BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, DC

American Federation of Government Employees HUD Council 222,	)	
Union,	)	
v.	)	Date: March 20, 2026
U.S. Department of Housing and Urban Development,	)	
Agency.	)	

AGENCY'S EXCEPTIONS TO ARBITRATOR'S AWARD

Pursuant to 5 U.S.C. § 7122(a) and 5 C.F.R. § 2425.6, the United States Department of Housing and Urban Development ("HUD" or "Agency") by and through its undersigned representatives, hereby files exceptions to the February 18, 2026, Award ("Award") issued by Arbitrator Michael T. Loconto, Esq. (the "Arbitrator").[1] Exhibit 1 – Award.[2]

INTRODUCTION

In January 2025, in response to a Presidential Memorandum directing federal agencies to return to their workforces to full-time in-person duty, the Agency notified its bargaining unit employees that their routine telework arrangements would be modified. That notification was not a surprise, and it was not a unilateral action. For more than two years before it occurred, the Parties had negotiated and executed detailed contractual procedures governing precisely how the

[1] Pursuant to 5 C.F.R. § 2425.4(a)(6), the Arbitrator's mailing and email address are:

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See https://www.locontoadr.com/home (last visited on March 19, 2026).
[2] FMCS No.: 250409-05235.

Agency could modify employee telework agreements, what notice was provided, and what new documentation employees would be required to complete. The Agency followed those negotiated procedures to the letter: it gave employees more than four weeks of advance written notice, provided its reasons for the modifications in writing, and directed employees to submit new Flexiplace Agreements. Under controlling precedent of this Authority that examined the identical contractual provisions in the Parties' collective bargaining agreement ("CBA"), that is the end of the analysis. *AFGE Local 3972 and HUD*, 74 F.L.R.A. 252 (2025) (denying union's exceptions where arbitrator found parties had already negotiated procedures for changing telework agreements and Agency followed those negotiated procedures). The Arbitrator's Award in this case, however, treated the Agency's compliance with its contractual obligations as a repudiation of them, imposed a novel evidentiary standard on the Agency's stated business reasons drawn from no provision of the CBA, and, without identifying or applying the Authority's framework, ordered the most disruptive remedy available—a status quo ante reinstatement of prior telework arrangements for nearly seven thousand employees. Each of those determinations is wrong, and two of Arbitrator's three remedies are separately barred by sovereign immunity and federal statute.

The Arbitrator's Award includes three categories of error, each of which independently warrants relief. First, the Award is contrary to law because it disregards the covered-by doctrine. When parties negotiate procedures for exercising a management right, as HUD and AFGE Council 222 plainly did in Article 18 and its accompanying supplements, a subsequent exercise of that right in compliance with those procedures does not give rise to a bargaining obligation or a finding of repudiation. The Arbitrator's effort to distinguish controlling precedent based on the scale of the modification has no foundation in the CBA, the Statute, or Authority precedent, and

if permitted to stand would effectively require agencies to return to bargaining every time a government-wide management directive requires them to exercise rights that are already the subject of detailed contractual procedures. Second, the Award fails to draw its essence from the CBA because it grafts an "arbitrary and capricious" evidentiary standard onto the Agency's proffered business reasons for modifying telework agreements. This evidentiary standard appears no where in the parties' agreement and was derived from a provision applicable only to the denial of telework rather than its modification. Third, the Award is based on two clearly erroneous nonfacts: that telework was eliminated, when in reality it was modified for a defined category of arrangements while situational telework remained available to all eligible employees; and that telework is a term and condition of employment to which employees are entitled, when both the CBA and the Flexiplace Agreements expressly and repeatedly state the opposite.

FACTS AND PROCEDURAL BACKGROUND OF ARBITRATION

From January 2022 until April 2022, the Parties negotiated and bargained over the CBA Supplements 33 and 34 and HUD's Flexiplace Policy, which outlined HUD's expanded workplace flexibilities. Exhibit 2 – Supplement 33; Exhibit 3 – Supplement 34; Exhibit 4 – Flexiplace Policy.

On April 11, 2022, the Parties executed Supplement 33 to the CBA, which implemented HUD's Flexiplace Policy as it relates to remote and mobile work. Exhibit 2 – Supplement 33. On April 11, 2022, the Parties executed Supplement 34 to the CBA, which made amendments to Article 18, Telework, in the 2015 CBA. Exhibit 3 – Supplement 34. In May 2022, HUD issued its Flexiplace Policy, Handbook 625.1 Rev. 1, which is now HUD's operative telework policy and supersedes any other references to telework in any other Agency policies or guidance dated

prior. Exhibit 4 – Flexiplace Policy. On or about December 18, 2024, the Parties agreed to extend the CBA through July 23, 2029. Exhibit 5 – CBA.

