73 FLRA No. 67

UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3320
(Union)

0-AR-5784

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DECISION

November 14, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members
(Member Kiko dissenting)

I. Statement of the Case

Arbitrator Mark D. Keyl found that the Agency properly issued an official reprimand (the reprimand) to an employee (the grievant) for certain conduct, but improperly suspended the grievant for five days for other conduct. Thus, the Arbitrator sustained the grievance in part, denied it in part, and directed various remedies discussed further below. The Agency filed exceptions arguing that the Arbitrator exceeded his authority and that the award fails to draw its essence from the parties' agreement. For the following reasons, we deny the exceptions.

II. Background and Arbitrator's Award

The Agency issued the reprimand, charging the grievant with failure to follow instructions and inattention to duty. The Union filed a grievance challenging the reprimand.

The Agency later proposed to suspend the grievant for seven days, alleging that the grievant again failed to follow instructions. On review, the Agency's deciding official determined that only one of three charges underlying the proposed suspension warranted discipline. Accordingly, she reduced the suspension to five days. The Union grieved the suspension.

The grievances were consolidated and went to arbitration. The parties did not stipulate the issues, but they both proposed issues concerning whether the disciplinary actions were for "just and sufficient cause" and what the appropriate remedy should be.[1] Neither party's proposed issue statements cited specific provisions in the parties' agreement.

Absent a stipulation by the parties, the Arbitrator stated that "the issue to be resolved . . . is whether the [g]rievant was properly disciplined under the terms of the . . . agreement . . . Article 12, Discipline, Section 12.01 [(Section 12.01)], which requires '[b]argaining[-]unit employees shall be the subject of disciplinary action only for just and sufficient cause.'"[2] The Arbitrator also addressed "[t]he issue of the appropriate penalty."[3]

The Arbitrator found that the grievances "were processed in accordance with Article 12 . . . and Article 51" of the parties' agreement.[4] The Arbitrator first quoted Section 12.01(1), which pertinently provides:

> The objective of discipline is to correct and improve employee behavior so as to promote the efficiency of the service. The parties agree to the concept of private, progressive discipline designed primarily to correct and improve employee behavior. . . . Bargaining[-]unit employees shall be the subject of disciplinary action only for just and sufficient cause.[5]

The Arbitrator next quoted Section 12.01(2), which provides: "Actions shall be fair and equitable, i.e., Management shall consider the relevant factors given the circumstances of each individual case and similar cases, if any, to make a fair decision."[6]

The Arbitrator stated that "'[j]ust cause' is a term of art in collective[-]bargaining agreements and is a standard recognized by labor and management in the federal sector."[7] According to the Arbitrator, "'[j]ust cause' consists of a number of substantive and procedural elements," including "the existence of sufficient proof that the employee engaged in the conduct for which [the employee] was disciplined," as well as "a requirement that discipline be administered even-handedly, that is, that

[1] Award at 2-3.
[2] *Id.* at 29.
[3] *Id.* at 35.
[4] *Id.* at 2.
[5] *Id.* at 3; Exceptions, Ex. 3 (Art. 12) at 37.
[6] Award at 3; Art. 12 at 37.
[7] Award at 29.

similarly situated employees be treated similarly and disparate treatment be avoided."[8]

"Additionally," the Arbitrator stated, "the Agency has an obligation to discipline [its bargaining-unit] employees for just and sufficient cause according to the [parties' agreement]."[9] In that regard, the Arbitrator stated that "[s]uspensions for [fourteen] days or less must be administered 'for such cause as will promote the efficiency of the [federal] service.'"[10] The Arbitrator determined that "[t]here must be a nexus between the employee's misconduct and the efficiency of the service," and that the efficiency-of-the-service requirement is "functionally identical to requirements that adverse actions be for 'just cause.'"[11]

