73 FLRA No. 76

UNITED STATES
DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY
ALEXANDRIA, VIRGINIA
(Agency)

and

FEDERAL EDUCATION ASSOCIATION
(Union)

0-AR-5509
(71 FLRA 765 (2020))

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ORDER GRANTING
MOTION FOR RECONSIDERATION

December 21, 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

This case is before the Authority on the Union's motion for reconsideration of the Authority's decision in *U.S. DOD Education Activity, Alexandria, Virginia* (*DODEA*).[1] Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision.[2] For the reasons that follow, we grant the Union's motion for reconsideration and dismiss or deny the Agency's exceptions.

II. Background and Authority's Decision in *DODEA*

Here, we set forth the facts relevant to the Authority's decision in *DODEA* and this decision. On May 1, 2017, the Agency notified the Union that it would implement a new performance-appraisal system the following year, pursuant to § 9902 of the National Defense Authorization Act for Fiscal Year 2010 (NDAA), which required it to establish a new performance-appraisal system that adhered to certain guidelines.[3] The new system, called the Defense Performance Management and Appraisal Program (DPMAP), would replace the Educator Performance Appraisal System (EPAS), which the parties had negotiated pursuant to Article 14 of their collective-bargaining agreement (CBA).[4]

In its notice to the Union, the Agency outlined the main differences between the two systems and advised the Union that if it wished to bargain appropriate arrangements/ implementation of DPMAP, it should submit a request to bargain and negotiable proposals.[5] The Union declined the Agency's offer to "consult" on the Agency's decision to implement DPMAP – what the Agency called "Pre-decisional involvement."[6]

On June 14, 2017, the Union filed a grievance alleging that the Agency's plan to implement DPMAP violated the parties' CBA and the Federal Service Labor-Management Relations Statute (the Statute).[7] The Agency denied the grievance on both a procedural ground – that it was filed prematurely because the Agency had not yet implemented DPMAP – and on the merits. The Agency subsequently implemented DPMAP on or about May 1, 2018.

At arbitration, the parties were unable to stipulate to an issue, so the Arbitrator framed the issues as follows:

> (1) Is the Union's June 14, 2017, grievance in this matter grievable/ arbitrable under the parties' CBA? (2) If it is, did the Agency violate the parties' CBA when it implemented

[1] 71 FLRA 765 (2020) (then-Member DuBester dissenting).
[2] 5 C.F.R. § 2429.17.
[3] National Defense Authorization Act of Fiscal Year 2010 § 1113(d), 5 U.S.C. § 9902(a) (2011) ("The Secretary [of Defense] . . . shall promulgate regulations providing for . . . [a] fair, credible, and transparent performance appraisal system").
[4] The parties' CBA went into effect in 1989 and the Arbitrator found that it remained in effect while the parties attempted to negotiate a successor agreement. Award at 1 n.1 (noting that "Article 53, Section 1 of the parties' CBA provides, in part, that '[t]he present Agreement shall remain in full force and effect during the renegotiation of said Agreement and until such time as a new Agreement is effective'"). The parties entered into a memorandum of understanding regarding EPAS in 2006. EPAS supplemented Article 14 of the parties' CBA, which addresses the parties' performance-appraisal system. *Id.* at 2 & n.2.
[5] *Id.* at 2.
[6] *Id.* at 3.
[7] 5 U.S.C. §§ 7101-7135.

> DPMAP in May 2018? (3) If so, did the Agency also violate 5 U.S.C. [§]7116(a)(l) and (7) when it implemented DPMAP in May 2018? (4) If the Agency violated the parties' CBA and/or the Statute, what shall the appropriate remedy be?[8]

In analyzing the grievance's arbitrability, the Arbitrator noted that Article 12, Section 5(C) of the parties' CBA provides, in relevant part, that a "grievance . . . that relates to a specific incident or occurrence[] must be filed within forty-five (45) calendar days after the incident or occurrence giving rise to the grievance."[9] The Arbitrator found that the forty-five-day window began when the Agency notified the Union of its plan to implement DPMAP, and thus that the grievance was timely.

The Arbitrator then addressed the Agency's argument that it provided adequate notice regarding the implementation of DPMAP and gave the Union an opportunity to bargain. He stated that "[a]t no time[] did the Agency offer to bargain with the Union, within the meaning of the Statute," because "'[c]onsultation' is not bargaining."[10] He further stated that the Union did not waive its right to bargain "by declining to participate in [Agency-]level consultations with other involved exclusive bargaining agents."[11]

In discussing the fundamental issue presented, the Arbitrator noted that § 9902(a)(4)(B) of the NDAA states that "[a]ny rules or regulations promulgated pursuant to this subsection shall be deemed an agency rule or regulation under [§] 7117(a)(2) [of the Statute], and shall not be deemed a Government-wide rule or regulation under [§] 7117(a)(1)."[12] In addition, the Arbitrator noted that Article 2, § 2 of the parties' CBA provides, in part, that "[t]his Agreement supersedes any non-government wide regulations or . . . directives pertaining to personnel policy or practices or other general conditions of employment where in conflict with this Agreement."[13] He further noted that § 7116(a)(7) of the Statute similarly provides that it shall be an unfair labor practice (ULP) "to enforce any rule or regulation . . . which is in conflict with any applicable collective[-]bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed."[14]

The Arbitrator concluded that the Agency violated § 7116(a)(1) and (7) of the Statute and Article 2, § 2 of the parties' CBA by implementing DPMAP on May 1, 2018. He found that § 9902(a)(4)(B) of the NDAA "makes it unequivocally clear" that any performance-appraisal system promulgated under that section is an agency-wide rule and regulation.[15] He concluded that the Agency violated § 7116(1)(7) of the Statute because at the time the Agency implemented DPMAP, "EPAS, as a pre-existing contractual provision, remained applicable and enforceable."[16] The Arbitrator concluded that the Agency violated Article 2, § 2 of the CBA for the same reason. Thus, the Arbitrator sustained the grievance. As a remedy, he ordered the Agency to, in part, "return to the status quo ante May 1, 2018, and take all necessary and appropriate steps to ensure that Article 14 . . . and EPAS are, and remain, operative and enforceable."[17]

The Agency filed exceptions to the award on several grounds, including that the Arbitrator's finding that the grievance was timely failed to draw its essence from the CBA.

