64 FLRA No. 190

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4363

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DECISION

July 14, 2010

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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 both a merits award and a remedy award of Arbitrator M. David Vaughn 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. In addition, the Authority issued an order to show cause why the exceptions should not be dismissed, to which the Agency and the Union filed responses.

As relevant here, in the merits award, the Arbitrator found that the Agency committed an unfair labor practice (ULP) by failing to give the Union notice and an opportunity to bargain over the impact and implementation of changes in assignment policies. Subsequently, the Arbitrator issued a remedy award.

For the reasons that follow, we deny the Agency's exceptions.

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

II. Background and Arbitrator's Awards

A. Background and Merits Award

Prior to the events giving rise to the award in this case, the Union and the Agency had negotiated a National Inspection Assignment Policy (NIAP) that provided for local bargaining -- i.e., bargaining below the level of recognition -- of certain matters, including permissive subjects of bargaining. Merits Award at 5. Subsequently, the Agency terminated the NIAP and ceased bargaining over all subjects at the local level. *Id.* In this regard, the Agency transmitted to the Union its Revised National Inspection Assignment Policy (RNIAP), which stated that the Agency would no longer bargain at the local level or be bound by any locally bargained assignment policies.[2] *Id.* Later, the Agency made changes to local assignment policies at various Agency ports without providing the Union notice or the opportunity to bargain, at the national level (the level of recognition), over the impact and implementation of those changes. *Id.* at 7. The Union filed a grievance, which was unresolved and submitted to arbitration.[3]

At arbitration, the parties stipulated the issue as: "Did the Agency violate 5 U.S.C. [§] 7116(a)(1) and (5) and [the parties' agreement] by failing to notify and/or provide an opportunity to negotiate over changes to the assignment of regular and overtime

2. Section 3 of the RNIAP provides in pertinent part:

> The policies and procedures contained [herein] take precedence over any and all other agreements . . . executed or applied by the parties previously, at either the national or local levels, concerning the matters covered [herein].
>
> . . . . No further obligation to consult, confer, or negotiate, either upon the substance or impact and implementation of any decision or action, shall arise upon the exercise of any provision, procedure, right or responsibility addressed or contained [herein].

Merits Award at 3-4.

3. After the filing of the grievance, the Authority certified a new bargaining unit that includes, among other employees, all employees from the unit at issue in the grievance. Merits Award at 4 n.2.

work to [unit employees] represented by [the Union]?"[4] *Id.* at 2.

Before the Arbitrator, the Agency argued that its assignment-policy changes were merely changes in "working conditions" that were consistent with the "conditions of employment" that had been established by its RNIAP. *Id.* at 10-11. In this regard, RNIAP provides that matters such as the length of the work week, work hours, days off, and assignment of overtime "shall be determined by [A]gency managers" and "may be changed" as required by "operational needs" and "budgetary limitations." *Id.* at 14-16. Additionally, the Agency asserted that the RNIAP is a collective bargaining agreement and that, therefore, the Authority's "covered by" doctrine should apply and provide a defense to the Agency's failure to bargain. *Id.* at 10-11. In contrast, the Union argued that the Agency changed conditions of employment and that the RNIAP did not extinguish the Agency's obligations to bargain over the impact and implementation of those changes at the national level. *Id.* at 8-9.

The Arbitrator rejected the Agency's assertion that it merely applied the RNIAP to change the working conditions of individual employees. *Id.* at 14. The Arbitrator stated that the RNIAP provisions concerning the assignment of work "do not prescribe any policies or procedures that constitute conditions of employment[;] [r]ather, they state that these policies are to be determined by local managers." *Id.* at 16. The Arbitrator found that the Agency implemented "new policies and procedures" that changed conditions of employment, and that the Agency had an obligation to notify the Union of the proposed changes and bargain over their impact and implementation. *Id.* at 17. The Arbitrator also rejected the Agency's "covered by" defense, citing Authority precedent holding that "such unilaterally-implemented documents are not collective bargaining agreements and thus not subject to the 'covered by' doctrine." *Id.* at 16-17.

The Arbitrator concluded that the Agency violated § 7116(a)(1) and (5) of the Statute by failing to provide notice and an opportunity to negotiate local assignment-policy changes at the national level. *Id.* at 17. The Arbitrator directed the parties to attempt to agree on an appropriate remedy, and retained jurisdiction in order to resolve the remedy in the event that the parties were unable to agree. *Id.* at 20.

B. The Remedy Award

When the parties were unable to reach an agreement on the appropriate remedy, the Arbitrator issued a "Remedial and Final Award" [5] in which he directed the Agency to provide the Union with notice and an opportunity to bargain. Remedy Award at 1-2, 15. In addition, he applied the criteria set forth by the Authority in *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI*),[6] and ordered a *status quo ante* (SQA) remedy -- directing the Agency to restore the status quo that existed six months prior to the filing of the grievance -- based upon his findings that: (1) the Agency gave the Union no notice of its changes to assignment policies; (2) the Agency gave the Union no opportunity to bargain and refused all negotiation requests; and (3) "the Agency's conduct was willful."[7] Remedy Award at 10, 15-16. The Arbitrator stayed the return to the SQA for 120 days following the disposition of any exceptions to the Authority, during which time the parties could "bargain with respect to inspectional work assignments and . . . implement required transitions." *Id.* at 19.

