had no way of knowing that the agreement would foreclose any further discussion of the uniform issue, *id.* at 12-13.

The Agency also argues that the award fails to draw its essence from the parties' agreement because the Arbitrator misinterpreted AFI 36-703. *See id.* at 13. The Agency contends that AFI 36-703's reference to "civilian employees" does not refer to technicians because they are dual-status employees, not civilian employees. *See id.*

The Agency contends that the award is based on a nonfact and evidence not in the record, and also fails to draw its essence from the parties' agreement, because the Arbitrator erroneously relied on the parties' silence at the bargaining table to conclude that the issue of technician uniform wear became part of the agreement. *See id.* at 13-15. The Agency argues that uniforms concern a permissive subject of bargaining under § 7106(b)(1) and that the Agency never agreed to bargain over them. *See id.* at 13-14. The Agency also asserts that Article 3, Section 3 of the agreement controls, not the parties' silence. *See id.* at 14. According to the Agency, Section 3 requires the parties to bargain over subjects that are not part of the agreement; because technician uniforms are not a part of the agreement, the Agency contends the Arbitrator should have concluded that Section 3 controls this matter. *See id.* at 14-15.

The Agency next asserts that the award ignores evidence, assumes evidence not in the record, and fails to draw its essence from the parties' agreement because the Arbitrator erroneously concluded that Article 28's reference to footwear bars the Agency from requiring technicians to wear uniforms. *See id.* at 15-16.

Finally, the Agency contends the award is based on a nonfact because the Arbitrator erroneously determined that uniforms would lower employee morale. *See id.* at 16. The Agency asserts nothing in the record supports this determination. Moreover, it argues morale

issues could have been addressed through impact and implementation bargaining. *See id.* at 17. Further, the Agency avers that the issue of employee morale had nothing to do with technician uniforms. *See id.*

B. Union's Opposition

The Union rejects the Agency's assertion that the grievance was untimely filed under the parties' agreement. *See* Opp'n at 2. The Union contends that the proper triggering date was the date of the Agency's response because that was when the Agency officially informed the Union that the subject of technician uniforms was not covered by the parties' agreement. *See id.* The Union also disputes the Agency's claim that the Arbitrator's timeliness determination was based on a nonfact. *See id.*

The Union disagrees with the Agency's assertion that AFI 36-703 was not incorporated into the parties' agreement. The Union contends that it was made part of the agreement through Article 3, Section 1. *See id.* at 3. Moreover, it asserts that the Union was not required to accept or bargain over the proposed change to the AFI because the change contradicted what was already contained in the agreement. *See id.*

Responding to the Agency's claim that the award could conflict with various management rights, the Union argues that the parties agreed to incorporate AFI 36-703 into the agreement. *See id.* In doing so, the Union contends, the Agency elected to allow technicians to wear civilian attire while performing civilian duties. *See id.*

The Union rejects the Agency's claim that technicians do not qualify as civilian employees within the meaning of AFI 36-703. *See id.* at 4. According to the Union, the Arbitrator properly applied AFI 36-703. *See id.*

The Union asserts that the Arbitrator did not find that the parties were silent on the issue of technician uniforms during negotiations. *See id.* The Union contends that the record establishes that the parties agreed technicians would wear civilian attire and that this decision was incorporated into the agreement. *See id.* Moreover, although the Union agrees that uniforms concern the means of performing work under § 7106(b)(1), it contends that allowing technicians to wear civilian attire is an appropriate arrangement. *See id.* at 4-5.

Next, the Union argues that the Arbitrator properly interpreted Article 28 of the parties' agreement. *See id.* at 5. The Union contends that the record establishes that Article 28 supports allowing technicians to remain in civilian attire. *See id.*

Finally, the Union avers that the award is not based on a nonfact because the record demonstrates that requiring technicians to wear uniforms would lower employee morale. *See id.* at 5-6.

IV. Preliminary Issues

A. The Agency's exceptions are not moot

In an Order to Show Cause (Order), the Authority directed the Agency to explain why its exceptions should not be dismissed as moot.[3] The Authority noted that the Arbitrator held that the Agency would be prohibited from requiring technicians to wear uniforms while in civilian status "for the life of the [a]greement" and that the parties' agreement had expired after the Agency filed its exceptions. Order at 1. Thus, the Authority stated, it was unclear whether the parties had a cognizable interest in the outcome of the dispute. *Id.* at 1-2 (citing *NATCA*, 63 FLRA 591, 591-92 (2009) (*NATCA*)). Alternatively, the Authority stated that it was unclear whether the provisions in dispute remained in effect because uniform wear is a permissive subject of bargaining, and the Authority has held that parties may terminate provisions that concern permissive bargaining subjects after an agreement has expired. *See id.* at 2 (citations omitted).

