66 FLRA No. 108

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
SSA GENERAL COMMITTEE
(Union)

0-AR-4563

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DECISION

March 30, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Charles Feigenbaum filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator found that the Agency violated the parties' agreement and § 7116(a) of the Statute by unilaterally implementing a new system for submitting applications for internal vacancies. For the reasons set forth below, we grant in part and deny in part the Agency's exceptions and we modify the award.

II. Background and Arbitrator's Award

The dispute arose when the Agency sent a letter to the Union proposing implementation of its Internal Vacancies on-Line (IVOL) program, which established an electronic application process for internal Social Security Administration (SSA) vacancies. Award at 3. The letter provided that employees must apply online using IVOL for all internal vacancies and also provided for an electronic method of ranking and rating applicants. *Id.* at 3-4.

The letter also stated that the Agency had no obligation to bargain over IVOL because: (1) the electronic filing of applications was "covered by" Article 26 of the parties' agreement, (2) IVOL did not affect conditions of employment for bargaining unit employees, and (3) IVOL did not have a reasonably foreseeable adverse impact on employees.[2] *Id.* at 4. The Union responded that the Agency's proposed implementation of IVOL would conflict with the parties' agreement and replied that "the Agency may not implement this initiative." *Id.*

The Union presented a grievance alleging that "the implementation of IVOL violated both the [parties' a]greement and statute." *Id.* The matter was not resolved and was submitted to arbitration. The Arbitrator framed the issue as: "Did the Agency's unilateral implementation of the IVOL system violate the [parties' a]greement and the [Statute]? If so, what shall be the remedy?" *Id.* at 2.

The Arbitrator first concluded that the Agency did not violate the parties' agreement by posting the internal vacancies on the internet in addition to the intranet. *Id.* at 22. According to the Arbitrator, Article 26, Section 7A, which states that vacancies must be announced on the SSA intranet, does not require that vacancies be posted exclusively on the intranet.[3] *Id.* Additionally, the Arbitrator rejected the Union's argument that, by announcing vacancies on the internet, employees would be discouraged from completing their applications on work time. *Id.*

The Arbitrator then concluded that the Agency violated Article 26 of the parties' agreement by requiring applications to be submitted online and by using an electronic method of rating and ranking applicants. *Id.* According to the Arbitrator, Section 8E, which allows employees to use Agency computers to complete application forms, "provid[es] room for employees to someday file applications electronically," but does not authorize the Agency to require electronic applications as the exclusive method. *Id.* at 23. Further, the Arbitrator found that Sections 7C.1(o)-(p) "clearly refer to paper applications." *Id.* at 25.

The Arbitrator found that, even if the parties discussed new technology at the bargaining table,

[1] Member DuBester's separate opinion, dissenting in part, is set forth at the end of this decision.

[2] The relevant provisions of the parties' agreement are set forth in the appendix to this decision.

[3] All references to sections in the parties' agreement refer to Article 26.

Article 26 "falls far short" of sanctioning the IVOL system the Agency implemented. *Id.* at 23. According to the Arbitrator, Article 26 did not authorize IVOL because it did not contain language indicating agreement to technological advances similar to language in other provisions, such as "or electronic equivalent." *Id.* at 23-24.

The Arbitrator rejected the Agency's argument that the use of IVOL constitutes the exercise of its right to determine "technology, methods and means of performing work" under 5 U.S.C. § 7106(b)(1). *Id.* at 24. The Arbitrator found that § 7106(b)(1) was not at issue because the Union had not requested bargaining, but, rather, asserted that the implementation of IVOL violated an already existing collective bargaining agreement. *Id.* According to the Arbitrator, § 7106(b)(1) does not permit the Agency to implement a system that would violate the parties' agreement. *Id.* at 24-25.

The Arbitrator also concluded that the Agency violated Article 26 because IVOL used an electronic ranking and rating system. *Id.* at 25. The Arbitrator found that, under IVOL, there was no longer a promotion committee reviewing applications as required by Section 10; instead, a staffing specialist reviewed the applications solely to determine whether employees met minimum qualifications. *Id.* at 25-26. According to the Arbitrator, the implementation of IVOL violated Section 10 because, even if the Agency used a "promotion committee," it no longer performed the functions required by that provision. *Id.* at 26-27.

