

73 FLRA No. 153

UNITED STATES
 DEPARTMENT OF HOMELAND SECURITY
 U.S. CUSTOMS AND BORDER PROTECTION
 U.S. BORDER PATROL
 RIO GRANDE VALLEY SECTOR
 EDINBURG, TEXAS
 (Agency)

and

AMERICAN FEDERATION
 OF GOVERNMENT EMPLOYEES
 LOCAL 3307
 NATIONAL BORDER PATROL COUNCIL
 (Union)

0-AR-5888

—
 DECISION

January 26, 2024
 —

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

I. Statement of the Case

The Union filed a grievance alleging the Agency acted improperly by revoking an employee's (the grievant's) law-enforcement authority and assigning the grievant administrative duties during a misconduct investigation. Arbitrator Daniel M. Kininmonth issued an award finding that the Agency violated Article 32 of the parties' agreement by placing the grievant on an administrative detail for an unreasonable length of time. On exceptions, the Agency argues the award is contrary to management's right to assign work under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute).¹

Applying the test set forth in *Consumer Financial Protection Bureau (CFPB)*,² we find the award affects management's right to assign work. We also find that neither the Arbitrator nor the Union provides a basis for concluding that the contract provisions upon which the Arbitrator relied – as he interpreted and applied them – are enforceable under § 7106(b) of the Statute.³ Therefore, we set aside, as contrary to law, the portion of the award finding an Article 32 violation and the associated remedies.

II. Background and Arbitrator's Award

The grievant, a border patrol canine officer, was involved in two incidents stemming from motor-vehicle pursuits, one of which resulted in two fatalities. Following the second incident, the Agency issued the grievant a letter revoking the grievant's law-enforcement authority and firearm authorization. The revocation letter stated that the grievant would perform administrative duties – making the grievant ineligible for overtime – pending an investigation into whether the grievant committed misconduct. As relevant here, the Agency's Use of Force Handbook permits the Agency to temporarily revoke an employee's law-enforcement and firearm authorities if there is "[e]vidence of . . . behavior that indicates . . . the individual may be a danger to themselves or others."⁴

The Union filed a grievance alleging the Agency violated the parties' agreement and the Use of Force Handbook by revoking the grievant's law-enforcement authority and placing the grievant on an indefinite administrative detail. The grievance went to arbitration. At the time of the arbitration hearing, the Agency's investigation remained open, and the grievant's administrative detail exceeded ten months.

The parties did not stipulate to an issue and, therefore, the Arbitrator framed the issues as: (1) "[w]hether the Agency violated the [Use of Force Handbook]" by suspending "the [g]rievant's . . . law[-]enforcement authority;" (2) "[w]hether the Agency committed an unjustified and unwarranted personnel action by unreasonably delaying its investigation after" suspending the grievant's law-enforcement authority; and (3) "[i]f so, what is the remedy?"⁵

Under Article 32G of the parties' agreement, the Agency "shall furnish employees with notices of proposed disciplinary/adverse actions within a reasonable time after [an] investigation concludes."⁶ Additionally, Article 32M requires the Agency to have "just and sufficient" cause for adverse actions.⁷

¹ 5 U.S.C. § 7106(a)(2)(B).

² 73 FLRA 670 (2023).

³ 5 U.S.C. § 7106(b).

⁴ Exceptions, Attach. 6, Agency's Use of Force Handbook at 9.

⁵ Award at 3-4.

⁶ Exceptions, Attach. 5, Collective-Bargaining Agreement at 69.

⁷ *Id.* at 70-71.

Addressing the first issue, the Arbitrator found the Agency met its evidentiary burden of proving that, at the time of the revocation, the grievant posed a danger to himself or others. As a result, the Arbitrator concluded that the Agency acted consistent with the Use of Force Handbook when it revoked the grievant's law-enforcement authority.

On the second issue, the Arbitrator acknowledged that management's right to assign work under § 7106 of the Statute entitled the Agency to assign the grievant administrative duties. Nonetheless, the Arbitrator found that the Agency could not "unreasonably delay its investigation" to "keep the [g]rievant on administrative duties indefinitely."⁸

Interpreting the parties' agreement, the Arbitrator found "the essence of Article 32G and Article 32M is that an unreasonably delayed [A]gency investigation violates just cause."⁹ Citing a previous arbitration award, the Arbitrator then determined that a reasonable investigation into the grievant's two incidents "should not have exceeded 'six . . . months.'"¹⁰ Thus, the Arbitrator found that the Agency's ten-month investigation was "'prima facie unreasonable'" and constituted "an unjustified and unwarranted personnel action in violation of the Back Pay Act."¹¹

Based on these findings, the Arbitrator sustained the grievance, in part. For a remedy, the Arbitrator directed the Agency to compensate the grievant "for all lost overtime, premium pay[,] or differentials beginning on July 21, 2022" – six months after the investigation began – up to and until the grievant's return to duty as a border patrol officer.¹²

The Agency filed exceptions to the award on May 15, 2023,¹³ and the Union filed an opposition to the Agency's exceptions on June 12. On September 27, 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 *CFPB*. The Agency filed a supplemental brief on October 26, and the Union filed a supplemental brief on

October 27.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's essence arguments.