On January 24, 2025, HUD Chief of Staff Andrew Hughes sent an email stating that all employees would be expected to begin reporting to a HUD office full time, unless approved for an exemption. Exhibit 6 – Notification from HUD Chief of Staff. On January 24, 2025, the Office of the Chief Human Capital Officer ("OCHCO") sent an email to staff stating that all bargaining unit employees ("BUEs") who are not on a remote work agreement are expected to begin reporting to their official HUD office on a full time basis beginning the week of February 24, 2025, and directed BUEs to submit modified Flexiplace Agreements. Exhibit 7 – OCHCO Notification. Pursuant to the Flexiplace Policy, it is clear that "[f]lexiplace arrangements are not an employee entitlement, and how work is accomplished in an office is *always* a management decision." Exhibit 4 – Flexiplace Policy, p. 3 (*emphasis* added); Exhibit 8 – Hearing Transcript ("Trans."), pp. 85:3 – 6; 86:4 – 7. Similarly, the Flexiplace Agreements require all teleworking Agency employees to certify their "understand[ing] that flexiplace arrangements are not an entitlement and this agreement may be modified or terminated at any time." Exhibit 9 – Flexiplace Application & Agreement; Exhibit 8 – Trans., pp. 199:17 – 200:4. Agency employees are still permitted to telework situationally. Exhibit 8 – Trans., p. 85:7 – 10.

On or about March 11, 2025, the Union filed a grievance alleging that the Agency "[repudiated] Article 18 of the CBA when it issued a 'Return to In-Office Work' ('RTO') directive" and "[failed] to bargain in good faith with the Union concerning its unilateral termination of telework and remote work arrangements" thereby violating Articles 4, 18, and 53 of the CBA as well as the Federal Service Labor-Management Relations Statute (the "Statute")

and the Telework Enhancement Act of 2010. Exhibit 10 – Grievance of the Parties.[3] The Union requested, among other relief, (1) recission of the return to in-person work notices, (2) an opportunity to bargain with the Agency, and (3) a finding that the Agency committed an unfair labor practice. Exhibit 10 – Grievance of the Parties.

On April 8, 2025, the Agency issued its decision on the March 11th grievance, finding that "the Agency action has been conducted in accordance with the HUD Flexiplace Policy, the Agreement, and the applicable Supplements to the [CBA]." Exhibit 11 – Response to Grievance of the Parties. The Agency's decision was based on the fact that telework was not eliminated, and the Agency dutifully engaged in good faith bargaining over Supplements 33 and 34 and subsequently exercised its discretion to require BUEs to report to the office. Exhibit 11 – Response to Grievance of the Parties. On April 8, 2025, over two months after being notified, the Union invoked arbitration over the modification to telework agreements. Exhibit 12 – Invocation of Arbitration.

On September 23, 2025, the parties participated in a hearing before the Arbitrator at the Agency headquarters in Washington, DC. On January 9, 2026, the parties timely submitted post-hearing briefs. On February 18, 2026, Arbitrator Loconto issued the Award and concluded that the Agency violated the CBA and committed an unfair labor practice. As a result, the Arbitrator directed the parties to return to the *status quo ante* and reinstated BUEs' previously-approved regular and routine telework agreements, further directed the Agency to post a notice, issue compensation to affected BUEs, pay the Arbitrator's fees and costs, and allowed the Union to petition the Arbitrator for the award of reasonable attorney's fees. Exhibit 1 – Award at 33.

[3] The subject matter of the grievance was not raised as an unfair labor practice charge, and was not raised in any other administrative procedures.

ARGUMENT

I. The Award is Contrary to Law Because It Disregards the Covered-By Doctrine and Wrongly Concludes that the Agency Repudiated Article 18 of the CBA.

The Authority is authorized to find an arbitrator's award deficient where the award is contrary to any law, rule, or regulation, and is further authorized to take such action as necessary to make it consistent with applicable laws, rules, and regulations. 5 U.S.C. § 7122(a). When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo. *U.S. DOJ, Fed. BOP, U.S. Penitentiary McCreary, Pine Knot, Ky. and AFGE Loc. 614*, 73 F.L.R.A. 865, 867 (2024). Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* "If a collective bargaining agreement 'covers' a particular subject, then the parties to that agreement 'are absolved of any further duty to bargain about that matter during the term of the agreement.'" *BOP v. FLRA*, 654 F.3d 91, 94 (D.C. Cir. 2011) (citing *Navy v. FLRA*, 962 F.2d 48, 53 (D.C. Cir. 1992)). Indeed, a contested agency action must be found to be covered by an existing agreement if the subject matter of the action is expressly contained in the agreement. *AFGE Nat'l Council 118 and DHS*, 73 F.L.R.A. 309, 310 (2022); *DHS and AFGE Loc. 1929*, 69 F.L.R.A. 261, 264 (2016).