Accordingly, the Arbitrator sustained the grievance and found that the Agency violated Article 26 of the parties' agreement as well as § 7116(a) of the Statute. *Id.* at 27-28. As a remedy, the Arbitrator ordered the Agency to discontinue using IVOL, except that the Agency may continue to announce vacancies online and accept paper or electronic SSA-45 forms. *Id.* at 28. The Arbitrator ordered that all current openings must be re-announced in accordance with his decision. *Id.* at 28-29. The Arbitrator also provided the Union forty-five days to file grievances or request audits for employees who were adversely affected by a selection made under IVOL. *Id.* at 29. Finally, the Arbitrator ordered the Agency to post a notice on all SSA bulletin boards where bargaining unit employees are located stating that it will not violate the parties' agreement or the Statute. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the Arbitrator's award is contrary to law because it violates the Agency's management right to determine the methods, means, and technology of performing work pursuant to § 7106(b)(1). Exceptions at 6. The Agency contends that it has not elected to bargain away that right and "made it clear during bargaining that [it] intended to determine and use technology whenever possible." *Id.* at 6-7. According to the Agency, prohibiting it from using IVOL interferes with its right to determine technology because IVOL provides a technological benefit to the Agency's application process by receiving applications faster and automating the rating process. *Id.* at 7-8.

The Agency asserts that the Arbitrator's award prohibiting it from using IVOL is unlawful under the test set forth in *United States Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.*, 53 FLRA 146, 151-54 (1997). *Id.* at 8-9. According to the Agency, the award was not a remedy for a "contract provision negotiated under [§] 7106(b) of the Statute." *Id.* at 9. The Agency contends that, as Article 26 was interpreted by the Arbitrator, it is not an appropriate arrangement because it violates management's right to determine the technology, methods, and means of performing work. *Id.* at 10.

The Agency also argues that the award is contrary to law because the alleged change is "covered by" the parties' agreement. *Id.* at 17. The Agency claims that "IVOL is provided for in Article 26" of the parties' agreement and, therefore, that the Agency is under no obligation to bargain over it. *Id.* According to the Agency, "[w]hile IVOL is not addressed by name" in the agreement, Section 8E "clearly indicates that all matters related to electronic application forms are covered by the contract." *Id.* at 18. The Agency also asserts that the Union was on notice that future technology concerning merit promotions could be used because that subject was discussed during negotiations over Article 26. *Id.* at 19. The Agency contends that the Union did not bargain for language requiring the Agency to bargain over any change "covered by" Article 26, as it did elsewhere in the parties' agreement. *Id.* at 20.

Additionally, the Agency asserts that the award fails to draw its essence from the parties' agreement. *Id.* at 10. According to the Agency, Section 8E "cannot reasonably be interpreted in a manner other than to conclude that the parties agreed that the [A]gency could use an electronic application process." *Id.* at 11. The Agency argues that, because the language of Section 8E

is clear, it was unnecessary for the Arbitrator to consider the intent of the parties. *Id.* at 12.

The Agency also argues that the Arbitrator's interpretation of Section 7C.1(o)-(p) fails to draw its essence from the parties' agreement. *Id.* at 15. The Agency asserts that Section 7C.1(o) does not refer only to paper applications simply because it mentions an "address." *Id.* According to the Agency, the dictionary does not limit "address" to a physical address, but can also refer to an email or other internet address. *Id.* at 15-16. Additionally, the Agency argues that Section 7C.1(p), requiring applications to be postmarked no later than the closing date, does not limit applications to paper because it requires either a postmark date or that the application be received by the closing date. *Id.* at 16.

Finally, the Agency argues that the award fails to draw its essence from Section 10 of the parties' agreement. *Id.* at 13. The Agency asserts that the Arbitrator was wrong to find that promotion committees were not being used under IVOL. *Id.* at 14. According to the Agency, promotion committees still review applications, put together application packages, and certify the Best Qualified List (BQL), with the only difference under IVOL being that management relies on an automatically generated rating. *Id.*

B. Union's Opposition

The Union argues that the award is not contrary to law because the Agency "willingly negotiated" over the technology, methods, and means of filling internal vacancies. Opp'n at 2. The Union asserts that Article 26 explains how to apply for internal vacancies and specifies the technology to be used. *Id.* at 2-3. According to the Union, IVOL is a "dramatically different technology" that was not contemplated by the parties' agreement. *Id.* The Union contends that the Agency voluntarily made the technology of filling vacancies a negotiable subject by agreeing to Article 26. *Id.*

The Union also argues that the award is not contrary to law because IVOL is not covered by the parties' agreement. *Id.* at 6. According to the Union, IVOL was not agreed to by the parties in Article 26. *Id.* at 7.

