74 FLRA No. 3

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

and

NATIONAL TREASURY EMPLOYEES UNION
(Union)

0-AR-5908

_____

DECISION

September 3, 2024

_____

Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

The Union filed a national grievance, alleging that the Agency violated Article 39 of the parties' collective-bargaining agreement (Article 39) by inconsistently processing requests for hardship reassignments (hardship requests). Arbitrator Stephen E. Alpern issued an award sustaining the grievance (merits award). After considering the parties' proposed remedies, the Arbitrator issued a second award (remedial award) directing the Agency to provide affected employees throughout the Agency (the grievants) with the opportunity to reapply for hardship reassignments. Additionally, the Arbitrator specified how the Agency should process the requests to ensure consistency.

In its exceptions to the remedial award, the Agency contends that the award is based on a nonfact and that the Arbitrator exceeded his authority in several ways. The Agency also argues the awarded remedies are contrary to management rights under § 7106(a) of the Federal Service Labor-Management Relations Statute (the Statute).[1]

As the Agency does not demonstrate that the alleged nonfact is clearly erroneous, we deny its nonfact exception. Because the Arbitrator did not exceed his authority as alleged, we deny the exceeded-authority exceptions. Finally, because the awarded remedies do not unlawfully interfere with management rights, we deny the Agency's contrary-to-law exception.

II. Background and Arbitrator's Awards

The Union filed a national grievance, alleging the Agency violated Article 39 by inconsistently processing hardship requests. Specifically, the Union claimed that, when an employee requested reassignment to another office (the gaining office), which did not have a vacancy, the Agency permitted the gaining office to determine its own procedures for resolving the request. The grievance proceeded to arbitration.

The parties stipulated the issues, including, as relevant here, "[w]hether the Agency violated Article 39 of the [parties' agreement] when approving[or]disapproving hardship . . . requests"; "[w]hether the Agency violated Article 39 . . . [by] creating alternative processes for employees who were denied a hardship . . . request"; and, if the Agency violated the parties' agreement, "what is the remedy?"[2]

Article 39, Section 2 governs employee-requested reassignments, and Section 2(E) establishes "procedures . . . so that employees experiencing hardships may be provided consideration for reassignment at other duty stations in an expedited manner and with greater priority than most other reassignment requests."[3] This section defines the circumstances under which an employee is eligible for a hardship reassignment, including hardships affecting the employee's immediate family members. Section 2(E) also provides the process for an employee to apply for such a reassignment.

At arbitration, the Union provided evidence that the Agency treated hardship requests in a variety of ways when there was no gaining-office vacancy, including: denying the request; approving the request without taking immediate action; placing the employee on a waitlist for reassignment; requesting authority to overstaff the gaining office; or encouraging the employee to seek a temporary detail in the gaining office. The Agency argued that Article 39 permitted it to consider whether there was a vacancy in the gaining office and to deny a request if there was not one. According to the Agency, the variety of outcomes were the result of the field offices seeking permissible alternative solutions to accommodate employees' requests when there was no vacancy.

Interpreting Article 39, the Arbitrator concluded that the Agency "may . . . consider whether a vacancy exists at the gaining facility before granting a reassignment request."[4] However, noting that Article 39 was part of a "national agreement" intended to "provid[e] uniform

[1] 5 U.S.C. § 7106(a).
[2] Merits Award at 3.
[3] *Id.* at 8.
[4] *Id.* at 27.

terms and conditions of employment for all employees covered by the [a]greement," the Arbitrator found that the Agency could not treat hardship requests differently in each office.[5] Because the Agency permitted each office to determine its hardship-request policy, the Arbitrator concluded that the Agency violated Article 39 by treating bargaining-unit employees inconsistently.[6]

During the arbitration hearing, the Union also provided evidence that the Agency denied a hardship request from a grievant who wanted to move closer to her mother while the mother was undergoing medical treatment. Article 39, Section 2(E)(4)(a)(2) provides that an employee is eligible for a hardship reassignment where the employee, or an immediate family member, has "[a] medical condition . . . [that] is not treatable in the employee's current duty station."[7] The Agency denied the request as the treatment the mother needed was available near the grievant's current duty station. However, because the mother's condition prevented her from traveling to the grievant's current duty station for treatment, the Arbitrator found the grievant was eligible for a hardship reassignment under Article 39, Section 2(E)(4)(a)(2). Thus, he concluded that the Agency violated Article 39 by denying her request.

