

**71 FLRA No. 211**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
VETERANS BENEFITS ADMINISTRATION  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
NATIONAL VETERANS AFFAIRS COUNCIL #53  
(Union)

0-AR-5414

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Decision

November 16, 2020

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Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Chairman Kiko dissenting in part)

**I. Statement of the Case**

Arbitrator Jerome H. Ross issued an award finding that the Agency violated the parties' collective-bargaining agreement (CBA) when it ceased providing a ninety-day performance improvement plan (PIP) as a prerequisite for performance-based actions. As a remedy, the Arbitrator directed the Agency to rescind any adverse actions taken against bargaining-unit employees, including the reinstatement of any removed employees, who did not first receive a ninety-day PIP.

This case is unique in two respects. First, the circumstances present a question that has been addressed by the Authority only once before – whether the Authority lacks jurisdiction to consider the Agency's exceptions to the award under §§ 7122(a) and 7121(f) of the Federal Service Labor-Management Relations Statute (the Statute) when the issue as stated in the grievance is transformed to a different issue at arbitration.<sup>1</sup> Second, the issues raised herein juxtapose the central purpose and intent of the Veterans Affairs Accountability and Whistleblower Protection Act of 2017

(Accountability Act)<sup>2</sup> to expedite the removal of poor performing employees against existing provisions of the parties' CBA which were negotiated prior to the passage of the Accountability Act.

While potential ramifications of the grieved Agency action may be outside of our jurisdiction under § 7122(a) and § 7121(f), we have jurisdiction over the award in this case because the Union's grievance involves allegations of contractual and statutory violations.

The Agency argues that the award is contrary to law, the Arbitrator exceeded his authority, and the award fails to draw its essence from the parties' CBA. We find that the Agency has failed to demonstrate that the award is deficient on any of the grounds stated above. Accordingly, we deny the Agency's exceptions.

**II. Background and Arbitrator's Award**

The Union represents Veterans Service Representatives (VSRs) at the Agency. The VSRs investigate veterans' benefits claims and assist veterans with the development of the evidence to support their claims.

Article 27, Section 10 (Section 10) of the CBA, entitled "Performance Improvement Plan (PIP)," sets forth certain procedures to be followed when a supervisor determines that an employee is not meeting one or more of the critical elements in the employee's performance standards.<sup>3</sup> Specifically, Section 10 requires the Agency to provide a PIP of at least ninety days to resolve specific performance issues before the Agency may initiate a performance-based action. The Agency argues generally that the Accountability Act<sup>4</sup> supersedes any conflicting provisions of the CBA. Of particular note, the Agency argues that it is no longer required to provide the ninety-day performance improvement period specified in Section 10 to VSRs who are not meeting performance expectations. As such, the Agency began to issue letters to such employees that gave them two pay periods to bring their performance to the fully successful level and a warning that "failure to perform at 'expected levels' . . . may lead to adverse action up to and including termination."<sup>5</sup>

The Union filed a national-level grievance alleging that issuance of the letters violated Section 10, which governs the process for assessing bargaining unit

<sup>1</sup> 5 U.S.C. §§ 7122(a), 7121(f); *see generally* U.S. Dep't of the Air Force, *Hill Air Force Base, Utah*, 58 FLRA 476 (2003) (Chairman Cabaniss dissenting) (*Hill AFB*).

<sup>2</sup> Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41 (codified in relevant part at 38 U.S.C. § 714).

<sup>3</sup> Award at 4-8.

<sup>4</sup> 38 U.S.C. § 714.

<sup>5</sup> Award at 3-4.

employee performance; Article 47, requiring the Agency to bargain over changes to conditions of employment; and Article 2, requiring the Agency to comply with all federal statutes and regulations. The Agency denied the grievance, and the Union invoked arbitration.

The parties failed to agree to a stipulated issue, so the Arbitrator framed the issue as “[w]hether the [Agency’s] decision to replace the performance appraisal and improvement process outlined [in Section 10] . . . was consistent with applicable law[;] [i]f not, what shall the remedy be?”<sup>6</sup>

As relevant here, the Arbitrator found that the Accountability Act did not supersede Section 10 because the Accountability Act only provides the “time periods for notice, response, final decision, and appeal of ‘a removal, demotion, or suspension,’”<sup>7</sup> and nothing in the Accountability Act provides for what an Agency “may or should do *prior* to any decision to remove, demote, or suspend an employee based on performance.”<sup>8</sup> The Arbitrator further found that Section 10 required the Agency to take specific actions to address performance-related problems before resorting to any adverse action.<sup>9</sup> As such, the Arbitrator found that the Agency violated Section 10 by failing to provide PIPs and failing to provide ninety days to improve.

To remedy the violation, the Arbitrator ordered the Agency to comply with Section 10, rescind any performance-based adverse actions taken against bargaining-unit employees (BUEs) who did not first receive a PIP that complied with Section 10, and reinstate any such employees, including back pay, restored leave, and other benefits. The Arbitrator also awarded the Union attorney fees.

On September 24, 2018, the Agency filed exceptions to the award, and on October 3, 2018, the Union filed an opposition to the exceptions.