The Agency argues that this matter is not moot because the parties continue to have a cognizable interest in resolving it. Response to Order (Response) at 1. The Agency avers that the contract provisions upon which the Arbitrator relied concern permissive subjects of bargaining because they involve uniform wear. *See id.* at 2. The Agency further contends that the parties' agreement requires the parties to continue to follow provisions concerning permissive subjects of bargaining even after the agreement expires. *See id.* at 4-5. Thus, the Agency states it has not taken any action to terminate the provisions in dispute; as such, it asserts that the grievance is not moot. *Id.* at 5.

[3] The Authority informed the Union that it could file a reply to the Agency's response "within fourteen days from the date of the Agency's service of its response on the Union." Order at 2. The Agency served the Union with its response by mail on September 1, 2011. *See* Response at 6. Because the Agency served its response by mail, the Union received an additional five days to file its reply. *See* 5 C.F.R. § 2429.22 (stating that party receives an additional five days to file if underlying document is served by mail). Thus, the Union was required to file its reply no later than September 20, 2011. However, the Union filed its reply on September 21, 2011. *See* Union Reply at 6. As such, the Union's reply is untimely, and we do not consider it.

Alternatively, the Agency asserts that the Authority "might," after reviewing the record, disagree with the Agency's interpretation of the parties' agreement and conclude that the parties can terminate permissive subjects of bargaining. *Id.* In such a situation, the Agency contends that this dispute is moot. *See id.*

An arbitration matter becomes moot when the parties no longer have a cognizable interest in the dispute. *NATCA*, 63 FLRA at 591-92 (citing *IAM District Lodge 776*, 63 FLRA 93, 94 (2009)). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

The Agency asserts that the contract provisions upon which the Arbitrator relied concern a permissive subject of bargaining and that it has taken no action to terminate those provisions. *See* Response at 2-5. Because the parties do not dispute that the provisions of the parties' agreement upon which the Arbitrator based his award remain in effect, the parties are still governed by those provisions. Consequently, the Arbitrator's award, which was tied to the life of the agreement, has not expired. Thus, the parties continue to have a legally cognizable interest in the resolution of this matter. Accordingly, we find that the Agency's exceptions are not moot. *See, e.g., U.S. Dep't of Veterans Affairs, Veterans Affairs Long Beach Healthcare Sys., Long Beach, Cal.*, 63 FLRA 332, 334 (2009) (finding that exception was not moot because parties still had a legally cognizable interest in having their dispute resolved).

B. Two of the Agency's exceptions are barred by § 2429.5 of the Authority's Regulations

The Agency raises two arguments in its exceptions that were not presented to the Arbitrator. Under § 2429.5 of the Authority's Regulations, the Authority generally will not consider evidence or arguments that could have been, but were not, presented to the arbitrator.[4] *See Soc. Sec. Admin.*, 57 FLRA 530, 534 (2001) (*SSA*) (citing *NAGE, Local R4-45*, 53 FLRA 517, 520 (1997); *U.S. Agency for Int'l Dev.*, 53 FLRA 187, 187 n.2 (1997)). Moreover, where a party makes an argument before the Authority that is inconsistent with its position before the arbitrator, the Authority applies § 2429.5 to bar the argument. *See, e.g., U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 328 (2009) (*FAA*) (dismissing agency's argument that parties' agreement did not incorporate certain Office of Personnel Management regulations because agency conceded before arbitrator that agreement *did* incorporate those regulations).

The Agency first argues that the Arbitrator erroneously concluded that Article 3, Section 1 incorporates AFI 36-703 as it existed in May 2007 into the agreement. *See* Exceptions at 10. Before the Arbitrator, the Agency asserted that "Article 3[,] [Section] 1 *incorporates all* current [f]ederal law, government wide rules and DoD and Air Force rules and regulations when the [a]greement became effective. Thus, *those preexisting matters became part of the [a]greement*." Award at 14 (emphasis added). The Agency, therefore, conceded to the Arbitrator that the May 2007 AFI 36-703 *was* incorporated into the agreement. The Agency has not asserted that the Arbitrator misstated its position. The Agency's position before the Arbitrator, therefore, is inconsistent with the position it has taken before the Authority. Accordingly, we find that the Agency's argument is barred by § 2429.5. *See, e.g., U.S. Dep't of the Navy, Trident Refit Facility, Kings Bay, Ga.*, 65 FLRA 672, 675 (2011) (citing *FAA*, 64 FLRA at 328) (party's exception barred by § 2429.5 because it was inconsistent with position taken before arbitrator).