In its essence exceptions, the Agency argues that the Arbitrator's contract-violation finding is based on an irrational interpretation of Articles 32G and 32M.¹⁴ According to the Agency, neither provision applies to the grievance because Article 32G does not govern "the length of [an] investigation," and investigations do not constitute "discipline or adverse action" under Article 32M.¹⁵

Sections 2425.4(c) and 2429.5 of the Authority's Regulations state that the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.¹⁶ At arbitration, the Union argued that the grievant's indefinite assignment to administrative duties violated Article 32.¹⁷ As such, the Agency should have known to present its interpretation of Articles 32G and 32M to the Arbitrator. However, the record does not reflect that the Agency addressed these articles. Because the Agency could have, but did not, raise its arguments concerning Articles 32G and 32M at arbitration, we dismiss the Agency's essence exceptions.¹⁸

IV. Analysis and Conclusion: The award is contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute.

The Agency argues that the award is contrary to law because it violates management's statutory right to assign work.¹⁹ When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.²⁰ In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.²¹

In *CFPB*, the Authority amended its test for resolving exceptions claiming that an arbitration award is contrary to management rights under § 7106 of the

⁸ Award at 56.

⁹ *Id.* at 59.

¹⁰ *Id.* at 61 & n.5.

¹¹ *Id.* at 60-61 & n.5 (emphasis omitted).

¹² *Id.* at 62-63.

¹³ Unless otherwise noted, all dates hereafter occurred in 2023.

¹⁴ Exceptions Br. at 8-12.

¹⁵ *Id.* at 10-11.

¹⁶ 5 C.F.R. §§ 2425.4(c), 2429.5.

¹⁷ Award at 33 (noting Union's argument that Agency committed unjustified personnel action "by imposing an indefinite suspension" without allowing grievant to exercise its "rights under Article 32"); Exceptions, Attach. 3, Union's Post-Hr'g Br. at 8 (alleging Agency wrongfully "circumvent[ed] the

suspension procedures and protections contained in Article 32 by . . . imposing an indefinite suspension").

¹⁸ 5 C.F.R. §§ 2425.4(c), 2429.5; see *NTEU, Chapter 149*, 73 FLRA 413, 414 (2023) (dismissing essence argument because excepting party could have, but did not, raise argument before arbitrator); *AFGE, Council of Prison Locs., Loc. 405*, 67 FLRA 395, 397 (2014) (dismissing essence exceptions where excepting party had "sufficient opportunity" to "present[] its interpretation of" parties' agreement at arbitration yet failed to do so).

¹⁹ Exceptions Br. at 13-16; Agency's Supp. Br. at 3-6.

²⁰ *U.S. Dep't of the Interior, U.S. Park Police*, 73 FLRA 276, 278 (2022).

²¹ *U.S. Dep't of the Navy, Naval Med. Ctr., Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 140 (2022).

Statute.²² 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.²³ As relevant here, if the answer to that question is yes, then the Authority will determine 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).²⁴

The Agency asserts that the award excessively interferes with its right to assign work because it restricts the Agency from assigning employees administrative duties.²⁵ The Authority has held that the right to assign work includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.²⁶

The Arbitrator found the Agency could not “keep the [g]rievant on administrative duties indefinitely”²⁷ because doing so would “violate[a] just[-]cause” standard implicit in Articles 32G and 32M.²⁸ Notwithstanding the Agency's ongoing investigation, the Arbitrator concluded that these articles prohibited the Agency from assigning the grievant administrative duties for longer than six months.²⁹ By restricting the Agency's authority to determine the duration of an administrative work assignment, the Arbitrator's interpretation and application of Articles 32G and 32M affects management's right to assign work.³⁰ The Union relies solely on the Arbitrator's remedy to argue that the award does not affect management's rights,³¹ but the Union does not dispute that the Arbitrator's *interpretation and application of the parties' agreement* affects management's rights.³² We conclude the answer to the first *CFPB* question is yes.