The Arbitrator directed the parties to seek agreement on appropriate remedies. When the parties were unable to reach agreement, the Arbitrator instructed the parties to submit proposed remedies for his consideration. In his remedial award, the Arbitrator noted the Agency "proposed relatively limited remedies" with the justification that the parties were starting negotiations on a successor collective-bargaining agreement that would cover new hardship-request procedures.[8] The Union disputed this justification, arguing that waiting to address the Agency's violations through bargaining was inappropriate because "the parties have customarily taken several years to negotiate successor collective[-]bargaining agreements."[9] The Arbitrator stated that his "guiding principles" for developing the remedies were "to ensure that employees' rights under Article 39 [were] fulfilled, to protect the Union's right to monitor implementation of the remedies[,] and to minimize the burden on the Agency."[10]

After weighing the parties' proposals, the Arbitrator directed the Agency to notify affected employees that they could resubmit hardship requests if they believed they were wrongfully denied such a request during the relevant period.[11] If there were no vacancies "for which [a requesting employee was] qualified" in the gaining office, the Arbitrator directed the Agency to maintain a waitlist at the gaining office (waitlist remedy).[12] The Arbitrator reasoned that this was "an appropriate remedy" because the Agency had already used waitlists in some field offices.[13]

Because some offices sought and obtained overstaffing authority in order to grant hardship requests when there was no vacancy, but the Agency had "no uniform policy regarding when field offices should seek authorization for overstaffing,"[14] the Arbitrator also directed the Agency to "determine the circumstances under which it will approve overstaffing . . . within the field offices and [to] advise field offices on the circumstances which require such action" (the overstaff remedy).[15]

Additionally, the Arbitrator directed the Agency to grant hardship requests, under Article 39, Section 2(E)(4)(a)(2), when a requesting employee's eligible family member is unable to relocate to the employee's duty station to receive medical care. The Arbitrator also rejected the Agency's argument that the remedies should be limited only to bargaining-unit employees in the field offices, finding that neither the grievance, nor the stipulated issues, included such a limitation. Thus, he directed the Agency to apply the remedies to all bargaining-unit employees subject to Article 39.

The Agency filed exceptions on July 31, 2023, and the Union filed an opposition on September 6, 2023. On September 26, 2023, the Authority issued *Consumer Financial Protection Bureau* (*CFPB*),[16] which revised the test the Authority will apply in cases where parties file management-rights exceptions to arbitration awards finding collective-bargaining-agreement violations. The Authority allowed the parties to file additional briefs concerning how the revised test should apply in this case.

---

[5] *Id.* at 31.
[6] *See id.*; *see also id.* at 34 (finding the Agency violated the agreement because "different field offices implemented different practices resulting in employees being treated differently"); *id.* at 35 (finding the Agency violated Article 39 "when creating alternative processes for employees who were denied a hardship reassignment request" due to a lack of vacancy in the gaining office).
[7] *Id.* at 8 (quoting Exceptions, Ex. A, Collective-Bargaining Agreement (CBA) at 236)).
[8] Remedial Award at 2.
[9] *Id.*
[10] *Id.* at 3.
[11] Based on the parties' proposals, the Arbitrator determined the remedial period would start ninety days before the filing of the grievance and end on the date of the remedial award. *Id.*
[12] *Id.* at 8.
[13] *Id.* at 6; *see also id.* at 5 (rejecting Agency's objection to waitlists, observing that the Agency had "attempted to defend the use of waiting lists" during the merits phase of the arbitration proceedings).
[14] *Id.* at 6.
[15] *Id.* at 8.
[16] 73 FLRA 670 (2023).