In *DODEA*, the Authority concluded, as relevant here, that the Arbitrator's timeliness determination was not a plausible interpretation of the CBA. Noting that Article 12, Section 5(C) states that the Union may file a grievance "*after* the incident or occurrence giving rise to the grievance," and that the Agency had not yet implemented DPMAP at the time the Agency notified the Union of its plan, *DODEA* concluded that the Agency's notification "could not be considered an 'incident or occurrence'" within the meaning of that provision.[18] Accordingly, *DODEA* granted the Agency's essence exception because the Arbitrator's finding that the Agency's notification "constituted the triggering event d[id] not represent a plausible interpretation of the [CBA's] plain language."[19]

In reaching this conclusion, *DODEA* relied upon the Authority's decision in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida* (*FCI Miami*),[20] which, the Authority explained, had

[8] Award at 12.
[9] *DODEA*, 71 FLRA at 765.
[10] Award at 17.
[11] *Id.*
[12] 5 U.S.C. § 9902(a)(4)(B).
[13] Award at 11.
[14] *Id.* (quoting 5 U.S.C. § 7116(a)(7)).
[15] *Id.* at 13.
[16] *Id.* at 14.
[17] *Id.* at 18.
[18] *DODEA*, 71 FLRA at 766.
[19] Chairman DuBester dissented from the majority's decision to grant the Agency's essence exception on grounds that it failed to afford the deference owed to the Arbitrator's construction of the agreement. *Id.* at 768 (Dissenting Opinion of then-Member DuBester).
[20] 71 FLRA 660 (2020) (Member Abbott concurring; then-Member DuBester dissenting), *pet. for review dismissed, AFGE, Loc. 3690 v. FLRA*, 3 F.4th 384 (D.C. Cir. 2021).

"clarifie[d] the discussion about essence exceptions – and any reliance on private-sector arbitration awards."[21] In *FCI Miami*, the Authority concluded that "[t]he Statute does not address what degree of deference should be accorded to arbitrators."[22] Further, addressing the standard that *should* be applied to address essence exceptions arising under the Statute, the Authority in *FCI Miami* held that the "foundational principles of collective bargaining that the Supreme Court outlined for the private sector in the *Steelworkers* cases does not extend very far into the collective-bargaining framework that Congress established for the Federal Government."[23]

The Union filed its motion for reconsideration of *DODEA* on June 1, 2020, and a motion for leave to file supplemental authority on August 6, 2020.

The Authority placed the instant matter in abeyance on June 7, 2021, pending the United States Court of Appeals for the District of Columbia Circuit's resolution of the union's petition for review of *FCI Miami*.[24] On June 14, 2022, the Authority took the Union's motion for reconsideration out of abeyance because the petition in *FCI Miami* was no longer pending.[25]

III. Motion for Reconsideration

The Union asks the Authority to reconsider its decision in *DODEA*.[26]

In its motion for reconsideration, the Union argues that the Authority's decision in *FCI Miami* constitutes a change in law that affected the dispositive issue in this case.[27] Specifically, the Union maintains that *FCI Miami* newly held that the Authority is not required to give the same level of deference to an arbitrator's interpretation of an agreement as required in private-sector arbitration.[28] The Union contends that, because *FCI Miami* was issued after it filed its exceptions in this case, it "did not have the opportunity to brief why the private-sector standard . . . should not be abandoned."[29]

In its motion for leave to file supplemental authority, the Union asks us to also consider the United States Court of Appeals for the District of Columbia Circuit's (the court's) decision in *National Weather Service Employees Organization v. FLRA* (*NWSEO*)[30] – a decision that issued after *DODEA* – which the Union asserts "definitively address[es]" one of the issues in its motion for reconsideration.[31] The Union states that its "pending motion for reconsideration asks the Authority to reassess the standard of review it applie[s] to an arbitrator's interpretation" of a collective-bargaining agreement, and argues that *NWSEO* holds that "the Authority must indeed apply the same standard of review as in private[-]sector arbitration."[32]

The Agency did not file oppositions to the Union's motions.

The Authority has repeatedly held that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[33] As relevant here, the Authority has held that extraordinary circumstances include situations where an intervening court decision affected dispositive issues in the underlying decision.[34] Further, as the Union notes in its motion, the Authority "has found that errors in its conclusions of law are

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[21] *DODEA*, 71 FLRA at 767 n.20 (quoting *NLRB Pro. Ass'n*, 71 FLRA 737, 738 n.16 (2020) (*NLRBPA*), *pet. for rev. denied sub nom. NLRB Pro. Assn' v. FLRA*, 856 F. App'x 316 (D.C. Circ. 2021) (*NLRB v. FLRA*)) (internal quotation marks omitted).

[22] *FCI Miami*, 71 FLRA at 664.

[23] *Id.* (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (*Steelworkers*); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960)); *see also id.* (finding that "the applicability of the *Steelworkers* cases in the federal public sector is limited in several key respects").

[24] Then-Member DuBester dissented from the Order placing this case in abeyance.

