

**72 FLRA No. 101**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
(Agency)

and

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

0-AR-5686

DECISION

December 10, 2021

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

**I. Statement of the Case**

This case involves a dispute over whether the Agency was required to adhere to a Memorandum of Understanding (MOU) regarding the smoking policy at Agency health care facilities. Arbitrator Mary P. Bass found that the Agency repudiated the MOU when it revised its smoking policy. The Agency argues that the award fails to draw its essence from the MOU, is based on nonfacts, and is contrary to law. Because the Agency fails to demonstrate that the award is deficient on any of these grounds, we deny the exceptions. We also dismiss one of the Agency's arguments because it is barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations.

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

The Agency and the Union entered into a MOU concerning the implementation of a new smoking policy on July 30, 2008. The MOU provided for designated smoking areas at Agency health care facilities available

to bargaining unit employees (BUEs).<sup>1</sup> On August 26, 2008, the Agency implemented Agency Directive 2008-052, "Smoke-Free Policy for VA Health Care Facilities" (Directive 2008),<sup>2</sup> which, consistent with the MOU, provided for designated smoking areas that BUEs could use.<sup>3</sup> The Agency rescinded Directive 2008 on February 10, 2017; however, the parties continued to follow the MOU.

On December 15, 2017, the Agency notified the Union of its intent to renegotiate the parties' master collective bargaining agreement. The parties started the negotiation process. On March 20, 2019, during term negotiations, the Agency notified the Union of its intent to publish VHA Directive 1085.01 (Directive 2019), which provides that "[Agency] health care facilities will be smoke free for employees."<sup>4</sup> On April 20, 2019, the Union notified the Agency that any negotiations concerning Directive 2019 would need to be addressed in term bargaining. However, neither party submitted proposals concerning smoking on Agency premises during term bargaining.

The Agency issued Directive 2019 on August 8, 2019, and implemented it on October 1, 2019. The Union filed a grievance on August 19, 2019, alleging that the Agency violated the parties' agreement, past practice,

<sup>1</sup> Exceptions, Ex. 3, Memorandum of Understanding (MOU) at 1 (The MOU states that "[t]he national parties agree that [BUEs] will continue to be provided with reasonably accessible designated smoking areas. Whenever practicable, smoking areas should not be within [thirty-five] feet of an entrance to a VA health care building or office building that is routinely used by patients, residents, employees or staff. Where an established smoking area has been located within [thirty-five] feet of an entrance due to space constraints or other logistical limitations, such smoking area need not be relocated to comply with this provision or the subject Directive. [BUEs] will be permitted to smoke outside on the grounds so long as they avoid smoking around routinely used building entrances. Appropriate signage will be installed to clarify where smoking is not permitted. The appropriate management official shall provide the local Union President with a copy of this MOU upon receipt.")

<sup>2</sup> Exceptions, Ex. 2, Smoke-Free Policy for VA Health Care Facilities (Directive 2008) at 1.

<sup>3</sup> *Id.* at 3 (providing that each VA health care facility is responsible for ensuring "[e]ach health facility has an area in a detached building as a smoking area for patients or residents . . ."); *id.* at 4 (providing "[w]henver possible . . . there should not be any outside smoking or areas in detached buildings within [thirty-five] feet of any entrance to a health care or office building that is routinely used by patients, residents, employees or staff"); *id.* ("Appropriate signage must be installed making it clear that smoking at entrances is not permitted. This is to include . . . posting signs at each entrance to a VA health care facility indicating that the facility is smoke-free and that smoking is only allowed in the designated smoking areas.")

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

and 5 U.S.C. § 7116(a) by repudiating the MOU and implementing Directive 2019. The Agency denied the grievance, and the Union invoked arbitration.

The parties stipulated to the following issue: “[w]hether the Agency violated [the] law or contract by implementing [Directive 2019] as applied to [BUEs]. If so, what shall be the remedy?”<sup>5</sup>

The Arbitrator determined that the MOU was an existing agreement between the parties because there was no expiration clause. The Arbitrator further found that the rescission of Directive 2008 did not invalidate the MOU because the MOU was executed before Directive 2008 was issued, and the MOU was a contract that could not be canceled by unilateral action.

The Arbitrator also determined that the MOU provides for “designated smoking areas on Agency premises,” whereas Directive 2019 “eliminates smoking on [Agency] premises entirely.”<sup>6</sup> Accordingly, the Arbitrator concluded that the MOU and Directive 2019 concerned the same subject matter – “whether and where BUE smoking on Agency premises will be permitted.”<sup>7</sup> And because the subject matter of Directive 2019 was covered by the MOU, the Arbitrator found that the Union was not required to mid-term bargain the Agency’s proposed new policy.