"Therefore," the Arbitrator concluded, "the Agency ha[d] the burden of persuading the Arbitrator that the [grievant's] discipline . . . was for just and sufficient cause, as required in the [parties' agreement]."[12] The Arbitrator stated that this burden consists of "three separate components:" (1) "[t]he elements of the administrative charge(s);" (2) "[t]he reasonableness of the penalty;" and (3) "[t]he nexus between the discipline and the efficiency of the federal service."[13]

The Arbitrator noted that "[f]ederal [a]gencies consistently employ" the factors that the Merit Systems Protection Board set forth in *Douglas v. Veterans Administration*[14] "to assess the reasonableness of their penalties and [e]nsure they have met their burden of proof."[15] The Arbitrator further noted that the Agency relied on those factors in deciding on the grievant's suspension. However, the Arbitrator also stated that "[i]t is settled law that arbitrators ultimately have great freedom to use reasoned judgment and experience to assess the reasonableness of [a]gency penalties."[16]

Turning to the Agency's two disciplinary actions against the grievant, the Arbitrator first found that the Agency met its burden of proof with regard to the reprimand. Therefore, he sustained that charge.

As for the five-day suspension, the Arbitrator noted that Article 12 of the parties' agreement defines "[s]uspensions of fourteen (14) days or less" as "[t]he temporary placement of an employee in non-duty, non-pay status for disciplinary reasons."[17] The Arbitrator found that the grievant "intentionally disobeyed an Agency[-]wide policy instruction."[18] Further, the Arbitrator found that "[t]he penalty was reasonable *in that it was reduced to the minimum* by" the deciding official.[19] The Arbitrator also found that "[t]here was a nexus between the discipline and the efficiency of the Agency."[20]

However, the Arbitrator determined that the five-day suspension was not an appropriate penalty. According to the Arbitrator, there was "no indication that" either the proposing official or the deciding official "considered . . . Article 12 in deciding" that penalty.[21] In this connection, the Arbitrator stated that "Article 12 cites the objective of discipline is to correct and improve employee behavior so as to promote the efficiency of the service."[22] The Arbitrator noted the proposing official's determination that the grievant's "actions and disregard of her instructions was mostly isolated to internal functions during the time," and the deciding official's determination that "there was no known impact to the Agency's reputation as a result of the [g]rievant's actions."[23]

Further, the Arbitrator found that the grievant was "a [thirty-one]-year employee with the Agency, with no disciplinary problems until recently,"[24] and that her "last performance evaluation was a rating of fully successful."[25] The Arbitrator also found that the grievant "at all times displayed an attitude of doing what was best for the Agency in her" actions, "although contrary to the instructions given by her supervisor or higher official."[26] Additionally, the Arbitrator stated that the grievant "cited her desire for self[-]improvement and desire to please her supervisor" as one of the reasons she engaged in her actions, which "show[s] the [g]rievant is motivated to further the mission of the Agency and a proper course correction could assist [her] and the Agency, by providing an opportunity to consider a more constructive disciplinary action."[27]

Next, the Arbitrator cited Article 12, Section 12.08 (Section 12.08) of the parties' agreement, which concerns alternative discipline and lists leave without pay (LWOP) as one alternative to a suspension. Relying on this provision, the Arbitrator directed the Agency to substitute the grievant's five-day suspension with five days of LWOP.

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[8] *Id.* at 29-30.
[9] *Id.* at 30.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] 5 M.S.P.R. 280 (1981).
[15] Award at 30.
[16] *Id.*
[17] *Id.* at 34; Art. 12 at 38.
[18] Award at 35.
[19] *Id.* (emphasis added).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 36.
[26] *Id.*
[27] *Id.*

Finally, the Arbitrator directed that the reprimand remain in effect for two years from the date of the Arbitrator's award, and, "[p]rovided the [g]rievant successfully remains discipline[-]free for two years or less, at the discretion of management, [the] reprimand would then be removed from her" official personnel folder (OPF).[28] According to the Arbitrator, "[t]his would give the [g]rievant an opportunity to work with her supervisor in correcting her deficiencies and continuing her public service with the Agency [in] a positive manner," and the reprimand "would stand as a reminder of the [g]rievant's challenge to follow the instructions of her supervisor and other officials within her organizational structure."[29]

Accordingly, the Arbitrator partially denied and partially sustained the grievance. On December 13, 2021, the Agency filed the instant exceptions to the award.