[25] The court dismissed the union's petition in *FCI Miami* based solely on jurisdictional grounds. *AFGE, Loc. 3690 v. FLRA*, 3 F.4th 384.

[26] 5 C.F.R. § 2429.17 ("After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order.").

[27] Motion for Recons. (Mot.) at 2.

[28] *Id.* at 1-2. The Union also argues at length that the Authority's conclusion in *DOJ Miami* was legal error under the *Steelworkers* cases. *Id.* at 3-13.

[29] *Id.* at 2.

[30] 966 F.3d 875 (D.C. Cir. 2020).

[31] Motion for Leave to File Suppl. Authority at 1; *see also* 5 C.F.R. § 2429.26(a) ("The Authority or the General Counsel, or their designated representatives, as appropriate, may in their discretion grant leave to file other documents as they deem appropriate.").

[32] Citation of Suppl. Authority at 1.

[33] *AFGE, Nat'l VA Council #53*, 71 FLRA 741, 742 (2020) (*Council #53*) (then-Member DuBester concurring); *AFGE, Loc. 2338*, 71 FLRA 644, 644 (2020).

[34] *U.S. Dep't of the Air Force, Air Force Materiel Command, Elgin Air Force Base, Fla.*, 65 FLRA 1047, 1048 (2011).

extraordinary circumstances that may justify reconsideration."[35]

Because we agree with the Union that *NWSEO* affects the dispositive issue in this case, as discussed in more detail below, we grant the Union's motion for leave to file supplemental authority and consider the *NWSEO* decision as part of the Union's motion for reconsideration.[36] Additionally, because we conclude, on the basis of *NWSEO*, that the Authority erred as a matter of law regarding the manner in which it decided the Agency's essence exception in *DODEA*, we grant the Union's motion for reconsideration and reconsider that essence exception in accordance with the correct standard.

As we grant the Union's motion for reconsideration on this basis, we need not consider, nor do we address, the additional grounds upon which the Union based its motion. To the extent the dissent suggests we are finding *DODEA*'s "footnote citation to *FCI Miami*," standing alone, "warrant[s] reconsidering *DODEA*,"[37] that is incorrect. Nevertheless, we note the dissent previously, expressly stated that *FCI Miami* "clarified the discussion about essence exceptions – and any reliance on private-sector arbitration awards," and that *FCI Miami* was "the decision that charts the course for this Authority, and for the federal labor-relations community, into the future."[38] Thus, it is unclear how the dissent can contend that *DODEA*, which indisputably relied on *FCI Miami*, merely applied "the Authority's *decades-old* essence standard."[39]

Further, contrary to the dissent's implication,[40] we are *not* holding that *United Paperworkers International Union, AFL-CIO v. Misco, Inc.* (*Misco*)[41] is an intervening court decision that affects dispositive issues in this case. Instead, we are holding that *NWSEO* – which makes explicit that *Misco*'s longstanding principles apply in the federal sector – is an intervening court decision that both affects the dispositive issue in this case and demonstrates that the Authority erred in its conclusions of law in *DODEA*.

Turning to *NWSEO*, in that decision, the court analyzed an Authority decision finding that an arbitrator's award failed to draw its essence from the collective-bargaining agreement at issue.[42] In the underlying decision, the Authority found that the arbitrator – in interpreting the phrase "formal renegotiations" as that term was used in the agreement and for purposes of determining whether the agency violated that agreement – improperly relied on several extraneous factors.[43] The Authority concluded that the arbitrator's interpretation manifested an infidelity to his obligation as the arbitrator of the dispute and, thus, the Authority granted the essence exception.[44]

In its petition to the court challenging that decision, the union argued, as relevant here, that the Authority's review of the arbitrator's interpretation of the agreement was "contrary to the standard of review that the Authority must apply in reviewing an arbitrator's decision."[45] The court granted the union's petition, concluding that the Authority "acted contrary to law" because it "failed to apply the correct standard of review" to the essence exception.[46]

In reaching this conclusion, the court held that, "[w]hen reviewing an arbitrator's award, the Authority is required to apply a similarly deferential standard of review to that a federal court uses in private-sector labor-management issues."[47] Applying this principle to essence exceptions, the court concluded that the Authority must review arbitrators' interpretations' "highly deferentially,"[48] explaining that the Authority's "sole inquiry" under the "proper standard of review" for essence exceptions should be "whether the [a]rbitrator was 'even arguably construing or applying the [collective[-]bargaining agreement].'"[49] More specifically, the court explained that, when applying this standard, "'[a]s long as the arbitrator is even arguably construing or applying the contract' . . . the Authority may not reverse the arbitrator's award even if [the Authority] is 'convinced [the arbitrator] committed serious error.'"[50]

Applying the principles articulated in *NWSEO*, we conclude that *DODEA* erred by granting the Agency's essence exception. In rejecting the Agency's timeliness

[35] Mot. at 2 (quoting *U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 59 (2012)); *see also U.S. Dep't of VA, John J. Pershing Med. Ctr, Poplar Bluff, Mo.*, 72 FLRA 219, 221 (2021) (granting motion for reconsideration because it demonstrated the Authority "erred in its legal conclusion" in the underlying decision).
[36] 5 C.F.R. § 2429.26(a); *see also SSA*, 45 FLRA 303, 307-08 (1992) (granting a motion to file supplemental authority that asked the Authority to consider a court decision).
[37] Dissent at 15.
[38] *NLRBPA*, 71 FLRA at 738 n.16; *see also Indep. Union of Pension Emps. for Democracy & Just.*, 71 FLRA 822, 824 n.22 (2022).
[39] Dissent at 15 (emphasis added).
[40] *See id.* at 16.
[41] 484 U.S. 29 (1987).
[42] *NWSEO*, 966 F.3d at 879.
[43] *Id.*; *see also Nat'l Weather Serv. Emps. Org.*, 71 FLRA 380, 381-82 (2019) (*NWSEO II*) (then-Member DuBester dissenting).
[44] *NWSEO II*, 71 FLRA at 382.
[45] *NWSEO*, 966 F.3d at 879.
[46] *Id.* at 882.
[47] *Id.* at 881.
[48] *Id.*
[49] *Id.* (quoting *Misco*, 484 U.S. at 38); *see id.* (further explaining that "[w]hether the [a]rbitrator correctly interpreted the [collective-bargaining agreement] was beyond the scope of the Authority's review").
[50] *Id.* (citing *Misco*, 484 U.S. at 38).