Finally, the Union argues that the award draws its essence from the parties' agreement. *Id.* at 4. In this regard, the Union claims that the Arbitrator clearly explained why the technological changes were not permitted by the parties' agreement. *Id.*

IV. Analysis and Conclusions

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

The Agency argues that the award fails to draw its essence from the parties' agreement. Exceptions at 10. In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, 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: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Agency argues that the award fails to draw its essence from several provisions of the parties' agreement because the provisions contemplate electronic applications, Exceptions at 11, and do not limit the required method to paper applications, *id.* at 15-16. The Agency's arguments are based on a misunderstanding of the Arbitrator's award. The Arbitrator found that the implementation of IVOL violated Article 26 of the parties' agreement because it provided that "all applications may *only* be submitted online." Award at 22 (emphasis added). The Arbitrator agreed with the Agency that Section 8E "provid[es] room" for technological advances, but concluded that, given the language of Article 26, those advances must be undertaken "in addition to, not instead of, the paper procedure." *Id.* at 23. The Arbitrator's award does not require the Agency to accept *only* paper applications; it prohibits the Agency from requiring electronic applications as the *exclusive* method. Therefore, we find that the Agency has failed to establish that the Arbitrator's interpretation of Article 26 is irrational, unfounded, implausible, or in manifest disregard of the agreement. *See U.S. Dep't of Health & Human Servs., Nat'l Insts. of Health*, 64 FLRA 266, 268 (2009) (denying an essence exception where the agency did not show that the arbitrator's interpretation was irrational,

unfounded, implausible, or in manifest disregard of the parties' agreement).

The Agency also argues that the Arbitrator's award fails to draw its essence from Section 10 of the parties' agreement because the Arbitrator incorrectly found that, under IVOL, the Agency no longer used promotion committees. Exceptions at 14. However, the Authority has held that a party's disagreement with an arbitrator's factual findings in the course of applying an agreement at arbitration does not demonstrate that an award fails to draw its essence from the agreement. *Soc. Sec. Admin.*, 66 FLRA 6, 9 (2011) (*SSA*) (citing *AFGE, Local 12*, 61 FLRA 507, 509 (2006)). Here, the Agency does not assert that the award is based on a nonfact; it merely disagrees with the Arbitrator's factual conclusion that promotion committees were not being used under IVOL. Moreover, even if the Agency's contention were correct, it would not affect the Arbitrator's finding that the Agency violated Article 26 of the parties' agreement, nor would it affect his chosen remedy because the entire remedy can be supported by the Arbitrator's finding that the Agency violated other sections of Article 26. *See* Award at 28-29. Accordingly, we find that the Agency has not established that the award fails to draw its essence from Section 10 of the parties' agreement. *See SSA*, 66 FLRA at 9 (denying an essence exception where the agency disagreed with the arbitrator's factual findings).

Accordingly, we deny the Agency's essence exceptions.

B. The award is contrary to law in part.

The Agency argues that the award is contrary to law. 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. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. The award is not contrary to § 7106 of the Statute.

The Agency first argues that the award is contrary to § 7106(b)(1). Exceptions at 6. The Authority has held that a contractual election to bargain over matters covered under § 7106(b)(1) is a matter of contract interpretation. *U.S. Dep't of the Treasury, Internal Revenue Serv., Wash., D.C.*, 56 FLRA 393, 395 (2000), *recons. denied*, 56 FLRA 935 (2000). While matters covered under § 7106(b)(1) are negotiable only at the election of the agency, when an agency does elect to bargain and a provision that concerns a matter covered under § 7106(b)(1) is included in an agreement, the provision is enforceable through grievance arbitration. *Id.*

The Agency argues that, by interpreting Article 26 of the parties' agreement to prohibit implementation of IVOL, the Arbitrator's award conflicts with its right to determine the technology, methods, and means of performing work under § 7106(b)(1). Exceptions at 6. However, that IVOL concerns technology within the meaning of § 7106(b)(1) does not permit the Agency unilaterally to change provisions negotiated pursuant to § 7106(b)(1). *See U.S. Dep't of Def., Am. Forces Radio & Television Broad. Ctr., Riverside, Cal.*, 59 FLRA 759, 760-61 (2004).

