73 FLRA No. 174

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JAMES A. HALEY
VETERANS HOSPITAL AND CLINICS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 0547
(Union)

0-AR-5845

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DECISION

June 5, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member
(Member Kiko concurring)

I. Statement of the Case

Arbitrator David V. Breen issued an award (1) finding a grievance concerning an employee's (the grievant's) performance appraisal procedurally arbitrable and (2) granting the grievance on the merits. Specifically, the Arbitrator found that the Agency violated the article in the parties' agreement governing performance appraisals (Article 27). As a remedy, he directed the Agency to raise the grievant's performance rating. The Agency filed exceptions to the award on nonfact, essence, and contrary-to-law grounds. In particular, the Agency argues that the award unlawfully interferes with its management rights to assign work and direct employees under § 7106(a)(2) of the Federal Service Labor-Management Relations Statute (the Statute).[1] Because the Union demonstrates Article 27 – as interpreted and applied by the Arbitrator – is enforceable under § 7106(b)(2) of the Statute, and we find that the awarded remedy reasonably correlates to the Agency's violation of Article 27, we deny the Agency's management-rights exception. For the reasons that follow, we also deny the remaining exceptions because they do not demonstrate the award is deficient.

II. Background and Arbitrator's Award

The grievant is an Advanced Medical Support Assistant (AMSA) at an Agency clinic, and assists patients with scheduling and other matters related to seeing medical-care providers. Before 2021, the Agency consistently rated the grievant's performance as "[e]xceptional" in all elements, resulting in annual "overall" ratings of "[o]utstanding."[2] The grievant's supervisor changed and, on November 18, 2021, the new supervisor rated the grievant as "[f]ully [s]uccessful" for the "Scheduling Process and Procedures" element (the scheduling element), which resulted in an overall rating of fully successful.[3] The appraisal contained no explanation for the rating.

On December 16, 2021, the grievant emailed her supervisor and several others in her supervisory chain, requesting an explanation for the scheduling element's rating. When the grievant received no response, she contacted her supervisor again on December 21, 2021. The grievant's supervisor responded she would provide the results of an audit of the grievant's work on which the rating was based (the scheduling audit). On December 21, 2021, the Union filed a grievance, alleging the Agency failed to provide "any counseling or direction" to the grievant "for a mark down on the critical element," and seeking to have the grievant's overall rating "upgraded" to "outstanding."[4] The matter proceeded to arbitration.

The parties did not stipulate to an issue, and the Arbitrator did not expressly frame one. However, as the Arbitrator described, the parties disputed both the grievance's timeliness and its merits.

As to timeliness, the Arbitrator cited Article 43, Section 7 of the parties' agreement (Article 43). Article 43 states an employee or the Union must present a formal grievance "to the immediate or acting supervisor, in writing, within [thirty] calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence; or anytime if the act or occurrence is of a continuing nature."[5] The Arbitrator found that, for the reasons he stated in his merits analysis (discussed further below), the Agency "violated Article 27, Performance Appraisal of the Master Agreement [(Article 27)] . . . during the 2021 performance[-]appraisal year *and thereafter*."[6] Relying on the grievant's December 2021 communications with her supervisor, the Arbitrator determined the grievance was timely because it was filed when the grievant knew "the Agency was not going to rectify promptly its ongoing . . . violations" of Article 27.[7]

[1] 5 U.S.C. § 7106(a)(2).
[2] Award at 2.
[3] *Id.* at 4.
[4] *Id.*
[5] *Id.* at 15 (quoting Art. 43); *see also* Exceptions, Attach. 4 (Agreement) at 230.
[6] Award at 15 (emphasis added).
[7] *Id.* at 16.

On the merits, the Agency argued it had implemented a rule requiring AMSAs to enter certain scheduling information in a comment field (scheduling rule), and that a failure to do so constituted an error. According to the Agency, the grievant's failure to follow the scheduling rule resulted in scheduling-audit errors that lowered her accuracy rate to 83.78 percent – below the ninety percent threshold required for an exceptional rating in the scheduling element.[8] Although the Agency argued the scheduling rule was contained within a 2016 Agency directive, the Arbitrator found there was no evidence the Agency directive included the scheduling rule.[9] He also noted the supervisor's admission that she did not know whether there was an actual rule, but that she considered the scheduling rule to be "common sense."[10] The Arbitrator found the Agency produced no evidence supporting the supervisor's assertions that she instructed the grievant about the scheduling rule or that AMSAs received training on the rule.