The Union and Agency each filed a supplemental brief on October 27, 2023.

III. Analysis and Conclusions

A. The Agency does not establish that the remedial award is based on a nonfact.

The Agency argues the remedial award is deficient because the Arbitrator allegedly based the waitlist and overstaff remedies on a nonfact.[17] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[18]

According to the Agency, the Arbitrator based his remedies on a nonfact by relying on the Union's "conjecture" about the duration of future negotiations to reject the Agency's proposed remedies.[19] In its remedy brief to the Arbitrator, the Agency "proposed relatively limited remedies," arguing that such remedies were appropriate because the parties were preparing to begin negotiations on a successor collective-bargaining agreement that would cover new hardship-request procedures.[20] Conversely, the Union argued that providing the grievants with limited remedies until the conclusion of bargaining was inappropriate because the parties spent approximately two years negotiating each of the last two term agreements.[21] Based on this past bargaining experience, the Union expressed concern that the grievants could be left without redress for a substantial period of time.[22]

The Agency contends the Arbitrator would not have awarded the waitlist and overstaff remedies if not for the Union's claim that it may take years to negotiate a successor agreement.[23] However, even assuming the Arbitrator relied on the Union's statement when selecting remedies, the Agency does not dispute the accuracy of the Union's statement. The Union argued that future negotiations could be lengthy because past negotiations had taken several years;[24] the Agency argues the Union's claim that future bargaining could be lengthy is "conjecture" but fails to contest the factual statement underlying the claim—the extended length of past negotiations.[25] Thus, the Agency does not demonstrate that the award is based on a clearly erroneous fact.

Accordingly, we deny this exception.[26]

B. The Agency does not establish that the Arbitrator exceeded his authority.

The Agency argues the Arbitrator exceeded his authority in the remedial award in a number of respects.[27] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[28] The Authority accords arbitrators substantial deference in the determination of the issues submitted to arbitration, including the arbitrator's interpretation of the scope of those issues.[29]

The Agency contends the Arbitrator exceeded his authority by disregarding a specific limitation on his authority.[30] According to the Agency, the Arbitrator could not direct the waitlist and overstaffing remedies, because Article 28 of the parties' agreement prevents arbitrators from "add[ing] to, subtract[ing] from, or modify[ing] the terms" of the parties' agreement.[31] In assessing whether arbitrators have exceeded their authority, the Authority grants arbitrators broad discretion to fashion remedies they consider appropriate.[32] Additionally, the Authority has previously rejected the argument that arbitrators disregard specific limitations on their contractual authority merely by directing the parties to comply with their contractual obligations.[33]

The Arbitrator interpreted Article 39 to require the Agency to treat hardship requests consistently.[34]

---

[17] Exceptions Br. at 20 (citing Remedial Award at 2).
[18] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex Victorville, Cal.*, 73 FLRA 835, 836 (2024) (*BOP*).
[19] Exceptions Br. at 20.
[20] Remedial Award at 2.
[21] Exceptions, Ex. I, Union's Proposed Remedy Br. (Union's Remedy Br.) at 8.
[22] *Id.*
[23] Exceptions Br. at 20.
[24] Union's Remedy Br. at 8.
[25] Exceptions Br. at 20.
[26] *See NLRB*, 72 FLRA 80, 81 (2021) (Member Abbott dissenting on other grounds) (denying nonfact exception that did "no[t] demonstrate[] how a factual finding [was] clearly erroneous").
[27] Exceptions Br. at 12-19.
[28] *AFGE, Loc. 2258*, 70 FLRA 210, 213 (2017).
[29] *Id.*
[30] Exceptions Br. at 13.
[31] *Id.* (quoting CBA at 137).
[32] *BOP*, 73 FLRA at 837; *U.S. DOL*, 67 FLRA 287, 289 (2014) (noting that the Authority grants arbitrators "great latitude in fashioning remedies" for contractual violations (quoting *U.S. DOJ, U.S. Fed. BOP, U.S. Penitentiary, Lewisburg, Pa.*, 39 FLRA 1288, 1301 (1991))).
[33] *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 66 FLRA 712, 715 (2012) (*IRS*) (Member Beck dissenting in part); *see also Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 520 (1986) (*Air Force*) (finding arbitrator did not exceed authority by "direct[ing] the [agency] to comply with the terms of [the parties'] agreements").
[34] Merits Award at 31. In its exceptions brief, the Agency does not challenge the Arbitrator's interpretation or application of Article 39 on essence grounds.

