68 FLRA No. 28

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4968

_____

DECISION

January 7, 2015

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

Arbitrator Robert T. Simmelkjaer found that the Agency violated 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a) when scheduling the work of bargaining-unit employees (unit employees), and he directed the Agency to provide backpay to adversely affected unit employees using specific remedial formulas. In addition, the Arbitrator directed the parties to participate in a claims process to ensure the accuracy of individual unit employees' backpay entitlements. There are five substantive questions before us.

The first question is whether the award is based on nonfacts. In this regard, the Agency's nonfact arguments either challenge the Arbitrator's legal conclusions, disagree with the Arbitrator's weighing of evidence, or rest on misunderstandings of the award. Because none of those arguments provides a basis for finding the award deficient on nonfact grounds, the answer to the first question is no.

The second question is whether the Arbitrator erred as a matter of law in applying the doctrine of stare decisis; failing to defer to the Agency's interpretation of applicable law and regulation; or finding that an award of backpay was consistent with § 6101, the fiscal-year earnings cap in the Customs Officer Pay Reform Act (COPRA),[1] and the Back Pay Act (the BPA).[2] The Arbitrator had discretion to apply stare decisis, the Agency was not entitled to the deference that it requested, and the Arbitrator's findings satisfy the pertinent requirements of COPRA and the BPA. Accordingly, the answer to the second question is no.

The third question is whether the award violates law or public policy by awarding punitive damages against the federal government. Because an award of backpay that is consistent with the BPA does not constitute an award of punitive damages, and as we find that the Arbitrator's award is consistent with the BPA, the answer to the third question is no.

The fourth question is whether the award is so ambiguous as to make implementation impossible. As the Union has agreed to interpret the award so as to eliminate the allegedly ambiguous aspects of the award that the Agency raises in its exception, the answer to the fourth question is no.

And the fifth question is whether the award is deficient on private-sector grounds not recognized in the Authority's Regulations. As the Agency fails to support this exception with citation to legal authority, the answer to the fifth question is also no.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated law and regulation in establishing unit employees' work schedules (the challenged schedules) without ensuring that the schedules included: (1) consistent start and stop times for each regular workday in a basic workweek, and (2) two consecutive days off outside the basic workweek. In its grievance response, the Agency contended that the challenged schedules were consistent with applicable law and regulation because the schedules complied with the Agency's Revised National Inspectional Assignment Policy (RNIAP), which "recognize[d] and implement[ed] both the statutory and regulatory requirements regarding work schedule[s]."[3] The grievance went to arbitration, where the Arbitrator framed the issues to include whether the Agency violated 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a) in establishing the challenged schedules, and, if so, what would be an appropriate remedy.

The Arbitrator found that § 6101(a)(3) and § 610.121(a) require, as relevant here, that agencies provide their employees with work schedules that include the same working hours in each regular workday and

[1] 19 U.S.C. § 267.
[2] 5 U.S.C. § 5596.
[3] Opp'n, Attach. 2 at 3; *see* Award at 10.

two consecutive days off outside the basic workweek (the scheduling requirements). But the Arbitrator also found that an agency could exempt itself from the scheduling requirements if the head of the agency determined that it "would be seriously handicapped in carrying out its functions or that costs would be substantially increased" by complying with the requirements (agency-head exemption).[4] In that regard, the Arbitrator determined that a 1954 agency-head exemption (the 1954 exemption) applied to unit employees until the RNIAP "superseded" the 1954 exemption.[5] More specifically, the Arbitrator found that, once the Agency began scheduling unit employees according to the RNIAP in July 2004, the RNIAP expressly required that its provisions take "precedence over any and all other . . . policies or . . . practices executed or applied by the parties previously . . . concerning" employee scheduling – including the 1954 exemption.[6] Consequently, the Arbitrator determined that the scheduling requirements applied to unit employees from July 2004 until April 2008 (the applicable period), when a new agency-head exemption took effect.

Although the Agency requested that the Arbitrator defer to the Agency's determination of whether it complied with the scheduling requirements, the Arbitrator rejected that "deference defense," which he noted was not supported by a "rule-making process."[7] Further, the Arbitrator declined to defer to the Agency's interpretation of certain scheduling-related regulations issued by the Office of Personnel Management (OPM) – including § 610.121. Instead, the Arbitrator reviewed witness testimony and Agency scheduling documentation to assess whether the Agency satisfied the scheduling requirements during the applicable period. With respect to one Agency witness (the witness), the Arbitrator noted that the witness's testimony regarding the managerial advantages of continual fluctuations in employees' work schedules was credible but "not comparable to" an extensive scheduling discussion that appeared in a memo supporting the 1954 exemption.[8] Based on his review, the Arbitrator found that the Agency "routinely" violated the scheduling requirements during the applicable period,[9] and he sustained the grievance for that period.

The Arbitrator found that a make-whole remedy under the BPA would be appropriate because: (1) the Agency "committed unjustified and unwarranted personnel actions" by scheduling unit employees in violation of § 6101(a)(3) and § 610.121(a); (2) those "unlawful scheduling practices resulted in the withdrawal or reduction of [unit employees'] pay, allowances[,] or differentials"; and (3) "there is a causal connection" between the Agency's unlawful scheduling practices and unit employees' "loss[es]" such that, "but for" the unlawful practices, the employees would not have suffered those losses.[10] As for calculating the backpay amounts that the Agency owed, the Arbitrator applied the doctrine of "stare decisis" and gave "precedential effect" to other arbitration awards involving the same parties and a similar scheduling dispute.[11] Consistent with those other awards, the Arbitrator adopted two remedial formulas proposed by the Union – one for unit employees whose schedules included different start and stop times for workdays in the same workweek (the first formula), and another for unit employees whose schedules did not provide consecutive days off (the second formula). Further, the Arbitrator explained that the formulas provided overtime backpay at the double-time rates established by COPRA and should include any applicable premium or differential pay.

In addition to adopting the Union's remedial formulas, the Arbitrator "adopt[ed] the Agency's proposal" for a "claims process to . . . ensure that the calculations made pursuant to [the formulas] accurately reflect the individual entitlements of adversely affected employees, *if any*."[12] The Arbitrator stated that if the claims process revealed that some unit "employees were not adversely affected" or "were not entitled to [the] overtime or premium pay" awarded to them by the formulas, "appropriate adjustment[s] can be made."[13] After describing the claims process, the Arbitrator also "note[d]" that, "given the make[-]whole intent of the remedial formulas . . . , there is no reasonable alternative to calculating the compensation due other than overtime at the COPRA rate, even if it cannot be shown there has been an actual loss in pay[or] allowances, or that employees would have normally worked the overtime" that the remedial formulas allocate to them.[14] Finally, the Arbitrator retained jurisdiction to "resolve any issues that may arise in the implementation or interpretation of the remedial portion of th[e] award."[15]

The Agency filed exceptions to the award, and the Union filed an opposition to the exceptions.