The Arbitrator credited the grievant's testimony that her previous supervisor never informed her of the scheduling rule; that she was never cited during any previous audits for failing to follow the rule; and that the first time she even became aware of the rule was during the arbitration hearing. The Arbitrator noted that, nevertheless, the Agency charged the grievant for violating the rule in the scheduling audit at issue.[11]

The Arbitrator concluded the Agency never trained the grievant on the scheduling rule or told her that "she must abide" by it and that failure to follow it would affect her rating on the scheduling element.[12]

The Arbitrator also "adopted," as his own findings, arguments from the Union's post-hearing brief concerning the Agency's violations of Article 27.[13] In doing so, he cited Section 1, which states the parties' "interest in improving" performance is achieved by "providing employees with frequent feedback" and identifying areas and action "for improved performance."[14] The Arbitrator further found that Section 2 requires performance appraisals be "fair and objective" and "measure actual work performance,"[15] and that Section 3 requires that performance appraisals be "fair, equitable, and strictly related to job performance."[16] Additionally, he cited Sections 4 and 9, which require the Agency to provide "on-going" feedback to "improv[e] employee performance" through progress reviews and informal, "candid, forthright dialogues between the supervisor and employee(s) aimed at improving the work product."[17] The Arbitrator also noted that Section 6 requires the Agency to communicate any change in the performance standards to employees. He adopted the Union's argument that Article 27 requires that "employees understand how their job performance relates to the criteria being measured."[18] The Arbitrator further cited Section 5's requirement that, in addition to providing employees their performance plans, the agency provide "[a]dditional information regarding performance expectations . . . sufficient to assist the employee in achieving the '[e]xceptional' level."[19]

The Arbitrator found the grievant "did not get any of th[e] benefit" of the communication those provisions require, because "[s]he received no ongoing feedback and no guidance" about the scheduling rule and therefore, her rating "came to her as a complete surprise."[20] The Arbitrator also found the grievant "was met with silence and stonewalling" when she sought "clarification" about her lower rating on the scheduling element.[21] In this regard, the Arbitrator credited the Union's assertion that "when [the grievant] appeared at her [a]rbitration in this matter – seven months after she received her performance review – she *still* did not know why her scheduling accuracy [rating] was suddenly so much lower than before or what she could do to improve it."[22] Based on the foregoing findings, the Arbitrator concluded the Agency "violated Article 27."[23]

As remedies, the Arbitrator directed the Agency to change the grievant's rating in the scheduling element to exceptional, raise her overall rating to outstanding, and make her whole "for any loss of earnings that may have resulted had she been rated properly."[24]

On November 21, 2022, the Agency filed exceptions to the award. On April 27, 2023, the Union filed an opposition to the Agency's exceptions.[25]

[8] *See id.* at 12-14 (summarizing Agency arguments).
[9] *See id.* at 17 (noting testimony that the directive required compliance with the scheduling rule, but finding witness never sufficiently identified any wording in the directive that imposes the scheduling rule).
[10] *Id.* at 16.
[11] *Id.* at 16-17.
[12] *Id.* at 18.
[13] *Id.* at 12, 18-20.
[14] *Id.* at 18 (quoting Union Post-Hr'g Br. at 13).
[15] *Id.* at 19.
[16] *Id.*
[17] *Id.* at 18.
[18] *Id.* at 18-19.
[19] *Id.* at 19.
[20] *Id.* at 20.
[21] *Id.*
[22] *Id.* (emphasis added).
[23] *Id.*
[24] *Id.*
[25] The case was in abeyance from December 20, 2022, until March 28, 2023, while the parties engaged in mediation. Therefore, the Union's opposition was due April 27, 2023. *See* March 28, 2023 Order.