The Agency has, in effect, conceded that it already bargained over technology by agreeing to Article 26. In this regard, the Agency asserts that Article 26 must be interpreted to mean that "the parties agreed that the [A]gency could use an electronic application process." Exceptions at 11. The Agency also maintains that, in bargaining over Article 26, the parties intended it to include use of new technology. *Id.* at 13.

Because the Agency bargained over and agreed to a provision that is concededly negotiated pursuant to § 7106(b)(1), that provision is fully enforceable in arbitration. *U.S. Dep't of Transp., Fed. Aviation Admin., Alaskan Region*, 62 FLRA 90, 92 (2007) (finding that an award is not contrary to § 7106(b)(1) because the agency conceded that it elected to bargain over technological matters). Accordingly, we deny this exception.

2. The award is contrary to § 7116(a) of the Statute.

The Agency also argues that the award is contrary to law because the disputed change – implementation of IVOL – is "covered by" Article 26 of the parties' agreement. Exceptions at 17. The "covered by" doctrine is a defense to a claim that an agency violated the Statute by failing to provide a union with notice and an opportunity to bargain over changes in

conditions of employment. *NTEU*, 64 FLRA 982, 986 (2010).[4]

The "covered by" doctrine has two prongs. Under the first prong, the Authority examines whether the subject matter of the change is expressly contained in the agreement. *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000). The Authority does not require an exact congruence of language. *Fed. Bureau of Prisons v. FLRA*, 654 F.3d 91, 94-95 (D.C. Cir. 2011) (*BOP*) *granting petition for review of U.S. Dep't of Justice, Fed. Bureau of Prisons, Wash., D.C.*, 64 FLRA 559 (2010). Instead, the Authority finds the requisite similarity if a reasonable reader would conclude that the contract provision settles the matter in dispute. *U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004, 1018 (1993) (*SSA, Balt.*).

If the agreement does not expressly contain the matter, then, under the second prong of the doctrine, the Authority will determine whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement. *SSA, Balt.*, 47 FLRA at 1018. In doing so, the Authority will determine whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining. *NTEU*, 66 FLRA 186, 189-90 (2011).

The Arbitrator found, and there is no dispute, that Article 26 sets forth the procedures for: (1) "applying for a competitive promotion," Award at 5, including the use of "automated applications and forms," *id.* at 23, and (2) "rating and ranking candidates," *id.* at 5. The subject matters of the disputed change concern the procedures for: (1) employees to apply for competitive promotions, including the use of automated applications and forms, and (2) the Agency to rate and rank candidates. *See id.* at 23-25. A reasonable reader would – and, in effect, the Arbitrator did – conclude that Article 26 settles the matters of how employees apply for positions and how the Agency will rate and rank their applications. As such, Article 26 expressly contains the subject matters of the disputed change, and prong I of the "covered by" doctrine is satisfied. *See SSA, Balt.*, 47 FLRA at 1018.

Alternatively, prong II of the "covered by" doctrine is satisfied. In this connection, the Arbitrator found that "Article 26 contains a complete merit promotion plan resulting from bilateral negotiations." Award at 24. Therefore, even under the second prong, the Arbitrator's findings indicate that the negotiations can be presumed to have foreclosed further bargaining on the subjects of the procedures by which the Agency will accept applications and rank applicants.[5] *See BOP*, 654 F.3d at 95 (finding that "[t]he procedures prescribed in Article 18 cover the substance of all decisions reached by following those procedures").

Therefore, we find that the matter in dispute, IVOL, is "covered by" the parties' agreement. *See IRS*, 60 FLRA at 574. We grant the Agency's exception and set aside the Arbitrator's finding that the unilateral implementation of IVOL constituted a violation of § 7116(a).[6] Additionally, we modify the language of the notice posting ordered by the Arbitrator to reflect that the Agency violated only the parties' agreement. *See NAGE, Local R3-32*, 61 FLRA 127, 133 (2005) (modifying a posting ordered by the arbitrator after the Authority upheld a contractual violation but set aside a statutory violation).