### **III. Preliminary Matter: The Authority has jurisdiction to resolve the Agency’s exceptions.**

After receiving the Agency’s exceptions, the Authority’s Office of Case Intake and Publication issued

a show-cause order, directing the Agency to demonstrate why the Authority should not dismiss the exceptions for lack of jurisdiction under § 7122(a) of the Statute.<sup>10</sup> Both the Agency and the Union filed pleadings in response to the show-cause order.<sup>11</sup>

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to resolve exceptions to an award “relating to” a matter described in § 7121(f) of the Statute.<sup>12</sup> Generally, such matters are “those matters covered under 5 U.S.C. §§ 4303 and 7512”<sup>13</sup> and are reviewable by the Merit Systems Protection Board (MSPB), and, on appeal, by the United States Court of Appeals for the Federal Circuit.<sup>14</sup> The Authority has determined that it is without jurisdiction under § 7121(f) when the matter is “inextricably intertwined with” a § 4303, § 7512, or similar matter.<sup>15</sup> In making this determination, the Authority looks, not at the outcome of the award<sup>16</sup> or allegations in the grievance,<sup>17</sup> but to whether the claim advanced in arbitration is one that would be reviewable by the MSPB or on appeal to the Federal Circuit.<sup>18</sup>

The grievance does not concern a matter described in § 7121(f) of the Statute. The gravamen of the Union’s grievance is that the Agency violated its duty to bargain in good faith under § 7116(a)(1) and (2) of the Statute<sup>19</sup> and three articles from the parties’ agreement – specifically Article 27, which governs the “process” for assessing bargaining unit employee performance; Article 47, requiring the Agency to bargain over changes to conditions of employment; and Article 2, requiring the

<sup>10</sup> Order to Show Cause at 1-2.

<sup>11</sup> We grant the Union’s request for leave to file and consider its reply to the Agency’s response. *E.g.*, *U.S. Dep’t of the Treasury, IRS, Austin, Tex.*, 70 FLRA 680, 682 n.15 (2018) (Member DuBester dissenting on other grounds) (granting leave to file a reply to a party’s response to a show-cause order where issue was whether award concerned a removal action). We do not consider the Agency’s supplemental submission, because the Agency failed to request leave to file that submission under § 2429.26 of the Authority’s Regulations. *See, e.g.*, *AFGE, Local 1738*, 63 FLRA 485, 485 n.1 (2009) (citing 5 C.F.R. § 2429.26).

<sup>12</sup> 5 U.S.C. § 7122(a).

<sup>13</sup> *Id.* § 7121(f).

<sup>14</sup> *AFGE Local 491*, 63 FLRA 307, 308 (2009) (*Local 491*); *Hill AFB*, 58 FLRA at 477.

<sup>15</sup> *U.S. Dep’t of VA, VA Caribbean Healthcare Sys.*, 71 FLRA 887, 887 (2020) (*VA Caribbean*).

<sup>16</sup> *Local 491*, 63 FLRA at 308.

<sup>17</sup> *Hill AFB*, 58 FLRA at 477 (“It is well established that the Authority looks at the claim advanced in arbitration, not the grievance, when determining its jurisdiction.”).

<sup>18</sup> *VA Caribbean*, 71 FLRA at 887 (citing *U.S. Dep’t of HUD*, 71 FLRA 720, 721 (2020) (Member DuBester concurring)); *AFGE, Local 2206*, 71 FLRA 938, 938 (2020) (citations omitted).

<sup>19</sup> 5 U.S.C. § 7116(a)(1) and (2).

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 22 (quoting Accountability Act, 38 U.S.C. § 714(c)).

<sup>8</sup> *Id.* at 22-23 (emphasis added).

<sup>9</sup> *Id.* at 20-21 (The Agency must “identify specific performance-related problems . . . ; develop a written PIP in consultation with the employee and local union representative; provide counseling, training, and other appropriate assistance . . . ; [and] afford the employee a reasonable opportunity of a least [ninety] calendar days to resolve the specific identified performance-related problems.”).

Agency to comply with all federal statutes and regulations.<sup>20</sup> In short, the grievance concerns *how* the Agency implemented certain provisions of the Accountability Act which the Union argues “exist[] alongside and independently from the requirements” of the parties’ agreement.<sup>21</sup> The Arbitrator describes the genesis of the issue before him: “[t]his arbitration . . . arose from the Agency’s decision to replace the [p]arties’ practices and procedures concerning performance appraisal and improvement with new processes and procedures.”<sup>22</sup> Therefore, the issue at arbitration was an institutional claim, which is properly before the Authority, because it involved the Union’s claim that the Agency violated the parties’ collective-bargaining agreement. Furthermore, the grievance is not “inextricably intertwined with” a § 4303, § 7512, or similar matter, because the fundamental nature of the grievance did not change, despite the fact that the Union introduced evidence *at arbitration* (over the Agency’s objection) that two employees had been “adversely affected” by the implementation of the Accountability Act procedures.<sup>23</sup>

We note that this case is distinguishable<sup>24</sup> from *U.S. Dep’t of the Air Force, Hill Air Force Base*,