III. Analysis and Conclusions

A. The Agency does not demonstrate the award is based on nonfacts.

The Agency alleges the award is based on several nonfacts.[26] 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, but for which the arbitrator would have reached a different result.[27] However, the Authority will not find an award deficient where the parties disputed the alleged nonfact before the arbitrator,[28] and disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not establish that an award is based on a nonfact.[29] The Authority also rejects nonfact exceptions that challenge alleged findings that an arbitrator did not actually make.[30] Additionally, an arbitrator's contractual interpretations cannot be challenged as nonfacts.[31]

First, the Agency claims the Arbitrator's timeliness determination was based on his erroneous finding that the grievance "challenged an ongoing violation rather [than] a discrete act or occurrence."[32] According to the Agency, the grievance challenged only the grievant's November 18, 2021 performance appraisal, and therefore needed to be filed within thirty days of the appraisal date in order to be timely.[33] However, Article 43 requires grievances be filed "within [thirty] calendar days of the date that the employee or Union became aware" of the challenged act or occurrence.[34] The Arbitrator concluded the Agency's violations of Article 27 included actions it took *after* issuing the performance appraisal,[35] and that the grievant timely filed once she *became aware* that the Agency was not going to "rectify promptly" its ongoing violations.[36] The Agency's argument merely challenges the Arbitrator's interpretation of the parties' agreement and evaluation of the evidence, neither of which provides a basis for finding the award based on a nonfact.[37]

Next, the Agency argues the award is based on nonfacts "to the extent the [a]ward may be construed to assert that the Agency violated all seven sections of Article 27."[38] Specifically, the Agency asserts that record evidence contradicts any finding that it violated Article 27, Sections 2, 5, 6, and 9, and the Arbitrator's findings that the Agency violated those sections are based on facts which "evidence conclusively refutes" or the "Arbitrator found to be false."[39] The Agency further alleges the Arbitrator ignored "overwhelming evidence" that the grievant's scheduling-audit score was "accurate," thereby undermining the Arbitrator's finding that the Agency violated Article 27, Section 2's requirement that performance appraisals measure "actual work performance."[40]

To support these arguments, the Agency relies on portions of the award in which the Arbitrator summarized the Agency's arguments, and a page in the hearing transcript where, it argues, the Arbitrator accepted that the grievant's accuracy score was below the required threshold for a higher rating.[41] However, the Arbitrator did not adopt the facts alleged in the Agency's arguments. Therefore, the Agency's arguments do not identify any specific findings the Arbitrator actually made.[42]

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[26] Exceptions Br. at 5-6 (challenging the procedural-arbitrability determination); *id.* at 7-9 (challenging alleged findings regarding contractual violations).

[27] *NAIL, Loc. 11*, 73 FLRA 328, 329 (2022) (citing *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022) (*HHS*)).

[28] *HHS*, 73 FLRA at 96 (citing *U.S. DOD, Def. Logistics Agency, Disposition Servs., Battle Creek, Mich.*, 70 FLRA 949, 950 (2018) (Member DuBester concurring; Member Abbott concurring)).

[29] *AFGE, Loc. 4156*, 73 FLRA 588, 590 (2023) (citing *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 67, 70-71 (2022) (Member Kiko concurring on other grounds)).

[30] *NFFE, Loc. 1998*, 73 FLRA 143, 145 (2022) (*Local 1998*) (citing *SSA, Off. of Hearing Operations*, 71 FLRA 177, 178 (2019)).

[31] *NTEU, Chapter 149*, 73 FLRA 133, 135 (2022) (*Chapter 149*) (citing *SSA*, 71 FLRA 580, 582 (2020) (Member DuBester concurring)).

[32] Exceptions Br. at 5-6.

[33] *Id.* at 5.

[34] Award at 15 (quoting Art. 43).

[35] *Id.* (finding the Agency violated Article 27 "during the 2021 performance appraisal year and thereafter").

[36] *Id.* at 15-16 (describing the grievant's attempts to either obtain an explanation for her rating or make the Agency aware of its error, and concluding the grievant timely filed once she "knew that the Agency was not going to rectify promptly" its apparent violations of Article 27).