The Arbitrator also rejected the Agency’s argument that it could unilaterally implement Directive 2019 as an exercise of management’s right to determine internal security practices under 5 U.S.C. § 7106(a)(1).<sup>8</sup>

Finally, relying on the parties’ stipulation that the Agency had “rejected entirely” the MOU when it implemented Directive 2019, the Arbitrator concluded that the Agency repudiated the MOU.<sup>9</sup> As such, the Arbitrator found that the Agency “violated law and contract by implementing [Directive 2019] as it applied to [BUEs]” and that it “repudiated the [MOU] . . . in violation of 5 U.S.C. §§ 7116(a)(1) and (a)(5).”<sup>10</sup> As a remedy, the Arbitrator ordered the Agency to rescind, and cease and desist implementation of Directive 2019. Further, the Arbitrator ordered that the Agency comply with the MOU and post a notice.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 10.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 14-15 (noting that the Agency neither cited any case holding that smoking “is a topic subject to managerial prerogative” nor established the requisite link between a security objective and the smoking policy).

<sup>9</sup> *Id.* at 16.

<sup>10</sup> *Id.* at 17.

On December 10, 2020, the Agency filed exceptions to the Arbitrator’s award, and on January 5, 2021, the Union filed an opposition to the exceptions.

### III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar one of the Agency’s arguments.

The Agency argues that it did not commit an unfair-labor-practice because its “reliance on the plain language of the [MOU] is a reasonable interpretation and does not establish a clear and patent breach of the [MOU].”<sup>11</sup> The Authority will not consider any evidence or arguments that could have been, but were not, presented to the Arbitrator.<sup>12</sup> There is no indication in the record that the Agency raised this argument below. Because the Agency could have raised this argument to the Arbitrator, but did not, we dismiss it.<sup>13</sup>

### IV. Analysis and Conclusions

A. The award does not fail to draw its essence from the parties’ agreement.

The Agency argues that the award fails to draw its essence from the MOU because it disregards the plain language of the MOU.<sup>14</sup> Specifically, the Agency contends the Arbitrator should have concluded that the MOU was invalidated by the rescission of Directive 2008, because, according to the Agency, the MOU “concerns and is inextricably intertwined” with Directive 2008.<sup>15</sup>

The Authority has held that a party’s attempt to relitigate its preferred interpretation of an agreement does

<sup>11</sup> To the extent the Agency argues that finding the MOU became ineffective when Directive 2008 was rescinded is *consistent* with public policy, we dismiss it for failure to raise a recognized ground for setting aside an award. *See* Exceptions Br. at 9-10; 5 C.F.R. § 2425.6(b)(2) (providing a recognized ground for review is if “[t]he award [i]s *contrary* to public policy”) (emphasis added); 5 C.F.R. § 2425.6(e)(1).

<sup>12</sup> 5 C.F.R. §§ 2425.4(c), 2429.5; *NATCA*, 72 FLRA 299, 300 (2021) (*NATCA*) (citing *U.S. DHS, CBP*, 68 FLRA 824, 825 (2015); *U.S. DOL*, 67 FLRA 287, 288-89 (2014)).

<sup>13</sup> *NATCA*, 72 FLRA at 300.

<sup>14</sup> The Authority will find that an arbitration award fails 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. *See, e.g., SSA*, 70 FLRA 227, 229 (2017) (*SSA*); *Libr. of Cong.*, 60 FLRA 715, 717 (2005) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

<sup>15</sup> Exceptions Br. at 7-9.

not demonstrate that an award fails to draw its essence from the parties' agreement.<sup>16</sup>

The Agency's essence exception is based on its belief that the first sentence of the MOU allowed it to unilaterally terminate the MOU by rescinding Directive 2008.<sup>17</sup> However, contrary to this assertion, the Arbitrator found that the MOU did not allow such unilateral termination because it was a contract that required mutual consent to modify.<sup>18</sup> Although the MOU states that it "concern[s]" Directive 2008,<sup>19</sup> this does not demonstrate that the Arbitrator erred in concluding that the MOU remained in effect after the Agency rescinded Directive 2008. Therefore, the Agency is merely attempting to relitigate its preferred interpretation, which does not demonstrate that the Arbitrator's interpretation is implausible, irrational, or evidences a manifest disregard for the MOU. Accordingly, we deny the Agency's exception.<sup>20</sup>

B. The award is not based on a nonfact.

The Agency argues that the award is based on a nonfact.<sup>21</sup> Specifically, the Agency argues that the Arbitrator's finding that the MOU was an existing agreement still binding on the parties is a nonfact.<sup>22</sup> However, as evidenced by the Agency's own exceptions,<sup>23</sup> this is a legal conclusion, and therefore, not

<sup>16</sup> *SSA*, 70 FLRA at 230.

<sup>17</sup> Exceptions Br. at 8; *see also* MOU at 1 ("The following constitutes an agreement between the [Agency] and the [Union] concerning [Directive 2008], 'Smoke-Free Policy for VA Health Care Facilities.'").

<sup>18</sup> Award at 14 (finding the MOU was a contract and "elimination of the [MOU] could be effectuated only by mutual consent of the parties . . .").

<sup>19</sup> MOU at 1.