[4] Award at 3 (quoting 5 U.S.C. § 6101(a)(3)); *see also* 5 C.F.R. § 610.121(a).
[5] Award at 55.
[6] *Id.* (quoting RNIAP, Section 3).
[7] *Id.* at 56.
[8] *Id.*
[9] *Id.* at 52, 58.
[10] *Id.* at 58-59; *see also id.* at 64.
[11] *Id.* at 61.
[12] *Id.* at 62, 65 (emphasis added).
[13] *Id.* at 63.
[14] *Id.*
[15] *Id.* at 63, 65.

III. Preliminary Matters

A. The Union timely filed its opposition.

The Agency filed two statements of service with its exceptions, and one of those statements indicates that the Agency served the exceptions on the Union by first-class mail and email on the same day. The Authority issued an order directing the Union to show cause why its opposition should not be dismissed as untimely because the opposition was not filed within thirty days of the Agency's purported service of the exceptions by email. Under the Authority's Regulations, the time limit for filing an opposition to exceptions is thirty days after the date of service of the exceptions.[16] Generally, a party receives an additional five days to respond to documents served by first-class mail.[17] But a party does not receive an additional five days to respond to a document that was served by first-class mail *and* (as relevant here) email on the same day,[18] provided that "the receiving party has agreed to be served by email."[19]

In response to the Authority's order, the Union contends that it did not agree to service of the exceptions by email and, consequently, the exceptions were properly served on the Union by first-class mail only. As a result, the Union contends that it was entitled to add five days to the due date for filing its opposition to the exceptions and that its opposition is, therefore, timely.

The Union has supported its contentions by submitting copies of correspondence with the Agency indicating that the Union did not agree to service by email. Consequently, the exceptions were not properly served by email,[20] and the Union was entitled to an additional five days (after the thirty-day due date) to file its opposition. Because the Union filed its opposition within that additional five-day window, the opposition was timely filed.

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[21] This includes challenges to requested relief that could have been raised during arbitration, but were not.[22] In addition, the Authority will not consider arguments offered in support of an exception if those arguments differ from, or are inconsistent with, a party's arguments to the arbitrator.[23]

The Agency contends that the award is based on the nonfact that the Agency relied on the RNIAP as part of its defense, which the Agency contends is "clearly erroneous."[24] But in the Agency's grievance response – which the parties submitted to the Arbitrator as a joint exhibit, and which the Arbitrator relied on his "[s]tatement [o]f [f]acts"[25] – the Agency asserted that the grievance lacked merit because the RNIAP "recognize[d] and implement[ed] both the statutory and regulatory requirements regarding work schedule[s]."[26] As this nonfact exception is inconsistent with the Agency's arguments below,[27] §§ 2425.4(c) and 2429.5 bar the exception, and we dismiss it accordingly.

Regarding agency-head exemptions, the Union argued before the Arbitrator that if he determined that the 1954 exemption was still in effect in 2004, then he should find that it "ceased to be effective upon the application" of the RNIAP to unit employees in July 2004.[28] The Agency did not challenge that argument below. But in its exceptions, the Agency argues that the Arbitrator's finding that the RNIAP superseded the 1954 exemption is deficient because: (1) an agency policy cannot supersede an agency-head exemption;[29] and (2) the Arbitrator should have deferred to the Agency's own "determination of the ongoing validity" of the 1954 agency-head exemption after July 2004.[30] The Agency could have presented both of these arguments to the Arbitrator, but the record does not reflect that the Agency did so. Therefore, §§ 2425.4(c) and 2429.5 bar the Agency from making these arguments in its exceptions.[31]

(We note the dissent's statement that we have "mischaracterize[d] the [Agency's contrary-to-law] exception" by treating it as an exception solely involving

---

[16] 5 C.F.R. § 2425.3(b).
[17] *Id.* § 2429.22(a).
[18] *Id.* § 2429.22(b).
[19] *Id.* § 2429.27(b)(6).
[20] *See AFGE, Local 1858*, 66 FLRA 913, 913-14 (2012) (citing 5 C.F.R. § 2429.27(b)(6)).
[21] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also U.S. DOL*, 67 FLRA 287, 288-89 (2014) (*DOL*); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).
[22] *E.g., U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 502 (2000) (*Warner Robins*).
[23] *AFGE, Council of Prison Locals, Local 405*, 67 FLRA 395, 396 (2014) (*Local 405*) (citing *U.S. Dep't of the Treasury, IRS*, 57 FLRA 444, 448 (2001)).
[24] Exceptions Br. at 38-39.
[25] Award at 9-10.
[26] Opp'n, Attach. 2; *see* Award at 10.
[27] *Local 405*, 67 FLRA at 396.
[28] Award at 28-29.
[29] *See* Exceptions Br. at 4, 12, 13, 14, 15, 18 (arguing that RNIAP could not, or did not, supersede the 1954 agency-head exemption).
[30] *Id.* at 23 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)), 27-28.
[31] *See, e.g., DOL*, 67 FLRA at 288-89.

deference, rather than an exception that also challenges the merits of the Arbitrator's finding that the RNIAP superseded the 1954 exemption.[32] But it is the *dissent* that mischaracterizes *our holding*. Specifically, we acknowledge the Agency's latter challenge, but find that it is not properly before us because it could have been, but was not, raised below. Further, as we do not reach the merits of the challenge, we do not express any opinion about the merits – or lack thereof – of the dissent's position.)

With regard to backpay, as mentioned earlier, the Union proposed specific remedial formulas at arbitration that calculated the Agency's potential backpay liabilities using COPRA overtime rates. In response to the Union's remedial proposals, the Agency argued that the evidence was insufficient to support any backpay remedy.[33] But in its exceptions, the Agency asserts for the first time that the remedial formulas are unlawful because COPRA overtime rates are limited to work that is "officially assigned" and "actually performed" – conditions that the Agency asserts were not met here.[34] Because the Agency could have, but did not, present these remedial challenges to the Arbitrator, §§ 2425.4(c) and 2429.5 bar the Agency from making these challenges in its exceptions.[35]

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency argues that the award is based on several nonfacts. To establish that an award is based on a nonfact, the 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.[36] However, the Authority will not find an award deficient on the basis of an arbitrator's determination of a factual matter that the parties disputed at arbitration.[37] In addition, neither challenges to an arbitrator's legal conclusions,[38] nor arguments based on a misunderstanding of an award, provide a basis for finding an award deficient as based on nonfacts.[39] Further, an argument that an arbitral finding is not sufficiently supported by record evidence does not establish that an award is based on a nonfact.[40] Moreover, "'disagreement with an arbitrator's evaluation of evidence . . . , including the determination of the weight to be accorded [to] such evidence, provides no basis for finding' that an award is based on a nonfact."[41]