The Agency next argues that the award is deficient because the Arbitrator erroneously interpreted AFI 36-703's reference to "civilian employees" as encompassing technicians. Exceptions at 13. According to the Agency, technicians do not actually qualify as civilian employees because of their dual status. *See id.* The Agency was on sufficient notice at arbitration that the proper interpretation and meaning of AFI 36-703 was in dispute; indeed, that was one of the central issues before the Arbitrator. *See, e.g.*, Award at 15 (setting forth Agency's argument concerning proper interpretation and meaning of AF-36-703); Exceptions, Jt. Ex. 2 (grievance and associated correspondences) at 7 (Union argued proper interpretation and meaning of AFI 36-703). Because the issue of the proper interpretation and meaning of AFI 36-703 was before the Arbitrator, the Agency could have argued to him that technicians are not within the meaning of "civilian employees" as set forth in AFI 36-703. The record contains no indication that the Agency made this argument. *See* Award at 13-16 (setting forth Agency's arguments). Accordingly, we find that the Agency is barred from presenting this argument now. *See SSA*, 57 FLRA at 534.

[4] The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations -- including § 2429.5 -- were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). Because the exceptions were filed before that date, we apply the prior Regulations.

V. Analysis and Conclusions

A. The Arbitrator's procedural arbitrability determination is not deficient

The Agency argues that the Arbitrator's procedural arbitrability determination is deficient on two grounds. First, the Agency contends that the Arbitrator's interpretation of the filing deadline in the parties' agreement fails to draw its essence from the parties' agreement. *See* Exceptions at 9. Second, the Agency avers that the award is based on a nonfact because the Arbitrator effectively "penalized" the Agency for complying with its duty under the Statute to bargain impact and implementation. *Id.* at 10.

The Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural arbitrability ruling itself. *See AFGE, Local 3882*, 59 FLRA 469, 470 (2003). However, a procedural arbitrability determination may be found deficient on the ground that it is contrary to law. *See id.* (citing *AFGE, Local 933*, 58 FLRA 480, 481 (2003)). For a procedural arbitrability determination to be found deficient as contrary to law, the appealing party must establish that the determination is contrary to procedural requirements established by statute that apply to the parties' negotiated grievance procedure. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005). The Authority also has stated that a procedural arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or that the arbitrator exceeded his or her authority. *U.S. Dep't of Veterans Affairs, Reg'l Office, Winston-Salem, N.C.*, 66 FLRA 34, 37 (2011).

The Agency's argument that the Arbitrator's timeliness determination fails to draw its essence from the parties' agreement directly challenges the Arbitrator's procedural arbitrability finding. Similarly, the Agency's contention that the timeliness determination is based on a nonfact because it penalizes the Agency's supposed compliance with the Statute also directly challenges the Arbitrator's procedural arbitrability determination. Because both of these arguments directly challenge the Arbitrator's procedural arbitrability determination, neither provide a basis for finding the award deficient. *See, e.g., AFGE, Local 3615*, 65 FLRA 647, 649 (2011) (citing *U.S. Dep't of Energy, Sw. Power Admin., Tulsa, Okla.*, 56 FLRA 624, 626 (2000)) (denying party's essence exception because it directly challenged arbitrator's procedural arbitrability determination); *U.S. Dep't of Transp., FAA, Portland, Me.*, 64 FLRA 772, 773 (2010) (denying party's nonfact exception because it directly challenged arbitrator's procedural arbitrability determination). We, therefore, deny these claims.

We also construe the Agency's argument that the Arbitrator's timeliness determination is based on a nonfact because it punishes the Agency for allegedly complying with the Statute as an assertion that the award is contrary to law, specifically, the Statute.[5] The Agency has not identified any specific procedural requirements established by the Statute that apply to the parties' negotiated grievance procedure with which the Arbitrator's award conflicts. Therefore, we find that the Agency's contention provides no basis for finding the Arbitrator's timeliness determination deficient. *See, e.g., U.S. Dep't of the Navy, Naval Air Station, Pensacola, Fla.*, 65 FLRA 1004, 1007-08 (2011) (denying party's claim that arbitrator's procedural arbitrability determination was contrary to law because party failed to identify any specific statutory procedural requirements that the award conflicted with).