<sup>20</sup> *See U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1168 (2020) (*Student Aid*) (then-Member DuBester concurring) (citing *Int'l Ass'n of Firefighters, Loc. F-283*, 70 FLRA 601, 601 (2018) (then-Member DuBester concurring; Member Abbott concurring); *Nat'l Nurses United*, 70 FLRA 166, 168 (2017)) (denying an essence exception when a party fails to show how the award fails to draw its essence from the parties' agreement); *see also U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 104-05 (2019) (denying an essence exception when the arbitrator's interpretation is a plausible interpretation of the parties' agreement).

<sup>21</sup> To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *U.S. Dep't of VA, VA Puget Sound Health Care Sys., Seattle, Wash.*, 72 FLRA 441, 443 (2021) (Chairman DuBester concurring).

<sup>22</sup> Exceptions Br. at 10.

<sup>23</sup> *Id.* at 11 (stating that the "Arbitrator erred in concluding the July 2008 MOU had not expired by *operation of law or contract* and that the July 2008 MOU could exist separate and

a factual determination challengeable on appeal as a nonfact.<sup>24</sup> Furthermore, the Authority will deny a nonfact exception when it is premised on a denied essence exception.<sup>25</sup> The Agency's nonfact argument is premised on the essence argument we rejected above – that the plain language of the MOU requires it to be invalidated by the rescission of Directive 2008. Accordingly, we deny the exception.

C. The award is consistent with law.

The Agency also argues that the award is contrary to § 7106(a)(1) of the Federal Service Labor-Management Relations Statute (Statute)<sup>26</sup> because it excessively interferes with the Agency's right to determine internal security practices.<sup>27</sup>

As relevant here, an award is contrary to a management right under the Statute if the award excessively interferes with a management right.<sup>28</sup> "Generally, an award that simply requires an agency to adhere to a provision to which it agreed does not

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apart from the directive to which it concerned" (emphasis added); *id.* ("The Agency's failure to take affirmative action to restrict access to smoking shelters does not equate to a concession that the Agency is still bound by the July 2008 MOU.").

<sup>24</sup> *U.S. DHS, Citizenship & Immigr. Servs., Dist. 18*, 71 FLRA 167, 167 (2019) (then-Member DuBester dissenting on other grounds) (citing *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010)) ("To establish that an award is based on a nonfact, the excepting party must establish that a central *fact* underlying the award is clearly erroneous . . ." (emphasis added)).

<sup>25</sup> *AFGE, Loc. 446*, 70 FLRA 973, 974 (2018) (when the Authority denies an essence exception, and a nonfact exception repeats the same argument, the Authority also denies the nonfact exception).

<sup>26</sup> When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *AFGE, Loc. 2076*, 71 FLRA 1023, 1026 n.26 (2020) (then-Member DuBester concurring) (citing *AFGE, Loc. 933*, 70 FLRA 508, 510 n.13 (2018)). 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. *Id.* In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *Id.*

<sup>27</sup> Exceptions Br. at 13-14.

<sup>28</sup> *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 405-06 (2018) (then-Member DuBester dissenting) (holding that in determining whether an award is contrary to a management right under the Statute, the Authority will ask three questions: (1) whether the Arbitrator found a violation of a contract provision, (2) whether the award is reasonably and proportionally related to the violation of the parties' agreement, and (3) whether the award excessively interferes with a management right).

excessively interfere with its management rights,”<sup>29</sup> unless the agency establishes that the contract provision is itself unlawful.<sup>30</sup>

We assume, without deciding, that a smoking policy falls under management’s right to determine internal security practices. Here, the award simply requires the Agency to adhere to the provisions of the MOU. And the Agency does not contend that the MOU itself is unlawful.<sup>31</sup> Therefore, the Agency fails to demonstrate how the award is contrary to law. Accordingly, we deny the exception.

## V. Decision

We dismiss the Agency’s exceptions in part, and deny them in part.

### Chairman DuBester, concurring:

I agree with the Decision to dismiss the Agency’s exceptions in part, and deny them in part

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<sup>29</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 1172, 1176 (2020) (*Dublin*) (then-Member DuBester dissenting, in part); see also *U.S. Dep’t of VA, Veterans Benefits Admin.*, 71 FLRA 1113, 1117 (2020) (Chairman Kiko dissenting on other grounds) (citations omitted).

<sup>30</sup> *Student Aid*, 71 FLRA at 1169 & n.34 (where arbitration award “simply require[d] the [a]gency to abide by the [telework] procedures to which it agreed,” and the agency did “not contend that the telework procedures in the parties’ agreement [we]re themselves unlawful,” the award did not excessively interfere with management’s rights); see also *Dublin*, 71 FLRA at 1176 (“[A]n exception to this general rule would [apply] . . . if an agency can demonstrate that the arbitrator’s interpretation of the [contract] provision encompasses subjects . . . beyond . . . [those to which] an agency can legally agree . . .”).

<sup>31</sup> See Exceptions Br. at 13-14 (management-rights arguments).