V. Decision

The Agency's exceptions are denied in part and granted in part. The finding of a violation of the Statute is set aside, and the award is modified consistent with the discussion set forth above.

[4] Chairman Pope notes that, as there is no contention that the Authority's covered-by standard warrants reconsideration, there is no reason to address the dissent's claim that the Authority's use of the standard "warrants a fresh look." Dissent at 15.

[5] The dissent asserts that we "overturn[] the Arbitrator with no deference to his interpretation of the agreement's limits or discussion of his rationale." Dissent at 12. On the contrary, we defer to the Arbitrator's findings that Article 26 covers the procedures by which the Agency will accept applications and rank applicants, and that the Agency violated Article 26 by changing those procedures. That the specific terms of IVOL are inconsistent with the agreement does not demonstrate that the *subject matter* of IVOL is not "covered by" the agreement. Indeed, a change cannot violate a contract provision unless the contract provision "covers" the subject matter of the change.

[6] Because the "covered by" defense applies only to the statutory duty to bargain, it does not excuse the contractual violation found by the Arbitrator. Therefore, while the dissent is correct that, in this case, application of the covered by doctrine does not provide the Union a *statutory* remedy, we have upheld the Arbitrator's finding of a *contractual* violation, as well as the remedy prohibiting the Agency from implementing IVOL. The Union is not left without any remedy, and the Agency is not free to take "unilateral Agency action flatly contrary to the parties' negotiated agreement," Dissent at 14, as suggested by the dissent.

APPENDIX

Article 26 of the parties' agreement provides, in relevant part:

> Section 7A
>
> All actions requiring the use of competitive procedures under this Agreement will be announced on the SSA Intranet.
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> . . . .
>
> Section 7C
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> 1. Vacancy announcements will include, as a minimum:
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> . . . .
>
> o. The Servicing Personnel Office (SPO) or the address where the application is to be submitted;
>
> p. Statement that applications must be received in the SOP by the closing date of the announcement, or postmarked no later than that date.
>
> . . . .
>
> Section 8E
>
> 1. Management will afford bargaining unit employees access and instruction so that they may use SSA's personal computers to complete automated applications and related forms under this article. Access will be granted to the extent that computers, related computer equipment and computer time are available and such use will not impede Agency operations. For purposes of this agreement, access includes a reasonable amount of time during an employee's working hours to prepare or modify his/her application.
>
> 2. The Agency will provide appropriate training on how to file for a vacancy and how to complete a SSA-45. The Agency will continue to make instructional materials on the promotional process available to bargaining unit employees.
>
> . . . .
>
> Section 10
>
> . . . .
>
> B. Promotion committees, selected by management, will be convened to rate applicants against the weights or factors or [knowledge, skills, and abilities]. The rating will be applied consistently to all applicants.
>
> . . . .
>
> F. After rating each applicant, the promotion committee may rank the applicants in descending score order . . . .

Award at 2-3.

Member DuBester, dissenting in part:

I disagree with the majority's resolution of the covered-by issue and its determination to set aside the Arbitrator's finding that the unilateral implementation of a new electronic application process (IVOL) constituted a violation of § 7116(a).

The Arbitrator found that the Agency's implementation of IVOL brought two changes that violated Article 26. Award at 22. First, IVOL required that all applications be submitted online. Second, IVOL changed the rating and ranking process so that a promotion committee was no longer involved. Instead, IVOL established an electronic rating and ranking process based on a questionnaire. *Id.* at 3-4.

The Arbitrator concluded that Article 26 did not give the Agency the right to make either change. *Id.* at 22-27. I find the Arbitrator's discussion thorough and persuasive. As to the online application process, the Arbitrator found that Article 26 "provid[ed] room for employees to someday file applications electronically, but this would have to be done in addition to, not instead of, the paper procedure contained in the [parties' agreement]" *Id.* at 23. The Agency's claim that the agreement "gave [the Agency] the right to make electronic application the exclusive method to be used stretches [the agreement] beyond recognition." *Id.* Regarding the change in the method of rating and ranking candidates, the Arbitrator found that the "introduction of the questionnaire . . . was neither contemplated by Article 26, nor permitted by it." *Id.* at 25. The Arbitrator found, moreover, that "review [of applications] by a promotion committee was the heart of the procedure for rating and ranking applicants." *Id.* The Arbitrator found that the change in the rating and ranking procedure was "the most serious violation brought about by IVOL." *Id.*