*Utah (Hill AFB)*.<sup>25</sup> In that case, the grievant was placed on an indefinite suspension when he was ordered to undergo rehabilitation as required by the agency’s Drug and Alcohol Impairment Procedures.<sup>26</sup> In its grievance, the union argued that the agency did not apply the policy “fairly and equitably” and that the grievant should not have been indefinitely suspended.<sup>27</sup> Ultimately, after the filing of the grievance and before the arbitration, the grievant was determined to be “permanently unfit for duty.”<sup>28</sup> Although the initial grievance in *Hill AFB* attacked the indefinite suspension as it violated the negotiated policy, the grievance (by challenging the indefinite suspension of the grievant) and the arguments raised at arbitration (by asking that the grievant be reinstated after the agency determined him to be “permanently unfit for duty”) both concerned matters that are “reviewable by the MSPB and, on appeal, by the Federal Circuit.”<sup>29</sup> Here, although the Union introduced evidence *at arbitration* (over the Agency’s objection) that two employees had been “adversely affected” by the

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<sup>25</sup> 58 FLRA at 477. While Member Abbott agrees that *Hill AFB* is distinguishable from the present case, he believes that it was wrongly decided because it took an unreasonably narrow interpretation of § 7122(a) and an unreasonably broad view of § 7121(f). The dissenting opinion in *Hill AFB* noted the “unusual circumstance” presented by that case – “one party alleging that an arbitrator exceeded his or her authority by modifying an issue, that originally was subject to review by the Authority, into an issue that does not fall within the Authority’s § 7122(a) jurisdiction because of the exclusion from Authority review set out in § 7121(f).” *Id.* at 479 (Dissenting Opinion of Chairman Cabaniss). Member Abbott agrees with subsequent Members of the Authority who have shared the same concern. *See U.S. Dep’t of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project*, 65 FLRA 5, 8 (2010) (Dissenting Opinion of Member Beck) (“The validity of the policy is a question *separate and distinct* from the propriety of the grievant’s removal and is a *matter over which the Authority* – and not the MSPB – *has jurisdiction*. Jurisdiction of the Board is limited strictly to those matters over which it has been given jurisdiction by law, rule, or regulation . . . . The Board’s jurisdiction does not extend, in general, to matters that involve an agency’s policies and conditions of employment.”) (citations omitted) (emphasis added); *U.S. DHS, U.S. CBP*, 66 FLRA 91, 94 (2011) (Dissenting Opinion of Member Beck) (“Nor is the Arbitrator’s determination about desk duties inextricably intertwined with the Agency’s decision to terminate the grievant’s employment. Obviously, the grievant could have been placed on desk duty without later being terminated, and could have been terminated without first being placed on desk duty . . . . Simply put, the grievance about desk duty is easily distinguished from the grievant’s eventual termination. Therefore, we are not precluded by § 7121(f) from reviewing the Agency’s exceptions that challenge the Arbitrator’s determination on that matter and his award of lost overtime.”).

<sup>26</sup> *Hill AFB*, 58 FLRA at 476.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 479.

<sup>29</sup> *Id.* (citing *U.S. DOJ, Fed BOP, Fed. Det. Ctr., Miami, Fla.*, 57 FLRA 677, 678 (2002)).

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<sup>20</sup> Exceptions, Ex. 4, Union Grievance (Grievance) at 6.

<sup>21</sup> *Id.* at 2.

<sup>22</sup> Award at 1.

<sup>23</sup> Award at 17-18.

<sup>24</sup> Member Abbott notes that it is important for the Authority to distinguish cases in order to provide clarity to the federal labor relations community. *See NTEU*, 70 FLRA 701, 701 n.4 (2018) (Member Abbott noting that one of his foremost objectives is “to bring ‘clarity’ to decisions which are issued by the Authority and to ensure that [Authority] decisions [are] written in such a manner that they could be understood by the federal labor-management relations community.”).

implementation of the Accountability Act procedures,<sup>30</sup> the fundamental nature of the grievance did not change. At all times, it concerned how the Agency implemented the new procedures under the Accountability Act, whether the Agency had a duty to bargain that implementation, and whether and to what extent the Accountability Act superseded Section 10—matters that fall squarely within the Authority’s jurisdiction and over which the MSPB has no authority whatsoever.

Our decision that our jurisdiction is not precluded by § 7121(f) under the circumstances of this case is consistent with our recent decision in *U.S. DOD, Defense Logistics Agency (DLA)*.<sup>31</sup> Although not explicitly discussed, the Authority had jurisdiction in that case, which provided reinstatement as a remedy, because the grievance involved violations of the parties’ agreement based on the Agency’s denial of the grievant’s request to telework from another state.<sup>32</sup> Therefore, we conclude that § 7121(f) does not preclude our review of the merits of the Agency’s exceptions.