argument concerning the Union's grievance, the Arbitrator recognized that "[u]nder Article 12, [Section] 5(C) of the CBA, the Union is required to file its grievance within 45 days after the incident or occurrence giving rise to the grievance."[51] However, after finding "no record evidence that the Agency was at all tentative about its decision to implement DPMAP," the Arbitrator concluded that "the Union satisfied that requirement" and "did not have to wait until DPMAP went into actual effect because the incident . . . giving rise to the grievance occurred on or about May 1, 2017, when the Agency announced it would be implementing DPMAP."[52]

In granting the Agency's essence exception, *DODEA* concluded that the Arbitrator's "finding that the Agency's notification that it planned to implement DPMAP constituted the triggering event [for the grievance] d[id] not represent a plausible interpretation of the plain language of the parties' agreement."[53] On this point, *DODEA* concluded that because Article 12, Section 5(C) "provides that the Union may file a grievance 'after the incident or occurrence giving rise to the grievance,'" the Agency's notification "could not be considered an 'incident or occurrence'" within the meaning of that provision because DPMAP's implementation had not yet occurred.[54]

However, this conclusion ignores that the Arbitrator *applied* the plain language of this provision in finding the grievance was timely filed. Further, contrary to the principles set forth in *NWSEO*, *DODEA* fails to afford proper deference to the Arbitrator's finding that the "'incident . . . giving rise to the grievance' occurred . . . when the Agency announced it would be implementing DPMAP."[55] Accordingly, upon reconsideration of *DODEA*, we deny the Agency's essence exception.

In doing so, we emphasize that we are not eliminating the Authority's existing tests for analyzing essence exceptions. Under those tests, the Authority will find that an 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.[56] As the Authority previously has stated, these tests are "[c]onsistent with" the notion that "the relevant question . . . is not whether the arbitrator erred – or even seriously erred – in interpreting the contract[,]" but "whether the arbitrator was 'even arguably construing or applying the contract.'"[57] In other words, the tests are consistent with *NWSEO*. However, to the extent that other Authority decisions have *applied* those tests in a way that do not comport with *NWSEO*, those decisions will no longer be followed.

Additionally, we note that the dissent's reliance on ULP standards to assess the contractual-timeliness issue here is misplaced for three reasons.[58] First, other than "*see also*" cites to two Authority ULP decisions,[59] *DODEA* gives no indication whatsoever that it was holding *statutory* standards must apply to the Arbitrator's *contractual* timeliness determination. Second, the Agency does not argue in its exceptions that the Arbitrator should have applied statutory standards – and, even in arbitration cases involving ULPs, the Authority does not address arguments that exceptions do not raise.[60] Third, the ULP decisions that the dissent cites – which involved the filing deadline for ULP charges under § 7118(a)(4)(B) of the Statute – simply do not apply here. As the Authority stated in *NLRB Professional Ass'n*[61] – another case where

[51] Award at 13 (internal quotation omitted).
[52] *Id.* (internal quotation omitted).
[53] *DODEA*, 71 FLRA at 766.
[54] *Id.*
[55] Award at 13 (quoting Art. 12, § 5(C)). In the decision reviewed in *NWSEO*, the Authority based its conclusion that the award failed to draw its essence from the parties' agreement upon its finding that the arbitrator misconstrued the term "formal negotiations" in the agreement. *NWSEO II*, 71 FLRA at 382. As noted, the court reversed this conclusion because "the Authority's sole inquiry under the proper standard of review should have been whether the [a]rbitrator was 'even arguably construing or applying the [parties' agreement,'" and "[w]hether the [a]rbitrator correctly interpreted the [parties' agreement] was beyond the scope of the Authority's review." *NWSEO*, 966 F.3d at 881 (quoting *Misco*, 484 U.S. at 38). Applying this standard, the court concluded that the Authority's "view that the [a]rbitrator erred in his interpretation of the [parties' agreement] is inadequate to warrant vacatur of the [a]rbitrator's award." *Id.* at 882.
[56] *E.g.*, *NAIL, Loc. 11*, 73 FLRA 328, 329-30 (2022); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[57] *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Mobile Dist., Mobile, Ala.*, 64 FLRA 508, 509 (2010) (Member Beck dissenting) (quoting *Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union*, 589 F.3d 437, 441 (D.C. Cir. 2009)).
[58] *See* Dissent at 16.
[59] *See DODEA*, 71 FLRA at 767 n.19.
[60] *See, e.g.*, *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 980 (2010) (then-Member DuBester dissenting on other grounds) (decision to set aside one portion of award "d[id] not affect the [a]rbitrator's unexcepted-to finding of an unlawful failure to respond to [an] information request[]"); *U.S. Dep't of HHS, Food & Drug Admin., Pac. Region*, 55 FLRA 331, 336 (1999) ("Because the [a]rbitrator ordered a status quo ante remedy for the unexcepted[-]to independent [§] 7116(a)(1) violation, the [a]gency's exceptions challenging that remedy based on the [a]rbitrator's finding of a [§] 7116(a)(1) and (5) violation, are unavailing.").
[61] 71 FLRA at 738 n.16.

an arbitrator resolved ULP issues – "[i]n order for a procedural-arbitrability ruling to be found deficient as contrary to law, the appealing party must establish that the ruling conflicts with statutory procedural requirements that apply to the parties' negotiated grievance procedure."[62] In upholding that decision, the D.C. Circuit clearly distinguished contractual-filing issues from statutory issues.[63] Here, it is clear that the parties' forty-five-day contractual deadline for filing grievances neither incorporates nor mirrors § 7118(a)(4)(B)'s six-month deadline for filing ULP charges. As such, there is no basis for applying statutory ULP principles to the Arbitrator's timeliness determination here.