[37] *AFGE, Loc. 2338*, 73 FLRA 510, 513 (2023) (rejecting nonfact exception based on arbitrator's evaluation of the evidence (citing *AFGE, Loc. 2142*, 72 FLRA 764, 766 (2022) (Chairman DuBester concurring)); *Chapter 149*, 73 FLRA at 135-36 (rejecting nonfact argument challenging arbitrator's contractual interpretation).

[38] Exceptions Br. at 7.

[39] *Id.* at 7-8 (asserting (1) there was "no evidence" that the face-to-face progress review required by Sections 2 and 9 "did not occur" and there was "undisputed evidence that it did"; (2) there was "no evidence" that the scheduling element "was not defined in objective terms" as required by Section 5; and (3) there was "undisputed evidence" that the scheduling element did not change, so Section 6 did not apply).

[40] *Id.* at 8 (quoting Art. 27, § 2).

[41] *Id.*

[42] *Local 1998*, 73 FLRA at 145-46; *see also AFGE, Loc. 2338*, 73 FLRA 229, 230 (2022) (denying nonfact exception where excepting party failed to identify a specific factual finding that was clearly erroneous (citing *NAIL, Loc. 5*, 69 FLRA 573, 574 (2016); *AFGE, Council of Prison Locs., Council 33*, 68 FLRA 757, 759-60 (2015))).

The Agency also contends the Arbitrator "refused to hear further evidence" showing that the grievant's accuracy rate on the scheduling audit fell below ninety percent because he found it to be "cumulative" insofar as the grievant's deficiency had already been established.[43] However, in the portion of the hearing transcript the Agency cites to support this assertion, the Arbitrator – in the course of rejecting the Agency's proffered testimony concerning the audit findings – stated that "[i]t's already been established" that "the Agency defines" the error rate at ninety percent.[44] Moreover, the record indicates the Arbitrator excluded the testimony based on the Union's objection that the Agency had "with[eld] [the audit findings] until the last minute."[45]

Because the Agency's arguments challenge the Arbitrator's weighing of the evidence, or allege findings that the Arbitrator did not make, they do not demonstrate the award is based on a nonfact.[46] Further, to the extent the Agency's argument challenges the Arbitrator's interpretation of Article 27, as stated above, such challenges provide no basis for finding an award deficient on nonfact grounds.[47]

We deny the Agency's nonfact exception.

B. The Agency does not demonstrate the award fails to draw its essence from the parties' agreement.

The Agency argues the Arbitrator's timeliness determination fails to draw its essence from Article 43.[48] The Authority will find an award is deficient as failing to draw its essence from a collective-bargaining agreement when the appealing party establishes 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.[49] Mere disagreement with an arbitrator's interpretation and application of an agreement does not provide a basis for finding an award deficient.[50]

As noted above, Article 43 states an employee or the Union must present a formal grievance "to the immediate or acting supervisor, in writing, within [thirty] calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence; or anytime if the act or occurrence is of a continuing nature."[51] Again, the Agency argues that the grievance challenged only the November 18 performance appraisal, and that, therefore, Article 43 required the Union to file the grievance within thirty days of November 18, 2021. The grievance alleged the Agency failed to provide "any counseling or direction" to the grievant "for a mark down on the critical element,"[52] and the Arbitrator interpreted this as challenging Agency actions beyond just the appraisal. Specifically, the Arbitrator found the December 21 grievance timely because: (1) the Agency's violations of Article 27 spanned beyond the appraisal period, including when the supervisor failed to respond to the grievant's questions about her rating; and (2) December 21, 2021, was the date upon which "the [g]rievant knew that the Agency was not going to rectify promptly its ongoing . . . violations."[53] The Agency merely argues for its preferred interpretation and application of Article 43, but provides no basis for finding the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. As such, we reject the Agency's essence argument.[54]

C. The award does not violate management's rights to assign work or direct employees.

The Agency asserts the Arbitrator's finding that it violated Article 27,[55] and the remedy directing the Agency to raise the grievant's rating,[56] are contrary to law because they violate management's rights to assign work and direct employees under § 7106(a)(2) of the Statute, and "do[] not enforce a contract provision negotiated under § 7106(b)" of the Statute.[57] When resolving a