The Arbitrator stated that any remedy should also "make whole individual employees who lost wages and benefits as a result of the Agency's improper action." *Id.* at 16. The Arbitrator found that the Union had established the necessary causal nexus between the Agency's violation and losses to employees and was "entitled to make its case to establish losses suffered by individual employees and for [such] employees . . . to be awarded monetary compensation." *Id.* at 16-17. To this end, the Arbitrator granted, in part, the Union's motion to compel the Agency to disclose documents necessary

4. The Arbitrator found that the Agency did not violate the parties' agreement. Merits Award at 18-19. As no exceptions were filed to this finding, we will not discuss it further.

5. Originally, the Arbitrator issued an "Opinion and Second Interim Award" addressing remedy issues, but, after consultation with the parties, he reissued the document with the title "Remedial and Final Award" to "recogniz[e] the finality of the remedial rulings made therein." Remedy Award at 2.

6. The *FCI* factors are set forth below.

7. The pertinent wording of the remedy award is as follows: "There was no notice, no opportunity to bargain -- and, in fact, a refusal to do so. The Agency's justification for its position is sufficient. I hold that the Agency's conduct was willful." Remedy Award at 15-16. We discuss below this analysis concerning the Agency's alleged willfulness.

for the Union to ascertain and demonstrate individual employees' lost wages and benefits. *Id.* at 17. In addition, he set forth detailed instructions concerning the process by which the parties would share information and determine individual employees' entitlement to backpay. *Id.* at 18-21.

The parties stipulated that the Arbitrator would retain jurisdiction for purposes of enforcement. *Id.* at 18. Finally, the Arbitrator stated that the parties "will each be afforded the opportunity fully to brief" the issue of a possible award of attorney fees "at an appropriate time." *Id.*

III. Preliminary Matter: The Agency's Exceptions Are Not Interlocutory

The Authority issued an order to show cause, directing the Agency to show cause why its exceptions should not be dismissed as interlocutory. Order to Show Cause at 1.

In its response, the Agency argues that the Arbitrator resolved all issues before him and merely retained jurisdiction to determine individual employees' entitlement to backpay, and "[t]he fact that he did not specify the amount of any back pay, damages, attorneys' fees, etc., does not render the Agency's [e]xceptions interlocutory." Agency Response at 6 (citing *Office of Pers. Mgmt.*, 61 FLRA 358, 361 (2005) (then-Member Pope dissenting in part on other grounds), *recons. den.* 61 FLRA 657 (2006)). In its response, the Union concurs with the Agency's position that the exceptions are not interlocutory. Union Response at 4.

Section 2429.11 of the Authority's Regulations pertinently provides that "the Authority . . . ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11. Thus, the Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration. *See, e.g., U.S. Dep't of Transp., Fed. Aviation Admin., Wash., D.C.*, 60 FLRA 333, 334 (2004). Where an arbitrator awards particular monetary remedies and leaves to be determined only the specific amounts to be awarded, the arbitrator's retention of jurisdiction to assist the parties in their computations of those remedies does not render exceptions interlocutory. *See U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007) (Chairman Cabaniss and then-Member Pope dissenting in part on other grounds). In addition, it is well established that, under the Back Pay Act and its implementing regulations, an arbitrator's retention of jurisdiction for the purpose of considering requests for attorney fees does not automatically render an award non-final. *U.S. Dep't of the Treasury, U.S. Customs Serv., Nogales, Ariz.*, 47 FLRA 1391, 1392 (1993), *recons. den.* 48 FLRA 938 (1993).

In the remedy award, the Arbitrator determined the remedies and retained jurisdiction only to assist in determining the specific amounts to be awarded to individual employees and to address any future Union request for attorney fees. [8] Consistent with the above-cited precedent, we conclude that the Agency's exceptions are not interlocutory.

IV. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the Arbitrator's finding that the RNIAP "does not actually prescribe conditions of employment" is a nonfact. Exceptions at 2. According to the Agency, this finding is contrary to a decision of the United States Court of Appeals for the District of Columbia Circuit. *Id.* at 18 (citing *NTEU v. FLRA*, 414 F.3d 50, 58 (D.C. Cir. 2005) (*FLRA*)).

In addition, the Agency argues that the Arbitrator's finding of an unlawful failure to bargain is contrary to law for two reasons. Exceptions at 12, 19. First, the Agency contends that the Arbitrator erred as a matter of law in finding that the RNIAP does not prescribe conditions of employment. In this

8. The remedy award pertinently provides:

> In the course of the discussions which led to the issuance of this . . . [a]ward, the Agency has indicated disagreement with the scope of any remedy to be applied based on its argument that the bargaining unit at issue . . . no longer exists. The Parties stipulated that I retain jurisdiction for purposes of enforcement. The Union urges that such jurisdiction would necessarily include jurisdiction to award attorney fees. The Parties will each be afforded the opportunity fully to brief those issues at an appropriate time. In the meantime, the positions are preserved and not waived.

