70 FLRA No. 83

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 817
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5238

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DECISION

February 22, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

On October 3, 2016, Arbitrator Kathleen Miller issued an award finding that the Agency violated the parties' agreement and the Federal Service Labor-Management Relations Statute (Statute)[1] when it reserved certain assignments, days off, and shifts for non-bargaining-unit employees before giving bargaining-unit employees the opportunity to bid on assignments, days off, and shifts as well as when it allowed non-bargaining-unit employees to participate in the bidding process under the parties' agreement. On November 2, 2016, the Agency filed five substantive exceptions.

This case primarily turns on one question—whether, as the Agency argues, the award is contrary to law because it is contrary to its management rights under § 7106 of the Statute. In order to answer this question, we take this opportunity to reevaluate how we analyze exceptions alleging that an award is contrary to a management right under § 7106 of the Statute. Under our new standard, we find that the award excessively interferes with the Agency's management rights to assign employees and to assign work. As such, we grant the Agency's exception and vacate a portion of the award.

Beyond this primary issue, the Agency raises four additional exceptions concerning the remaining portion of the award. First, the Agency argues that we should set aside the award because the Agency's conduct was covered by the parties' agreement. Because the Arbitrator found a contractual violation, and the covered-by defense is therefore inapplicable, we deny this exception.

Second, the Agency claims that the Arbitrator based her award on a nonfact. Because this nonfact challenges the Arbitrator's interpretation of the parties' agreement, and this does not provide a basis for finding an award deficient, we deny this exception.

Third, the Agency contends that the Arbitrator exceeded her authority by analyzing an issue not submitted to arbitration. Because the award is responsive to the issues as framed by the Arbitrator, we deny this exception.

Finally, the Agency alleges that the award is contrary to law because it requires the Agency to violate the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).[2] Because the award denies a benefit based on non-bargaining-unit status, and not any current or former membership in the uniformed services, we deny this exception.

II. Background and Arbitrator's Award

As part of its mission, the Agency provides medical services to approximately 210,000 federal inmates. In order to provide these services, the Agency utilizes two types of employees: bargaining-unit employees who are covered by the parties' agreement; and U.S. Public Health Service Commissioned Corps (PHS) officers who are members of the uniformed services and are excluded from representation by § 7103 of the Statute.[3]

The unit employees work in a variety of medical positions, including physicians, physician assistants, nurse practitioners, registered nurses, dentists, and physical therapists. Since the 1930s, the Agency also has used PHS officers to provide this

[1] 5 U.S.C. § 7106.

[2] 38 U.S.C. §§ 4301-4335.

[3] 5 U.S.C. § 7103(a)(2)(B)(ii) (stating that, as used in the Statute, "'employee' . . . does not include . . . a member of the uniformed services.").

medical care. Because of the nature of the workplace, all employees also perform some correctional duties. The number of PHS officers utilized has increased over time, and, out of about 3,600 medical professionals, approximately twenty-four percent are PHS officers. All bargaining-unit employees and PHS employees also perform some correctional duties. The Agency testified that the correctional duties as well as less competitive pay than the private sector increase the challenge of recruiting PHS employees to work in the Agency.[4]

The Union filed a national grievance concerning the bidding processes under Articles 18 and 19 of the parties' agreement. Article 18(d)(2) states that the Agency will post a blank roster "for the purpose of giving [correctional staff] advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit their preference request."[5] Prior to posting this roster, the Agency set aside a number of assignments, days off, and shifts for PHS officers. Article 19 concerns bidding for annual leave. In some instances, the Agency set aside days of vacation for PHS officers; in others, the Agency allowed PHS officers to participate in the same bidding process as bargaining-unit employees. The Union's grievance alleged, as relevant here, that the Agency violated the parties' agreement as well as § 7103 by setting aside slots from the bidding process and allowing PHS officers to participate in the bidding process under the parties' agreement.

The parties were unable to resolve the issue, and they submitted it to arbitration.

As relevant here, the Arbitrator framed the issue as whether the Agency violated the parties' agreement and the Statute when it reserved assignments, days off, and shifts for PHS officers, preventing bargaining-unit employees from bidding on those slots, as well as allowing PHS officers to participate in the vacation selection process along with bargaining-unit employees.

At arbitration, the Union argued that the Agency violated Article 18 when it withheld and removed posts from the roster on which bargaining-unit employees bid for slots. Furthermore, the Union argued that PHS officers, as members of a uniformed service, were excluded from getting any benefits from collective bargaining under the Statute. As such, the Union continued, the Agency violated the Statute when it allowed PHS officers to participate in the bidding process established in the parties' agreement.