III. Analysis and Conclusion

A. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority.[30] As relevant here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration,[31] disregard specific limitations on their authority,[32] or award a remedy without finding a violation.[33]

First, the Agency claims that the Arbitrator improperly issued a remedy after finding no legal or contractual violation.[34] According to the Agency, although the award "states that the proposing and deciding officials did not appear to consider . . . Section 12.08 [in imposing the suspension], the [a]ward does not articulate any violation by either official or explain how the decision not to consider alternative discipline violated Article 12."[35] Instead, the Agency posits that the Arbitrator found: the grievant intentionally disobeyed an Agency-wide policy instruction; "the penalty was reasonable in that it was reduced to the minimum by" the deciding official; and there was a nexus between the discipline and the efficiency of the Agency.[36]

It is true that the Arbitrator did not expressly state that the Agency violated the agreement. However, when evaluating exceptions to an arbitration award, the Authority considers the award and the record as a whole.[37] That is, the Authority interprets the language of an award in context.[38]

Here, the Arbitrator found that, under Article 12, the Agency had the burden to prove that it had just and sufficient cause to impose the five-day suspension.[39] The Arbitrator stated that this burden entailed multiple parts, including not only that discipline was warranted, but also that the chosen penalty was reasonable.[40] In other words, if the Agency did not demonstrate that the chosen penalty of a five-day suspension was reasonable, then it would fail to demonstrate just and sufficient cause, as Section 12.01 requires.

We acknowledge the Arbitrator's statement that the five-day suspension "was reasonable *in that it was reduced to the minimum* by" the deciding official, after the proposing official had proposed seven days.[41] However, the Arbitrator then went on to find that there was "no indication that" either the proposing official or the deciding official "considered . . . Article 12 in deciding" on a suspension.[42] In this regard, the Arbitrator, relying upon the wording of Section 12.01(1), found that "Article 12 cites the objective of discipline is to correct and improve employee behavior so as to promote the efficiency of the service."[43] The Arbitrator then cited various considerations and found that "a proper course correction could assist the [g]rievant and the Agency, by providing an opportunity to consider a more constructive disciplinary action."[44] On this basis, he "sustained" the grievance in part.[45]

In our view, the most reasonable reading of the award is the Arbitrator found that, by imposing the five-day suspension, the Agency failed to comply with Section 12.01. As he found a contract violation, he was

[28] *Id.*
[29] *Id.*
[30] Exceptions at 4-6.
[31] *NLRB, Wash., D.C.*, 73 FLRA 223, 226 (2022) (*NLRB*) (Member Kiko dissenting on other grounds).
[32] *Id.*
[33] *U.S. DOL*, 67 FLRA 287, 289 (2014).
[34] Exceptions at 4.
[35] *Id.* at 5.
[36] *Id.*
[37] *U.S. Dep't of the Treasury, IRS*, 68 FLRA 145, 147 (2014) (*IRS*).
[38] *Id.*
[39] Award at 30.
[40] *Id.* at 30, 35.
[41] *Id.* at 35 (emphasis added).
[42] *Id.*
[43] *Id.*
[44] *Id.* at 36.
[45] *Id.* at 37.

not precluded from directing a remedy.[46] Thus, the Agency's first exceeded-authority argument is without merit.