According to the Agency, the Arbitrator found that every time an employee's schedule deviated from the scheduling requirements, that employee lost pay, allowances, or differentials due to an unjustified or unwarranted personnel practice.[42] To the extent that the Agency is arguing that the evidence at arbitration did not support an award of backpay to any unit employees, this factual matter was disputed before the Arbitrator. Consequently, the Agency's argument provides no basis for finding the award deficient as based on a nonfact.[43] And to the extent that the Agency is contending that the Arbitrator found that employees should receive backpay amounts without adjusting for individual circumstances, the Arbitrator's adoption of a claims process permitting individual adjustments to backpay shows that the Agency's contention is based on a misunderstanding of the award. Consequently, this contention does not establish that the award is based on nonfacts.[44]

The Agency also asserts that the award is based on nonfacts because: (1) the Arbitrator did not defer to the Agency's interpretation of § 6101 or OPM's regulations implementing § 6101;[45] and (2) the Arbitrator allegedly found that regulatory interpretations are entitled to deference only if they are supported by a formal rule-making process.[46] As these nonfact arguments challenge legal conclusions, they provide no basis for finding the award deficient on nonfact grounds.[47]

Further, the Agency asserts that the Arbitrator's interpretation of the RNIAP is based "on information not found in the record" and that, consequently, the award is

[32] Dissent at 19.
[33] Exceptions Br., Attach., Agency's Closing Br. at 42-46.
[34] *See* Exceptions Br. at 12, 58-63 (arguing award is deficient because COPRA is limited to work "officially assigned" and "actually performed").
[35] *Warner Robins*, 56 FLRA at 502; *see U.S. DHS, U.S. CBP*, 66 FLRA 745, 747 (2012) (declining to consider agency's argument that arbitrator failed to defer to agency's interpretation of phrase "officially assigned," where agency did not raise argument below).
[36] *E.g.*, *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 461 (2012) (*NLRB*).
[37] *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993) (*Lowry AFB*).
[38] *AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 456-57 (2003) (*Local 801*) (citing *U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 744, 749 (2000)).
[39] *AFGE, Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010) (*Food Inspection*).
[40] *AFGE, Local 1923*, 67 FLRA 392, 393 & n.17 (2014) (*Local 1923*).
[41] *NLRB*, 66 FLRA at 461 (quoting *AFGE, Local 1102*, 65 FLRA 40, 43 (2010)).
[42] Exceptions Br. at 35-36, 38, 48.
[43] *See Lowry AFB*, 48 FLRA at 593-94; *accord U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 1040, 1046 (2011) (argument that arbitrator's backpay calculation was "too 'speculative' . . . effectively challenges the [a]rbitrator's factual findings").
[44] *See Food Inspection*, 64 FLRA at 1118.
[45] Exceptions Br. at 18, 19.
[46] *Id.* at 20.
[47] *See Local 801*, 58 FLRA at 456-57.

based on a nonfact.[48] An arbitrator's interpretation of an agency regulation is a legal conclusion[49] that cannot be challenged as a nonfact,[50] and, as mentioned above, an argument that arbitral findings are not sufficiently supported by the record provides no basis for finding an award deficient on nonfact grounds.[51] Thus, we deny this nonfact argument.

Finally, the Agency alleges that the award is based on the nonfact that the witness's testimony regarding the managerial advantages of continual fluctuations in employees' work schedules was not comparable to the scheduling analysis that supported the 1954 exemption.[52] Specifically, the Agency asserts that the Arbitrator's conclusions about the testimony are "unfounded"[53] and erroneously suggest that the Agency "was . . . intending to provide a verbal agency[-]head" exemption for unit employees' schedules.[54] But the Arbitrator's evaluation of testimony, including the weight accorded to it, provides no basis for finding that the award is based on a nonfact.[55] Accordingly, we deny this nonfact allegation as well.

B. The award is not contrary to law.

The Agency argues that the award is contrary to law in six respects, which are discussed separately below. When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law de novo.[56] 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.[57] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[58]

1. The Arbitrator did not err as a matter of law in applying the doctrine of stare decisis.

According to the Agency, the Arbitrator misapplied the doctrine of stare decisis by giving precedential effect to other arbitrators' awards.[59] The Authority has held that "an arbitrator has the discretion to decide that an earlier award is binding" and that the Authority defers to such a determination because the arbitrator is "making determinations that constitute factual findings and reasoning to which the Authority normally accords deference."[60] Consistent with those holdings, the Arbitrator's decision to give precedential effect to the remedial formulas in other arbitration awards merits deference and does not provide a basis for finding the award contrary to law.

2. The Arbitrator did not err as a matter of law by failing to defer to the Agency's interpretations of applicable law and regulation.

The Agency contends that the Arbitrator unlawfully denied the Agency the deference to which it is entitled concerning the scheduling requirements. And the Agency argues that the Arbitrator misapplied the holdings of three U.S. Supreme Court decisions concerning deference to administrative agencies.[61] As relevant here, the Authority has previously recognized that "deference is granted to [an] agency to which Congress has delegated administration of a congressionally created program."[62] And in particular, where Congress has delegated administration of a program to OPM, the Authority defers to OPM's regulations and guidance concerning that program, but does *not* defer to another agency's "application of [OPM's] regulations."[63]

First, the Agency alleges that, if the Arbitrator had not "misapplied" the three Supreme Court decisions mentioned above, then the Arbitrator would have deferred to the Agency's interpretation of the scheduling requirements.[64] But as the scheduling requirements are part of a program that Congress entrusted OPM to

[48] Exceptions Br. at 39.
[49] *See U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 629-31 (2012) (de novo evaluation of argument that award was contrary to governing agency-wide regulation).
[50] *Local 801*, 58 FLRA at 456-57.
[51] *Local 1923*, 67 FLRA at 393 & n.17.
[52] Exceptions Br. at 34-35.
[53] *Id.* at 34.
[54] *Id.* at 35.
[55] *NLRB*, 66 FLRA at 461 (quoting *AFGE, Local 1102*, 65 FLRA 40, 43 (2010)).
[56] *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)).
[57] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[58] *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012) (*CBP*).
[59] Exceptions Br. at 32-34.
[60] *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 64 FLRA 619, 621 n.2 (2010) (quoting *AFGE, Local 2459*, 51 FLRA 1602, 1606-07 (1996)).
[61] *E.g.*, Exceptions Br. at 18-19 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Chevron*, 467 U.S. 837; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).
[62] *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1066 (2001) (*Army*).
[63] *Id.*
[64] Exceptions Br. at 18, 19, 20, 23.

administer,[65] the Agency's interpretations of the scheduling requirements do not merit deference.[66] Further, as mentioned above, the Authority does not accord deference to an agency's assessment of whether it complied with OPM regulations.[67] As such, the Arbitrator did not err as a matter of law in applying Supreme Court precedent or declining to defer to the Agency's interpretation of the scheduling requirements.