Finding the Agency failed to do so, the Arbitrator directed the Agency to give affected employees the opportunity to reapply for hardship reassignments and to have those requests processed using consistent policies.[35] As the Agency already used waitlists and overstaffing in certain circumstances,[36] the Arbitrator directed the Agency to use waitlists whenever there was no gaining-office vacancy and to develop a "uniform policy" on overstaffing.[37] Because both of these remedies address the Agency's failure to comply with Article 39, the Arbitrator did not "add to . . . or modify the terms" of the parties' agreement.[38] Consequently, we deny this exception.[39]

The Agency also argues the Arbitrator exceeded his authority by directing the Agency to grant hardship requests when eligible family members are unable to travel to an employee's duty station for medical treatment.[40] According to the Agency, the meaning of Article 39, § 2(E)(4)(a)(2)—the provision concerning hardship reassignments for medical treatment—"was not an issue set before the [A]rbitrator for determination."[41]

However, one of the stipulated issues was "[w]hether the Agency violate[d] Article 39 of the [parties' agreement] when approving[or] disapproving hardship . . . requests[.]"[42] Based on the evidence the Union presented at arbitration, the Arbitrator concluded that the Agency violated a section of Article 39 by denying an employee's hardship request when an eligible family member needed medical treatment in another city.[43] As the Agency agreed to a broad issue that encompassed all sections of Article 39, and this remedy was responsive to that issue, this exception does not demonstrate that the Arbitrator exceeded his authority.[44] Accordingly, we deny it.

According to the Agency, the Arbitrator also exceeded his authority by directing remedies for employees outside the grievant class.[45] Although the Agency concedes the remedy "appears consistent with the issue presented," it argues the Arbitrator should have interpreted the issue more narrowly.[46] The Agency contends the Arbitrator should have limited remedies to employees in the field offices because the Union's grievance and evidence at arbitration concerned only the Agency's handling of hardship requests between field offices.[47]

Considering this argument at arbitration, the Arbitrator found neither the wording of the grievance, nor the stipulated issues, limited the grievant class to field-office employees.[48] In its grievance, the Union identified "all bargaining[-]unit employees impacted by the allegations,"[49] and the stipulated issues asked whether the Agency violated Article 39 in its handling of hardship requests without identifying field-office employees in particular.[50] The Agency does not cite any authority to support its contention that arbitrators are required to interpret issues more narrowly than they are written based on the scope of the evidence provided.[51] Because the Agency does not demonstrate that the Arbitrator expanded the grievant class when he applied the remedies to all affected bargaining-unit employees subject to Article 39, we deny this exception.[52]