Remedy Award at 18. Because the Arbitrator proceeded to order all of the remedies he found appropriate elsewhere in his award, we interpret the Arbitrator's retention of jurisdiction as concerning only attorney fees and individual employees' entitlement to backpay. *See id.* at 19.

connection, the Agency claims that its obligation to negotiate would only arise if it changed the RNIAP itself, not each time it "applie[d] the framework" of the RNIAP when changing employees' "working conditions." *Id.* at 12-15 (citing *U.S. Dep't of Labor, Occupational Safety & Health Admin., Region 1, Boston, Mass.*, 58 FLRA 213, 216 (2002) (Chairman Cabaniss concurring) (*OSHA*)). Second, the Agency argues that the Arbitrator's finding that the RNIAP is not a collective bargaining agreement is contrary to law and that the Authority erred in deciding to the contrary in *NTEU, Chapter 137*, 60 FLRA 483 (2004) (Chairman Cabaniss concurring), *recons. den.* 61 FLRA 60 (2005), *pet. for review dismissed sub nom. NTEU v. FLRA*, No. 05-1338, 2006 WL 2521320 (D.C. Circ. Aug. 14, 2006) (*Chapter 137*). Exceptions at 20-21.

In a related argument, the Agency asserts that the Arbitrator's failure to apply the "covered by" doctrine is contrary to public policy. *Id.* at 26. According to the Agency, when it first transmitted the RNIAP to the Union, the Union included its request to negotiate the RNIAP as part of its proposed ground rules for renegotiation of the parties' collective bargaining agreement. *Id.* at 3. When the Agency disagreed and implemented the RNIAP, the Authority held that the Union's proposed ground rules constituted a permissive subject of bargaining and, consequently, the Agency had the right to implement the RNIAP without completing bargaining. *Id.* at 4 (citing *U.S. Dep't of the Treasury, Customs Serv., Wash. D.C.*, 59 FLRA 703 (2004) (then-Member Pope concurring), *aff'd sub nom. FLRA*, 414 F.3d at 61). According to the Agency, the RNIAP is a collective bargaining agreement because the Union "acted at its peril" when it "chose to bind its request for ground rules negotiations to any [RNIAP] negotiations." Exceptions at 28. The Agency contends that failing to apply the "covered by" doctrine will frustrate the Statute's policy of "prohibiting 'endless negotiations over the same general subject matter.'" *Id.* at 26-28 (quoting *U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004, 1017 (1993) (*SSA*)).

The Agency also argues that the SQA remedy is contrary to law because the Arbitrator "failed to properly and completely analyze" the *FCI* factors. Exceptions at 31. As to the first and second factors -- whether the Agency gave the Union notice and whether the Union requested bargaining -- the Agency again states that it was not obligated to give the Union notice and an opportunity to bargain. *Id.* The Agency next asserts that it was "inconsistent" for the Arbitrator to find that the third *FCI* factor -- the willfulness of the Agency's failure to bargain -- supported an SQA remedy because, immediately preceding his finding of willfulness, the Arbitrator stated that "the Agency's justification for [its] position is sufficient." *Id.* As to the fourth *FCI* factor -- the nature and extent of the adverse effect upon employees -- the Agency notes the Arbitrator's statement that "the Union was not obligated to prove at the earlier stage of the proceeding that individual employees suffered losses; that burden and opportunity -- as well as the Agency's right to challenge the Union's claim -- was left by the Parties to the next, implementation and enforcement phase." Remedy Award at 16. In light of this statement, the Agency "concedes that the fourth *FCI* factor is unable to be discussed at this time, but reserves its right to contest it at a later time." Exceptions at 31 n.7. In addition, the Agency claims that the Arbitrator failed to consider its arguments under the fifth *FCI* factor that an SQA remedy would "disrupt or impair the efficiency and effectiveness of the [A]gency's operations." *Id.* at 31-32.

Additionally, the Agency argues that, as the result of a Regional Director's (RD's) certification of a newly configured, larger unit (new unit), the unit at issue in the grievance (former unit) no longer exists,[9] and, therefore, the Arbitrator's award of an SQA remedy is contrary to law because the Agency "cannot implement a return to the *status quo* for a bargaining unit that does not exist." *Id.* at 6. The Agency acknowledges that the positions of the employees in the former unit are all encompassed within the new unit. *Id.* at 8. The Agency argues that the SQA remedy would unlawfully require the Agency to assign work to employees from the former unit "according to the procedures in place before the implementation of the [RNIAP]," while the remaining new unit employees would receive work assignments according to the RNIAP and the new local assignment policies underlying the grievance. *Id.* at 11. According to the Agency, this would be contrary to 5 U.S.C. § 7112(a) and the RD's certification of the new unit because it would disrupt the new unit's community of interest by creating

9. The Union was elected as the exclusive representative for both the former unit and the new unit. *See* Merits Award at 4 n.2.

different procedures for assigning work to employees in the same position.[10] *Id.* at 12.

The Agency also argues that, although the Union represents the new unit, "[a]ny order to bargain with a union . . . in its capacity as the exclusive representative of . . . the now nonexistent legacy unit[] is contrary to law." *Id.* at 9. Further, the Agency argues that the Statute does not permit the Union, as the exclusive representative of the new unit, to engage in bargaining for only those employees who were in the former unit. *Id.* at 10. Finally, according to the Agency, the fact that the former unit no longer exists renders the Arbitrator's order to bargain moot. *Id.* at 6-11 & 9 n.4 (citing *Def. Mapping Agency, Hydrographic/Topographic Ctr., Louisville Office, Louisville, Ky.*, 51 FLRA 1751 (1996) (*DMA*); *Overseas Educ. Ass'n*, 7 FLRA 84 (1981) (*OEA*), *order clarified by* 9 FLRA 1088 (1982)).