Second, the Agency asserts that the Arbitrator failed to defer to OPM regarding § 610.121(b)'s requirements that agencies: (1) schedule employees' work so as to accomplish the agency's mission, and (2) schedule administrative workweeks to correspond with actual work requirements.[68] But the Authority has long recognized that those requirements in § 610.121*(b)* are *subject to* an agency's obligations to satisfy the scheduling requirements (that the Arbitrator found the Agency to have violated) in § 610.121*(a)*[69] – including the requirements that agencies provide their employees with work schedules that include the same working hours in each regular workday[70] and two consecutive days off outside the basic workweek.[71] Consistent with this precedent, we find that the Arbitrator did not fail to defer to OPM by requiring the Agency to comply with the § 610.121(a) scheduling requirements at issue in the grievance and at arbitration.

Third, the Agency argues that the Arbitrator erred by holding that deference to the Agency's statutory or regulatory interpretations is appropriate only when supported by a formal rule-making process.[72] In conducting de novo review, the Authority assesses whether an arbitrator's legal conclusion – not his or her underlying reasoning – is consistent with the relevant legal standard.[73] As discussed above, the Agency's interpretations of the scheduling requirements did not merit deference, so the Arbitrator's reasoning for not deferring to those interpretations does not establish that the award is contrary to law.

Fourth, the Agency contends that the Arbitrator failed to defer to the findings in the 1954 exemption that the Agency would be seriously handicapped or its costs would be substantially increased by complying with the scheduling requirements.[74] But the Arbitrator did not fail to defer to the findings underlying the 1954 exemption. Rather, the Arbitrator relied on the express wording of the RNIAP (and not merely a "disinclination" to reach a contrary conclusion, as the dissent claims),[75] and held that, once the Agency began scheduling unit employees according to the RNIAP in July 2004, the RNIAP expressly required that its provisions take "precedence over any and all other . . . policies or . . . practices executed or applied by the parties previously . . . concerning" employee scheduling – including the 1954 exemption.[76] (As discussed in Section III.B. above, we dismiss the Agency's exception challenging that holding because the Agency could have, but did not, make a similar argument below.) The Agency's contention regarding deference is based on a misunderstanding of the award. And the Authority has held that exceptions based on misunderstandings of an arbitrator's award do not demonstrate that the award is contrary to law.[77] Consequently, the Agency's contention does not demonstrate that the award is contrary to law.

Fifth, the Agency argues that the Arbitrator failed to defer to the Agency's interpretation of its regulations implementing COPRA at 19 C.F.R. § 24.16.[78] But the Agency does not identify a provision of those regulations to which the Arbitrator failed to defer, or explain how deferring to those regulations would have altered the Arbitrator's legal conclusions. Further, the Authority has recognized that "[n]othing in . . . 19 C.F.R. § 24.16 excludes" the Agency's employees "from the scheduling protections" of § 6101(a)(3) and § 610.121(a).[79] Therefore, this argument does not show that the award is contrary to law.

3. The award is not contrary to COPRA's earnings cap.

COPRA includes a provision (the earnings cap) that limits the "aggregate of overtime pay . . . and premium pay . . . that a customs officer may be paid in any fiscal year . . . ; except that [certain Agency officials or their] designee[s] may waive this limitation in

[65] *See* 5 U.S.C. § 6101(c) ("The [OPM] may prescribe regulations . . . necessary for the administration of this section[.]").
[66] *See Army*, 56 FLRA at 1066 (declining to defer to an agency's decision whether particular work situations required environmental-differential pay under OPM regulations).
[67] *Id.*
[68] Exceptions Br. at 28-29, 30-31.
[69] *U.S. Dep't of the Interior, Nat'l Park Serv.*, 67 FLRA 489, 490-91 (2014) (citing *U.S. Dep't of the Navy, Phila. Naval Shipyard*, 39 FLRA 590, 604 (1991); *NAGE, Local R7-23*, 23 FLRA 753, 755-56 (1986)).
[70] 5 C.F.R. § 610.121(a)(3).
[71] *Id.* § 610.121(a)(2).
[72] Exceptions Br. at 20, 22.
[73] *AFGE, Nat'l Border Patrol Council, Local 2595*, 67 FLRA 361, 366 (2014) (citing *NTEU, Chapter 32*, 67 FLRA 174, 176 (2014)).
[74] Exceptions Br. at 24.
[75] Dissent at 22; *see also id.* at 20.
[76] Award at 55.
[77] *See SPORT Air Traffic Controllers Org.*, 66 FLRA 552, 554 (2012) (*SATCO*) (citing *Food Inspection*, 64 FLRA at 1118).
[78] Exceptions Br. at 57.
[79] *U.S. DHS, U.S. CBP*, 65 FLRA 978, 983 n.6 (2011); *accord id.* at 984.

individual cases."[80] The Agency argues that the award "directs the Agency to compensate employees . . . in a manner that will very likely exceed the . . . COPRA earnings cap."[81] But the Authority has previously recognized that, under the Agency's own COPRA-implementing regulations, the COPRA earnings cap does not apply to "compensation . . . for work not performed, which includes . . . awards made in accordance with back[pay] settlements,"[82] such as the award in this case. In addition, the Arbitrator specifically stated that the claims process would permit "appropriate adjustment[s]" in cases where "employees . . . were not entitled to overtime or premium pay pursuant to . . . the COPRA cap."[83] Thus, we deny the Agency's argument that the award requires the Agency to violate COPRA's earnings cap.

4. The award does not violate 5 U.S.C. § 6101.

Citing a decision of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), the Agency argues that violations of § 6101 cannot support awarding backpay and that, consequently, the Arbitrator's award of backpay is unlawful.[84] In the decision that the Agency cites, the Federal Circuit found that certain sections of the Fair Labor Standards Act[85] and the Federal Employees Pay Act[86] did not authorize awarding backpay for § 6101 violations.[87] But the Federal Circuit's decision did not address the BPA, which is the basis for the Arbitrator's award in this case. Thus, the Arbitrator's award of backpay is not contrary to the Federal Circuit's decision regarding backpay for § 6101 violations.