---

[35] Remedial Award at 7-8.
[36] *Id.* at 6 (finding that waitlists were "an appropriate remedy in this case" because the Agency already used them); *id.* (noting that the Agency "did permit overstaffing under certain circumstances, but that there was no uniform policy regarding when field offices should seek authorization for overstaffing").
[37] *Id.* at 6-7.
[38] *See* CBA at 137.
[39] *See IRS*, 66 FLRA at 715 (denying exceeded-authority exception where arbitrator directed agency to comply with the violated provision in future actions).
[40] Exceptions Br. at 15-17.
[41] *Id.* at 16.
[42] Merits Award at 3.
[43] *Id.* at 30; *see also id.* at 8 (quoting CBA Art. 39, § 2(E)(4)(a)(2) ("Qualified hardships include when an employee (or immediate family member) experiences . . . [a] medical condition . . . [that] is not treatable in the employee's current duty station . . . .")).
[44] *See U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 72 FLRA 253, 255 (2021) (Member Abbott dissenting in part on other grounds) (denying exceeded-authority exception where remedy was "directly responsive" to issue before arbitrator); *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, St. Louis Dist., St. Louis, Mo.*, 65 FLRA 642, 644 (2011) (denying exceeded-authority exception where "remedy [was] directly responsive and properly confined to the stipulated issues").
[45] Exceptions Br. at 17-19.
[46] *Id.* at 19.
[47] *Id.* at 18-19.
[48] Remedial Award at 4-5.
[49] Exceptions, Ex. B, Grievance at 1.
[50] Merits Award at 3 ("Whether the Agency violated Article 39 of the [parties' agreement] when approving/disapproving hardship . . . requests[.]").
[51] *See* Exceptions Br. at 18 (arguing that the Arbitrator should have limited the issue to field-office employees based on the specifications in the grievance and the Union's evidence at arbitration).
[52] *See U.S. Dep't of Com., Nat'l Weather Serv., Nat'l Oceanic & Atmospheric Admin.*, 58 FLRA 490, 494 (2003) (denying exceeded-authority exception arguing relief awarded too broadly where the grievance covered all employees affected by alleged violation of parties' agreement); *Air Force*, 24 FLRA at 519-20 (denying exceeded-authority exception arguing arbitrator expanded grievant class where the "matter in dispute concern[ed] a management practice and policy generally applicable to the entire bargaining unit").

C. The Agency does not establish that the remedial award is contrary to management's rights.

The Agency argues the waitlist and overstaffing remedies violate management's rights under § 7106(a) of the Statute to assign employees and to determine the personnel by which Agency operations shall be conducted, as well as its rights to determine the mission, budget, organization, number of employees, and internal security practices of the Agency.[53] 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.[54] In applying the de novo standard, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standards of law.[55] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[56]

In *CFPB*, the Authority amended its test for resolving exceptions claiming that an arbitration award is contrary to management rights under § 7106 of the Statute.[57] 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, or the awarded remedy, affects a management right.[58] In *CFPB*, the Authority stated that "if it is clear that the [collective-bargaining-agreement] provision is enforceable under § 7106(b), then the Authority may assume, without deciding, that the interpretation and application of the [agreement] and/or the awarded remedy 'affects' a management right."[59] For the following reasons, we find Article 39—as interpreted and applied by the Arbitrator—is an enforceable procedure under § 7106(b)(2) of the Statute. Thus, we assume, without deciding, that the Arbitrator's interpretation and application of Article 39 affect management rights under § 7106(a).[60]

In *CFPB*'s second question, we ask whether the arbitrator correctly found, or the opposing party demonstrates, that the provision—as interpreted and applied by the arbitrator—is enforceable under § 7106(b) of the Statute.[61] Here, the Arbitrator did not address this question, but the Union argues that Article 39 is an enforceable procedure under § 7106(b)(2).[62] The Authority has upheld arbitrators' enforcements of assignment procedures under § 7106(b)(2) where they require an agency to select employees for assignments in a certain manner, as long as the agency retains discretion to evaluate whether the employees are qualified for the assignment.[63]

Finding the parties' agreement provides "uniform terms and conditions of employment for all employees," the Arbitrator determined the Agency violated Article 39 by treating similarly situated grievants in a disparate manner.[64] As the Union observes, the Authority has found that requiring an agency to administer reassignments in a particular sequence *among employees the agency has determined to be qualified* are lawful procedures under § 7106(b)(2).[65] Importantly, the Arbitrator's interpretation of Article 39 does not impact each field