Having denied the Agency's essence exception, we now consider the merits of the exceptions that were not considered in *DODEA*.[64]

IV. Preliminary Matter: We will not consider the Agency's management-rights and conditions-of-employment exceptions.

The Agency argues that the award is contrary to § 7106 of the Statute[65] and fails to draw its essence from Article 2, Section 5 of the CBA, which, it alleges, "mirrors" § 7106.[66] Additionally, the Agency contends that the award conflicts with § 7103(a)(14) of the Statute and the Authority's decision in *U.S. DHS, U.S. CBP, El Paso, Texas*,[67] which interpreted § 7103(a)(14).[68] The Union argues that these exceptions are not properly before the Authority because they repeat arguments the Arbitrator found to be untimely raised below.[69]

The Arbitrator found that the Agency did not raise its arguments regarding management's rights and conditions of employment until it filed its post-hearing brief.[70] The Arbitrator determined that it would be inappropriate to address those arguments – which the Agency repeats here – because "[i]t is generally understood in labor arbitration that issues not raised during the processing of a grievance cannot be raised for the first time in arbitration."[71] The Arbitrator's finding that the Agency's arguments were not timely raised is a procedural-arbitrability determination.[72] When an arbitrator finds that an issue is not arbitrable and a party fails to except to that arbitrability finding, the Authority will not consider exceptions that involve the non-arbitrable issue.[73] The Agency did not file any exceptions challenging the Arbitrator's procedural-arbitrability determination. Therefore, we will not consider the Agency's management-rights and conditions-of-employment exceptions.[74]

V. Exceptions Not Considered in *DODEA*

A. The award is not based on a nonfact.

The Agency argues that "the award is premised upon the Arbitrator's erroneous determination that the Union did not waive its right to bargain."[75] Specifically,

[62] *Id.* at 739.
[63] *See, e.g., NLRB v. FLRA*, 856 Fed. App'x at 319 ("the Authority's purely procedural and threshold determination of timeliness under the terms of the . . . agreement neither explicitly nor implicitly involves a substantive ruling addressing or finding [a ULP] under the Statute"); *id.* at 320 ("In short, the Authority's order involved nothing doctrinal at all. It ruled only that the arbitrator properly read the . . . agreement's timely-filing provision and counted days on the calendar. Statutory labor law had nothing to do with it."); *id.* (the union's "argument confuses the statutory time limit with the one set by the collective[-]bargaining agreement").
[64] *U.S. DOL*, 60 FLRA 737, 738 (2005) (where the Authority found that it had erred in a factual finding and thus granted the agency's motion for reconsideration and considered the merits of the claims that were not considered in the underlying decision); *Dep't of the Interior, Bureau of Reclamation, Wash., D.C.*, 36 FLRA 3, 7 (1990) (granting motion for reconsideration of decision that held agency committed a ULP by unilaterally terminating Sunday premium pay, and concluding, based on intervening judicial interpretation of the Civil Service Reform Act, that the agency was not obligated to bargain and did not commit a ULP), *aff'd sub nom. AFGE, Loc. 1978, AFL-CIO v. FLRA*, 960 F.2d 838 (9th Cir. 1992).
[65] Exceptions at 9-11.
[66] *Id.* at 8.
[67] 70 FLRA 501 (2018) (then-Member DuBester dissenting).
[68] Exceptions at 12-13.
[69] Opp'n at 13, 17, 21, 24.
[70] Award at 14.
[71] *Id.* Although the Arbitrator went on to address the Agency's arguments "arguendo" in order to "provide a complete decision on the issues raised . . . (and to obviate a possible remand on appeal)," *id.* at 15, the Arbitrator's findings regarding those issues are dicta. *Cf. Indep. Union of Pension Emps. for Democracy & Just.*, 72 FLRA 328, 329 n.18 (2021) (where arbitrator found grievance untimely, comments on the merits were dicta that could not provide a basis for finding the award deficient).
[72] *See, e.g., U.S. DHS, U.S. CBP, Border Patrol, San Diego Sector, San Diego, Cal.*, 68 FLRA 128, 131 (2014) (arbitrator's finding that agency waived procedural challenges by not timely raising them was a procedural-arbitrability determination).
[73] *IFPTE, Loc. No. 1*, 67 FLRA 587, 589 (2014) (citing *AFGE, Loc. 1367*, 67 FLRA 378, 379-80 (2014)) (denying the union's exception that the arbitrator exceeded his authority by failing to resolve an issue when the union did not except to the arbitrator's finding that the issue was not arbitrable).
[74] *Id.* Because we decline to consider the Agency's management-rights and conditions-of-employment exceptions on this basis, we need not address the Union's arguments that the Authority's Regulations bar these exceptions. Opp'n at 13, 17, 21, 24; *see U.S. Dep't of the Army, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 70 FLRA 172, 173 (2017) (finding it unnecessary to address the remaining exceptions).
[75] Exceptions at 14.

the Agency argues that the Arbitrator's finding that the Agency did not offer to bargain with the Union within the meaning of the Statute is clearly erroneous and that, but for this error, the Arbitrator would have found that "the Union waived its right to bargain over the Agency's implementation of DPMAP."[76]

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[77] Assuming, without deciding, that the Arbitrator clearly erred in stating that the Agency did not offer to bargain with the Union within the meaning of the Statute, the Agency has not established that, but for that error, the Arbitrator would have reached a different result. The Arbitrator's award is not based on his finding that the Agency failed to bargain with the Union, nor does it discuss or find that the Agency failed to bargain in good faith.