Here, the subject matter of the contested Agency action is the modification of telework. The Agency modified telework arrangements pursuant to the bargained-for modification procedures expressly contained in the CBA and related supplements. Exhibit 13 – Agency Post-Hearing Brief, pp. 7 – 9. There was no repudiation of Article 18 of the CBA. Specifically, the Agency notified BUEs of the modification, provided the business reasons for said modification, and directed BUEs to submit new telework agreements. Exhibit 5 – CBA, Article 18, Section

18.06(3) (management "must give reasonable advance notice for permanent or long term modifications to telework agreements and, under normal circumstances no less than one full pay period. The modification must be in writing and provide the reason(s) for the modification" and a "permanent modification to a telework agreement requires a new agreement"); Exhibit 13 – Agency Post-Hearing Brief, pp. 7 – 9. Simply put, no further bargaining was required. *See* BOP, 654 F.3d at 96 ("[b]ecause the parties reached an agreement about how and when management would exercise its right to assign work, the implementation of those procedures, and the resulting impact, do not give rise to a further duty to bargain" because the "[collective bargaining article] covers and preempts challenges to all specific outcomes of the [] process").

The precise issue was already raised in the matter of *AFGE Local 3972 and HUD*, wherein the requirement for in-office attendance was increased for certain BUEs. 74 F.L.R.A. 252 (2025) (denying Union's exceptions to arbitrator award finding that parties had already negotiated the procedures for changing telework agreements and that the Agency had followed those negotiated procedures). The *AFGE Local 3972* decision arose under the identical contractual framework at-issue here. The arbitrator in that case applied the same 2015 HUD-AFGE CBA, the same Article 18 modification procedure and requirements, and the same National Supplement 34, and concluded that the Agency "precisely followed the procedures" for permanently modifying telework agreements. *Id.* at 254. The contractual provisions the Arbitrator was required to apply in this matter are word-for-word the provisions that the Authority already held, in *Local 3972*, foreclose any claim of repudiation or unlawful unilateral action when the Agency follows those procedures. *Id.* at 255-56. Instead of faithfully applying this controlling precedent, the Award attempts to distinguish the two matters by explaining that the modification only applied to one regional office rather than the vast majority of the Agency,

and contemplated specific business reasons. Exhibit 1 – Award at 27 – 28. There is no basis in the law, the CBA or any relevant supplements for such a distinction. There is no limit on the degree to which a modification can be made, and as such the distinction the Arbitrator attempts to create is contrary to law. Any conclusion that the Agency improperly terminated telework agreements and repudiated Article 18 should be excepted and, instead, the Authority should conclude that the Agency simply modified telework arrangements for BUEs, did not repudiate Article 18 and resolve this exception in favor of the Agency.

II. The Award Fails to Draw its Essence from the CBA Because the Arbitrator Imported An Evidentiary Standard Not Based in the CBA.

The Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award does not represent a plausible interpretation of the agreement or evidences a manifest disregard of the agreement. *U.S. DOT FAA and NATCA*, 70 F.L.R.A. 687, 688 (2018) (citing *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla. and AFGE Loc. 916*, 48 F.L.R.A. 342, 348 (1993)).

Here, the Award does not draw its essence from the CBA because it implausibly inserts an evidentiary standard for business reasons offered by the Agency to justify a modification to telework arrangements. Exhibit 1 – Award, pp. 28 – 29. More specifically, the Arbitrator imposed an "arbitrary and capricious" evidentiary standard for Agency-proffered business reasons for telework agreement modifications. Exhibit 1 – Award, pp. 28 – 29. The Agency properly modified the telework policy pursuant to bargained-for procedures but, instead, the Award treats the modification as a repudiation of Article 18 in its entirety. Importantly, telework is not an employee entitlement. The Flexiplace Policy dictates that decisions regarding *how* and *where* work is accomplished lies with management. Exhibit 8 – Trans., pp. 198:8 – 201:11. Tellingly,

the Flexiplace Policy and Telework Agreements make it clear, and the Union acknowledges that, employees are not entitled to telework, and their arrangement can be modified or terminated at any time. Exhibit 4 – Flexiplace Policy, pp. 3; Exhibit 8 – Trans., pp. 199:17 – 200:4. BUEs can still telework situationally, which is a type of telework specifically delineated in the Flexiplace Policy and the CBA. Exhibit 4 – Flexiplace Policy, pp. 10 – 11; Exhibit 3 – Supplement 34, pp. 1 – 2; Exhibit 8 – Trans., p. 85:7 – 13. The Flexiplace Agreement requires employees to certify that "flexiplace arrangements are not an entitlement and this agreement may be modified or terminated at any time." Exhibit 9 – Flexiplace Agreement, p. 4. BUEs are aware of the Agency's ability to modify or terminate their agreements in accordance with the negotiated procedures, and telework is not a term or condition of their employment to which they are entitled to.