Next, the Agency claims that the Arbitrator exceeded his authority by resolving an issue not submitted to arbitration – the issue of alternative discipline.[47] The Agency contends that the parties have agreed that "the [Arbitrator's] jurisdiction and authority . . . shall be confined to the issue(s) presented in the grievance and that the [A]rbitrator 'shall not have the authority to add to, subtract from, or modify any terms of this Agreement.'"[48] The Agency notes that the submitted and framed issues involved whether the Agency had just and sufficient cause for the suspension under Section 12.01, and asserts that the Arbitrator "made several findings that were tantamount to a conclusion that there was just and sufficient cause" for the suspension.[49] According to the Agency, once the Arbitrator reached this alleged conclusion, "he exceeded his authority by granting an alternate remedy."[50] Further, the Agency argues that: the award improperly interferes with the Agency's right to use progressive discipline by amending the suspension to a non-disciplinary action; the grievant never requested alternative discipline action in her response to the proposed suspension or at the hearing; the Union never argued that the Agency had a duty to consider Section 12.08; and, consequently, the Agency had no opportunity to present arguments or evidence regarding Section 12.08.[51]

The Authority has held that where, as here, the parties fail to stipulate to an issue, arbitrators may formulate the issues based on the subject matter before them.[52] In those circumstances, the Authority examines whether the award is directly responsive to the issue that the arbitrator framed.[53] Further, the Authority has held that arbitrators enjoy broad discretion in fashioning remedies, particularly where the parties specifically authorized the arbitrator to determine the appropriate remedy for a violation.[54] Moreover, a remedy is not deficient merely because a party did not request it.[55]

Here, as noted above, both parties submitted proposed issues regarding whether the grievant's discipline was for just and sufficient cause and, if not, what the remedy should be.[56] Because the parties did not stipulate to the issues, the Arbitrator framed it, in pertinent part, as "whether the [g]rievant was properly disciplined under the terms of the . . . agreement. . . Article 12, Discipline, Section 12.01, which requires '[b]argaining[-]unit employees shall be the subject of disciplinary action only for just and sufficient cause.'"[57] Further, the Arbitrator addressed "[t]he issue of the appropriate penalty."[58]

As discussed above, the most reasonable reading of the award is that the Arbitrator found the Agency violated Section 12.01 because it lacked just and sufficient cause to impose a five-day suspension. Thus, the Agency's contrary premise is misplaced. As the Arbitrator found no just or sufficient cause, he proceeded to consider – consistent with both parties' proposed issues and an issue that he identified – what the appropriate remedy was. In order to do that, he considered another section of the same agreement article at issue, specifically, Section 12.08. The Agency does not cite any agreement provisions that precluded him from doing so,[59] and the Agency's claim that the Union did not request alternative remedies does not demonstrate that the Arbitrator lacked authority to award such remedies.[60] Thus, the Arbitrator's findings regarding alternative discipline were directly responsive to the issues that the parties proposed and the Arbitrator framed. Further, it is undisputed that the grievance was "processed in accordance with Article 12,"[61] and there is no basis for finding that the Agency lacked sufficient notice that alternative discipline under Section 12.08 could be at issue. For these reasons, we reject the Agency's