Rather, the Arbitrator concluded that the Agency violated § 7116(a)(1) and (7) of the Statute and Article 2, § 2 of the CBA when it implemented DPMAP over EPAS, because at that time "EPAS, as a pre-existing contractual provision, remained applicable and enforceable."[78] The Arbitrator's conclusion is thus premised upon his finding that the Agency implemented an agency rule or regulation in conflict with an existing collective-bargaining agreement. Accordingly, the Agency has failed to establish how the Arbitrator's findings regarding waiver and notice to bargain were central facts that, if clearly erroneous, would have compelled a different result.[79] We therefore deny the Agency's nonfact exception.

B. The award is not contrary to either 5 U.S.C. § 9902 or § 7116(a)(1) and (7) of the Statute.

When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any questions of law raised by the exception and the award de novo; in doing so, it determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[80] However, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[81]

The Agency argues that the award is contrary to 5 U.S.C. § 9902 because the Arbitrator "erroneously determined that § 9902 did not require the Agency to implement DPMAP."[82] Towards this end, it argues that the Arbitrator erred by "relying solely upon the language of § 9902(a)(4)(B)" to conclude that DPMAP conflicted with the parties' "open" CBA, and by ignoring that "the Agency provided the Union notice and an opportunity to bargain over implementation of DPMAP on 5 May 2017."[83] The Agency also argues that the award is inconsistent with the plain language of § 7116(a)(7) of the Statute because § 9902 "is a law, not a rule or regulation."[84] As part of this argument, it reiterates its contention that it could lawfully implement DPMAP because the CBA was "open."[85]

Section 7116(a)(7) of the Statute provides that it shall be an ULP "to enforce any rule or regulation . . . which is in conflict with any applicable collective[-]bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed."[86] As noted, the Arbitrator concluded the Agency violated this provision by implementing DPMAP, which he found constituted an agency rule or regulation pursuant to § 9902(a)(4)(B),[87] because DPMAP conflicted

[76] *Id.* at 15.
[77] *AFGE, Nat'l Council of Field Labor Locs.*, 71 FLRA 1180, 1181 (2020) (*AFGE*) (citing *AFGE, Loc. 3254*, 70 FLRA 577, 580 (2018); *NAGE, SEIU, Loc. 551*, 68 FLRA 285, 288 (2015)).
[78] Award at 14.
[79] *NLRB Pro. Ass'n*, 68 FLRA 552, 555 (2015) (denying nonfact exceptions where the union failed to establish that the arbitrator's finding was a central fact, but for which the arbitrator would have reached a different result and failed to demonstrate that, but for an alleged error, the arbitrator would have reached a different result); *U.S. Dep't of HHS, Food & Drug Admin., San Diego, Cal.*, 67 FLRA 255, 255-56 (2014) (denying a nonfact exception where the agency provided no basis for finding that, but for the alleged factual error, the arbitrator would have reached a different conclusion); *AFGE, Loc. 1482*, 67 FLRA 168 169 (2014) (denying a nonfact exception where the Authority stated "even assuming that the facts asserted by the [u]nion . . . are true, they do not refute these central facts upon which the [a]rbitrator based his award").
[80] *U.S. DOD, Educ. Activity*, 71 FLRA 373, 375 (2019) (then-Member DuBester concurring in part and dissenting in part) (citing *U.S. Dep't of State, Bureau of Consular Affs., Passport Servs. Directorate*, 70 FLRA 918, 919 (2018)).
[81] *Id.*
[82] Exceptions at 8.
[83] *Id.* at 8-9.
[84] *Id.* at 14.
[85] *Id.*
[86] 5 U.S.C. § 7116(a)(7); *U.S. Dep't of VA*, 72 FLRA 287 (2021) (Member Abbott concurring).
[87] Award at 2, 13.

with "EPAS, as a pre-existing contractual provision [that] remained applicable and enforceable."[88]

We find no basis to disturb these conclusions on the grounds set forth by the Agency. At the outset, the Arbitrator did *not* find that § 9902 did not require the Agency to implement DPMAP. Rather, as the Arbitrator noted, § 9902 directs the Secretary to "promulgate regulations" establishing the new performance standards.[89] The Arbitrator's finding that DPMAP constituted an agency rule or regulation promulgated pursuant to this authority is consistent with § 9902's plain language, which explicitly provides that "[a]ny rules and regulations promulgated pursuant to this subsection shall be deemed an agency rule or regulation,"[90] and states that such regulations shall be "implement[ed] . . . subject to the requirement of [the Statute.]"[91] In other words, the Arbitrator did not err by relying on the plain language of § 9902 in determining that the Agency violated § 7116(a)(7) of the Statute. To the contrary, the award is entirely consistent with the plain language of both provisions.