Modification of telework arrangements requires the Agency to (1) notify all employees, including the Union, at least one pay period before the modification is set to take effect, (2) provide the reasons for the modification, and (3) direct employees to complete a new telework agreement. Exhibit 5 – CBA, Article 18, §§ 18.03(1)(d), 18.06(1), (3); Exhibit 2 – Supplement 33, p. 7. There was a valid modification by the Agency. The evidence shows the Agency generously provided over four weeks of advance written notice, which was more than double the required notice period, to each BUE and provided the reasons for the modification. The Friday, January 24, 2025 email from the Agency's Chief of Staff to all HUD employees, which was shared and forwarded to the Union that same day, set forth the business reasons for the modification to telework, namely to (i) increase the efficiency and accountability of the federal workforce, (ii) increase the quality of services, and (iii) improve the supervision and training of Agency employees. Exhibit 6 – Notification from HUD Chief of Staff. Requirement (1) to notify all employees at least one pay period before the modification is to take effect and requirement (2)

to provide the reasons for modification are easily satisfied. Finally, requirement (3) was satisfied because all Agency employees were required to submit a new Flexiplace Agreement. Exhibit 6 – Notification from HUD Chief of Staff; Exhibit 9 – Flexiplace Application & Agreement. Moreover, Article 18 of the CBA obligates employees to report to the office "at least twice per pay period." Exhibit 5 – CBA, Article 18, § 18.04. A plain reading of the provision suggests that the number of days of in-office reporting may be increased, pursuant to a valid modification.

Unfortunately, the Arbitrator imposed an "arbitrary and capricious" evidentiary standard for Agency-proffered business reasons for telework agreement modifications. Exhibit 1 – Award, pp. 28 – 29. In support, the Arbitrator relied on Section 18.02(2) of the CBA and Supplement 34, which are unavailing.[4] First, Article 18, Section 18.02(2) of the CBA applies only to the "denial and termination" of telework for eligible employees. Exhibit 5 – CBA, Article 18, Section 18.02(2). For reasons previously set forth and those forthcoming, neither situation applies because telework was neither denied nor terminated – instead, telework agreements were modified. *See supra*, 4 – 6; *infra*, 9 – 10. Next, Supplement 33 only states that the reasons for the modification of flexiplace arrangements need not be arbitrary or capricious. Neither Supplement 33 nor the CBA prescribe a standard of evidentiary heft that reasons for modifying flexiplace arrangements must be supported by, as the Award suggests. Exhibit 1 – Award, pp. 28 – 29; Exhibit 5 – CBA, Article 18, Section 18.06 ("[t]he modification must be in writing and provide the reason(s) for the modification."). The Agency clearly provided three reasons for the modification – (1) increase the efficiency and accountability of the federal workforce, (2) increase the quality of services, and (3) improve the supervision and training of Agency

[4] The Award cites to Supplement 34, but the Agency believes the Arbitrator meant to cite to Supplement 33, based on the provisions cited and language quoted. Exhibit 1 – Award at 28. Supplement 33, however, relates to remote and mobile work, which is distinct from telework, and not at issue in the instant matter. See Exhibit 4 – Flexiplace Policy, pp. 4, 15 – 19.

employees. Exhibit 6 – Notification from HUD Chief of Staff. There is no basis in the CBA or the law for the arbitrator to provide any type of second guessing of the validity or veracity of the Agency's proffered business reasons for modifying the telework agreements. It's well-settled that management has the right to assign work and direct employees and an arbitrator cannot substitute their own judgment for how an agency should do so. 5 U.S.C. § 7106(a)(2); Exhibit 4 – Flexiplace Policy, p. 3 ("Flexiplace arrangements are not an employee entitlement, and how work is accomplished in an office is always a management decision"); *see generally Soc. Sec. Admin. Off. of Hearings Operations and Ass'n of Admin. L. Judges Int'l Fed'n of Pro. & Tech. Eng'rs*, 71 F.L.R.A. 687, 690 (Apr. 8, 2020) (employee's discretionary use of telework "excessively interfere[s] with the Agency's rights to direct employees and assign work"). The Authority should rule in favor of the Agency on this exception and find that the Arbitrator's conclusion that that the Agency "offered no substantive evidence" to justify the modification to telework arrangements failed to draw its essence from the CBA.