[46] *See, e.g.*, *IRS*, 68 FLRA at 147 ("[R]ead in context, the most reasonable reading of the award is that the Arbitrator found a contractual violation" and, thus "did not grant a remedy without finding a contractual violation[.]"); *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, Red River, Texarkana, Tex.*, 67 FLRA 609, 611 (2014) (Member Pizzella dissenting) ("Read in context, the most reasonable reading of the Arbitrator's award is that he implicitly found a [contract] violation[,] [s]o . . . he did not exceed his authority by granting a remedy.").
[47] Exceptions at 5.
[48] *Id.* (quoting Exceptions, Ex. 4, Art. 52, § 52.10(1)-(2) at 245-46).
[49] *Id.* at 6.
[50] *Id.* (citing *Hernandez v. Dep't of Agric.*, 83 M.S.P.R. 371 (1999)).
[51] *Id.*
[52] *NLRB*, 73 FLRA at 226.
[53] *Id.* at 226-27.
[54] *AFGE, Council 215*, 66 FLRA 137, 141 (2011).
[55] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 66 FLRA 388, 391 (2011) (*FCI Sheridan*); *see also U.S. Dep't of the Navy, Naval Med. Ctr., Camp Lejune, Jacksonville, N.C.*, 73 FLRA 137, 141-42 (2022) (*Camp Lejune*) (denying exceeded-authority exception that alleged the arbitrator lacked authority to award a remedy that the grievance did not request); *U.S. Dep't of the Army, Mil. Dist. of Wash., Fort Myer, Va.*, 72 FLRA 772, 774-75 (2022) (*Fort Myer*) (same).
[56] Award at 2-3.
[57] *Id.* at 29.
[58] *Id.* at 35.
[59] *See, e.g., Broad. Bd. of Governors*, 66 FLRA 380, 385 (2011) (Member Beck dissenting) (denying essence exception based on examination of the relevant contract article "as a whole").
[60] *FCI Sheridan*, 66 FLRA at 391; *see also Camp Lejune*, 73 FLRA at 141-42; *Fort Myer*, 72 FLRA at 774-75.
[61] Award at 2.

argument that the Arbitrator exceeded his authority by awarding alternative discipline.[62]

Accordingly, we deny the exceeded-authority exceptions.

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

The Agency argues that the award fails to draw its essence from the parties' agreement in several respects.[63] The Authority will find that an arbitration award fails to draw its essence from a collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the 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.[64]

First, the Agency asserts that the award's substitution of LWOP for the five-day suspension is deficient.[65] According to the Agency, Section 12.08 gives management the "sole discretion" to decide whether to use alternative discipline.[66]

Section 12.08 provides, in pertinent part, that: "[a]lternative discipline is an effort to correct behavior in lieu of traditional discipline when management determines an alternative has a greater potential to prevent repetition of the misconduct"; and "[a]lternative discipline may be used at management's discretion in lieu of an official reprimand or suspension of fourteen . . . days or less."[67] Contrary to the Agency's characterization, this provision does not give the Agency *sole* discretion to decide whether alternative discipline is warranted in any given instance – including when an arbitrator has found that the Agency violated the agreement.[68] Relatedly, Section 12.08 does not impose any limits on an arbitrator's remedial authority – especially where, as here, the Arbitrator effectively found that the Agency improperly *failed* to consider alternative discipline in imposing a five-day suspension.[69] For these reasons, the Agency's first essence argument fails.

Second, the Agency argues that the award's imposition of alternative discipline "fails to consider the negotiated process outlined in . . . Section 12.08(3) that must be followed when alternative discipline is used," including a written agreement between management and the disciplined employee.[70] However, Section 12.08(3) sets forth an interactive process that the parties will follow "[i]f *Management* determines that alternative discipline is appropriate."[71] Here, the Arbitrator, not management, determined that alternative discipline is appropriate. As such, there is no basis for finding that the interactive process applies here, and the Agency's second essence argument also fails.

Finally, the Agency argues that the reprimand remedy fails to draw its essence from Article 12, Section 12.04 (Section 12.04) of the parties' agreement in two respects.[72] First, the Agency claims that the direction to retain the reprimand in the grievant's OPF for two years from the date of the *award* conflicts with Section 12.04's requirement that the Agency keep the reprimand in the OPF for a "maximum" of two years.[73] Second, the Agency asserts that the remedy "appears to condition" the reprimand's removal from the OPF on the grievant remaining discipline-free for two years, when Section 12.04 requires its removal even if the grievant does not remain discipline-free.[74]

Section 12.04 provides: "Letters of reprimand shall be placed in an employee's [OPF] for a period not to exceed two (2) years. However, at Management's discretion, it may be for a lesser period of time."[75] Nothing in this provision purports to limit an arbitrator's remedial authority to direct that the two-year period should run from the date of the arbitration award and that, given the particular circumstances at issue, the letter will be removed only if the employee remains discipline-free during that period. As such, the Agency provides no basis for finding this arbitral determination irrational, unfounded, implausible, or in manifest disregard of