#### IV. Analysis and Conclusions

##### A. The award is consistent with law.

The Agency argues that the award is contrary to law because the Accountability Act supersedes Section 10, and that it is contrary to the Statute because it excessively interferes with management’s rights to assign work and direct employees. The Authority reviews questions of law de novo.<sup>33</sup> In conducting a de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.<sup>34</sup>

##### 1. Section 10 of the parties’ CBA is not contrary to the Accountability Act

The Agency argues that Section 10 is contrary to the Accountability Act, and therefore, that it did not violate the CBA by failing to provide PIPs and a ninety-day improvement period.<sup>35</sup> As the Arbitrator correctly found, the Accountability Act provides for timelines regarding the notice, response, and final decision in a *removal, demotion, or suspension* of a covered employee for performance or misconduct, which is not the issue contested here – PIPs.<sup>36</sup> Further, the Accountability Act does not specify what actions an agency can or cannot do *prior* to providing notice of a removal, demotion, or suspension.<sup>37</sup> Section 10’s requirements must occur *before* the Agency initiates a performance-based action, as distinguished from the procedures/timelines of the Accountability Act, which govern *after* it has initiated the performance-based action.<sup>38</sup> This conclusion is consistent with the purpose of a PIP, which is to provide an employee an opportunity to improve his or her performance *prior* to receiving a performance-based adverse action.<sup>39</sup> Therefore, Section 10, which requires the Agency to give an employee a PIP and ninety days to improve *prior* to initiating a performance-based action, is not contrary to the Accountability Act.<sup>40</sup> Accordingly, we deny the Agency’s contrary to law exception.

<sup>35</sup> Exceptions Br. at 13-19.

<sup>36</sup> 38 U.S.C. § 714(c); Award at 22-23.

<sup>37</sup> 38 U.S.C. § 714.

<sup>38</sup> The dissent ignores this distinction and erroneously concludes that the contractual requirement of a PIP before a performance-based adverse action commenced is part of the procedures governed by the Accountability Act. The Accountability Act provides that when the Agency *takes an adverse action* against an employee, the “aggregate period for notice, response, and final decision . . . may not exceed [fifteen] business days.” *Id.* § 714(c)(1)(A). Therefore, the Accountability Act governs the timeline *after* the Agency has actually taken *the adverse action* – not the procedures, in this case contractual requirements, required *before* an adverse action.

<sup>39</sup> Exceptions, Ex. 2, Master CBA at 134-35.

<sup>40</sup> The Agency’s other contrary-to-law exceptions are based on its assertion that the Accountability Act expressly states that “[t]he procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section.” Exceptions Br. at 13 (quoting 38 U.S.C. § 714(c)(3)); *id.* at 14-18 (arguing that a period for improvement is a procedural requirement provided by chapter 43 of title 5). However, this does not change the analysis regarding the applicability of the Accountability Act to Section 10 because the Accountability Act deals with timelines and procedures once an agency takes an adverse action, not actions *prior* to the Agency providing notice of a removal, demotion, or suspension.

<sup>30</sup> Award at 17-18.

<sup>31</sup> 70 FLRA 932 (2018) (Member DuBester dissenting); *see also U.S. DHS, U.S. CBP*, 66 FLRA 91, 94 (2011) (Dissenting Opinion of Member Beck) (presciently arguing that a later-introduced issue (indefinite suspension) that can be easily distinguished from an issue appropriately before the Authority (administrative desk duty) should not become means to rid an excepting party of review). Member Abbott also observes that jurisdiction is always at issue – without jurisdiction, we cannot act - ever.

<sup>32</sup> *DLA*, 70 FLRA at 933.

<sup>33</sup> *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)).

<sup>34</sup> *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party established that they are nonfacts. *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).

2. The award does not excessively interfere with management's rights to assign work and direct employees.

The Agency also argues that the award excessively interferes with its rights to assign work and direct employees under § 7106(a)(2) of the Statute.<sup>41</sup> First, the Agency argues that the awarded remedy – requiring the Agency to rescind any adverse action taken against any BUE for unacceptable performance who did not first receive a PIP and reinstate all affected BUEs with backpay and benefits – is not reasonably and proportionally related to the found violation because it is beyond the scope of the grievance.<sup>42</sup> The Arbitrator found that the Agency violated Section 10 by failing to provide BUEs with PIPs and ninety days to improve prior to initiating an adverse action.<sup>43</sup> The remedy, which requires the Agency to rescind the adverse actions it took without following the parties' CBA, is reasonably and proportionally related to the found violation because it merely requires the Agency to initiate performance-based actions pursuant to the provision of the parties' CBA it agreed to.<sup>44</sup> Accordingly, we deny this exception.