III. The Award is Based on the Non-Facts that Telework Was Eliminated and that Telework is an Employee Entitlement.

The award is deficient because it is based on two non-facts: (1) telework was eliminated entirely, and (2) telework is an employee entitlement. *See* Exhibit 1 – Award, pp. 26 – 27 ("By terminating telework agreements for thousands of bargaining unit members without a valid basis, the Employer repudiated the Agreement. In doing so, the Employer committed an unfair labor practice by restraining those employees from accessing a term and condition of employment. For these and other reasons described herein, the grievance is sustained"). To establish a non-fact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous and that but for the error, the arbitrator would have reached a different result. See *NLRB, Region 9, Cincinnati, Ohio and NLRB Union*, 66 F.L.R.A. 456, 461 (2012).

In reality, telework agreements were modified to eliminate just one specific *type* of telework. The Union confirmed this fact, and it's further supported by Supplement 34, which differentiates different types of telework. Exhibit 3 – Supplement 34, pp. 1 – 2; Exhibit 4 – Flexiplace Policy, pp. 10 – 11; Exhibit 8 –Trans. 85:7 – 13. Additionally, at least 10% of the workforce maintains a routine telework arrangement. Exhibit 8 – Trans., p. 205:7 – 10. Second, as explained above, *supra* 6 – 8, the CBA and Agency policy clearly demonstrate that BUEs are not entitled to telework, and management has the right to direct employees and assign work. Because the award rests on two clearly erroneous and central factual premises that (1) telework was eliminated entirely and not just modified pursuant to set bargained-for procedures, and (2) telework is a term and condition of employment, the Authority should set aside the award based on two non-facts and resolve this exception in favor of the Agency.

IV. All Three Remedies Awarded by the Arbitrator are Contrary to Law.

For the reasons previously discussed, the Award should be set aside in its entirety because it is contrary-to-law, fails to draw its essence from the CBA, and relies on non-facts. The Authority need not go any further in its analysis. However, if the Authority were to reach the issue of remedy, the Authority should set aside each of the Arbitrator's remedies as contrary to law.[5] First, the monetary remedy comprised of commuting costs and elder care expenses

[5] The Agency's exceptions to the Arbitrator's awarded remedies herein comply with 5 C.F.R. §§ 2425.4(c) and 2429.5, which generally bar consideration of arguments or challenges to remedies that could have been, but were not, presented to the arbitrator. In its post-hearing brief, the Agency specifically requested that the Arbitrator find there was no violation of the CBA or any law and therefore "deny the Union's grievance and all requested relief." Exhibit 13 – Agency Post-Hearing Brief, p. 1; *see U.S. DOT FAA and Pro. Aviation Safety Specialists, AFL-CIO*, 74 F.L.R.A. 335, 338 (2026) (agency not required to propose alternative remedy to preserve exception to an awarded remedy, particularly where agency's interpretation of the operating agreement underlying its exception was raised in arbitration). Further, sovereign immunity is an issue of jurisdiction and "can be raised by an agency at any time." *Soc. Sec. Admin. Office of Disability Adjudication and AFGE Loc. 1164*, 65 F.L.R.A. 334, 337 (2010); *DHS CBP and NTEU*, 68 F.L.R.A. 253, 257 (2015) ("though the record does not indicate that the Agency presented its sovereign-immunity argument to [the] Arbitrator . . . §§ 2425.4(c) and 2429.5 do not preclude the Agency from raising this claim before the Authority."); *Settles v. Parole Comm'n*, 429 F.3d 1098, 1105 (D.C. Cir. 2005) ("Sovereign immunity may not be waived by federal agencies").

violates the doctrine of sovereign immunity because neither category constitutes "pay, allowances, or differentials" under the Back Pay Act ("BPA"). Second, the elder care component of the remedy is further barred under the CBA, which both memorializes the Parties' acknowledgment that no legislation authorizes the expenditure of federal funds to subsidize elder care and contractually allocates the cost of dependent care to employees. Third, the status quo ante remedy ordering immediate reinstatement of prior existing telework schedules is contrary to law because the Arbitrator failed to identify, let alone apply, the five-factor test established by the Authority in *Federal Correctional Institution and AFGE Loc. 2052, AFL-CIO*, 8 F.L.R.A. 604 (1982) ("*FCI*"), and the relevant factors affirmatively weigh against that extraordinary remedy. Each ground independently warrants vacatur of that portion of the Award.