B. Union's Opposition

The Union asserts that the Arbitrator's finding that the RNIAP did not establish the conditions of employment at issue was neither based on a nonfact nor contrary to law. Opp'n at 16. According to the Union, the Authority has held that, despite the RNIAP, changes in local assignment policies trigger Agency bargaining obligations at the national level. *Id.* at 16-17 (citing *NTEU, Chapter 143*, 60 FLRA 922 (2005) (*Chapter 143*) (Chairman Cabaniss concurring), *aff'd sub nom. NTEU v. FLRA*, 453 F.3d 506 (D.C. Cir. 2006); *Chapter 137*, 60 FLRA at 488).

The Union also asserts that the Authority should reaffirm its previous determination that the "covered by" doctrine does not apply to the RNIAP because it is not a collective bargaining agreement. Opp'n at 21 (citing *Chapter 137*, 60 FLRA at 487-88). Similarly, the Union argues that the Arbitrator's determination that the "covered by" doctrine did not apply to the RNIAP is not contrary to public policy. Opp'n at 22-26.

The Union argues that the SQA remedy is appropriate under *FCI*. *Id.* at 34. In this regard, the Union asserts that the Agency's challenge to the Arbitrator's finding of willfulness misconstrues the Arbitrator's language. *Id.* at 36-37. According to the Union, "[i]n context, the sentence that states that '[t]he Agency's justification for its position is sufficient' was clearly intended to provide a transition between [the Arbitrator's] observation that the Agency actively refused to bargain, and his conclusion that its conduct was willful." *Id.* at 37. Thus, the Union claims, "the Arbitrator was explaining that the [A]gency's refusal to bargain provided a sufficient basis for him to find that its conduct was willful." *Id.* Alternatively, the Union argues that the Arbitrator may have inadvertently omitted the word "not," so that the sentence should have read "the Agency's justification for its position is [not] sufficient." *Id.* at 37 n.8. Additionally, the Union asserts that the Agency fails to cite any record evidence to support its argument that SQA relief would disrupt the Agency's operations. *Id.* at 38.

The Union also argues that the certification of the new unit does not render unlawful either the SQA remedy or the bargaining order. *Id.* at 29. Similarly, the Union argues that the reorganization of the unit does not make the bargaining order moot. *Id.*

V. Analysis and Conclusions

A. Exceptions Concerning the Merits Award

1. The finding that the Agency violated its obligation to bargain is not based on a nonfact.

To establish that an award is based on a nonfact, a party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). However, an arbitrator's legal conclusions cannot be challenged on the grounds of nonfact. *See, e.g.*, *AFGE*, 63 FLRA 627, 628 n.3 (2009); *AFGE, Local 3690*, 63 FLRA 118, 120 (2009); *U.S. Dep't of Def. Educ. Activity, Arlington, Va.*, 56 FLRA 744, 749 (2000). In this connection, the Authority has held that an exception challenging an arbitrator's conclusion about whether an Agency action changed a condition of employment "challenges the [a]rbitrator's legal conclusion based on his interpretation of the evidence[,]" and, accordingly, "does not provide a basis for finding that the award is based on a nonfact." *AFGE*, 63 FLRA at 628 n.3.

10. 5 U.S.C. § 7112(a) provides, in pertinent part:

> The Authority shall determine the appropriateness of any unit. The Authority . . . shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

The Agency's nonfact exception challenges the Arbitrator's finding that the RNIAP does not prescribe conditions of employment and his resulting conclusion that the Agency had an obligation to bargain over its assignment policy changes. Exceptions at 18-19. In effect, the Agency challenges the Arbitrator's finding that its implementation of local assignment policies changed conditions of employment. Consistent with the above-cited precedent, neither the Agency's argument, nor its citation to *FLRA*, 414 F.3d 50, provides a basis for finding that the award is based on a nonfact, and we deny the exception.

2. The finding that the Agency violated its obligation to bargain is not contrary to law, rule, and/or regulation.

In addition to its nonfact exception, the Agency also argues that the Arbitrator's finding that the RNIAP did not prescribe conditions of employment is contrary to law. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an 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 a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

It is well established that, prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain if the change will have more than a *de minimis* effect on conditions of employment. *See, e.g., U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr. Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173 (2009) (Member Beck concurring in part on other grounds) (*Detachment 12*); *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 89 (2009) (*Air Force*). Where such a change to conditions of employment falls within an agency's exercise of a management right under § 7106 of the Statute, the agency is nevertheless obligated to notify the exclusive representative and negotiate over the impact and implementation of the change. *See, e.g., U.S. Dep't of the Treasury, Internal Revenue Serv.*, 62 FLRA 411, 414 (2008).