The Agency also argues that the award excessively interferes with its rights to supervise and evaluate employee performance because it prohibits the Agency from providing “any communication or correspondence to an employee advising them that they are not meeting expectations.”<sup>45</sup> While the Agency is correct in asserting that management has the right to

supervise and evaluate employees,<sup>46</sup> it is incorrect in claiming that the award excessively interferes with this right.<sup>47</sup> Instead, the award requires the Agency to comply with Section 10 – in that it must provide employees a PIP and ninety calendar days to improve before initiating a performance-based action.<sup>48</sup> Because the award merely requires the Agency to comply with a provision it agreed to, it cannot excessively interfere with its management right to supervise and evaluate employees.<sup>49</sup> Accordingly, we deny this exception.<sup>50</sup>

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<sup>41</sup> Exceptions Br. at 9-12. See *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 405-06 (2018) (*DOJ*) (Member DuBester dissenting). As the majority found in *DOJ*: In determining whether an award excessively interferes with a management right, the Authority will apply a three-part test. *Id.* “The first question that must be answered is whether the arbitrator has found a violation of a contract provision. If the answer to that question is yes, then the second question is whether the arbitrator’s remedy reasonably and proportionally relates to that violation. If the answer to any of these questions is no, then the award must be vacated. But, if the answer to the second question is yes, then the final question is whether the arbitrator’s interpretation of the provision excessively interferes with a § 7106(a) management right. If the answer to this question is yes, then the arbitrator’s award is contrary to law and must be vacated.” *Id.*

<sup>42</sup> Exceptions Br. at 11.

<sup>43</sup> Award at 22.

<sup>44</sup> See *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 792, 793 (2018) (Member DuBester dissenting) (finding an award allowing a grievant to remain in the same position if another employee volunteered to be reassigned, as required by the *Memorandum of Understanding and the parties’ CBA*, was reasonably and proportionally related to the violation).

<sup>45</sup> Exceptions Br. at 12.

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<sup>46</sup> See *SSA, Office of Hearings Operations*, 71 FLRA 589, 591 (2020) (*SSA*) (Member DuBester dissenting in part) (citations omitted) (finding that management has “the right to establish performance standards in order to supervise and determine the quantity, quality, and timeliness of work required of employees”).

<sup>47</sup> Exceptions Br. at 12.

<sup>48</sup> Award at 24. See also Exceptions, Ex. 2, Master CBA at 134-35.

<sup>49</sup> See *Ass’n of Civilian Technicians, Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1155-56 (D.C. Cir. 1994) (finding “[t]he nonnegotiability of management rights enumerated in [§ 7106](a) is expressly ‘[s]ubject to [7106](b)’” and finding “the agreement cannot subsequently be deemed unlawful . . . simply because it pertains to a permissible – rather than mandatory – subject of [bargaining]”); *U.S. DHS, U.S. CBP, Laredo Field Office, Hidalgo Port of Entry*, 70 FLRA 216, 218 (2017) (finding remedy not contrary to law because it enforced a provision negotiated pursuant to 5 U.S.C. § 7106(b)(2)); *AFGE, Council 220*, 65 FLRA 726 (2011) (Member Beck concurring) (explaining that “a contract provision interpreted so as to affect the exercise of a management right is contrary to law, as interpreted, unless it was negotiated under § 7106(b)”; see also *AFGE, Local 1156*, 63 FLRA 340, 341 (2009) (finding that a proposal concerning PIPs was an appropriate arrangement under 5 U.S.C. § 7106(b)(3)).

<sup>50</sup> Member DuBester notes that he continues to disagree with the application of *DOJ*. However, to avoid impasse, and because the same result would occur with the application of the abrogation test, he agrees to join the majority in finding that the award does not excessively interfere with management’s rights. See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Tallahassee, Fla.*, 71 FLRA 622, 625 (2020) (Dissenting Opinion of Member DuBester) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596, 598-99 (2018) (Dissenting Opinion of Member DuBester); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 445 (2018) (Concurring Opinion of Member DuBester); *U.S. DOJ, Fed. BOP*, 70 FLRA 409-12 (Dissenting Opinion of Member DuBester)).

- B. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority<sup>51</sup> by resolving an issue not submitted to arbitration<sup>52</sup> and by awarding relief beyond the identified grievants.<sup>53</sup>

The Agency argues that the Arbitrator exceeded his authority by resolving an issue not submitted to arbitration because he framed the issue in such a way as to transform “the issue presented by the grievance into a distinct, immensely broad, and factually inaccurate issue beyond the scope of the grievance.”<sup>54</sup> Simply put, the Agency excepts to the Arbitrator’s framing of the issue.<sup>55</sup> The Authority has held that when parties do not agree to the issues to be submitted to arbitration, the Arbitrator has the discretion to frame them,<sup>56</sup> and we typically defer to the exercise of that discretion.<sup>57</sup> Here, the parties could not agree to the issue; therefore, the Arbitrator framed the issue as “[w]hether the [Agency’s] decision to replace the performance appraisal and improvement process outlined by Article 27, Section 10 of the [CBA] was consistent with applicable law.”<sup>58</sup> The Agency complains that the issue is not the same as the issue in the grievance;<sup>59</sup> however, the grievance clearly provides that the Union believed “the performance assessment program spelled out in the [letters] violate[] Article 27 in several areas” and “amount to a repudiation of the . . . performance appraisal and performance approval

process.”<sup>60</sup> Therefore, the Arbitrator did not exceed his authority in framing the issue because it accurately reflects the issues contained in the grievance.