Further, the Agency asserts that the Arbitrator's statement that the witness's testimony was "not comparable to" the scheduling analysis supporting the 1954 exemption shows that the Arbitrator unlawfully required the Agency to provide a "verbal agency[-]head" exemption at arbitration to satisfy § 6101.[88] But as the award does not state that the Agency had to provide a verbal agency-head exemption, the Agency's assertion is based on a misunderstanding of the award.[89] Thus, this assertion provides no basis for finding the award contrary to § 6101.[90]

5. The award does not violate the BPA, the Anti-Deficiency Act, or the doctrine of sovereign immunity.

The Agency argues that the Arbitrator's award of backpay is contrary to the BPA[91] and, as a result of violating the BPA, the award is also contrary to the Anti-Deficiency Act[92] and the doctrine that the federal government is immune from money damages unless a federal statute waives that immunity (the doctrine of sovereign immunity).[93]

First, the Agency argues that violations of the scheduling requirements cannot be unwarranted or unjustified personnel actions under the BPA.[94] But as the Arbitrator recognized,[95] the precedent of the U.S. Claims Court establishes that the scheduling requirements are mandatory and that violating those requirements may "entitle federal employees to pay" under the BPA.[96] We find that this precedent provides a sufficient basis to deny the Agency's argument that violations of the scheduling requirements cannot be unwarranted or unjustified personnel actions under the BPA.

Second, the Agency contends that the Arbitrator improperly concluded that every deviation from the scheduling requirements resulted in a loss of pay, allowances, or differentials[97] even though, according to the Agency, the Union failed to establish that any unit employees suffered actual reductions in pay, allowances, or differentials for which they may receive backpay under the BPA.[98] In that respect, the Agency asserts that the Arbitrator unlawfully awarded backpay even when not required to make employees whole.[99] More specifically, the Agency argues that the award is deficient because the Arbitrator did not find that "each and every [unit employee] would have worked . . . [the] overtime" that the remedial formulas attribute to them.[100] The Arbitrator twice made express findings that the Agency's

[80] 19 U.S.C. § 267(c)(1).
[81] Exceptions Br. at 64.
[82] *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 560 (1999) (quoting 19 C.F.R. § 24.16(h)).
[83] Award at 63.
[84] Exceptions Br. at 12, 42.
[85] *Sanford v. Weinberger*, 752 F.2d 636, 637 (Fed. Cir. 1985) (citing 29 U.S.C. § 207(a)(1)).
[86] *Id.* (citing 5 U.S.C. § 5542(a)).
[87] *Id.* at 640.
[88] Exceptions Br. at 34-35.
[89] *See SATCO*, 66 FLRA at 554 (party's misunderstanding of award provides no basis for finding award contrary to law).
[90] *See also U.S. DHS, U.S. CBP*, 65 FLRA 356, 362 (2010) (challenging an arbitrator's evaluation of testimony does not provide a basis for finding an award contrary to law).
[91] Exceptions Br. at 4, 12, 43-45, 49.
[92] *Id.* at 56, 64-65 (citing 31 U.S.C. §§ 1341-42).
[93] *Id.* at 4, 40, 43.
[94] *Id.* at 41.
[95] Award at 61.
[96] *Gahagan v. United States*, 19 Cl. Ct. 168, 172 (1989) (citing *Acuna v. United States*, 202 Ct. Cl. 206 (1973)).
[97] Exceptions Br. at 35-36.
[98] *E.g., id.* at 12.
[99] *Id.* at 57.
[100] *Id.* at 49.

violations of the scheduling requirements resulted in losses to unit employees,[101] and we have rejected the Agency's arguments that those findings are deficient as nonfacts. Further, the Agency's assertion that the Arbitrator awarded backpay regardless of whether individual unit employees required backpay to make them whole reflects a misunderstanding of the award.[102] Contrary to this assertion, the Arbitrator established a claims process to ensure that individual unit employees' awards correspond to their losses, and he stated that if the claims process revealed that "some employees were not adversely affected" by violations of the scheduling requirements, then those employees would not be entitled to compensation.[103] Indeed, the Arbitrator stated that the claims process would ensure that backpay amounts "reflect the individual entitlements of adversely affected employees, *if any*,"[104] thereby emphasizing that some unit employees may not receive backpay. Moreover, the Authority has held that an arbitrator need not require evidence of "itemize[d] individual loss[es]" to support an award of backpay under the BPA,[105] as long as an award sufficiently identifies the specific circumstances under which employees are entitled to backpay.[106] For these reasons, the Arbitrator's findings are sufficient to establish that the Agency's violations of the scheduling requirements resulted in losses to unit employees for which they are entitled to compensation under the BPA.

Third, the Agency argues that the backpay award is deficient because the Arbitrator did not expressly reconcile certain testimony that the Agency identifies in its exceptions.[107] But the Arbitrator did not have an obligation under the BPA to credit, discredit, or reconcile any particular testimony before awarding backpay.[108] Thus, we reject this argument as a basis for finding the award contrary to law.

Fourth, the Agency argues that the award violates the BPA due to the Arbitrator noting that he saw "no reasonable alternative to calculating the compensation due other than overtime at the COPRA rate, even if it cannot be shown there has been an actual loss in pay[or] allowances, or that employees would have normally worked the overtime" that the remedial formulas allocate to them.[109] The Authority has recognized that if an arbitrator's findings support the arbitrator's legal conclusions, then any additional speculation or statements by the arbitrator that are separate from the findings required to support the award are "dicta" that do not provide a basis for finding an award contrary to law.[110] Here, the Arbitrator's statement about whether there were reasonable alternatives to awarding backpay at COPRA overtime rates did not affect his earlier determinations that: (1) the Agency's violations of the scheduling requirements were unwarranted or unjustified personnel actions that resulted in losses to unit employees;[111] and (2) a claims process would ensure that individual backpay entitlements were calculated accurately to reflect the adverse effects experienced by individual unit employees.[112] Thus, the Arbitrator's statement about whether reasonable remedial alternatives existed is dicta that provides no basis for finding the award contrary to the BPA.

The Agency's arguments that the award is contrary to the Anti-Deficiency Act and the doctrine of sovereign immunity are based entirely on the Agency's contentions that the award violates the BPA. Thus, consistent with our rejection of the Agency's arguments that the award violates the BPA, we find that the Agency has not established that the award violates the Anti-Deficiency Act or the doctrine of sovereign immunity.