[53] Agency's Supp. Br. at 12 (citing 5 U.S.C. § 7106(a)).
[54] *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 419 (2023).
[55] *Id.*
[56] *Id.*
[57] *CFPB*, 73 FLRA at 676-681.
[58] *Id.* at 676-77.
[59] *Id.* at 681 n.123.
[60] *Id.* at 681 n.123 (noting the "Authority will not necessarily apply all of the steps of [the four-question] test," and, where appropriate, "may assume, without deciding, that the interpretation and application of the [parties' agreement] and/or the awarded remedy 'affects' a management right"); *see also Consumer Financial Prot. Bureau*, 73 FLRA 781, 783 (2024) (*CFPB II*) (assuming, without deciding, that the first part of the *CFPB* test was met).
[61] *CFPB*, 73 FLRA at 679-80.
[62] Union's Supp. Br. at 2-3.
[63] *E.g.*, *U.S. DHS, U.S. CBP, Laredo Field Off., Hidalgo Port of Entry*, 70 FLRA 216, 217-18 (2017) (*Hidalgo*) (finding award requiring agency to use rotation process to assign overtime among employees the agency had previously determined to be qualified enforced a lawful overtime-assignment procedure under § 7106(b)(2)); *U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Gulf Coast Pascagoula, Miss.*, 62 FLRA 328, 330 (2007) (*Navy*) (upholding arbitrator's conclusion that process for reassigning employees was enforceable procedure under § 7106(b)(2) where process "permit[ted] the [a]gency to determine qualifications and require[d] reassignments only of employees who [were] equally qualified").
[64] Merits Award at 31.
[65] Union's Supp. Br. at 3 (citing *AFGE, Loc. 3295*, 47 FLRA 884, 907 (1993) (*Loc. 3295*) (proposal requiring agency to make assignments using reverse seniority among qualified employees negotiable under § 7106(b)(2) because it "preserve[d] the [a]gency's right to determine the qualifications necessary for the reassignment and whether individual employees [met] those qualifications"); *AFGE, Loc. 1760*, 28 FLRA 160, 165 (provisions prescribing the procedures management must follow when selecting an employee for reassignment "from among employees previously judged to be qualified to perform the work of the position to which they are to be reassigned" were negotiable procedures under § 7106(b)(2)), *recons. granted in part & denied in part*, 30 FLRA 29 (1987)).

office's discretion to determine whether each employee is eligible for the requested reassignment or qualified for the position for which they requested reassignment. He merely found the Agency could not treat inconsistently the employees the Agency deemed eligible and qualified for hardship reassignments.[66] Consequently, we find the Union establishes that Article 39—as interpreted and applied by the Arbitrator—is an enforceable procedure under § 7106(b) of the Statute.[67] Therefore, we move on to the third *CFPB* question.

The third *CBPB* question asks whether the excepting party challenges the remedy separate and apart from the underlying violation.[68] As the Agency specifically challenges the waitlist and overstaff remedies as contrary to law,[69] the answer to the third question is yes, and we move to the fourth and final *CFPB* question.[70]

In the fourth question, we ask whether the excepting party has demonstrated that the challenged remedy fails to reasonably correlate to the enforced provision, as interpreted and applied by the arbitrator.[71] In this regard, in *CFPB*, the Authority explained that a remedy affecting management rights must be "adequately tied to an enforceable limitation on management rights" in order for the Authority to uphold it.[72] The Authority provided an example of a reasonably correlated remedy: an arbitrator who found an agency violated a just-cause provision by disciplining an employee might reasonably direct the agency to mitigate or set aside the discipline because those remedies are "adequately tied" to the just-cause provision – an enforceable limitation on management's rights.[73] By contrast, the Authority stated that if the arbitrator remedied the just-cause violation by *promoting* the employee – a remedy having nothing to do with the discipline that violated the provision – then that remedy would not reasonably correlate to the provision, as interpreted and applied.[74] Additionally, where an arbitrator found an agency violated its contractual obligation to communicate performance expectations by lowering an employee's performance rating using criteria it had not previously communicated to her, the Authority found a remedy directing the agency to raise the improperly lowered performance rating to be "reasonably correlate[d]" to the performance-communication procedures being enforced by the arbitrator.[75]