The Agency also argues that the Arbitrator exceeded his authority by awarding relief beyond the identified grievants because the remedy applies to all BUEs, not just the affected VSRs.<sup>61</sup> The Authority has held that an arbitrator does not exceed his authority by awarding a particular remedy so long as it is responsive to the harm caused by the Agency’s violation.<sup>62</sup> In the award, the Arbitrator found that “[t]he Agency violated [Section 10] when it failed to provide PIPs to [BUEs].”<sup>63</sup> As a remedy, the Arbitrator ordered the Agency to rescind any performance-based adverse actions taken against BUEs who did not first receive a PIP that complied with Section 10, and reinstate any such employees, including back pay, restored leave, and other benefits.<sup>64</sup> This is responsive to the harm caused by the Agency’s failure to provide PIPs to BUEs.<sup>65</sup> Therefore, we deny the Agency’s exception.<sup>66</sup>

<sup>51</sup> The Authority will find that an arbitrator exceeded his or her authority when he or she fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to those not encompassed within the grievance. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

<sup>52</sup> Exceptions Br. at 20-23.

<sup>53</sup> *Id.* at 23-25.

<sup>54</sup> Exceptions Br. at 20. The Agency also argues the remedy excessively interferes with management’s rights because it is beyond the scope of the grievance. *Id.* at 11. For the same reasons discussed in this section, we deny this exception. See *AFGE, Local 1698*, 70 FLRA 96, 99 (2016) (citing *Indep. Union of Pension Emp. For Democracy & Justice*, 68 FLRA 999, 1007 (2015)) (denying exceptions that were based on previously denied exceptions).

<sup>55</sup> We note that Article 44, Section 2(F) of the parties’ CBA provides that if the parties cannot agree to a joint statement of the issue or issues, the arbitrator shall determine the issue or issues to be heard. Exceptions, Ex. 2, Master Agreement (CBA) at 235.

<sup>56</sup> *U.S. Dep’t of VA, Med. Ctr. Richmond, Va.* 70 FLRA 900, 901 (2018) (Member DuBester concurring) (citing *AFGE, Council 215*, 66 FLRA 137, 141 (2011)).

<sup>57</sup> *U.S. Dep’t of Transp., FAA., Mike Monroney Aeronautical Ctr.*, 70 FLRA 256, 257 (2017) (citing *NTEU*, 70 FLRA 57, 58 (2016)).

<sup>58</sup> Award at 2.

<sup>59</sup> Exceptions Br. at 20-23.

<sup>60</sup> Grievance at 3.

<sup>61</sup> Exceptions Br. at 23-25.

<sup>62</sup> *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 862 (2012) (Chairman Pope dissenting in part) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 66 FLRA 388, 391 (2011)); *U.S. DOL, Bureau of Labor Statistics, Wash., D.C.*, 59 FLRA 533, 535 (2003) (*DOL*) (denying exceeds-authority exception because remedy was responsive to the violations and appropriate).

<sup>63</sup> Award at 21.

<sup>64</sup> *Id.* at 24.

<sup>65</sup> See *SSA*, 71 FLRA at 590 (finding that an arbitrator did not exceed her authority by awarding a remedy that addressed the harm caused by the agency); see also *id.* at 590 n.9 (citing *DOL*, 59 FLRA at 534) (“When an exception concerns whether the remedy awarded by the arbitrator exceeded the arbitrator’s authority, both the Authority and Federal courts have consistently emphasized the broad discretion to be accorded arbitrators in the fashioning of appropriate remedies.”).

<sup>66</sup> Member Abbott notes that the Arbitrator found that “the Union filed a national-level grievance on behalf of ‘any employee adversely affected by’ the Agency’s distribution of letters to each [VSR] employed by the Agency.” Award at 2 (emphasis added). Further, the Arbitrator found that “[t]he Agency violated these requirements when . . . it issued [Office of Field Operations (OFO)] Letters to VSRs informing them of their performance . . . [without informing them] that they would receive a PIP.” *Id.* at 22. Therefore, when the Arbitrator used the term “bargain[ing]-unit employees” in the remedy portion of the award, he clearly meant the affected VSRs. See *U.S. DHS, U.S. CBP*, 71 FLRA 243, 246 (2019) (Member Abbott concurring) (citing *U.S. Dep’t of the Army, U.S. Corps of Eng’rs, Nw. Div.*, 65 FLRA 131, 133 (2010)) (finding that if a grievance is limited to a particular individual, then the remedy must be similarly limited). However, to avoid impasse, he agrees with the rationale expressed in the majority for finding that the Arbitrator did not exceed his authority.

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

The Agency argues that the award fails to draw its essence<sup>67</sup> from the parties' CBA because the Arbitrator "effectively consolidated [two] grievances" in violation of Article 43, Section 10 of the parties' CBA.<sup>68</sup> The Agency is merely recasting its exceeds-authority exception regarding the framing of the issue at arbitration as an essence exception.<sup>69</sup> Furthermore, the Agency fails to point to any part of the record that demonstrates that the Arbitrator consolidated the grievances, but instead asserts that by allowing testimony and evidence that would fall within the scope of a subsequent grievance, the Arbitrator "effectively consolidated [the] grievances."<sup>70</sup> As such, we deny this exception.<sup>71</sup>

V. Order

We deny the Agency's exceptions.