[62] *See, e.g.*, *U.S. DHS, U.S. CBP, U.S. Border Patrol, Yuma Sector*, 68 FLRA 189, 192 (2015) (Member Pizzella dissenting) ("[T]he [a]gency has not identified a limitation on the [a]rbitrator's authority that precluded him from relying on any sections of the parties' agreement when fashioning remedies, so the [a]rbitrator did not exceed his authority in this respect.").
[63] Exceptions at 2-4.
[64] *NLRB*, 73 FLRA at 226.
[65] Exceptions at 3.
[66] *Id.*
[67] Art. 12 at 40.
[68] *Cf. U.S. Dep't of HUD, Portland, Or.*, 64 FLRA 651, 653-54 (2010) (Member Beck dissenting) (denying essence exception where the arbitrator acknowledged supervisory discretion to grant or deny leave requests, but found that the discretion "must be exercised reasonably and with due regard for the intent behind the negotiated language[]").
[69] We note that Section 12.08(2)(c) expressly sets forth LWOP as an alternative remedy to a suspension. *See* Art. 12 at 40.
[70] Exceptions at 3.
[71] Art. 12 at 40 (emphasis added).
[72] Exceptions at 3-4.
[73] *Id.*
[74] *Id.* at 4.
[75] Art. 12 at 38.

Section 12.04. Thus, the Agency's third essence argument also fails.

Accordingly, we deny the essence exceptions.

IV. Decision

We deny the Agency's exceptions.

Member Kiko, dissenting:

When an arbitrator decides the merits of a dispute and finds no violation of law or contract, Authority precedent clearly holds that the arbitrator has no authority to issue a remedy.[1] Here, the Arbitrator unequivocally found that the Agency had just cause for issuing the grievant a written reprimand and five-day suspension. Nonetheless, the Arbitrator – assuming the unassigned roles of mediator and deciding official – mitigated the grievant's suspension. Instead of rectifying this overreach, the majority attempts to introduce plausibility and coherence into the award by inferring a contract violation where the Arbitrator had plainly found none. Although the Authority affords deference to arbitrators where entitled, it is not appropriate for the Authority to prop up awards that are deficient on their face. Because the award in the instant case fails to state a basis on which the Arbitrator could direct relief, I would grant the Agency's exceeded-authority exception and set aside the remedial portion of the award.[2]

In resolving the framed issue of "whether the grievant was properly disciplined under . . . Article 12 . . . Section 12.01,"[3] the Arbitrator determined that both the written reprimand and suspension were "reasonable" penalties.[4] With respect to the suspension, the Arbitrator also concluded that the grievant "intentionally disobeyed an Agency[-]wide policy instruction," and "[t]here was a nexus between the discipline and the efficiency of the Agency."[5] At that point, the Arbitrator had decided the framed issue on the merits; determined that the Agency had just cause for its proposed discipline; and found no violation of law or the parties' agreement. The Arbitrator should have, but did not, stop there.[6]

Instead, the Arbitrator found it appropriate to make additional observations about, among other things, the grievant's "attitude," "motivat[ion] to further the mission of the Agency," and "desire to please her supervisor."[7] Despite acknowledging that these observations were "not mitigating factors," the Arbitrator opined that "a proper course correction could assist the [g]rievant and the Agency[] by providing an opportunity to consider a more constructive disciplinary action."[8] Then, relying on Article 12, Section 12.08 – a section of the agreement not raised at arbitration nor included in the sole framed issue – the Arbitrator directed the Agency to remove the suspension from the grievant's personnel folder and impose five days of leave without pay (LWOP) instead.[9]