6. The award does not violate law or public policy by awarding punitive damages against the federal government.

The Agency notes that awarding punitive damages against the federal government is not authorized by law, and, in that regard, the Agency asserts that the award amounts to an unlawful award of punitive damages.[113] The Agency also contends that public policy prohibits awarding punitive damages against the federal

[101] Award at 58-59, 64.
[102] *SATCO*, 66 FLRA at 554.
[103] Award at 62-63.
[104] *Id.* at 62, 65 (emphasis added).
[105] *Int'l Ass'n of Machinists & Aerospace Workers, Lodge 2261*, 47 FLRA 427, 434-35 (1993).
[106] *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 560 (1999).
[107] Exceptions Br. at 41.
[108] *E.g.*, *U.S. Dep't of the Treasury, U.S. Customs Serv., Portland, Or.*, 54 FLRA 764, 771 (1998) (finding backpay award consistent with BPA even though arbitrator "did not specifically address the [a]gency's contentions" on certain matters).
[109] Exceptions Br. at 43, 45 (quoting Award at 63).
[110] *E.g.*, *U.S. Nuclear Regulatory Comm'n*, 65 FLRA 79, 82-83 (2010) (arbitrator's statement that, if the Statute did not apply in the dispute before him, then it would rarely apply in other similar cases, was dicta that provided no basis for finding award contrary to law); *NFFE, Local 1827*, 52 FLRA 1378, 1384-85 (1997) (arbitrator's speculation about the burden of proof that a union would bear in judicial, rather than arbitration, proceedings was dicta); *see also AFGE, Local 1923*, 51 FLRA 576, 578 (1995) (where arbitrator rejected grievance on the merits despite finding that the grievance was not "timely filed," arbitrator's statements on timeliness did not provide a basis for finding the award deficient).
[111] Award at 58-59; *see also id.* at 64.
[112] *Id.* at 62-63, 65.
[113] Exceptions Br. at 4, 13, 65.

government.[114] But the Authority has previously rejected the contention that a backpay award that complies with the BPA is an impermissible assessment of punitive damages against the federal government.[115] Consistent with that precedent, and given our determination that the award complies with the BPA, we reject the Agency's contention that the award provides for punitive damages contrary to law and public policy.

C. The award is not so ambiguous as to make implementation impossible.

The Agency contends that the award is so ambiguous as to make implementation impossible because it completely incorporates one of the awards to which the Arbitrator gave precedential effect,[116] and because it is unclear how the first formula and second formula would apply in two particular circumstances, discussed further below.[117] The Authority will set aside an award that is "incomplete, ambiguous, or contradictory as to make implementation of the award impossible."[118] To prevail on this ground, the excepting "party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain."[119]

Even if the Agency were correct in its contention that the Arbitrator completely incorporated another arbitration award into the award here, the Agency fails to explain how that incorporation renders the Arbitrator's award impossible to implement.[120] Further, with regard to the first formula, the Agency argues that it is impossible to implement because, in some scenarios, the first formula would yield two equally permissible backpay amounts.[121] In its opposition, the Union states that where the first formula provides two possible backpay amounts under the circumstances identified by the Agency, then the Union "would agree that the Agency is liable for . . . the les[ser] amount of backpay."[122] With regard to the second formula, the Agency argues that the award is unclear as to whether an employee must receive overtime backpay for certain shifts even if the employee has already been paid overtime for those shifts.[123] But in its opposition, the Union states that the scenario posited by the Agency regarding the second formula "is outside the ambit of the . . . remedial award" in this case.[124]

When an opposing party agrees to interpret an award so as to avoid a deficiency alleged by an excepting party, the Authority has recognized the agreed-to interpretation of the award as binding, and has dismissed, as moot, any objections to the award based on a different interpretation.[125] With regard to the alleged ambiguities in the first and second formulas that the Agency contends render the award impossible to implement, we interpret the award to be consistent with the Union's statements in its opposition about how the remedial formulas will operate and, consequently, find that the Agency's contrary arguments regarding the impossibility of implementing the award are moot.[126]

D. The award is not deficient on grounds not previously recognized.

The Agency contends, without elaboration, that the award is deficient on grounds that the Authority has not previously recognized.[127] A party claiming that an arbitration award is deficient based on private-sector grounds not listed in the Authority's Regulations "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions."[128] As the Agency fails to identify the private-sector grounds on which it relies and does not provide any supporting legal authority, we deny this exception.

V. Decision

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

[114] *Id.*
[115] *U.S. DOD, Def. Depot Memphis, Memphis, Tenn.*, 43 FLRA 228, 236-37 (1991).
[116] Exceptions Br. at 12, 52.
[117] *Id.* at 52-55.
[118] 5 C.F.R. § 2425.6(b)(2)(iii).
[119] *U.S. Dep't of the Air Force, Grissom Air Reserve Base, Ind.*, 67 FLRA 302, 304 (2014) (quoting *U.S. DOD, Def. Logistics Agency*, 66 FLRA 49, 51 (2011)).
[120] *See id.*
[121] Exceptions Br. at 52-55.
[122] Opp'n at 44.
[123] Exceptions Br. at 52-55.
[124] Opp'n at 44.
[125] *See, e.g., U.S. Dep't of VA, VA Long Beach Healthcare Sys., Long Beach, Cal.*, 63 FLRA 332, 334 (2009) (*VA*); *U.S. Food & Drug Admin., Detroit Dist.*, 59 FLRA 679, 683 (2004); *U.S. DOJ, INS, Jacksonville, Fla.*, 36 FLRA 928, 932 (1990).
[126] *See VA*, 63 FLRA at 334.
[127] Exceptions Form at 10.
[128] 5 C.F.R. § 2425.6(c).

Member Pizzella, dissenting:

In the childhood game of *rock, paper, scissors*, participants have accepted for a very long time that rock trumps scissors and scissors trump paper. And I doubt that any poker player would dare dispute the rule that a *straight flush* always trumps a *full house*.

Likewise, this case turns on one simple axiom – a determination by the head of a federal agency, made pursuant to specific statutory authority, undoubtedly *trumps* a generic "revised" handbook or generic policy.[1]

This case arose when Immigration and Naturalization Service (INS) officers (legacy officers), after being transferred in 2003 from the Department of Justice (DOJ) into the Customs and Border Protection (CBP) component of the Department of Homeland Security (DHS) as part of the establishment of the DHS,[2] complained about the scheduling of their work weeks.[3] The legacy officers, who were represented by the American Federation of Government Employees (AFGE), not the National Treasury Employees Union (NTEU) at the time, complained that, after being transferred into CBP, they were not being scheduled to work the "same start[-]and[-]stop times" and with "two consecutive days off" between workweeks[4] as required by 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.201.

Ironically, however, the legacy officers, who filed the grievance, had never been entitled to those schedules, even when they worked under DOJ. Since 1954, they had been categorically *exempted from the scheduling provisions* of 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.201 (a fact that is ignored by both the Arbitrator and the majority).