<sup>67</sup> The Authority will find an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 661 n.11 (2020) (Member DuBester dissenting) (citing *U.S. Dep't of Treasury, IRS, Office of Chief Counsel*, 70 FLRA 783, 785 n.31 (2018) (Member DuBester dissenting); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

<sup>68</sup> Exceptions Br. at 26-27; CBA at 233 ("Multiple grievances over the same issue may be initiated as either a group grievance or as single grievances at any time during the time limits of Step 1. Grievances may be combined and decided as a single grievance at the later steps of the grievance procedure by mutual consent.").

<sup>69</sup> Exceptions Br. at 26-28; Exceptions, Attach. 6, Tr. at 11 (arguing that anything beyond the scope of the OFO letters would be beyond the scope of the grievance); *id.* at 13 (discussing the issue to be submitted to arbitration); *id.* at 26 (discussing the "second grievance" that the Agency thinks is beyond the scope of the issue to be submitted to arbitration); *id.* at 91-96 (arguing about the introduction of evidence because it was beyond the scope of the grievance/issue at arbitration); *id.* at 98 (same); *id.* at 103 (same); *id.* at 106 (same).

<sup>70</sup> Exceptions Br. at 26-28; *see also* 5 C.F.R. § 2425.6(e)(1) (An exception "may be subject to dismissal or denial if . . . [t]he party fails to . . . support a ground.").

<sup>71</sup> *NTEU*, 62 FLRA 45, 48 (2007) (denying an exceeds-authority exception because it merely recast the essence exception denied above).

**Chairman Kiko, dissenting in part:**

I disagree with the majority's conclusion that the award is consistent with the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (the Accountability Act).<sup>1</sup> The Accountability Act provides that when the Department of Veterans Affairs (VA) takes an adverse action against an employee, the "aggregate period for notice, response, and final decision . . . may not exceed [fifteen] business days,"<sup>2</sup> and that fifteen-day "procedure[] . . . shall supersede any collective[-]bargaining agreement to the extent that such agreement is inconsistent with such procedures."<sup>3</sup>

Here, Article 27, Section 10 of the parties' agreement (Section 10) prevents the Agency from taking adverse actions within the Act-mandated fifteen days by requiring it to first offer employees a performance improvement plan (PIP) of "at least [ninety] calendar days."<sup>4</sup> Yet, the Arbitrator found that the Accountability Act did not supersede Section 10.<sup>5</sup> In upholding the Arbitrator's award, the majority shuns its responsibility to enforce the Accountability Act according to its unambiguous terms.<sup>6</sup> Instead, the majority interprets the Act as distinguishing between procedures that "occur before the Agency initiates" an adverse action and procedures that "govern after it has initiated the [adverse] action."<sup>7</sup> This interpretation, however, is simply incompatible with the plain wording of the Accountability Act. A PIP – like the one required by Section 10 – is a procedure related to an adverse action, and the Accountability Act does not differentiate between procedures based on *when* they occur.<sup>8</sup> By concluding otherwise,<sup>9</sup> and holding that a PIP falls outside the coverage of the Accountability Act, the majority

<sup>1</sup> 38 U.S.C. § 714.

<sup>2</sup> *Id.* § 714(c)(1)(A) (emphasis added). The Authority has held that the Accountability Act "leaves no discretion for the [VA] on the timeline in a[n] adverse action." *AFGE, Nat'l VA Council #53*, 71 FLRA 410, 411 (2019) (*Council #53*) (Member DuBester concurring).

<sup>3</sup> 38 U.S.C. § 714(c)(1)(D) (emphasis added).

<sup>4</sup> Award at 21-22 (emphasis added).

<sup>5</sup> *Id.* at 22-23.

<sup>6</sup> *See U.S. GPO, Wash., D.C.*, 51 FLRA 1088, 1092 (1996) (where a statute's wording is plain, "the 'sole function of the courts is to enforce it according to its terms'" (quoting *U.S. v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989))).

<sup>7</sup> Majority at 6-7.

<sup>8</sup> 38 U.S.C. § 714(c)(1)(D) (stating only that "[t]he procedures in this subsection shall supersede any collective[-]bargaining agreement . . . inconsistent with such procedures").

<sup>9</sup> Majority at 7 (finding that a PIP is "distinguished from the procedures/timelines of the Accountability Act" because it occurs "prior to [the Agency] initiating a[n] adverse] action").

effectively extends the Act's fifteen-day expedited procedure into an elongated 105-day enterprise.