Recognizing that "the Arbitrator did not expressly state that the Agency violated the agreement,"[10] the majority insists that the Arbitrator implicitly found a contractual violation.[11] As evidence, the majority relies on the Arbitrator's observation that "there was 'no indication that' either the proposing official or the deciding official 'considered . . . Article 12.'"[12] However, the majority errs in elevating this single comment over the Arbitrator's central findings—namely, that the suspension was "reasonable"[13] and "[t]here was a nexus between the discipline and the efficiency of the Agency."[14] To the extent the Arbitrator believed that the Agency should have expressly considered Article 12, the Arbitrator did not consider the omission significant enough to warrant stating

[1] *E.g.*, *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 65 FLRA 969, 973 (2011) (*Army*) (citation omitted); *U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr., Ogden, Utah*, 63 FLRA 195, 197 (2009) (*IRS*) (citing *NLRB, Tampa, Fla.*, 57 FLRA 880, 881 (2002) (*NLRB*)).

[2] Exceptions Br. at 4-5.

[3] Award at 29.

[4] *Id.* at 33, 35.

[5] *Id.* at 35.

[6] *See NLRB*, 57 FLRA at 881 (holding that arbitrator had no authority to direct a remedy after finding no violation of law or parties' agreement in resolving framed issues).

[7] Award at 36.

[8] *Id.*

[9] *Id.*; Exceptions Br. at 6 (arguing that "the [g]rievant never requested an alternative disciplinary action in . . . response to the proposed suspension or at the arbitration hearing," nor did "the Union . . . argue[] that the Agency had a duty to consider Article 12, [Section] 12.08"); *see also U.S. Dep't of the Navy, Naval Sea Logistics Ctr. Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688-89 (2002) (where arbitrator resolved framed issue by finding agency did not violate parties' agreement, arbitrator lacked authority to award remedy based on agency's noncompliance with separate obligation that, "as a general concern, was not an issue presented to the [a]rbitrator").

[10] Majority at 6.

[11] *See id.* ("[T]he Arbitrator found that, by imposing the five-day suspension, the Agency failed to comply with Section 12.01.").

[12] *Id.* (quoting Award at 35).

[13] Award at 35. The majority attempts to undermine the importance of the Arbitrator's finding that the suspension was reasonable. To that end, the majority emphasizes that the Arbitrator found the penalty reasonable "'*in that it was reduced to the minimum* by' the deciding official." Majority at 6 (quoting Award at 35 (emphasis added)). But it is typical for arbitrators to find discipline reasonable precisely because the agency proposed the minimum penalty permitted under its table of penalties. *See, e.g.*, *AFGE, Loc. 3701*, 66 FLRA 291, 292 (2011) (arbitrator found grievant's suspension warranted, in part, because agency "selected the minimum penalty that it could impose"); *NAGE, Loc. R1-109*, 58 FLRA 501, 502 (2003) (arbitrator determined that agency's proposed discipline "was reasonable because the minimum penalty [was] . . . the penalty imposed"). As such, the Arbitrator's explanation does not detract from, or otherwise limit, his reasonableness determination.

[14] Award at 35.

that the suspension lacked just cause. Further, the majority fails to establish the relevance of the Arbitrator's statement that "Article 12 cites the objective of discipline is to correct and improve employee behavior so as to promote the efficiency of the service" as a finding supporting its interpretation of the award.[15] In merely reciting a section of Article 12, the Arbitrator gave no indication that the Agency actually violated it.

Thus, even accepting the majority's premise that the award must be read "as a whole" and "in context," it remains unclear how the majority can substantiate its *inference* that the Arbitrator found a contract violation.[16]

Rather than attempting to reinforce this award through interpretive gap-filling, the majority should be setting the reasonable expectation that arbitrators' awards will communicate, in clear and unambiguous terms, whether there has been a violation of law, rule, regulation, or agreement. Where, as here, the award does not find any such violations, the Authority should assume that the omission is an intentional act rather than an invitation for the Authority to introduce findings that the arbitrator did not make.[17] Accordingly, unlike the majority, I would resolve the Agency's exceeded-authority exception based on the Arbitrator's explicit finding that the suspension was for just cause.[18] The Arbitrator's decision to convert the suspension to LWOP was based on nothing more than his personal sense of industrial justice.[19]