Regarding the second *CFPB* question, the Arbitrator – who issued his award before the Authority issued *CFPB* – did not discuss § 7106(b)'s applicability in

finding that the Agency violated Articles 32G and 32M. Neither party argues there is any need to remand the case for further development of the record. Absent any arbitral analysis of § 7106(b), *CFPB* provides that “the opposing party” – the Union in this instance – “ha[s] the burden to demonstrate that the [contract] provision at issue . . . is enforceable under § 7106(b).”³³

In its supplemental brief, the Union generally recognizes that the second *CFPB* question concerns § 7106(b).³⁴ However, the Union does not advance any specific arguments – in either its supplemental brief or its opposition – as to how Articles 32G and 32M are enforceable under § 7106(b)(1), (b)(2), or (b)(3). Instead, the Union merely reiterates its position that the Arbitrator correctly interpreted Article 32G and issued a remedy that does not affect management's rights.³⁵ Therefore, we find the Union has not met its burden of demonstrating that Articles 32G and 32M – as interpreted and applied by the Arbitrator – fall within an exception to management's rights under § 7106(b). Thus, the answer to the second *CFPB* question is no, and we need not consider the third and fourth questions.³⁶

Consistent with *CFPB*, where a management-rights exception “successfully challenges” an arbitrator's “underlying finding of a [contract] violation,” the Authority “will set aside *both* the finding of a violation *and* the remedy for the violation.”³⁷ Based on the foregoing, we set aside the Arbitrator's contract-violation finding as contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute. As this violation was the Arbitrator's sole basis for finding an unjustified or unwarranted personnel action under the

²² 73 FLRA at 676-81.

²³ *Id.* at 676-77.

²⁴ *Id.* at 677-80.

²⁵ Exceptions Br. at 14; Agency's Supp. Br. at 3-4.

²⁶ *Antilles Consol. Educ. Ass'n*, 73 FLRA 282, 283 (2022).

²⁷ Award at 56.

²⁸ *Id.* at 59.

²⁹ *Id.* at 60-61; *see also id.* at 61 n.5 (finding Agency's ten-month investigation, and concurrent placement of grievant on administrative duties, “‘prima facie’ unreasonable” (emphasis omitted)).

³⁰ *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 57 FLRA 158, 159 (2001) (Chairman Cabaniss dissenting on other grounds) (finding award affected management's right to assign work where arbitrator's interpretation of parties' agreement limited duration of work assignments); *AFGE, Nat'l Border Patrol Council*, 51 FLRA 1308, 1325 (1996) (holding that proposals which “restrict management in determining the

duration of work assignments . . . affect . . . management's right to assign work” (citing *AFGE, Loc. 1658*, 44 FLRA 1375, 1379 (1992))).

³¹ *See* Union's Supp. Br. at 1 (arguing that “Arbitrator's remedy does not direct the Agency to take or refrain from taking any action that involves a management right”).

³² *See CFPB*, 73 FLRA at 677 (explaining that an “arbitrator's finding of a [contract] violation” and an “arbitrator's awarded remedy” constitute “two, conceptually distinct ways” that an award can affect management's rights (emphasis omitted)).

³³ *Id.* at 679.

³⁴ Union's Supp. Br. at 2.

³⁵ *Id.*

³⁶ *CFPB*, 73 FLRA at 680 (recognizing that it is unnecessary to address the third and fourth *CFPB* questions unless “the answer to the [second] question is yes”).

³⁷ *Id.*

Back Pay Act,³⁸ we also set aside the Arbitrator's findings, and associated remedies, regarding the Back Pay Act.³⁹

Accordingly, we grant the Agency's exception and set aside the award, in part.⁴⁰ Because the Agency's remaining exceptions challenge the same portion of the award that we have set aside, it is unnecessary to address them.⁴¹

V. Decision

We set aside the award, in part.

³⁸ Award at 59-61; *see* 5 U.S.C. § 5596(b)(1) (requiring backpay award be supported by finding that employee suffered "an unjustified or unwarranted personnel action," as evidenced by violation of "applicable law, rule, regulation, or collective[-]bargaining agreement").

³⁹ *See U.S. Dep't of the Treasury, U.S. Customs Serv., Port of N.Y. & Newark*, 57 FLRA 718, 722 (2002) (setting aside backpay remedy for lack of unjustified personnel action where Authority found arbitrator's underlying contract-violation and unfair-labor-practice findings deficient).

⁴⁰ We note that neither party excepted to the Arbitrator's finding that the Agency did not violate the Use of Force Handbook in suspending the grievant's law-enforcement authority or the

Arbitrator's denial of certain requested remedies. Award at 60-62. Therefore, we leave undisturbed those portions of the award.

⁴¹ Exceptions Br. at 16-17; Agency's Supp. Br. at 6-7 (arguing that award is contrary to management's right to determine internal security practices under § 7106(a)(1) of the Statute); Exceptions Br. at 17-19 (arguing that backpay remedy is contrary to Back Pay Act because there is no underlying unjustified or unwarranted personnel action); *see, e.g., U.S. Dep't of VA, Robley Rex Med. Ctr.*, 73 FLRA 468, 470 n.27 (2023) (finding it unnecessary to address additional exceptions after setting aside award as contrary to law).