Here, the Agency contends the Arbitrator could have "required the Agency to uniformly adjudicate and process hardship requests within each [f]ield [o]ffice," but the remedial award "cease[d] to be correlated with the provision" when the Arbitrator directed the Agency to adopt specific hardship-request processes nationally.[76] According to the Agency, these remedies are not reasonably correlated because the specifics of the hardship-request process "remain within management's right to determine,"[77] and the Agency "delegated [that discretion] to the [twenty] field offices."[78]

Contrary to the Agency's argument that each field office can determine its own hardship-reassignment procedures, the Arbitrator found the Agency violated Article 39 by treating hardship requests inconsistently among field offices when there was no vacancy at the gaining office.[79] The Agency has not successfully challenged this finding as failing to draw its essence from

[66] Merits Award at 31.
[67] *See Hidalgo*, 70 FLRA at 218 (award enforced lawful overtime-rotation procedure under § 7106(b)(2) where agency retained discretion to determine whether employees were qualified for the assigned work); *Navy*, 62 FLRA at 330 (award implementing reassignment procedure requiring agency to solicit qualified volunteers for a reassignment and then use reverse seniority for remaining positions was enforceable under § 7106(b)(2)); *NTEU*, 47 FLRA 1038, 1044-45 (1993) (finding provision determining which eligible employee agency would select for assignment affected management's rights to assign work and determine personnel but was negotiable procedure where it preserved agency's discretion to determine employee eligibility); *Loc. 3295*, 47 FLRA at 907 (finding reassignment provision negotiable procedure where it "preserve[d] the [a]gency's right to determine the qualifications necessary for the reassignment and whether individual employees [met] those qualifications").
[68] *CFPB*, 73 FLRA at 680-81.
[69] Agency's Supp. Br. at 11-12.
[70] *See CFPB*, 73 FLRA at 680-81.
[71] *Id.*
[72] *Id.* at 681.
[73] *Id.*
[74] *Id.*
[75] *U.S. Dep't of VA, James A. Haley, Veterans Hosp. & Clinic*, 73 FLRA 880, 886 (2024) (*Dep't of VA*) (Member Kiko concurring).
[76] Agency's Supp. Br. at 17.
[77] *Id.*
[78] *Id.* at 15.
[79] Merits Award at 31 (finding that the Agency violated Article 39 by permitting each field office to use different procedures for hardship requests); *id.* at 32 ("[The Agency] had inconsistent policies regarding the request for over-hire authority in the face of hardship . . . requests.").

the parties' agreement.[80] Therefore, we defer to the Arbitrator's interpretation of Article 39 in evaluating whether the remedies reasonably correlate to that provision.[81] Thus, the Agency's argument that the awarded remedies do not reasonably correlate to *the Agency's* interpretation of Article 39 does not demonstrate that the remedies are unlawful.