This conclusion is not affected by the Agency's assertion that it provided the Union with notice and an opportunity to bargain over DPMAP's implementation.[92] We similarly reject the Agency's argument that its actions were consistent with § 7116(a)(7) because its agreement with the Union was "open."[93] The Agency has not explained precisely what it means by the term "open." Nor has it explained how this assertion, if true, would render the award unlawful. This omission is sufficient grounds upon which to deny this exception because the Authority's regulations require an excepting party to support its arguments.[94]

However, to the extent that the Agency is arguing that it did not violate § 7116(a)(7) because its agreement was not in effect at the time that it implemented DPMAP, we reject that assertion. The Arbitrator found it was undisputed that the CBA "went into effect in September 1989 and remains in effect at this time while the parties attempt to negotiate a successor agreement,"[95] and the Agency did not challenge this finding in its exceptions. Consequently, we conclude that the award is consistent with both 5 U.S.C. § 9902 and 5 U.S.C. § 7116 (a)(1) and (7), and we deny the Agency's exception.

VI. Decision

We grant the Union's motion for reconsideration and, on reconsideration, partially dismiss and partially deny the Agency's exceptions.

[88] *Id.* at 14.
[89] *Id.* at 11 (quoting 5 U.S.C. § 9902(a)(1)).
[90] 5 U.S.C. § 9902(a)(4)(B).
[91] *Id.* at § 9902(a)(4)(A).
[92] *See, e.g., Dep't of HHS, Health Care Fin. Admin.*, 39 FLRA 120, 130, 132 (1991) (finding agency violated § 7116(a)(7) by implementing regulation that conflicted with parties' memorandum of understanding notwithstanding fact that agency gave the union notice and an opportunity to bargain over the regulation's impact and implementation).
[93] Exceptions at 9.
[94] *See AFGE*, 71 FLRA at 1181 (denying a contrary-to-law exception because the union failed to explain how the award was contrary to law); *see also* 5 C.F.R. §§ 2425.4(a)(2), 2425.6(e)(1).
[95] Award at 1; *see also id.* at 1 n.1 (quoting Art. 53, § 1 of the CBA, which states that "the present Agreement shall remain in full force and effect during the renegotiation of said Agreement until such a time as a new Agreement is effective").

Member Kiko, dissenting:

Applying the Authority's decades-old essence standard, the Authority held in *U.S. DOD Education Activity, Alexandria, Virginia* (*DODEA*) that the parties' collective-bargaining agreement did not permit the Union to grieve expected, future contract violations.[1] Instead, the agreement's plain wording permitted grievances to be filed only "*after* the incident or occurrence giving rise to the grievance."[2] Because *DODEA*'s conclusion remains a sound one, I disagree with the majority that the Authority committed legal error in *DODEA*. Moreover, I disagree that *National Weather Service Employees Organization v. FLRA* (*NWSEO*)[3] affected dispositive issues in *DODEA*, thereby warranting its reconsideration. As I will explain in greater detail below, *NWSEO* did not change the standard that the Authority must apply to resolve essence exceptions, and the Authority decided *DODEA* using the proper standard.[4]

The Union's motion and the majority's decision rely on several faulty premises to show that reconsideration is warranted here.

First, following a line of argument from the Union's motion,[5] the majority suggests that *DODEA*'s essence analysis relied heavily, if not exclusively, on *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida* (*FCI Miami*).[6] This suggestion is completely inaccurate because *DODEA*'s essence analysis rested on two other Authority decisions,[7] and *FCI Miami* was cited in only one portion of a footnote response to the dissent in *DODEA*.[8] The footnote citation to *FCI Miami* does not warrant reconsidering *DODEA*, and I would deny the Union's argument to the contrary.

Second, the Union's motion criticizes *DODEA* for rejecting the wholesale transplantation of the *Steelworkers* cases[9] into the realm of federal-sector collective bargaining.[10] But both the Union[11] and the majority[12] contend that *DODEA* should be reconsidered on the basis of the U.S. Supreme Court's decision in *United Paperworkers International Union, AFL-CIO v. Misco, Inc.* (*Misco*)[13] – rendering any previous Authority critique of the *Steelworkers* cases immaterial here. According to the majority, *Misco* requires that, as long "as the arbitrator is even arguably construing or applying" a collective-bargaining agreement, an essence exception must fail.[14] Because *Misco* is certainly not an intervening court decision – it was decided in 1987 – relying on a rule set forth in *Misco* does not establish extraordinary circumstances that justify reconsidering *DODEA*.[15]

Third, the majority concludes that the Authority erred in *DODEA* by finding that the Union could not allege an "anticipatory [contractual] breach" as a basis for the Union's unfair-labor-practice (ULP) claims.[16] However, the majority's conclusion ignores the Authority's

[1] 71 FLRA 765, 766 (2020) (then-Member DuBester dissenting).

[2] *Id.* (emphasis added in *DODEA*) (quoting Collective-Bargaining Agreement at 33 (emphasis added)).

[3] 966 F.3d 875 (D.C. Cir. 2020).

[4] Because I do not agree that *NWSEO* affected dispositive issues in this case, or changed the standard that the Authority must apply to resolve essence exceptions, I would deny the Union's request to supplement the record with arguments concerning *NWSEO*. Mot. for Leave to File Suppl. Authority (citing 5 C.F.R. § 2429.26(a)).

[5] Mot. for Recons. at 3-4, 5, 12.

[6] 71 FLRA 660 (2020) (Member Abbott concurring; then-Member DuBester dissenting), *pet. for review dismissed sub nom. AFGE, Loc. 3690 v. FLRA*, 3 F.4th 384 (D.C. Cir. 2021); *see* Majority at 4-5.

[7] *DODEA*, 71 FLRA at 766 n.14 (citing *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755 (2018) (then-Member DuBester dissenting)); *id.* at 767 n.20 (citing *U.S. DOD Domestic Elementary & Secondary Schs.*, 71 FLRA 236, 237 (2019) (Member Abbott concurring; then-Member DuBester dissenting)).