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

The Agency argues that the award is based on a nonfact and evidence not in the record, and also fails to draw its essence from the parties' agreement, because the Arbitrator relied on the parties' silence at the bargaining table to conclude that uniform wear became part of their agreement. *See* Exceptions at 13-15. The Agency asserts that Article 3, Section 3 of the agreement controls, not the parties' silence. *See id.* at 14-15.

The Authority will find that an arbitration award is deficient as failing 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 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. DOL (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's

[5] In construing this exception, we note that the Agency's exceptions were filed prior to the October 1, 2010 effective date of the Authority's revised arbitration Regulations.

Because the Agency only identifies this exception as a nonfact exception, which is one of the seven private-sector grounds for review currently recognized by the Authority, Member DuBester would resolve this exception on that basis without construing it as a contrary to law exception. *See* 5 C.F.R. § 2425.6.

construction of the agreement for which the parties have bargained." *Id*. at 576.

The Agency has not established that the award fails to draw its essence from the parties' agreement.[6] The Agency argues that Article 3, Section 3 controls this matter because it requires the parties to bargain when changes establish new policies, practices or procedures that are not already part of the agreement, and that technicians being required to wear uniforms was such a change. The Arbitrator agreed that Section 3 applies to new changes that are not already part of the agreement. *See* Award at 21. However, he also found that the parties incorporated the 1999 version of AFI 36-703 -- and its instruction that military dress standards did not apply to civilian employees -- into the agreement. *See id.* Thus, according to the Arbitrator, technician uniform wear *was* part of the agreement; as such, Section 3 did not apply to this matter. *See id.* The Agency has not explained why the Arbitrator erred in reaching this conclusion; to the contrary, as discussed, the Agency conceded that AFI 36-703, and all other existing DoD and Air Force regulations, were incorporated into the agreement. *See id.* at 14. The Agency's assertion that the Arbitrator improperly rejected Section 3, therefore, is misplaced.

Equally unpersuasive is the Agency's contention that the Arbitrator relied on the parties' silence at the bargaining table to conclude uniforms became part of the agreement. The Arbitrator found that the parties' silence was "immaterial" because the parties had agreed to maintain existing standards of grooming and dress. *See id.* at 22. He did not rely on the parties' silence to reach his conclusion; rather, he relied on what he found the parties' chose to include in their agreement. The Arbitrator, therefore, actually found that the parties' silence was irrelevant to his conclusion. *See id.* Accordingly, we find that the Agency has not established that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement.

C. The award is not contrary to law

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 covered by doctrine

The Agency argues that the award is based on a nonfact because the Arbitrator erroneously applied the Authority's covered by doctrine to conclude that: (1) the issue of uniform wear by technicians was part of the agreement, Exceptions at 12; and (2) the agreement would have precluded further bargaining on uniform wear, particularly because the parties never discussed uniforms, *id*.[7] We construe the Agency's claims as assertions that the award is contrary to law, specifically, the covered by doctrine.[8]

The award is not contrary to the covered by doctrine. The Arbitrator did not actually rely on, or otherwise apply, the Authority's covered by doctrine. The Arbitrator stated that the contractual issue before him was "similar to, but someways different from, statutory legal standards under the [Authority's] 'covered by' doctrine." Award at 20. He further stated that, through the agreement, the parties agreed to matters that otherwise would be addressed by Authority precedent concerning the covered by doctrine. *See id.* (citing *SSA Balt.*, 47 FLRA 1004). The Arbitrator, therefore, unequivocally expressed that application of the covered by doctrine was unnecessary to his award. Consequently, we find that the Agency's exception provides no basis for finding that the award is contrary to law. *See, e.g., Soc. Sec. Admin.*, 65 FLRA 339, 342-43 (2010) (denying agency's claim that award was contrary to covered by doctrine because agency failed to establish that arbitrator actually relied on it).