[43] Exceptions Br. at 8.
[44] Exceptions, Attach. 1, Tr. at 279 (further stating that "[t]he real question now is whether these were errors").
[45] *Id.* at 284-86; *see also id.* at 170 (opining that the parties might not have needed arbitration if the Agency had provided the audit to the grievant earlier, but noting that the grievant "may dispute" the audit findings).
[46] *Local 1998*, 73 FLRA at 145-46 (denying nonfact exception which challenged findings the arbitrator did not make and explaining that a claim the arbitrator "ignored" evidence submitted by the excepting party merely challenges the arbitrator's evaluation of the evidence (citations omitted)).
[47] *Chapter 149*, 73 FLRA at 135-36.
[48] Exceptions Br. at 5-6.
[49] *NAGE*, 71 FLRA 775, 776 (2020) (citing *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017)).
[50] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mia., Fla.*, 71 FLRA 1262, 1264 (2020) (*Miami*) (Member DuBester concurring); *U.S. DOL (OSHA)*, 34 FLRA 573, 575-76 (1990).
[51] Award at 15 (quoting Art. 43); *see also* Agreement at 228.
[52] Award at 4 (quoting grievance).
[53] *Id.* at 16.
[54] *See Miami*, 71 FLRA at 1264 (denying an essence exception because it constituted mere disagreement with the arbitrator's interpretation and application of the parties' agreement); *see also SSA*, 70 FLRA 227, 230 (2017) (concluding an excepting party's attempt to relitigate its interpretation of an agreement and the evidentiary weight given by the arbitrator fails to demonstrate the award is deficient).
[55] Exceptions Br. at 6.
[56] *Id.* at 9.
[57] *Id.* at 6-7.

contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[58] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[59] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[60]

After the Agency filed its exceptions, the Authority issued an order permitting the parties to file supplemental briefs addressing the Authority's revised test for resolving management-rights exceptions, articulated in *Consumer Financial Protection Bureau* (*CFPB*).[61] Both parties filed timely briefs.

Under the four-part *CFPB* framework, the first question is whether the excepting party establishes that the arbitrator's interpretation and application of the parties' agreement, and/or the awarded remedy, affects a management right.[62] If the answer to that question is yes, then the Authority will move to the second question under *CFPB*. That question asks whether the arbitrator correctly found, or the opposing party demonstrates, that the pertinent contract language – as interpreted and applied by the arbitrator – is enforceable under § 7106(b).[63] However, in *CFPB*, the Authority noted that "if it is clear that the [contract provision] is enforceable under § 7106(b), then the Authority may assume, without deciding, that the interpretation and application of the [provision] and/or the awarded remedy 'affects' a management right."[64]

As discussed previously, the Arbitrator based his awarded remedy upon his finding that the Agency violated several subsections of Article 27. We assume, without deciding, that the Arbitrator's interpretation and application of Article 27 affects management's rights to direct employees and assign work.[65] However, for the following reasons, we find Article 27 – as interpreted and applied by the Arbitrator – is enforceable under § 7106(b) of the Statute.

As an initial matter, the Agency asserts the award does not enforce a provision negotiated under § 7106(b), because the Arbitrator did not "identify, with reasonable specificity, *which* contract provisions [the Agency] . . . violated and how."[66] However, the Authority considers an arbitrator's award and the record as a whole when determining whether an award is contrary to law,[67] and has applied this principle to reject similar specificity arguments.[68] Therefore, the Agency's assertion that the award lacked the requisite specificity does not, by itself, demonstrate that the award fails to enforce a provision negotiated under § 7106(b).[69]

Further, the Arbitrator found Article 27, Sections 1, 4, and 5 require the Agency to communicate performance standards and provide employees "continuing" feedback for improving performance, including information on how to achieve an "exceptional" rating.[70] Additionally, the Arbitrator found Section 3 requires appraisals to be "fair" and "equitable."[71] The Arbitrator concluded the grievant did not get the benefit of these provisions, because the Agency never trained her on the scheduling rule, never told her that she needed to follow it, and never told her that failure to follow the rule would result in her being charged with errors that would lower her rating in the scheduling element.[72]