A. The Back Pay Act Does Not Authorize Reimbursement of Commuting Costs or Elder Care.

The United States is broadly immune from liability in suits under the doctrine of sovereign immunity. *See Lane v. Pena*, 518 U.S. 187, 192 (1996). Sovereign immunity can be waived by statute, however, the waiver must be "unequivocally expressed in statutory text." *Id.* A federal agency therefore will only be subject to a monetary claim if the statute on which the claim is based unambiguously establishes that the Government has waived its sovereign immunity to permit suit, and that the scope of that waiver extends to an award of money damages.

The BPA authorizes an arbitrator to award backpay only when two requirements are satisfied: (1) an unjustified or unwarranted personnel action, and (2) the action directly resulted in the "withdrawal of pay, allowances, or differentials." 5 U.S. Code § 5596(b). The term "pay, allowances, or differentials" is a defined term of art encompassing "pay, leave, and other monetary benefits an employee is entitled to by statute or regulation." 5 C.F.R. § 550.803. The

statute does not grant a general right to reimbursement for expenses incurred by employees as a result of an unjustified or unwarranted personnel action. The Authority has repeatedly enforced this limitation and set aside awards purporting to compensate losses outside of the statutory definition. *See, e.g.*, *DHS CBP and AFGE Loc. 2913*, 67 F.L.R.A. 107, 109 – 10 (2013) (setting aside arbitral award of "actual expenses" and subsistence expenses exceeding the per-diem rate where losses were not a statutory or regulatory entitlement under BPA); *DOT FAA and NATCA*, 64 F.L.R.A. 325, 328 – 29 (2009) (setting aside arbitral award requiring agency payment of expenses incurred by union to remediate mold because the expense was not "pay, allowances, or differentials" under BPA); *Dep't of Health and Hum. Servs. Gallup Indian Med. Cen. Navajo Area Indian Health Serv. and LIUNA Loc. 1376*, 60 F.L.R.A. 202, 212 (2004) (setting aside award of expenses for moving, replacement life insurance, and medical services as not covered by BPA).

In this case, the Award ordered HUD to compensate affected bargaining unit employees for "costs for commuting or elder care" incurred after February 24, 2025. Exhibit 1 – Award at 31. In support of this remedy, the Arbitrator cited the BPA's authorization of compensation for "monetary loss due to the violation of a collective bargaining agreement." *Id.* (citing *U.S. CBP and NBPC*, 66 F.L.R.A. 198, 204 (2011)). The Arbitrator's single-sentence legal analysis, however, omits the controlling limitation embedded in the BPA's statutory text—compensation is available only for losses of "pay, allowances, or differentials." 5 U.S.C. § 5596(b)(1)(A)(i); *see Dep't of the Army Corpus Christi Army Depot and AFGE Loc. 2142*, 72 F.L.R.A. 541 (2021) ("we remind arbitrators that they may not award compensatory damages to a grievant . . . unless a statute authorizes such payments.").

It is long settled under Authority precedent that commuting expenses incurred by employees are not compensable as "pay, allowances, or differentials" under the BPA. *U.S. Customs Serv. Chicago-O-hare and NTEU Ch. 172*, 23 F.L.R.A. 366, 367-68 (1986) ("additional personal commuting expenses incurred as a result of the . . . unwarranted action are not proper components of an award of backpay under the [BPA] and its implementing regulations"). Rather, an employee's daily cost of traveling between home and the office is a personal expenditure incurred as an incidental consequence of working. For example, in *Soc. Sec. Admin. Office of Disability Adjudication and Review Region 1 and AFGE Loc. 1164*, an arbitrator's award initially granted monetary compensation for employees' increased commuting costs caused by an agency's change to its flexiplace agreement. 65 F.L.R.A. 334 (2010). The agency filed an exception with the Authority arguing the award for commuting costs violated sovereign immunity. *Id.* at 337. The Authority agreed, setting aside the remedy and holding that because commuting costs do not constitute pay, allowances, or differentials under the BPA, reimbursement for the employees' mileage and parking costs would violate the Government's sovereign immunity. *Id.* at 338. Applying the BPA's plain textual limitations and Authority precedent here, the compensation of employees for additional commuting costs incurred as a result of the Agency's modifications of flexiplace agreements should be set aside as contrary to law.