The Agency contends that the Arbitrator erred in finding that the RNIAP does not prescribe conditions of employment. Exceptions at 12. Specifically, the Agency claims that it is only obligated to bargain over changes to the RNIAP itself, not over changes to inspectional assignments for which it alleges the RNIAP provides. *Id.* at 12-13. Although the Authority has upheld the Agency's implementation of the RNIAP, the Authority also has repeatedly held that the Agency "remains obligated to bargain at the national level[.]" *Dep't of Homeland Sec., Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Seattle, Wash.*, 61 FLRA 272, 276 (2005) (Chairman Cabaniss concurring), *pet. for review denied sub nom. NTEU v. FLRA*, 511 F.3d 893 (9th Cir. 2007) (*Homeland*). *See also NTEU Chapter 137*, 61 FLRA 413, 416 n.3 (2005); *Chapter 137*, 60 FLRA at 488. In particular, the Authority has held that Section 3 of the RNIAP terminated the Agency's obligation to bargain with respect to inspectional assignment matters at the local level, but that "Section 3 . . . did not extinguish the Agency's statutory bargaining obligations at the national level . . . to bargain over all mandatory subjects of bargaining concerning overtime inspectional assignments." *Chapter 137*, 60 FLRA at 488. Consistent with this precedent, the Agency has not established that it had no duty to bargain at the national level over the local assignment policy changes at issue.[11]

11. The dissent asserts that "the Arbitrator erred in concluding that the RNIAP 'does not actually prescribe conditions of employment[,]'" and that "the subjects covered by the RNIAP -- workweek, work hours, days off, scheduling, staffing levels, overtime -- constitute conditions of employment." Dissent at 15 (quoting Merits Award at 14). However, the RNIAP merely states that matters in these categories "shall be determined by agency managers" and "may be changed" as required by "operational needs" and "budgetary limitations." Merits Award at 14-16. Contrary to the dissent's assertion, the RNIAP does not "prescribe" any conditions of employment in these categories. *See* Dissent at 15. With regard to the dissent's statement that "actions taken by management that are consistent with existing practice or policy do not constitute changes to a condition of employment[,]" Dissent at 16, this rule, and the decisions cited by the dissent, concern an agency's application of an existing, established practice. *See U.S. Dep't of the Air Force Headquarters, 96th Air Base Wing, Eglin Air Force Base, Fla.*, 58 FLRA 626, 630 (2003) (Chairman Cabaniss concurring) (policy that did not change the nature of crew chiefs' assignments, but only changed the non-unit supervisor making assignment determinations, did not change conditions of employment); *U.S. Dep't of Labor, OSHA, Region 1, Boston, Mass.*, 58 FLRA 213, 215-16 (2002) (Chairman Cabaniss

The Agency also argues that the local assignment policies underlying the grievance changed employees' "working conditions," but not their "conditions of employment." Exceptions at 13-14 (citing *OSHA*, 58 FLRA at 216 (Chairman Cabaniss concurring opinion)). The Authority has explicitly rejected such arguments, holding that "there is no substantive difference between 'conditions of employment' and 'working conditions' as those terms are practically applied." *Air Force*, 64 FLRA at 90. *See also Detachment 12*, 64 FLRA at 175 n.10. Therefore, the Agency's exceptions do not establish that the Arbitrator erred in finding that the local managers' implementation of new assignment policies changed unit employees' conditions of employment.

Further, the Agency challenges the Arbitrator's finding that the RNIAP is not a collective bargaining agreement and, thus, "not subject to the 'covered by' doctrine." Merits Award at 17. However, the Authority has repeatedly held that the RNIAP is not a collective bargaining agreement and, thus, is not subject to the "covered by" doctrine. *See Chapter 143*, 60 FLRA at 929; *Chapter 137*, 60 FLRA at 487-88. Although the Agency requests that the Authority reverse this precedent, it has provided no basis to do so.

For the reasons stated above, we find that the exceptions do not demonstrate that the Arbitrator erred by finding that the Agency violated its obligation to bargain, and deny these exceptions.

3. The failure to apply the "covered by" doctrine is not contrary to public policy.

Although the Authority will find an award contrary to public policy, this ground is "extremely narrow." *NTEU*, 63 FLRA 198, 201 (2009) (quoting *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 810 F.2d 1239, 1241 (D.C. Cir. 1987)). For the award to be found deficient on this basis, the asserted public policy must be "explicit," "well-defined," and "dominant," *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983) (*Rubber Workers*), and a violation of the policy "must be clearly shown." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (*Paperworkers*). In addition, the appealing party must identify the policy "by reference to the laws and legal precedents and not from general considerations of supposed public interests." *NTEU*, 63 FLRA at 201 (quoting *Rubber Workers*, 461 U.S. at 766).