2. § 7106(a) and (b) of the Statute

The Agency also contends that the award "violates" unspecified management rights under § 7106(a) and (b) of the Statute. Exceptions at 11. The Agency contends that the Arbitrator's conclusion that AFI 36-703 was incorporated into the parties' agreement also means that he "added literally hundreds if not thousands of other laws, rules and regulations to the agreement." *Id.* at 11-12. The Agency's argument rests on a flawed interpretation of the award. The Arbitrator found only that the parties' agreement incorporated

[6] We address the Agency's nonfact argument in Part V.D.

[7] The Agency also argues that the Arbitrator inappropriately applied the covered by doctrine in his analysis of Articles 7 and 28 of the parties' agreement. *See* Exceptions at 12. Those exceptions are addressed in Part V.E.

[8] We also address the Agency's nonfact argument in Part V.D. Because the Agency only identifies this exception as a nonfact exception, Member DuBester would resolve it on that basis only for reasons expressed supra in footnote five.

DoD and Air Force rules and regulations as they existed in 1999. *See* Award at 21. The Agency cites no language in the award that indicates the Arbitrator intended to incorporate every existing law, rule, and regulation into the agreement. Thus, the Agency's argument is misplaced, and we find that it does not provide a basis for finding the award deficient.

D. The award is not based on 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. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.* In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA 88, 92 (1995).

The Agency asserts that the award is based on a nonfact because the Arbitrator concluded that the parties' silence at the bargaining table regarding technician uniforms demonstrated that the parties intended to include this issue in their agreement. *See* Exceptions at 15. This claim is misplaced. Whether the Arbitrator determined that the parties' silence established that the issue of technician uniforms became a part of the agreement is immaterial because, even if true, it is not a central fact underlying the award that would have resulted in a different outcome had the Arbitrator decided that fact differently. As discussed in Part V.B, the Arbitrator did not rely on the parties' silence at the bargaining table to conclude that the issue of technician uniforms was a part of the parties' agreement; rather, he relied on what the parties actually included in the agreement. *See* Award at 22. Thus, the Arbitrator did not rely on the fact cited by the Agency. The Agency's argument, therefore, does not provide a basis for finding that the award is based on a nonfact. *See, e.g., U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 242-43 (2011) (because alleged nonfact was not central to award, Authority concluded that award was not deficient).

The Agency also contends that the award is based on a nonfact because the Arbitrator erroneously concluded that the issue of technician uniforms is covered by the parties' agreement within the meaning of the Authority's covered by doctrine. Exceptions at 12 (citation omitted). The Agency's argument is flawed because, as we held, the Arbitrator did not apply the covered by doctrine. Moreover, even if the Arbitrator did apply the covered by doctrine, the Agency's nonfact challenge would not provide a basis for finding the award deficient. When the determination alleged to constitute a nonfact is based on an interpretation of law, that determination cannot be challenged as a nonfact. *See, e.g., AFGE, Nat'l Border Patrol Council, Local 2455*, 62 FLRA 37, 40 (2007) (*AFGE*). An application of the covered by doctrine constitutes a legal conclusion, not a factual one. *See, e.g., U.S. Dep't of Homeland Sec., Customs & Border Prot., Wash., D.C.*, 63 FLRA 434, 438 (2009) (stating that issue of whether a matter is covered by a parties' agreement is a question of law) (citation omitted). Thus, the Agency's nonfact claim does not provide a basis for the finding the award deficient. *See AFGE*, 62 FLRA at 40.

E. The Agency's remaining exceptions

The Arbitrator found that his decision also was supported by: (1) his interpretation of Articles 7 and 28 of the parties' agreement, *see* Award at 23-24; and (2) the harm to employee morale that the uniforms would create, *see id.* at 22-23. The Agency presents several exceptions to these findings. The Agency argues that: (1) the award is based on a nonfact because the Arbitrator incorrectly found that this matter is covered by Articles 7 and 28 of the agreement, *see* Exceptions at 12; (2) the Arbitrator's interpretation of Article 28 fails to draw its essence from the agreement, ignores evidence, and assumes facts that are not in evidence, *see id.* at 15-16; and (3) the Arbitrator's assertion that uniforms would hurt employee morale was based on nonfacts, ignored evidence in the record, and fails to draw its essence from the agreement, *see id.* at 16-17.