The Union asserts these Article 27 requirements are enforceable procedures under § 7106(b)(2).[73] In its exceptions, the Agency states that it "is not disputing that Article 27 . . . correctly interpreted, includes provisions negotiated under [§] 7106(b)."[74] Moreover, the Agency does not argue that the award fails to draw its essence from

[58] *NTEU, Chapter 338*, 73 FLRA 487, 488 (2023) (citing *U.S. Dep't of the Army, U.S. Army Garrison Redstone Arsenal, Huntsville, Ala.*, 73 FLRA 210, 211 (2022)).
[59] *Id.*
[60] *Id.* (citing *U.S. Dep't of VA, Robley Rex Med. Ctr.*, 73 FLRA 468, 469 (2023)).
[61] 73 FLRA 670, 672-82 (2023).
[62] *Id.* at 676-77.
[63] *Id.* at 677-80.
[64] *Id.* at 681 n.123.
[65] Exceptions Br. at 7.
[66] Agency Supplemental Br. at 2.
[67] *See, e.g.*, *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 420 (2023) (reviewing the arbitrator's challenged statement in context of entire award in order to resolve exception (citing *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 220, 221 (2022); *AFGE, Loc. 3294*, 70 FLRA 432, 436 n.42 (2018) (Member DuBester concurring))).
[68] *U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs.*, 67 FLRA 665, 667 (2014) (Member Pizzella concurring on other grounds) (rejecting argument that award did not enforce a contract provision negotiated under § 7106(b) because arbitrator had failed to identify a specific violated provision where clear from the record that arbitrator found agency violated a particular article).
[69] The Agency also asserts, without elaboration, that the Arbitrator "exceeded his authority by awarding a remedy without finding a violation" of the parties' agreement. Exceptions Br. at 10. As the Arbitrator clearly found that the Agency violated Article 27, Award at 20, we reject this argument.
[70] Award at 18-19.
[71] *Id.* at 19.
[72] *Id.* at 20; *see also id.* at 18.
[73] Union Supplemental Br. at 7-8.
[74] Exceptions Br. at 7.

Article 27.[75] In its supplemental brief – relying solely on the specificity argument we have rejected above – the Agency asserts that the Union cannot demonstrate that the award enforces a provision negotiated under § 7106(b).[76] However, for the following reasons, we find the Union demonstrates that the provisions on which the Arbitrator relied are – as interpreted and applied by the Arbitrator – enforceable exceptions to management's rights.

The Union argues that Article 27, as interpreted and applied by the Arbitrator, concerns procedures management officials will observe during the performance-evaluation process, but does not infringe on management's rights to set performance standards or evaluate performance under those standards.[77] When determining whether a contract provision involving performance discussions constitutes a procedure under § 7106(b)(2), the Authority has noted that agencies have a statutory duty to bargain over "procedures which management officials will observe in the development and implementation of performance standards."[78] Consistent with this principle, the Union correctly asserts[79] that the Authority has found provisions requiring an agency to conduct performance discussions with employees, including communicating expectations and problems, are enforceable procedures.[80]

It is undisputed that the Agency used the scheduling rule to measure the grievant's performance.[81] Thus, the Arbitrator's interpretation and application of Article 27 – requiring the Agency to inform the grievant of, and train her on, the scheduling rule before using it to measure her performance – is similar to proposals and provisions the Authority has previously found to constitute procedures under § 7106(b)(2).[82] Moreover, as noted previously, the Agency does not argue that the award fails to draw its essence from Article 27.[83] Accordingly, we find the Union has demonstrated that Article 27, as interpreted and applied by the Arbitrator, is enforceable under § 7106(b)(2).[84] As such, the answer to the second *CFPB* question is yes.[85]

The third *CFPB* question is whether the excepting party challenges the remedy separate and apart from the underlying contract violation.[86] The Agency asserts that the remedy directing it to raise the grievant's rating is contrary to its management rights because it does not reflect the grievant's actual performance or relate to

[75] *See id.*; *see also CFPB*, 73 FLRA at 679 (explaining that the Authority "will continue to apply the arbitrator's interpretation of the [parties' agreement] unless the excepting party demonstrates that the award fails to draw its essence from the agreement" (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 1172, 1176 n.46 (2020) (*BOP Dublin*) (Member DuBester dissenting in part)).