The Agency asserts that the Arbitrator's decision not to apply the "covered by" doctrine to the RNIAP is contrary to public policy underlying that doctrine, specifically the policy prohibiting multiple "trip[s] to the bargaining table . . . over a single topic." Exceptions at 26-28 (citing *SSA*, 47 FLRA at 1017). However, the "covered by" doctrine applies only to negotiated agreements. *See SSA*, 47 FLRA at 1017-18 ("*upon execution of an agreement*, an agency should [not be required] to continue negotiations over . . . conditions of employment already resolved by the previous bargaining" (emphasis added)). As discussed above, the Authority has repeatedly held that the "covered by" doctrine does not apply to the RNIAP because it is not a negotiated agreement. *Chapter 143*, 60 FLRA at 929; *Chapter 137*, 60 FLRA at 487-88. The Agency also asserts that the Union's "tactical decision[]" to "bind its request for ground rules negotiations to any [RNIAP] negotiations" should foreclose the Union's ability to negotiate impact and implementation. Exceptions at 27-28. Nevertheless, as noted above, although the Authority has held that the Agency lawfully implemented the RNIAP without completing bargaining, the Authority has repeatedly held that the Union did not waive its rights to bargain over future changes in conditions of employment at the national level. *See Homeland*, 61 FLRA at 276 & n.8; *NTEU, Chapter 137*, 61 FLRA at 416 n.3; *Chapter 137*, 60 FLRA at 488. Therefore, even assuming that the

concurring) (terminating use of government operated vehicle (GOV) where employee voluntarily sought reassignment to a position not authorized to use GOV did not change conditions of employment); *U.S. Immigration & Naturalization Serv., Hous. Dist., Hous., Tex.*, 50 FLRA 140, 144 (1995) (assigning employees to an established shift where the agency routinely assigned employees to different shifts did not change conditions of employment). Here, however, the Arbitrator found, and there is no dispute, that the Agency changed local practices concerning the assignment of work. Merits Award at 14-17. As the Authority has repeatedly held, the Agency's termination of local-level bargaining via the RNIAP does not relieve the Agency of its statutory obligation to bargain at the national level (the level of recognition) over the impact and implementation of changes to conditions of employment made by local managers. *See Homeland*, 61 FLRA at 276; *Chapter 143*, 60 FLRA at 929; *Chapter 137*, 60 FLRA at 488. The dissent's position that "the Agency's bargaining obligation would have arisen [only] if it had changed the RNIAP [itself,]" Dissent at 15, would effectively allow the Agency to convert its lawful implementation of the RNIAP (revoking the Agency's agreement to bargain at the *local* level) into a sweeping, indefinite waiver of the Union's statutory bargaining rights at the *national* level.

"covered by" doctrine stands for an "explicit," "well-defined," and "dominant" public policy, the Agency has not "clearly shown" how the award violates the asserted public policy. *Rubber Workers*, 461 U.S. at 766; *Paperworkers*, 484 U.S. at 43. Accordingly, we deny this exception.

B. Exceptions Concerning the Remedy Award

1. The SQA remedy is not contrary to law, rule, and/or regulation.

The Agency argues that the remedy award is contrary to law because the Arbitrator "failed to properly and completely analyze" whether the circumstances of the Agency's violation met the criteria for awarding an SQA remedy set forth by the Authority in *FCI*. Exceptions at 31. Where an arbitrator has found a ULP and granted an SQA remedy, and a party has excepted to that remedy, the Authority has applied statutory standards to determine whether the remedy was deficient. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 63 FLRA 505, 510 (2009). Consistent with this precedent, we apply the *FCI* factors to determine whether the SQA remedy is deficient.

The *FCI* factors are:

> (1) whether, and when, notice was given to the union by the agency concerning the 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 and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations 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 FLRA at 606.

With regard to the first and second *FCI* factors, the Arbitrator found that "[t]here was no notice, no opportunity to bargain -- and, in fact, a refusal to do so." Remedy Award at 15-16. The Agency does not dispute that it did not afford the Union notice and an opportunity to bargain over its local assignment policy changes. Rather, the Agency reiterates its arguments that it was not required to bargain. Exceptions at 31. As we have rejected these arguments above, the first and second factors support the Arbitrator's award of an SQA remedy.

With respect to the third *FCI* factor, the parties present competing interpretations of the Arbitrator's statement -- immediately preceding his finding of willfulness -- that "[t]he Agency's justification for its position is sufficient." Remedy Award at 16. In the context of the award -- particularly his express finding that "the Agency's conduct was willful" -- the Arbitrator's assertion appears to be a misstatement. *Id.* In addition, the Agency's argument that its conduct was not willful under the third *FCI* factor is based upon its continued erroneous assertion that it had no bargaining obligation. Exceptions at 31. The Authority has held that an agency's "erroneous belief that it had no duty to bargain does not support a conclusion that the [agency's] actions were not 'willful' for the purposes of *FCI*." *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 13 (2000). Thus, the Agency's asserted belief that it had no duty to bargain does not detract from the willful nature of the refusal.

Because the Union has not yet been required to prove the damages of individual employees, the Agency "concedes that the fourth *FCI* factor is unable to be discussed at this time, but reserves its right to contest it at a later time." Exceptions at 31 n.7. Notwithstanding the Arbitrator's pending determination of individual employees' entitlement to backpay, the Arbitrator's findings support a conclusion that the Agency's violation adversely affected employees. In this regard, the Arbitrator found that the Union presented evidence that employees lost wages or benefits as a result of the Agency's unlawful actions, and that the parties' stipulations recognized the probability of such harm. Remedy Award at 17. The Agency's exceptions provide no basis for finding that the Arbitrator erred in this regard, or for finding that the fourth *FCI* factor warrants setting aside the SQA remedy.