[8] *Id.* at 767 n.20 (citing *FCI Miami* in only the second half of the footnote). Although the majority contends that *DODEA* "indisputably relied on *FCI Miami*," Majority at 6, that contention is, in fact, strongly disputed. As I explained above, *FCI Miami* was cited *only* in response to the *DODEA* dissent, and *DODEA*'s substantive essence analysis relied exclusively on two other decisions – not *FCI Miami*. *See* note 7.

[9] *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

[10] Mot. for Recons. at 3, 5-7, 10-13.

[11] *Id.* at 3-4.

[12] Majority at 7-8.

[13] 484 U.S. 29 (1987).

[14] Majority at 7 (quoting *Misco*, 484 U.S. at 38). Moreover, I note that the Supreme Court's statement of this principle in *Misco* did not cite the *Steelworkers* cases for support. In fact, that particular statement did not rely on any previous decisions. *See Misco*, 484 U.S. at 38.

[15] The majority denies that it is relying exclusively on *Misco*, Majority at 6-7, but the majority applies *Misco*'s holding – and no other legal rule – to justify granting reconsideration here. *Compare Misco*, 484 U.S. at 38 ("[A]s long as the arbitrator is even arguably construing or *applying* the contract . . . [,] serious error does not suffice to overturn his decision." (emphasis added)), *with* Majority at 8 (finding that *DODEA* erred by "ignor[ing] that the Arbitrator *applied* the plain language" of the contract in finding the grievance timely).

[16] *DODEA*, 71 FLRA at 766-67; *see* Majority at 7-8.

obligation to ensure that arbitrators deciding ULP claims apply the same legal standards that the Authority's administrative law judges apply to such claims.[17] The issues before the Arbitrator here were whether the Agency's actions violated the parties' agreement and constituted ULPs under § 7116(a)(1) and (7) of the Federal Service Labor-Relations Statute (the Statute).[18] In that context, the Authority found that the Union has to wait until *after* the Agency allegedly breached the parties' agreement to file a grievance, and the Authority's finding was bolstered by longstanding ULP case law that requires a party to wait for a change in conditions of employment to be effectuated before alleging a ULP based on that change.[19] By reversing *DODEA*, the majority appears willing to permit anticipatory contractual breaches to serve as the bases for ULP claims[20] – at least when those claims are litigated at arbitration.[21]

Finally, on a more fundamental level, I believe that the U.S. Court of Appeals for the District of Columbia Circuit lacked jurisdiction to review the Authority's disposition of an essence exception in *NWSEO* because that exception did not "involve[] an unfair labor practice."[22] While I recognize that the Authority has to apply *NWSEO* as the "law of the case" in further stages of that dispute,[23] I do not agree that *NWSEO* binds the Authority in the resolution of any other disputes. Consequently, I would not find that *NWSEO* affected dispositive issues in *DODEA*, or that *NWSEO* identified legal errors that were common to both that case and *DODEA*.

For all these reasons, I would deny the Union's motion for reconsideration.[24] Accordingly, I dissent.

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[17] *E.g.*, *NLRB*, 61 FLRA 197, 199 (2005) (citing *AFGE, Loc. 3529*, 57 FLRA 464, 465 (2001)). The majority protests that "other than" explicitly citing cases about statutory ULP timeliness standards to support its conclusion, "*DODEA* gives no indication whatsoever that it was holding *statutory* standards must apply to the Arbitrator's *contractual* timeliness determination." Majority at 9. I am left to wonder what "indication[s]" would satisfy the majority if *DODEA*'s acknowledged reliance on decisions about statutory standards is insufficient. *Id.*

[18] *DODEA*, 71 FLRA at 765-66 (noting that the Arbitrator found that the Agency violated the parties' agreement and § 7116(a)(1) and (7) of the Statute).

[19] *Id.* at 767 n.19 (citing *U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 736 (2015) (time for union to file ULP charge concerning change to conditions of employment does not begin to run until agency implements change)); *see SSA*, 16 FLRA 56, 67 n.7 (1984) (administrative law judge found, in decision adopted by the Authority, that because "*anticipated* changes were inchoate in nature," they were not "tantamount to effecting changes which might be violative" of the Statute (emphasis added)). I disagree with the majority that the Agency did not raise this issue in its exceptions to the Arbitrator's award, Majority at 9, because the Agency argued that "the issues pertaining to the merits of the grievance, as framed by the Arbitrator . . . [- including the] resulting [ULP -] transpired subsequent to the filing of the Union's grievance, further demonstrating that [the grievance] was prematurely filed," Exceptions Br. at 8.

[20] *See* Majority at 9-10 (apparently confirming that the majority will permit anticipatory contractual breaches to serve as the bases for arbitrated ULP claims, as long as the anticipatory contractual breaches are grieved in accordance with the deadlines set forth in a collective-bargaining agreement).

[21] It is worth noting that the anticipated contractual breach that the Union grieved here was the Agency's notice to the Union that the Agency intended to comply with a legal directive in the National Defense Authorization Act for Fiscal Year 2010 to establish a new performance-appraisal system. *See* 5 U.S.C. § 9902 note (Pub. L. No. 111-84, § 1113(b)(1), (d)).

[22] 5 U.S.C. § 7123(a)(1) (barring judicial review of a final order of the Authority "involving an award by an arbitrator[], unless the order involves an unfair labor practice").

[23] *E.g.*, *U.S. DOJ, Fed. BOP, Wash., D.C.*, 67 FLRA 69, 70 (2012) (in decision on remand from court of appeals, adopting the court's holdings as the "law of the case" that governed the remanded dispute).

[24] As such, I would not address the merits of the exceptions that *DODEA* left unresolved, and I do not join the majority's analysis of any of those exceptions.