Alternatively, the Agency argues that, even if the Arbitrator's interpretation is correct and Article 39 requires consistent nationwide processes for hardship-reassignments, the Arbitrator's remedies directing specific processes fail to reasonably correlate to Article 39 because they intrude on management's right to determine what national processes to adopt.[82]

In his remedial award, the Arbitrator noted that his "guiding principles" for developing appropriate remedies were "to ensure that employees' rights under Article 39 [were] fulfilled, to protect the Union's right to monitor implementation of the remedies[,] and to minimize the burden on the Agency."[83] Balancing these interests, the Arbitrator did not alter the Agency's discretion to assess employees' eligibility for reassignment or their qualifications for the requested position.[84] Moreover, contrary to the Agency's contention, the Arbitrator did not direct the Agency to create and administer a single "national waitlist" tracking every reassignment request.[85] Instead, drawing on the Agency's existing waitlist policy in certain field offices, the Arbitrator determined an "appropriate remedy"[86] would be for each of the remaining field offices to implement the same waitlist system for employees seeking reassignment to those offices.[87] As for the overstaff remedy, rather than directing the Agency to implement any particular policy, the Arbitrator directed the Agency to "determine the circumstances under which it will approve overstaffing."[88]

In addressing *CFPB*'s fourth question, the Agency merely (1) reiterates its position that the award affects a management right, and (2) proposes its preferred remedy. However, the Agency fails to explain *how* the challenged remedies lack a reasonable correlation with Article 39 *as interpreted and applied by the Arbitrator*. By directing the Agency to adopt standardized policies, the Arbitrator enforced Article 39's requirement that the Agency process hardship requests consistently for all bargaining-unit employees.[89] These remedies are "adequately tied" to the Agency's violation of Article 39.[90] As a result, we find they reasonably correlate to the enforced provision.[91]

Consequently, the Agency has not established that these remedies unlawfully infringe on the cited management right, and we deny this exception.[92]

IV. Decision

We deny the Agency's exceptions.

[80] In its supplemental brief, the Agency argues for the first time that the "Arbitrator's interpretation and application of Article 39 . . . fails to draw it essence from the agreement." Agency's Supp. Br. at 4. In directing the parties to submit supplemental management-rights briefs, we specified the supplemental briefs were "not an opportunity for the parties to make new arguments that are unrelated to the revised management-rights test." Supplemental-Filing Order at 1. As noted previously, the Agency does not argue in its exception brief that the award fails to draw its essence from Article 39. Thus, to the extent the Agency raises new essence arguments in its supplemental brief, we do not consider them. *See CFPB II*, 73 FLRA at 782 (declining to consider "entirely new arguments" that were "beyond the limited scope" of request for supplemental briefing on application of *CFPB*'s revised management-rights test).

[81] *See Dep't of VA*, 73 FLRA at 885 (deferring to arbitrator's interpretation of the parties' agreement in applying *CFPB* where agency did not argue award failed to draw its essence from the enforced contractual provisions).

[82] Agency's Supp. Br. at 16 ("[A]ssuming arguendo that the Arbitrator's interpretation is correct . . . an appropriate remedy would be to mandate that the Agency begin to process the hardship reassignments consistently across the nation, . . . not [to] mandate the specific processes [that] management must utilize.").

[83] Remedial Award at 3.

[84] *See id.* at 6-7.

[85] Agency's Supp. Br. at 15; *see also* Exceptions Br. at 11 (arguing that the Arbitrator "mandate[ed] a national[-]level waitlist").

[86] Remedial Award at 6 (finding that, "while not required by the parties' [a]greement, the use of waiting lists is an appropriate remedy in this case"); *see also* Merits Award at 19 (summarizing Agency's argument that "nothing in Article 39 . . . prohibits the use of waitlists . . . when considering hardship reassignment requests").

[87] Remedial Award at 8 ("A separate [wait]list shall be maintained by each [f]ield [o]ffice.").

[88] *Id.*

[89] *See* Merits Award at 31.

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

[91] *See Dep't of VA*, 73 FLRA at 886.

[92] *See id.* (denying contrary-to-management-rights argument where agency failed to demonstrate remedy lacked reasonable correlation with enforced provisions); *CFPB*, 73 FLRA at 681 (explaining that the Authority will deny a contrary-to-management-rights exception where excepting party does not "demonstrate that the remedy fails to reasonably correlate to the enforced provision").