On November 2, 1954, under authority granted to "the head[s] of an[y] [e]xecutive agency,"[5] the Attorney General of the United States, Herbert Brownell, Jr., in response to a request by INS Commissioner, Joseph M. Swing, determined that applying the general work-schedule provisions of 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.201 to INS officers "would not only *substantially increase costs, but might well cripple the* [*INS*]"[6] (Brownell determination). When Attorney General Brownell "granted" Commissioner Swing's request,[7] the exemption became an agency-head determination and was recognized for fifty-four years as binding precedent by eleven INS Commissioners[8] and the federal courts.[9] Attorney General Brownell's agency-head determination remained in effect until CBP Commissioner W. Ralph Basham issued his own, nearly identical, determination in 2008.[10]

For some reason, though, the legacy officers from INS became convinced that the long-standing exemption from the work-schedule provisions no longer applied to them after their transfer from DOJ to DHS. It is difficult to surmise how they reached that conclusion because if their representatives from AFGE had just read the Homeland Security Act (HSA),[11] which controlled the transfer of the INS from DOJ into CBP, they would have discovered the "Savings Provision"[12] of the HSA, which clarified Congress' intent regarding agency-head exemptions. The Savings Provision specified that existing policies, rules, and regulations of agencies transferring into DHS − "completed *administrative actions* of any agency [being transferred into DHS] [−] *shall not be affected* by . . . the transfer of such agency to [DHS], but *shall continue in effect . . . until amended*."[13]

The Brownell exemption remained in effect, therefore, until Commissioner Basham determined in 2008[14] that it was necessary to continue the work-schedule "exempt[ions]."[15] Commissioner Basham determined, as the agency head of CBP, that the work-schedule provisions of 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.201 would continue to "substantially increase costs."[16] Commissioner Basham also determined that, if the exemptions were not continued, the "primary functions" of the CBP would be "*seriously handicapped*,"[17] "*severely hamper[ed]*," [18] and affect its

[1] Award at 12.
[2] *Id*. at 9.
[3] *Id*. at 10.
[4] *Id*.
[5] 5 U.S.C. § 6101(a)(3).
[6] *Acuna v. United States*, 479 F.2d at 1356, 1362 (Ct. Cl. 1973) (*Acuna*) (emphasis added) (citing Brownell Memorandum, dated November 2, 1954, to the Attorney General of the United States).
[7] *Id*.
[8] Comm'rs of Immigration and Naturalization, U.S. Citizenship and Immigration Serv., http://www.uscis.gov/uscis-tags/unassigned/commissioners-immigration-and-naturalization.
[9] *Acuna*, 479 F.2d at 1363-64.
[10] Award at 55.
[11] 6 U.S.C. § 552(a), (d).
[12] Award at 5 (quoting 6 U.S.C. § 552(a), (d)).
[13] 6 U.S.C. § 552(a) (emphases added).
[14] Award at 55.
[15] Exceptions, Attach., *Memorandum from Thomas S. Winkowski, Assistant Comm'r for W. Ralph Basham, Comm'r, Recommendation that Customs & Border Protection Officers & Agriculture Specialists be Excepted from Certain Requirements of 5 U.S.C. § 6101(a)(3)* (April 17, 2008) (Basham Determination) at 3.
[16] *Id*. at 2, 6, 8.
[17] *Id*. at 8 (emphasis added).
[18] *Id*. at 6 (emphasis added).

"ability to carry out . . . important law enforcement functions . . . [and] *respond . . . to . . . threat*[*s*]."[19]

By the time AFGE's 2004 grievance made its way to arbitration in 2013, NTEU (which assumed union "jurisdiction" over the INS legacy officers in 2007)[20] came up with an entirely new theory.[21] According to NTEU, a "handbook" (not so affectionately referred to as the "'revised' National Inspectional Assignment Policy [(RNIAP)] . . . [h]andbook"[22]) somehow magically "superseded" Attorney General Brownell's exemption.[23] How that could have happened is still a mystery because the handbook set forth nothing more than "[*g*]*eneral* [s]cheduling and [s]taffing [p]rinciples"[24] which, according to the Authority, did not even rise to the level of a collective-bargaining agreement.[25] Even though CBP first proposed to implement the handbook in 2001, AFGE, and later NTEU, repeatedly challenged the implementation of the handbook.[26]

Nonetheless, Arbitrator Robert T. Simmelkjaer convinced himself that it was up to him to single-handedly prove that an Attorney General of the United States, eleven INS Commissioners, CBP's Commissioner, and several federal court judges were all wrong. In the end, Arbitrator Simmelkjaer was "disinclined" to extend Attorney General Brownell's determination any longer[27] and determined that he had a better understanding of 5 U.S.C. § 6101(a)(3), 5 C.F.R. § 610.201, and the Savings Provision of the HSA than did all of the federal officials and judges noted above.

CBP argues that the award "is *erroneous* as a *matter of law* [and] . . . *contrary to* the previous *holdings of the FLRA*" insofar as the Arbitrator determined that the RNIAP handbook "overruled" the Brownell determination.[28]

But the majority minimizes the significance of CBP's contrary-to-law exception when it mischaracterizes the exception as an argument that the Arbitrator "failed to defer to the findings in the 1954 exemption."[29]

I disagree with that characterization of CBP's exception.

While CBP unmistakably argues that Attorney General Brownell's agency-head determination is entitled to substantial deference (a proposition with which I agree), CBP's arguments are not just about the Arbitrator's "fail[ure] to defer to the findings in [Attorney General Brownell's] exemption."[30]

To the contrary, CBP specifically argues that "with respect to split days off and non-uniform starting times,"[31] the legacy officers have been exempted from the scheduling provisions of 5 U.S.C. § 6101 *since 1954* as a result of the Brownell determination.[32] Even Arbitrator Simmelkjaer acknowledged that Brownell's exemption was effected pursuant to 5 U.S.C. § 6101(a)(3). He also acknowledged that the exemption constituted a "completed administrative action," as that term is defined by the Savings Provision of 6 U.S.C. § 552(a)(1) and (2),[33] and, therefore, followed the legacy officers when they were moved to CBP.[34]

But, still, Arbitrator Simmelkjaer determined that it was time to do away with Attorney General Brownell's exemption because the RNIAP handbook "superseded" his exemption.[35]

The Arbitrator is flat wrong on this point.