Similarly, costs associated with elder care are quintessential personal costs and not "monetary employment benefits to which an employee is entitled by statute or regulation." 5 C.F.R. § 550.803. The Authority has set aside monetary awards for analogous categories of personal out-of-pocket expenses, including moving costs, medical bills, and replacement insurance premiums, precisely because such losses, however real and however causally

connected to an agency's conduct, fall outside the BPA's definitional limits. *See Dep't of Health and Hum. Servs. Gallup Indian Med. Cen. Navajo Area Indian Health Serv. and LIUNA Loc. 1376*, 60 F.L.R.A. 202, 212 (2004). Elder care costs are personal family expenses of the same character. To this end, the CBA confirms the Parties' mutual understanding that "there is no legislation supporting the expenditure of appropriated funds to subsidize elder care." Exhibit 5 – CBA, Article 54, Section Article 54.05. Because there is no statute, regulation, or Authority decision supporting monetary remedies for elder care costs resulting from modified flexiplace schedules, the Authority should set aside the award of elder care costs as contrary to law, and this exception should be resolved in favor of the Agency.

B. The Award of Elder Care Expenses is Also Contrary to the Express Provisions of the CBA.

Even if the elder care component of the Award were not barred by sovereign immunity and the BPA, the Award independently fails to draw its essence from the CBA. 5 U.S.C. § 7122(a)(2); 5 C.F.R. § 2425.6(b)(2)(i).[6] An award fails to draw its essence from the CBA when the award: "(1) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement, as to manifest an infidelity to the obligation of the arbitrator; (2) does not represent a plausible interpretation of the agreement; (3) cannot in any rational way be derived from the agreement; or (4) evidences a manifest disregard of the agreement." *See U.S. SBA and AFGE Loc. 2951.*, 55 F.L.R.A. 179, 181 – 82 (1999) (setting aside award on failure to draw essence grounds where award directed agency to pay union's costs and

[6] The Agency's specific exception to the Arbitrator's remedy of reimbursement for elder care expenses complies with 5 C.F.R. §§ 2425.4(c) and 2429.5 on additional grounds that the Arbitrator granted the award *sua sponte*, and there was no reasonable basis for the Agency to address the issue when neither the Union's position nor any evidence in the record put the Agency on notice that elder care reimbursement was at-issue. *See DOJ BOP and AFGE Loc. 4047*, 68 F.L.R.A. 841, 844 (2015) (Chairman Pope, *concurring*) ("§§ 2425.4(c) and 2429.5 of the Authority's regulations do not bar an excepting party from making arguments where it is unclear that the party reasonably should have known to make those arguments at arbitration"); FLRA Arbitration Guide at 19 (regulatory bar applies only where excepting party "reasonably should have known to raise" an issue before the arbitrator).

expenses, but the parties' CBA expressly required those costs to be borne equally by both parties).

Here, the Award rests on the implicit premise that the Agency's return-to-office directive generated new dependent care costs for affected employees, which would not have been borne but for the Agency's modification to telework schedules. This premise inverts the actual contractual relationship. Under Section 18.03(2)(d) and National Supplement 34, employees who held approved flexiplace agreements were already obligated to independently obtain and pay for appropriate elder care arrangements as a condition of participating in regular telework. *See* Exhibits 3 – Supplement 34, p. 2; Exhibit 5 – CBA, Article 18, Section 18.03(2)(d). "Employees must ensure that appropriate dependent care (i.e., children, elders, and/or loved ones) is obtained and utilized during work hours while participating in the telework program." Exhibit 5 – CBA, Article 18.03(2)(d); Exhibit 3 – Supplement 34, p. 3; *see also* Exhibit 4 – Flexiplace Policy, p. 8 (same). Employees therefore could not have been teleworking under the CBA's terms without having discharged that obligation at their own expense. The Award therefore does not compensate an employment benefit withdrawn bv the Agency when it modified employees' flexiplace agreements. It reimburses them for an expense that the CBA expressly required them to bear at their own cost as an express condition of their telework participation.

Compensating employees for costs they were contractually required to absorb rewrites the Parties' agreed-upon cost allocation in a manner that the CBA expressly forecloses. *See* Exhibit 5 – CBA, Article 52, Section 52.10(2) ("The arbitrator shall not have authority to add to, subtract from, or modify any of the terms of this Agreement"); Article 52.10(6) ("An award must be consistent with current law and regulation."). By re-allocating costs to the Agency in a

manner that contradicts the CBA, the Award of elder care costs fails to draw its essence from the CBA and must be set aside. *See Small Bus. Admin.*, 55 F.L.R.A. at 181 – 82.

C. A Status Quo Ante Remedy Is Contrary to Law Because the Arbitrator Failed to Consider or Apply the *FCI* Factors.

The Award's most consequential remedy is its order that HUD reinstate pre-February 2025 telework schedules for all affected bargaining-unit employees. Status quo ante reinstatement does not automatically follow from a finding of an unfair labor practice under the Statute. It requires a separate, independent analysis under the framework established by the Authority in *FCI*.