[76] Agency Supplemental Br. at 2.

[77] *See* Union Supplemental Br. at 7-8 (citing *Dep't of VA v. FLRA*, 33 F.3d 1391, 1393 (D.C. Cir. 1994) (Statute requires bargaining over procedures employed in exercise of management rights, including right to set performance standards); *SSA*, 65 FLRA 638, 640-41 (2011) (discussing precedent holding agencies have an obligation to bargain over procedures which management officials will observe in the development and implementation of performance standards); *AFGE, Council 220*, 65 FLRA 726, 728-29 (2011) (*Council 220*) (Member Beck concurring); *U.S. Dep't of VA, Montgomery Reg'l Off., Montgomery, Ala.*, 65 FLRA 487, 490 (2011); *AFGE, Loc. 1164*, 49 FLRA 1408, 1414 (1994) (Member Talkin dissenting) (establishing performance standards constitutes an exercise of management's rights, but "proposals that concern only the application of performance standards do not directly interfere with management's rights")).

[78] *SSA*, 65 FLRA at 640 (emphasis omitted) (quoting *NTEU*, 35 FLRA 254, 256 (1990)).

[79] *See* Union Supplemental Br. at 7-8 (arguing "provisions 'concerning [performance-]expectation discussions would be enforceable as procedures under § 7106(b)(2)'" (quoting *Council 220*, 65 FLRA at 729)).

[80] *See SSA*, 65 FLRA at 640-41 (requiring management to hold performance discussions does not preclude management from establishing performance standards or evaluating employee performance (citing *NFFE*, 13 FLRA 426, 426-28 (1983) (proposal requiring supervisor to discuss appraisal with employee before discussing with higher-level management was a procedure)).

[81] *E.g.*, Award at 12-13 (summarizing Agency allegations that the grievant was charged with errors for failing to follow the scheduling rule, which lowered her accuracy rate below the threshold entitling her to an exceptional rating in the scheduling element).

[82] *See, e.g.*, *Council 220*, 65 FLRA at 728; *SSA*, 65 FLRA at 640-41.

[83] *See* Exceptions Br. at 7; *see also CFPB*, 73 FLRA at 679 (explaining that the Authority "will continue to apply the arbitrator's interpretation of the [parties' agreement] unless the excepting party demonstrates that the award fails to draw its essence from the agreement" (citing *BOP Dublin*, 71 FLRA at 1176 n.46)).

[84] *See* Union Supplemental Br. at 7 (arguing Arbitrator's interpretation of Article 27 is permissible under § 7106(b)(2) because it did not prevent the Agency from using the scheduling rule to evaluate employee performance, but only required "that an employee . . . be informed of the standards by which she is to be evaluated").

[85] Although the Union also asserts that Article 27 is enforceable as an appropriate arrangement under § 7106(b)(3) of the Statute, Union Supplemental Br. at 9-10, we need not resolve that argument. *CFPB*, 73 FLRA at 679 (explaining that the opposing party need only demonstrate "that one of the subsections of § 7106(b) applies").

[86] *CFPB*, 73 FLRA at 681.

any contract violation.[87] Therefore, the answer to the third *CFPB* question is yes.

The fourth *CFPB* question is whether the Agency demonstrates the remedy fails to reasonably correlate to the enforced provision, as interpreted and applied by the Arbitrator.[88] Based on his findings, the Arbitrator directed the Agency to change the grievant's rating on the scheduling element from "[f]ully [s]uccessful" to "[e]xceptional," and – consequently – to upgrade the grievant's overall rating to "[o]utstanding."[89]

The Agency argues this remedy does not reasonably correlate to Article 27, claiming the Arbitrator "strongly suggested" the grievant's actual work did not warrant the higher rating.[90] However, as discussed previously, the Arbitrator made no finding to that effect. The parties do not dispute either (1) that the Agency charged the grievant with audit errors for failing to follow the scheduling rule; or (2) that the grievant's rating in the scheduling element was derived directly from her scheduling audit accuracy rate.[91] At arbitration, the Agency asserted that the grievant's failure to follow the scheduling rule brought her accuracy rate below the threshold accuracy rate for the higher rating in the scheduling element.[92] However, the Arbitrator concluded that the grievant should not have been charged with those audit errors, because the Agency's use of the scheduling rule to rate her performance violated Article 27.[93] Taken as a whole, the Arbitrator's findings support a conclusion that, but for the Agency's improper reliance upon the scheduling rule to rate the grievant, she would have received an exceptional rating in the scheduling element.[94]