With respect to the fifth *FCI* factor, the Authority requires that a conclusion that an SQA remedy would be disruptive to the operations of an agency be based on record evidence. *See, e.g., Soc. Sec. Admin., Office of Hearings & Appeals, Montgomery, Ala.*, 60 FLRA 549, 555 (2005). The Agency does not cite any record evidence to support its assertion that an SQA remedy would disrupt and impair the efficiency and effectiveness of its operations. Moreover, any alleged disruptiveness of

the SQA remedy is mitigated by the fact that the Arbitrator stayed implementation of the SQA for 120 days following the disposition of any exceptions to afford the parties an "opportunity to bargain with respect to inspectional work assignments and to implement required transitions." Remedy Award at 19. In these circumstances, the Agency provides no basis for finding that the fifth *FCI* factor warrants setting aside the SQA remedy.

For the foregoing reasons, we find that the Agency has not demonstrated that the SQA remedy is deficient under the *FCI* factors.

With regard to the Agency's claim that the SQA remedy for a bargaining unit that no longer exists is contrary to law, the remedy award requires the Agency to rescind its assignment policy changes as they were applied to employees in the former unit, thereby restoring the SQA only for those employees.[12] *Id.* However, nothing in the award prohibits the Agency from seeking to extend those policies as to the whole unit. In any event, the Agency does not cite any authority to support its assertion that it would be inappropriate for employees within the same unit to be subject to different work assignment policies.

For the foregoing reasons, we deny the Agency's exceptions regarding the SQA remedy.

2. The bargaining order is not contrary to law, rule, and/or regulation.

The Agency argues that the Arbitrator's order to bargain is contrary to law because of the reorganization of the unit. The remedy award requires the Agency to cease and desist from failing to provide the Union with notice and opportunity to bargain any further non-emergency changes to conditions of employment. *Id.* As the current exclusive representative of the new unit, the Union is entitled to participate in any prospective bargaining on behalf of unit employees. *See Dep't of Health & Human Servs., Office of the Sec'y Headquarters*, 20 FLRA 175, 175 n.2 (1985) (*HHS*). The Agency fails to explain how the Union's participation in such bargaining would be contrary to law. Accordingly, we deny the exception.

3. The bargaining order is not moot.

The Authority has held that a dispute becomes moot when the parties no longer have a legally cognizable interest in the outcome. *See, e.g., Soc. Sec. Admin., Boston Region (Region 1), Lowell Dist. Office, Lowell, Mass.*, 57 FLRA 264, 268 (2001) (Member Wasserman dissenting in part on other grounds) (*SSA, Boston*). When evaluating whether a particular remedy is moot, the Authority has found that the party urging mootness meets its burden by demonstrating that: (1) there is no reasonable expectation that the situation addressed by the challenged portion of the award will recur; and (2) interim relief or events have completely or irrevocably eradicated the effects of the alleged violation. *See id.* In particular, the Authority has found that where an Agency failed to notify or bargain with a predecessor union before changing conditions of employment, the ordered remedies were not rendered moot merely because the employees' exclusive representative changed during the pendency of the complaint. *See HHS*, 20 FLRA at 175 n.2.

The Agency does not establish that the Arbitrator's bargaining order has been rendered moot merely because the Union now represents the employees from the former unit as part of its representation of the new, larger unit. *Cf. id.* The Agency does not argue that there is no reasonable expectation that the situation addressed by this portion of the award will recur. *See SSA, Boston*, 57 FLRA at 268. Further, the Agency has not established that the reorganization of the unit has "completely or irrevocably eradicated the effects" of its unlawful failure to bargain. *See id.* *OEA*, upon which the Agency relies, is inapposite as it pertains to the mootness of the negotiability of proposals on behalf of a predecessor bargaining unit, rather than an agency's prospective bargaining obligation concerning changes to conditions in employment. 7 FLRA at 85-86. The Agency also cites *DMA*, 51 FLRA 1751, which concerns the mootness of a union's informational request after the agency closed the activity at issue. That decision is distinguishable because the Authority's mootness finding was based, as relevant here, on its findings that: (1) in the wake of the activity's closure, there was no exclusive representative to receive the requested information or make any use of it; and (2) there was no contention that the agency had an employer relationship with any of the employees in the defunct unit. *Id.* at 1756.

12. We note the Agency's assertion that the SQA remedy would require the Agency to assign work to employees from the former unit "according to the procedures in place before the implementation of the [RNIAP.]" Exceptions at 11-12. However, the Arbitrator declined to find that the "ante" for the SQA remedy was prior to the implementation of the RNIAP, but instead found that it was six months prior to the filing of the grievance. Remedy Award at 16.

In contrast, here, the Agency continues to employ the employees at issue, who are represented by the same union. Accordingly, we find that the Agency's exception provides no basis for setting aside the bargaining order as moot.

VI. Decision

The Agency's exceptions are denied.