The majority overturns the Arbitrator with no deference to his interpretation of the agreement's limits or discussion of his rationale. Moreover, the majority fails to explain how the requirement that all applications be submitted online, and the replacement of a promotion committee with an electronic rating and ranking process, satisfies either prong of the covered-by standard. Plainly, neither matter is expressly addressed by the parties' agreement. *E.g., Soc. Sec. Admin.*, 64 FLRA 199, 202 (2009) (*SSA*) (Member Beck dissenting in part as to another matter)). Similarly, neither matter is "inseparably bound up with and . . . thus plainly an aspect of . . . a subject expressly covered by the contract." *U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004, 1018 (1993) (alteration and citations omitted) (*SSA, Baltimore*); *accord, e.g., SSA*, 64 FLRA at 202. Nothing in Article 26 suggests even implicitly that the parties had addressed or bargained with respect to the Agency's discretion to alter the process for submitting applications. As the Arbitrator found, Article 26 merely provides a paper procedure for submitting applications. To the same effect, Article 26's focus on a promotion committee for rating and ranking applicants does not in any way encompass, even as an aspect, the committee's replacement by an electronic rating and ranking process. In short, the majority's application of the covered-by standard is unjustifiably expansive. I therefore dissent.

This case illustrates, more fundamentally, the difficulty in applying the current covered-by standard. Particularly noteworthy is that the covered-by standard's second prong so lacks precision as to raise a question about its practical usefulness to parties or the Authority. As indicated, under the covered-by standard's second prong, a party properly may refuse to bargain if a matter is inseparably bound up with, and thus is plainly an aspect of, a subject expressly covered by the agreement. *E.g., SSA, Baltimore*, 47 FLRA at 1018.

In its current form, the covered-by standard stems from the Authority's *SSA, Baltimore* decision. There, the Authority "establish[ed] a definitive test for determining when a matter is contained in or covered by a collective bargaining agreement." *Id.* at 1016. The Authority's decision flowed from the D.C. Circuit's decision in *Department of the Navy, Marine Corps Logistics Base, Albany, Georgia v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992) (*Marine Corps*). In *Marine Corps*, the court criticized the Authority for failing to adopt a covered-by standard rather than a clear and unmistakable waiver standard for determining whether a contract provision authorizes an agency to act unilaterally with respect to a particular term and condition of employment.[1] *See Marine Corps*, 962 F.2d at 55.

A principal consideration underlying the Authority's adoption of the covered-by standard in *SSA, Baltimore* was "the need to provide the parties to [a collective bargaining agreement] with stability and repose with respect to matters reduced to writing in the agreement." *SSA, Baltimore*, 47 FLRA at 1017 (quoting *Marine Corps*, 962 F.2d at 59).

I agree that one of the Statute's primary purposes is to promote stability and repose in contractual

[1] The Authority's original adherence to the clear and unmistakable waiver standard extends back to its earliest decisions. *E.g., Dep't of the Air Force, Scott Air Force Base, Ill.*, 5 FLRA 9, 10-11, 21 (1981) (rejecting an agency's reliance on the provisions of the parties' agreement, and finding that the agency committed an unfair labor practice in part because "[n]o clear and unmistakable waiver is evident from the language of the agreement"). *Id.* at 21.

relations. As the court commented in *Marine Corps*, urging the Authority to adopt a covered-by standard: "[T]o the extent that the parties are required to adhere to the specific conditions of employment mutually established in their agreement, . . . stability at the work place is thereby fostered." *Marine Corps*, 962 F.2d at 59 (quoting *IRS*, 17 FLRA 731, 734 (1985)); *accord*, *e.g.*, *IRS*, 17 FLRA at 736-37 (recognizing the importance of promoting contractual repose); *FAA, Nw. Mountain Region, Seattle, Wash.*, 14 FLRA 644, 647 (1984) (recognizing the importance of stability).