As an initial matter, the Arbitrator determined that the violation at-issue was statutory in nature rather than purely contractual, stating that the Agency "committed a prohibited personnel practice in violation of the Statute" when it implemented changes to employee flexiplace agreements. Exhibit 1 – Award at 30 (citing 5 U.S.C. § 7116(a)(1)). Upon finding a statutory violation, the Arbitrator was required to assess the appropriateness of status quo ante remedy by "carefully balancing the nature and circumstances of a particular violation against the degree of disruption in government operations that would be caused by such a remedy." *Dep't of the Air Force and NAGE Loc. R3-32, SEIU, AFL-CIO*, 57 F.L.R.A. 852, 857 (2002) (overturning status quo ante remedy where it would adversely impact security level at duty location); *see* 5 U.S.C. § 7101(b) ("provisions of [5 U.S.C. Chapter 71] should be interpreted in a manner consistent with the requirement of an effective and efficient government").

Under Authority precedent, an arbitrator is required to make an individualized determination of the appropriateness of a status quo ante remedy by analyzing the five factors set forth under *FCI*:

> (1) whether, and when, notice was given to the union by the agency concerning that action or change decided upon;
> (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change;
> (3) the willfulness of the agency's conduct in failing to discharge its bargaining duty under the Statute;
> (4) the nature and extent of the impact experienced by adversely affected employees; and
> (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.

FCI, 8 F.L.R.A. at 606.

Here, the Arbitrator never mentioned *FCI*, never identified its five factors in his Award, and never evaluated whether any of those factors supported the remedy of status quo ante. *See* Exhibit 1 – Award, p. 30. This failure is grounds to vacate the remedy as contrary to law. *See Dep't of Commerce Nat'l Inst. of Standards and Tech. and FOP*, 71 F.L.R.A. 199, 201 (2019) (vacating remedy of status quo ante where arbitrator did not apply *FCI's* factors, and ordering instead that agency engage in post-implementation bargaining) ("*NIST*").

Moreover, the Arbitrator failed to issue any findings in the Award that would support affirming a status quo ante remedy on review. With respect to the first two *FCI* factors, the Award states that the Agency provided advanced notice to the union of its intent to modify flexiplace agreements of bargaining unit employees, and that "[t]he Union did not demand to bargain over the change." Exhibit 1 – Award, p. 16. Although the Union argued it did not request bargaining because it interpreted the Agency's notice as a *fait accompli*, the Arbitrator made no finding in support of the Union's position. *Compare DHS CBP and NTEU*, 64 F.L.R.A. 916, 921 (2010) (affirming determination that union did not waive bargaining based on arbitrator's "factual finding" that change was announced as a *fait accompli*). The Arbitrator made no finding under the third factor, the "willfulness" of the Agency's conduct, or the fourth factor, the nature and extent of the impact on affected employees. With respect to the fifth factor, the Arbitrator

issued no determinations, findings of fact, or analysis of the potential disruption to Agency operations. However, the record evidence demonstrates the disruption and impact on Agency operations would be immediate and severe, requiring the Agency to process and implement new flexiplace agreements for approximately 6,856 Agency employees—on the same individual terms and conditions in place in January 2025 for each employee—within a single pay period. Exhibit 1 – Award, pp. 14, 30.

In short, because the Arbitrator failed to apply the *FCI* factors prior to issuing a status quo ante remedy for a violation of the Statute, and because the record and Award do not support the remedy when applying the factors, the Authority should vacate the status quo ante remedy as contrary to law. To the extent the Authority on review overturns only the Award's remedies under 5 U.S.C. § 7122(a), the Authority should order post-implementation bargaining as the appropriate remedy. *See NIST*, 71 F.L.R.A. at 201 (ordering parties to engage in post-implementation bargaining after vacating arbitrator's status quo ante remedy); *FCI*, 8 F.L.R.A. at 606 (ordering prospective bargaining as remedy after status quo ante remedy was found deficient).

CONCLUSION

For the reasons set forth above, the Award is contrary to law, fails to draw its essence from the CBA, and is based on non-facts. Therefore, the Award must be set aside.

5 C.F.R. § 2425.4(a)(4) STATEMENT

Pursuant to 5 C.F.R. § 2425.4(a)(4), the Agency is not requesting an expedited, abbreviated decision.

Respectfully submitted,

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STATEMENT OF SERVICE

The undersigned Agency Representative certifies that the foregoing Agency Exceptions and exhibits were sent on March 20, 2026, to the following individual:

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/s/ Anju V. Mathew
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