Member Beck, Dissenting in part:

I agree with my colleagues that the Agency's exceptions are not interlocutory. I do not agree, however, with their decision to deny the Agency's contrary to law exception. I conclude instead that the Arbitrator erred in finding that the Agency must bargain about matters that are expressly reserved as management rights by the lawfully implemented RNIAP.[*]

The Agency correctly argues that the Arbitrator erred in concluding that the RNIAP "does not actually prescribe conditions of employment," Exceptions at 12, (quoting Merits Award at 14) and "do[es] not prescribe any policies or procedures that constitute conditions of employment." Exceptions at 12 (quoting Merits Award at 16). The Agency further correctly argues that its obligation to bargain arises only when the Agency changes the policies or procedures set forth in the RNIAP itself -- not when managers exercise options that are authorized by the RNIAP. Exceptions at 12-13. Accordingly, the Agency's bargaining obligation would have arisen if it had changed the RNIAP but not when, as here, it merely exercised the authority that it already enjoyed under the RNIAP.

Without a doubt, the subjects covered by the RNIAP -- workweek, work hours, days off, scheduling, staffing levels, overtime -- constitute conditions of employment. *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85 (2009) (assignment of work constitutes a condition of employment); *Veterans Admin., Wash., D.C.*, 30 FLRA 961, 987 (1988) (matters involving workweek constitute a condition of employment); *U.S. Dep't of the Treasury, Internal Revenue Serv.*, 62 FLRA 411 (2008) (work hours constitute a condition of employment); *AFGE, Local 2128*, 58 FLRA 519, 523 (2003) (work schedules constitute conditions of employment). Therefore, the Arbitrator erred when he concluded that the RNIAP does not establish conditions of employment.

The RNIAP sets out the manner in which the Agency may exercise specific 5 U.S.C. § 7106(b)(1) rights. *See U.S. Dep't of the Treasury, Customs*

[*] It may or may not be that the RNIAP is tantamount to a "negotiated agreement" such that it could be the basis for a "covered by" defense. This is a close call. However, for the reasons discussed below, I believe it is unnecessary to reach that question in order to resolve the Agency's remaining contrary to law exceptions.

Serv., Wash., D.C., (*Customs I*), 59 FLRA 703 (2004), *aff'd sub nom. NTEU v. FLRA*, 414 F.3d 50 (D.C. Cir 2005); *NTEU, Chapter 137*, 60 FLRA 483, 483 (2004) (*Chapter 137*); *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Port of Seattle, Seattle, Wash.*, 60 FLRA 490 (2004) (*Customs II*); *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 60 FLRA 496, 500 (2004) (*Customs III*). Article 3 of the RNIAP expressly relieves managers of any obligation to negotiate in connection with the exercise of those rights. *See* Exceptions, Attach. 6. The Authority held in *Customs I, NTEU, Chapter 137, Customs II*, and *Customs III* that the Agency "lawfully implemented" the RNIAP.

I conclude that the Agency had no obligation to bargain with the Union in connection with managers' decisions about the manner in which regular and overtime work is assigned during the period covered by this grievance (2003 to 2005). *See* Merits Award at 7. Any obligation to bargain occurred in August 2001, when the Agency notified the Union of its intention to implement the proposed RNIAP. *See Chapter 137*, 60 FLRA at 484. The Union had the opportunity at that time to submit procedural and appropriate arrangement proposals (in accord with 5 U.S.C. § 7106(b)(2) and (3)) regarding the changes contained within the RNIAP. The Union chose not to submit proposals but instead took a position that would have required the Agency to negotiate an entire national agreement before implementing the RNIAP. *Chapter 137*, 60 FLRA at 484. The Authority (as well as the court in *Customs I*) concluded that the Agency had no duty to delay implementation of the RNIAP and that the RNIAP was "lawfully" implemented by the Agency in 2001. *Id.* at 486-87; *Customs III*, 60 FLRA at 500; *Customs II*, 60 FLRA at 494. Accordingly, the Agency was free to take actions authorized by the RNIAP.

The Authority has found consistently that the determination of whether an Agency's action constitutes a change to a condition of employment is a matter that must be evaluated on a case-by-case basis. *U.S. Dep't of Homeland Sec., Border & Transp. Sec., Directorate, U.S. Customs & Border Prot., Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169, 173 (2004) (citing *U.S. Dep't of Labor, OSHA Region 1, Boston, Mass.*, 58 FLRA 213, 215-16 (2002)); *92 Bomb Wing, Fairchild AFB*, 50 FLRA 701, 704 (1995). Specifically, the Authority has found that actions taken by management that are consistent with existing practice or policy do not constitute changes to a condition of employment. *U.S. Dep't of the Air Force, Headquarters, 96th Air Base Wing, Eglin Air Force Base, Fla.*, 58 FLRA 626, 629-30 (2003) (citing *United States Immigration & Naturalization Ser., Houston Dist., Houston, Tex.*, 50 FLRA 140, 144 (1993)). *See also OSHA Region 1, supra* (terminating use of government operated vehicle (GOV) is not a change to a condition of employment when employee's new position is not authorized GOV use under parties' agreement and regulation).

During the period covered by this grievance (2003-2005), the Agency made no change (and proposed no changes) to the RNIAP. All of the actions taken by its local managers (i.e., adjusting work schedules and overtime assignments) were permitted by the RNIAP. Therefore, I cannot conclude, as do the Arbitrator and the Majority, that the Agency implemented "new policies and procedures" when it "[made] changes [in] the assignment of regular and overtime work" at the local port level. Award at 17.

I would grant the Agency's contrary to law exception and vacate the Arbitrator's award.