

**67 FLRA No. 17**

UNITED STATES  
DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF PRISONS  
WASHINGTON, D.C.  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
COUNCIL OF PRISON LOCALS  
COUNCIL 33  
(Union)

0-AR-4225  
(64 FLRA 559 (2010))

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DECISION ON REMAND

December 12, 2012

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Before the Authority: Carol Waller Pope, Chairman, and  
Ernest DuBester, Member

**I. Statement of the Case**

This case is before the Authority on remand from the United States Court of Appeals for the District of Columbia Circuit.<sup>1</sup> The court vacated the Authority's decision in *U.S. DOJ, Federal BOP, Washington, D.C. (BOP, Wash.)*.<sup>2</sup> In *BOP, Wash.*, the Authority denied exceptions to an arbitrator's award finding that the Agency violated the Federal Service Labor-Management Relations Statute (the Statute) and the parties' agreement by failing to bargain over the impact and implementation of a change in conditions of employment. The court remanded the case to the Authority to set aside the award.

**II. Background**

As a cost-savings measure, the Agency announced a "critical[-]roster program" that eliminated unnecessary posts.<sup>3</sup> The Union requested negotiations before the Agency implemented the program. The Agency claimed that it was not obligated to bargain because the matter was "covered by" the parties' agreement.<sup>4</sup> Subsequently, the Union filed a grievance, and when it was not resolved, submitted it to arbitration. The Arbitrator found that the matter was not "covered by" the parties' agreement and concluded that the Agency violated 5 U.S.C. § 7116(a)(1) and (5), and the parties' agreement when it refused to bargain. The Agency filed exceptions to the Arbitrator's award.

In *BOP, Wash.*, the Authority denied the Agency's exceptions. In the Authority's view, the Arbitrator correctly determined that the critical-roster program was neither expressly addressed in the terms of the parties' agreement nor inseparably bound up with the agreement's procedures addressing rosters.<sup>5</sup> Accordingly, the Authority concluded that the matter was not covered by the parties' agreement and that the Agency violated 5 U.S.C. § 7116(a)(1) and (5), and the parties' agreement when it refused to bargain over the program's impact and implementation.<sup>6</sup> Additionally, the Authority denied the Agency's exceptions because the Agency did not specifically except to the Arbitrator's finding that the Agency violated the parties' agreement, which the Authority found was a separate and independent ground for the award.<sup>7</sup>

On review, the court vacated the Authority's decision and remanded the matter to the Authority to set aside the Arbitrator's award.<sup>8</sup> The court found that the Authority erred when it determined that the parties' agreement did not cover the critical-roster program. The court concluded that the roster-preparation procedures prescribed in the parties' agreement "cover the substance of all decisions reached by following those procedures," including the decisions reflected in the critical-roster program.<sup>9</sup> The court also rejected the Authority's separate-and-independent-ground holding "because the arbitral award makes no distinction between the purportedly 'separate' statutory and contractual grounds for the award."<sup>10</sup>

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<sup>1</sup> *Fed. BOP v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011), *reh'g en banc denied* (D.C. Cir. 2011) (*BOP v. FLRA*).

<sup>2</sup> 64 FLRA 559 (2010).

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<sup>3</sup> *BOP, Wash.*, 64 FLRA at 559.

<sup>4</sup> *Id.*

<sup>5</sup> *BOP, Wash.*, 64 FLRA at 559, 561.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 562.

<sup>8</sup> *BOP v. FLRA*, 654 F.3d at 98.

<sup>9</sup> *Id.* at 95.

<sup>10</sup> *Id.* at 97.

### **III. Analysis and Conclusions**

Consistent with the court's opinion in *BOP v. FLRA*, we adopt as the law of the case the court's conclusion that the parties' agreement covered the critical-roster program, and that accordingly the Agency did not violate 5 U.S.C. § 7116(a)(1) and (5), and the parties' agreement by declining to negotiate over the program's impact and implementation. We also adopt, as the law of the case, the court's ruling on "separate and independent grounds."<sup>11</sup>

### **IV. Decision**

We grant the Agency's exceptions and set aside the Arbitrator's award.

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<sup>11</sup> *Id.*