Based on these findings, we find the Arbitrator's directions that the Agency change the grievant's rating on the scheduling element – and, consequently, to upgrade the grievant's overall rating to "[o]utstanding" – reasonably correlate to his conclusion that the Agency violated Article 27. Therefore, the answer to the fourth *CFPB* question is no.

We find the Agency does not demonstrate that the award violates the cited management rights. Therefore, we deny the Agency's contrary-to-law exception.

IV. Decision

We deny the Agency's exceptions.

[87] Exceptions Br. at 9-10; Agency Supplemental Br. at 3.
[88] *CFPB*, 73 FLRA at 681.
[89] Award at 20.
[90] Agency Supplemental Br. at 3-4.
[91] *See* Exceptions, Attach. 5, Agency's Post-Hr'g Br. (Agency's Post-Hr'g Br.) at 7-10 (describing the scheduling rule, the grievant's audit errors for failing to follow the scheduling rule, and how the rating for the "Scheduling Processes & Procedures" element is derived from the audit accuracy rate).
[92] *See* Award at 12-13; *see also* Agency's Post-Hr'g Br. at 21-22.
[93] *See* Award at 18-20.
[94] *See, e.g.*, *id.* at 2 (grievant regularly received an "[e]xceptional" rating in the scheduling element in years prior), 17 (grievant was never cited for violating the scheduling rule in prior scheduling audits).

Member Kiko, concurring:

I agree with the decision in all respects. In challenging the lawfulness of the Arbitrator's remedy, I note that the Agency cites[1] *U.S. Department of the Treasury, Office of the Comptroller of the Currency* (*Comptroller*).[2] In *Comptroller*, the Authority found that an award directing a higher performance rating violated management rights where the arbitrator expressly rejected the notion that his rating remedy was based on evidence of the grievant's performance.[3] In contrast, here, the Arbitrator's findings demonstrate that because the grievant consistently received an exceptional rating in the scheduling element in prior years, and the grievant's scheduling audit accuracy rate would have earned her an exceptional rating if she were not charged with errors for violating the scheduling rule of which she was unaware, the Arbitrator's rating remedy is supported by evidence of the grievant's performance. Accordingly, *Comptroller* is distinguishable.[4]

Generally, I believe that supervisors – not arbitrators – should have the final say on an employee's performance rating. Having assigned the employee duties, communicated performance expectations, and observed the employee's performance for an entire performance period, supervisors are best qualified to rate employee performance. Moreover, the Authority has repeatedly held that evaluating employee performance is an exercise of management's rights to direct employees and assign work.[5] Thus, in some performance-rating arbitration cases, the only appropriate remedy will be to remand the matter to the agency to reassess the employee in a manner that complies with the parties' agreement, as interpreted and applied by the arbitrator. However, in rare situations like this, where the arbitrator has sufficient evidence of the grievant's performance to make a specific finding, an arbitrator's designation of a particular performance rating to remedy a contract violation does not violate § 7106 of the Federal Service Labor-Management Relations Statute.[6]

[1] Exceptions Br. at 9-10.

[2] 71 FLRA 387 (2019) (Member DuBester dissenting in part).

[3] *Id.* at 388 (arbitrator found it "not necessary for the [u]nion to demonstrate that the [g]rievant's performance warranted" the higher rating).

[4] *See SSA*, 71 FLRA 798, 801-02 (2020) (Member Abbott dissenting in part; Member DuBester dissenting in part) (upholding rating remedy where arbitrator made factual findings to support the conclusion the grievant's performance warranted a higher rating).

[5] *Id.* at 801; *Comptroller*, 71 FLRA at 390 ("[T]he right to evaluate employee performance extends to the determination of the rating that management will assign to a given employee." (citing *NTEU*, 47 FLRA 705, 710 (1993)).

[6] 5 U.S.C. § 7106.