We need not address these exceptions. The Authority has consistently recognized that, when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to have the award found deficient. *See, e.g., U.S. Dep't of Health & Human Servs., Food & Drug Admin., Pac. Region*, 55 FLRA 331, 336 (1999). In those circumstances, if the excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the Arbitrator, it is unnecessary to address exceptions to the other ground. *See, e.g., U.S. Dep't of Labor, Wash., D.C.*, 55 FLRA 1019, 1023 (1999) (Member Cabaniss dissenting in part). The Arbitrator based his award primarily on his interpretation of Article 3, Sections 1 and 2 of the parties' agreement, which was a separate and independent ground for his award. The Agency has not established that the Arbitrator's interpretation of these provisions is deficient. Because the Agency has failed to establish that this ground is deficient, we find that it is unnecessary to consider the Agency's challenges to the

Arbitrator's alternative grounds for his award.[9] *See, e.g., U.S. Dep't of Justice, Exec. Office for Immigration Review, Board of Immigration Appeals*, 65 FLRA 657, 660 (2011) (Member Beck concurring as to other matters) (citing *AFGE, Council of Prison Locals 33, Locals 1007 & 3957*, 64 FLRA 288, 291 (2009)).

VI. Decision

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

[9] In denying the Agency's exceptions to the Arbitrator's alternative grounds for the award, on the application of the "separate and independent grounds" standard, we express no view as to the merits of any of those grounds. We also note that this case is distinguishable from the U.S. Court of Appeals for the District of Columbia's Circuit's recent decision in *Federal Bureau of Prisons v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011), granting petition for review of *United States Department of Justice, Federal Bureau of Prisons, Washington, D.C.*, 64 FLRA 559 (2010) (*BOP*). In that decision, the court rejected the Authority's conclusion that an award was based on separate and independent grounds, finding that the award made no distinction between "the purportedly 'separate' statutory and contractual grounds for the award." *BOP*, 654 F.3d at 93. By contrast, in this case, the Arbitrator clearly distinguished the separate rationales on which he relied on to sustain the grievance. *See* Award at 22-23. Moreover, we note that the Arbitrator did not frame any issues involving statutory violations. *See id.* at 2.

APPENDIX

Article 3, "Legal Authority," of the parties' agreement states, in relevant part:

> Section 1: This agreement is governed by existing Federal laws, Government-wide rules or regulations, and Department of Defense or Department of the Air Force rules and regulations.
>
> Section 2: In the event of new or amended governing directives that affect or contradict certain Articles of this Agreement, the Union and Management may agree to negotiate implementation of the directives, which could result in a new amended article.
>
> Section 3: It is agreed by the Parties that when changes are made to governing directives above the installation level that establishes new personnel policies, practices or procedures not currently contained in this agreement, a new article will be appropriately negotiated to update the agreement.

Award at 3.

Article 7, Section 7, "Right of the Employees," states:

> Section 7: An Employee is accountable only for the performance of official duties and compliance with the standards of conduct for Federal Employees. Within this context, the Employer affirms the right of an Employee to conduct his or her private life as he or she deems fit. Employees shall have the right to engage in outside employment of their own choosing; however, they may be required by governing directives to report to the employer prior to engaging in such activities.

Id. at 4.

Article 28, Section 4, "Safety and Environmental Health," states:

> Section 4: Protective Safety Footwear shall be provided to all Employees working in areas, taskings,

> and operations, which are identified by the Employer as requiring protective footwear. If Employees are identified as mandated use of protective footwear, the Employer shall notify the Union to meet Bargaining Unit obligations.
>
> a. If Employees feel they need protective footwear based on their own assessment of the hazards associated with their occupation, they shall request the Personal Protective Equipment (PPE) through their Supervisor. Employee preference for use of protective footwear does not obligate or make it mandatory for others within the work center.
>
> b. Safety toe footwear shall be purchased through a distributor mutually acceptable to Organizational Commanders or designee and the Union. Employees may select from the distributors available shoes which meet ANSI Z 41 standards. The Employee selection on the installation may be made on duty time; if selection off the installation occurs, duty time will not exceed two hours in length. The Employer's cost shall not exceed $125.00. Any additional cost will be at the Employee's expense. The Employee may be required to pay applicable taxes on the amount above the Employer's cost. Protective footwear shall be replaced if it is deemed no longer serviceable.
>
> c. Employees with special footwear needs will be accommodated when they provide acceptable medical documentation.
>
> d. When work areas or occupations require the use of uncommon special protective footwear such as electrical hazard, non-conductive soles, chemical hazard etc., the Employer shall forego the price limitation in order to provide the specialized personal protective equipment.

Id. at 4-5.