Federal courts have consistently recognized that when an agency head is authorized discretion by statute, and the official exercises that authority, that determination is not superseded (or in other words, not trumped) by a subsequent policy change.[36]

---

[19] *Id.* (emphasis added).
[20] Award at 10; *see also NTEU's "Alvara-Rassenfoss" Dilemma*, Fedsmill (Aug. 24, 2014), www.fedsmill.com/rassenfoss (Fedsmill Article).
[21] Fedsmill Article.
[22] Award at 12.
[23] *Id.* at 55; *see also* Exceptions at 15 (citing *NTEU, Chapter 137*, 60 FLRA 483, 487 (2004) (*Chapter 137*) (Chairman Cabaniss concurring on other grounds) (RNIAP established an obligation for the Customs Service "to bargain at the *local level*.") (emphasis added), *aff'd sub nom. NTEU v. FLRA*, 414 F.3d 50, 61 (D.C. Cir. 2005) (*NTEU*)).
[24] Award at 12 (emphasis added).
[25] *Chapter 137*, 60 FLRA at 487.
[26] *NTEU*, 414 F.3d at 61.
[27] Award at 55.
[28] Exceptions at 15 (emphases added).
[29] Majority at 10.
[30] *Id.*; *see* Exceptions at 18-32.
[31] Exceptions at 8.
[32] Award at 53.
[33] *Id.* at 54.
[34] *Id.*
[35] *Id.* at 55.
[36] *See, e.g., El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176, 190 (3d Cir. 2010) (When the Secretary of the Interior makes an agency-head determination pursuant to 5 C.F.R. § 710.31(c), regulations, issued subsequent to 5 C.F.R. § 710.31(c), do not "supersede" the Secretary's determination even when a subsequent regulation "d[oes] not "explicitly incorporate the language of [5 C.F.R. § 710.31(c)].); *Acuna*, 479 F.2d at 1363-64 (The scope and impact of the Brownell determination, and the INS's "long-standing interpretation and application" of that determination, are not changed by subsequent government-wide and agency policies concerning the scheduling of workweeks.); *Myers v. Hollister*, 226 F.2d 346, 347, 349 (D.C. Cir. 1955) (Regulations of the Civil

Therefore, it stands to reason, if an agency-head determination cannot be revoked by default or by a generic policy, it certainly cannot be invalidated by a handbook that does not even carry the force and effect of a collective-bargaining agreement.[37] Only a "reasoned decision" of a subsequent agency head, or, in this case, another Commissioner,[38] could effectively trump the Attorney General Brownell's agency-head determination. According to the explicit language of the Savings Provision of the HSA, that exemption continued in full force and effect until it was replaced by Commissioner Basham's subsequent agency-head determination.

Therefore, the Arbitrator's "disinclin[ation] to extend the application of the exemption" is contrary to law. Arbitrator Simmelkjaer had no more business second guessing *how* and *when* INS, and CBP after 2003, would exercise its statutory authority under 5 U.S.C. 6101(a)(3) than did the arbitrator, in *U.S. DHS, U.S. ICE*,[39] have the ability to second guess *when* and *how* ICE should "exercise" its authority "to address specific security risks."[40]

The remedy ordered by the Arbitrator could impact more than 25,000 legacy INS officers.[41] Following the Arbitrator's award, NTEU issued several press releases notifying the legacy INS officers that each officer will qualify for up to eight hours of Customs Officer Pay Reform Act (COPRA) overtime for every week, from 2004 to 2008, and that CBP and OPM will be required to recalculate the retirement pay of retired legacy officers as well as retirement calculations for current legacy officers.[42] I do not have the means to measure what the exact costs of this remedy will be, but considering the number of current legacy INS officers impacted – 25,000 – which does not account for those who have since retired, there is no doubt that it will be "significant."[43]

As discussed above, Congress recognized that overtime for this category of employees could "substantially increase[]" costs to such a degree that an agency's mission could be "seriously handicapped."[44] Attorney General Brownell determined that is was necessary to exempt INS officers from the work-schedule requirements of 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.201 because the "substantial[] increase costs," associated with those provisions, could "cripple the [INS]."[45]

Since 2012, CBP has lost 521 FTEs.[46] It is operating under a hiring freeze that permits it to make just one hire for every seven vacancies, and its personnel budget has been decreased by $125 million.[47] The reality that the costs associated with the work-schedule provisions, when applied to the legacy officers, could "cripple the [INS]"[48] has not changed. It was true from 1954 until 2003 (when INS became a part of DHS), and it was also true from 2004 (when AFGE filed this grievance) until 2008 when CBP Commissioner Basham determined that the exemption was essential to the mission of the CBP.[49] Commissioner Basham found that the conditions never changed and reaffirmed that the work-schedule provisions would "substantially increase costs"[50] to such a degree that the "primary functions" of the CBP "would be seriously handicapped" and "severely hampered" affecting its ability to carry out important law[-]enforcement functions . . . [and] to respond properly to [] threat[s]."[51]

The costs − that Attorney General Brownell and Commissioner Basham determined would "cripple"[52] and "severely hamper"[53] the mission of the CBP − are the very same costs that Arbitrator Simmelkjaer imposed on CBP based upon his myopic "disiniclination."[54]

As I cautioned in *U.S. DHS, CBP*, [55] the Authority has an obligation to promote "the effective conduct of government business."[56] Part of that charge is to recognize the significant impact that our decisions may have on agencies' missions and on the taxpayers who are ultimately called upon to foot this bill.[57]

Unlike the majority, I am unwilling to affirm one Arbitrator's "disinclination" (which I believe to be contrary to law) especially when that decision may

Service Commission, concerning reductions in force, do not overrule determinations made by an agency head, pursuant to authority granted by statute, as to which employees to retain.)

[37] *See supra* note 25.

[38] *U.S. DHS, U.S. CBP*, 65 FLRA 978, 983-84 (2011).

[39] 67 FLRA 501 (2014) (Member Pizzella dissenting).

[40] *Id*. at 507 (Dissenting Opinion of Member Pizzella).

[41] Award at 34; *see also U.S. DHS Budget-in-Brief Fiscal Year 2014*, http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf (last visited Nov. 12, 2014) (*DHS Budget-in-Brief*).

[42] NTEU, Chapter 177, www.nteuchapter177.com/?pz143 (last visited Nov. 12, 2014).

[43] *Id*.

[44] 5 U.S.C. § 6101(a)(3).

[45] *Acuna*, 479 F.2d at 1362.

[46] *DHS Budget-in-Brief* at 118.

[47] *Id*.

[48] *Acuna*, 479 F.2d at 1362.

[49] Basham Determination at 8.

[50] *Id*. at 2, 6, 8.

[51] *Id*. at 6.

[52] *Acuna*, 479 F.2d at 1362.

[53] Basham Determination at 8.

[54] Award at 55.

[55] 67 FLRA 107 (2013) (Member Pizzella concurring).

[56] *Id*. at 112 (Concurring Opinion of Member Pizzella).

[57] *Id*.

significantly impact the ability of the CBP to carry out its mission.

Thank you.