Although the remedial portion of the award is deficient on exceeded-authority grounds, I note further that the LWOP remedy fails to draw its essence from Article 12, Section 12.08.[20] Because "[a]lternative discipline may be used *at management's discretion* in lieu of . . . a suspension of fourteen . . . days or less,"[21] the Arbitrator had no basis for applying Section 12.08 unless management elected to impose alternative discipline. Even if the Arbitrator "effectively found that the Agency improperly *failed* to consider alternative discipline,"[22] – yet another debatable inference – such a finding would be inconsistent with the discretionary language in Section 12.08(1). Moreover, the majority casually ignores the contractually-mandated interactive process for implementing alternative discipline[23] simply because "the Arbitrator, not management, determined that alternative discipline [was] appropriate."[24] While arbitrators' remedial discretion may be broad, it is not so expansive that the Authority must show deference when a remedy conflicts with the plain wording of the parties' agreement.[25]

For the foregoing reasons, I dissent.

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[15] Majority at 6 (quoting Award at 35).

[16] *Id.*

[17] *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 68 FLRA 151, 152 (2014) (then-Member DuBester dissenting) (finding backpay remedy deficient because arbitrator "did not find that the [a]gency violated any applicable law, rule, regulation, or provision of the parties' collective-bargaining agreement"); *see also U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, Red River, Texarkana, Tex.*, 67 FLRA 609, 617 (2014) (Dissenting Opinion of Member Pizzella) (noting that the Authority's precedent "simply does not permit the Authority to correct a deficient arbitral award to find a contractual violation 'implicitly' when no contract violation was found by the arbitrator").

[18] Award at 35.

[19] *See Army*, 65 FLRA at 973-74 (granting exceeded-authority exception where arbitrator, after resolving stipulated issue and finding no violation of law or contract, considered additional issues and awarded remedies); *IRS*, 63 FLRA at 197 (award deficient on exceeded-authority grounds where arbitrator directed remedies despite earlier determination that union "did not establish a violation of law or the parties' agreement"); *see also SSA*, 71 FLRA 355, 357 (2019) (then-Member DuBester concurring) (holding that the arbitrator, after denying grievance, could not award remedy based on "his own sense of industrial justice").

[20] Exceptions Br. at 3 (arguing that remedy fails to draw its essence from Article 12, Section 12.08 because it does not require an interactive "process or written agreement" and "preclude[s] management from exercising its right to impose the traditional discipline"); *see also U.S. Dep't of VA, James A. Haley Veterans Hosp.*, 71 FLRA 699, 701 (2020) (then-Member DuBester dissenting) ("The Authority has held that an award's remedy must comport with the parties' agreement when that agreement defines the actions an agency can take in disciplinary matters.").

[21] Exceptions, Ex. 3, Collective-Bargaining Agreement (CBA) at 40 (emphasis added).

[22] Majority at 9.

[23] Under Article 12, Section 12.08(3), management "will offer in writing the alternative discipline simultaneously with . . . the notice of decision on the traditional discipline." CBA at 40. If an employee accepts management's proposal, "the alternative discipline will be placed in a written agreement," and if an employee "fails to meet the terms and conditions of the agreement, then the traditional penalty . . . will be imposed." *Id.* at 41.

[24] Majority at 9.

[25] *See U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 70 FLRA 680, 683-84 (2018) (then-Member DuBester dissenting) (granting essence exception because remedy was inconsistent with "the agreement's plain wording"); *U.S. Dep't of the Treasury, IRS*, 60 FLRA 506, 507-08 (2004) (where arbitrator's remedy "imposed a requirement that [was], on its face, inconsistent with the parties' agreement," Authority set aside remedy).