The majority's argument in favor of a before-and-after distinction is well understood.<sup>10</sup> What remains unclear is why the majority would prefer to engage in a line-drawing exercise, one that epitomizes the type of "technical hair splitting" that the Authority has repeatedly admonished, rather than apply the Accountability Act's plain meaning.<sup>11</sup>

The Accountability Act also states that the "procedures under chapter 43 of title 5," which includes 5 U.S.C. § 4302, "shall not apply to a removal, demotion, or suspension under this section."<sup>12</sup> Section 4302 provides for the administration of a PIP for certain federal employees.<sup>13</sup> Despite the Act expressly prohibiting procedures in that section from applying to VA-initiated adverse actions, the Arbitrator relied on § 4302 to conclude that a PIP was permissible.<sup>14</sup> Giving token consideration to this issue, the majority simply echoes its refrain that the Accountability Act contains an unwritten, yet somehow crystal-clear, distinction between procedures occurring before and after the Agency initiates an adverse action.<sup>15</sup>

Moreover, the majority's analysis does not even consider the Accountability Act's intent and purpose. The Act's legislative history demonstrates a clear intent to streamline the VA's cumbersome process for taking adverse actions against employees unfit to serve our nation's veterans due to poor performance or misconduct.<sup>16</sup> Before the passage of the Accountability

Act, the VA reported that it could "take up to a year to remove or discipline" employees, including some who had "participated in an armed robbery" or "participated in a veteran's surgery while intoxicated."<sup>17</sup> In the instant case, the Agency proposed to remove two employees who were below fully satisfactory in the critical element "Output" by 36% over seven months and 58% over six-months, failing to achieve fully satisfactory during any month within the evaluation period.<sup>18</sup> Despite receiving numerous counselings, one employee rejected the Agency's offer for additional training.<sup>19</sup> The majority's approach hinders the VA's ability to remove employees like these. And, in fact, by condoning a seven-fold or greater increase to the time limit for processing adverse actions under the Accountability Act, the majority expressly defeats Congress's stated purpose when passing the Act: giving the Secretary "the tools he needs to *swiftly* and effectively discipline employees who don't meet the standards our veterans deserve."<sup>20</sup>

Applying the Accountability Act's plain and unambiguous wording, it is clear that the Act supersedes Section 10's ninety-day PIP requirement. Any PIP that precludes the VA from taking an adverse action within fifteen days – whether required by a collective-bargaining agreement or Chapter 43 of title 5 – is impermissible under the Accountability Act.<sup>21</sup>

Accordingly, I would set aside the award as contrary to the Accountability Act.<sup>22</sup>

<sup>10</sup> *Id.* at 7 n.38.

<sup>11</sup> See *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va., 70 FLRA 512, 515 (2018) (Navy) (Member DuBester dissenting)* (stating that the Authority would no longer entertain the "technical hair-splitting and artful pleading" of parties to manipulate the plain wording and intent of a statute); see also *U.S. DOD, Educ. Activity, 71 FLRA 900, 902 n.20 (2020) (Member Abbott concurring; Member DuBester dissenting)* (affirming that the Authority "refuse[s] to engage" in "technical hair splitting"); *SSA, Office of Hearings Operations, 71 FLRA 123, 124 (2019) (Member DuBester dissenting)* ("We do not believe that Congress intended for the application of election-of-forum provisions . . . to be based on . . . technical hair-splitting and artful pleading." (internal quotation marks omitted)).

<sup>12</sup> 38 U.S.C. § 714(c)(3) (emphasis added).

<sup>13</sup> 5 U.S.C. § 4302(c)(5)-(6) (requiring agencies to set up performance appraisal systems that "assist[] employees in improving unacceptable performance," and permit adverse actions "only after an opportunity to demonstrate acceptable performance" has been given).

<sup>14</sup> Award at 23.

<sup>15</sup> Majority at 7 n.40.

<sup>16</sup> See 163 Cong. Rec. H4867-03 (daily ed. June 13, 2017) (statement of Rep. Yoder) (stating that the Accountability Act

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will "create a more efficient and effective system to remove, demote, or suspend any VA employee for poor performance or misconduct"); 163 Cong. Rec. S3268 (daily ed. June 6, 2017) (statement of Sen. Isakson) (explaining that the Accountability Act "gives [the] VA the authority to expedite the removal of a bad employee" by "shorten[ing] the process for removing an employee to [fifteen] days"); 163 Cong. Rec. H2114 (daily ed. Mar. 16, 2017) (statement of Rep. Roe) (noting that under the Accountability Act, the "prenotification and response process [for adverse actions] would be required to be completed within [fifteen] business days"); see also H.R. Rep. No. 115-34, 115th Cong., 1st Sess. 4 (2017) ("[I]t would defy common sense to have the expedited provisions of this bill superseded by a process [in a collective-bargaining agreement] that can take 349 days or more.").

<sup>17</sup> 163 Cong. Rec. H2174-03 (daily ed. Mar. 17, 2017) (statement of Rep. LaMalfa).

<sup>18</sup> Opp'n, Union Ex. 1 at 2; Opp'n, Union Ex. 2 at 5.

<sup>19</sup> Opp'n, Union Ex. 2 at 1.

<sup>20</sup> 163 Cong. Rec. H2114 (daily ed. Mar. 16, 2017) (statement of Rep. Roe) (emphasis added).

<sup>21</sup> 38 U.S.C. § 714(c)(1)(D), (c)(3); see also *Navy, 70 FLRA at 515 & n.28 (emphasizing that the Authority must give effect to a statute's "plain meaning")*.

<sup>22</sup> See *Council #53, 71 FLRA at 412-13* (vacating award as contrary to law where the award was inconsistent with the plain wording and intent of the Accountability Act).