However, as this case illustrates, if prong two's legal standard is difficult to apply, and indeed undercuts the parties' incentive to adhere to their agreement's provisions, then a question is raised as to whether the policies of stability and repose are being served. Here, applying prong two, the Authority concludes that the parties' negotiation of Article 26 relieves the Agency of any statutory obligation to bargain over its unilateral change in procedures by which the Agency will accept applications and rank applicants. Prong two's application thus shields from any unfair labor practice claim the Agency's unilateral replacement of significant parts of Article 26 with wholly new application procedures and rating and ranking methods. But based on the Arbitrator's findings, the Agency's unilateral changes are "neither contemplated by Article 26, nor permitted by it," Award at 25 and, if considered within the Agency's right to implement, would "stretch[] that provision beyond recognition." *Id.* at 23. Accordingly, prong two's application in this case, depriving the Union of any statutory remedy for unilateral Agency action flatly contrary to the parties' negotiated agreement, hardly promotes "stability and repose with respect to matters reduced to writing in the agreement," *SSA, Baltimore*, 47 FLRA at 1017. Similarly, immunizing the Agency from an unfair labor practice charge challenging its blatant violation of the agreement does little to reinforce the parties' "adher[ence] to the specific conditions of employment mutually established." *Marine Corps*, 962 F.2d at 59.

That my colleagues uphold the Arbitrator's finding of a contractual violation (*see* Majority at 8-9 & n.6) simply underscores the odd results the covered-by doctrine produces. Acknowledging the validity of the Union's reliance on its contract with the Agency, my colleagues uphold the Arbitrator's determination that the Agency committed a contractual violation when it unilaterally implemented IVOL. However, no sooner do my colleagues uphold the finding of a contractual violation than they reverse course, abandon the reading of the contract supporting that determination and, adopting a contrary reading, conclude that the contract the Agency violated "forclose[s] further bargaining" on the subjects the Agency's unilateral changes improperly affected. Majority at 8.

I am mindful, moreover, that in urging the Authority to adopt a covered-by standard rather than a waiver standard, the D.C. Circuit relied on what it viewed as longstanding private sector precedent. *See id.* at 60-61.[2] This reliance, however, is open to question. For example, in a 2007 decision, the National Labor Relations Board (NLRB) took issue with the D.C. Circuit as to private sector precedent in this area. *Provena Hosps.*, 350 NLRB 808, 808 n.1, 810-14 (2007). In *Provena*, the NLRB considered an employer's argument that the NLRB should abandon its clear and unmistakable waiver standard. The employer urged the NLRB to use instead a covered-by analysis ("contract-coverage" in the NLRB's lexicon) to resolve complaints that an employer had unilaterally implemented changes in terms and conditions of employment in violation of §§ 8(a)(1) and (5) of the National Labor Relations Act.[3] *Provena Hosps.*, 350 NLRB at 808.

"[R]eaffirm[ing its] adherence to one of the oldest and most familiar of [NLRB] doctrines, the clear and unmistakable waiver standard[,]" the NLRB rejected the employer's argument. *Id.* at 810, 815. The NLRB critically observed that the covered-by standard "creates an incentive for employers to seek contractual language that might be construed as authorizing unilateral action on subjects of no present concern, requires unions to be wary of agreeing to such provisions, and invites future disputes about the scope of the contractual provision." *Id.* at 813-14. The NLRB also observed that only two courts of appeal, the D.C. Circuit and the Seventh Circuit, supported application of the covered-by standard, "a relatively recent judicial innovation," *id.* at 811, to resolve private sector duty to bargain unfair labor practice disputes, *id.* at 808 n.1; 810-11 & n.14. The NLRB noted, in contrast, that the clear and unmistakable waiver standard is applied by the Second, Third, Fourth, Sixth, Eighth, and Ninth Circuits. *Id.* at 812 n.21.

Further reviewing private sector precedent, the NLRB cited Supreme Court case law, and noted that on at least two occasions, the Supreme Court has ratified "[t]he [NLRB's] longstanding adherence to the waiver standard." *Id.* at 812 (citing *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967) and *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983)).

Viewed against this background, the Authority's use of the covered-by standard warrants a fresh look.

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[2] The court cited *Local Union No. 47, Int'l Bhd. of Elec. Workers v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991); *Int'l Union, UAW v. NLRB*, 765 F.2d 175, 183 & n.30 (D.C. Cir. 1985); *N L Indus., Inc. v. NLRB*, 536 F.2d 786, 790 (8th Cir. 1976); *C & S Indus., Inc.*, 158 NLRB 454, 457 (1966).

[3] 29 U.S.C. § 158(a)(1), (5).