The Agency argued that, under the rights to assign employees and assign work in § 7106 of the Statute, it has the right to determine where employees will be assigned and what assignments it will offer to bargaining-unit employees for bidding. As such, "[r]equiring the [A]gency to offer ALL posts to the bargaining unit for their placement by seniority prior to assigning non-bargaining[-]unit employees . . . directly interferes with management's right[s] to assign [employees] and assign work."[6]

The Arbitrator found that Article 18 of the parties' agreement prevented the Agency from setting aside slots for PHS officers and that, in doing so, the Agency violated the parties' agreement and the Statute. Specifically, the Arbitrator found that the parties' agreement limits the Agency's right to assign and prevents the Agency from assigning PHS officers to any post or days off. Additionally, the Arbitrator found that, by setting vacation time apart for PHS officers prior to the bidding process in the parties' agreement, the Agency was "circumventing the contractually[ ]agreed bidding process."[7] The Arbitrator further stated that the Agency should exclude PHS officers from any contractual bidding process in order to be "consistent with its obligations under [the Statute]."[8]

As a remedy, the Arbitrator ordered the Agency to follow the bidding process in Article 18. Specifically, the Arbitrator ordered that the Agency should not withhold any assignments, days off, or shifts from the roster of slots available for bargaining-unit employees to bid on, and that the Agency should not set aside vacation slots for PHS officers or allow PHS officers to participate in the contractual bidding process for vacation slots.

The Agency filed exceptions to the award on November 2, 2016; the Union filed an opposition to those exceptions on December 7, 2016.

[4] Award at 16-17.
[5] *Id.* at 35-36 (quoting the parties' agreement).
[6] Exceptions, Attach. B, Agency's Closing Br. at 14.
[7] Award at 37.
[8] *Id.* at 40.

IV. Analysis and Conclusions

A. The award is contrary to § 7106 of the Statute.

The Agency argues that the award is contrary to law because it violates its management rights to assign employees and to assign work under § 7106 of the Statute. As noted above, when an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo.[9] The right to assign work under § 7106(a)(2)(B) includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom, or what positions, the duties will be assigned.[10] This right also includes the right to assign work to non-bargaining-unit employees.[11] The right to assign employees under § 7106(a)(2)(A) includes the right to make initial assignments to positions, to reassign employees to different positions, and to make temporary assignments or details.[12]

In its exceptions, the Agency requests that the Authority reconsider the current standard that we apply when considering an assertion that an award is contrary to a management right. We agree that a thorough reexamination is warranted.

The Statute established procedures which permit federal agencies and unions to negotiate collective-bargaining agreements and to resolve disputes through negotiated grievance procedures. But it also included in § 7106(a) enumerated rights which could not be compromised by any of the other provisions and procedures set forth in the Statute.

The Federal Labor Relations Authority was entrusted with the responsibility to interpret and apply the Statute. Since its inception the Authority has grappled with articulating a coherent, consistent, and understandable framework to determine when an arbitral award impermissibly interferes with § 7106(a) rights.

When Congress enacted the Statute, and enumerated those rights, it could not have imagined that arbitrators—with no particular expertise or training—would, over time, view their authority so expansively as to make rulings that impact the ability of federal agencies to carry out their fundamental missions and operations, that impact how federal agencies safeguard the nation's security or their own internal security practices, or that compel federal agencies to spend funds appropriated by Congress in a manner which runs counter to specific statutory mandates or restrictions. Nonetheless, with the Authority's help, the rulings of arbitrators have been permitted to ever more directly encroach upon and undermine how federal agencies carry out their essential governmental functions. Consider the following examples:

- An arbitrator dictated that the Immigration and Customs Enforcement Agency could not determine how and when it could restrict employee use of government computers (despite recent and repeated hacks associated with employees' personal use of the agency's computers) without first seeking the permission of the union.[13]
- An arbitrator required the U.S. Department of Health and Human Services to pay entirely discretionary awards from a subsequent year's budget even when the agency was under sequestration.[14]
- An arbitrator instructed the U.S. Department of the Air Force how it had misinterpreted its own statute for 119 years.[15]
- An arbitrator mandated how the U.S. Department of Homeland Security must interpret the Inspector General Act thereby extending representational

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[9] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (*Chapter 24*).

[10] *U.S. Dep't of Commerce, Patent & Trademark Office*, 65 FLRA 13, 15 (2010).

[11] *Int'l Bhd. Of Elec. Workers, Local 121*, 56 FLRA 609, 612 (2000) (proposal that would restrict an agency from assigning work to non-bargaining-unit employees affects the right to assign work); *Int'l Bhd. of Elec. Workers, Local 570, AFL-CIO-CLC*, 14 FLRA 432, 433-34 (1984) (proposal that would have prevented the agency from assigning bargaining-unit work to employees outside the bargaining unit, except in emergency situations, restricted management's right to assign work).

[12] *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Newport News, R.I.*, 63 FLRA 222, 225 (2009).

[13] *U.S. Dep't of the Treasury, IRS*, 68 FLRA 1027, 1034 (2015) (Dissenting Opinion of Member Pizzella).

[14] *U.S. Dep't of HHS, Nat'l Inst. of Envtl. Health Sci.*, 68 FLRA 1049, 1055 (2015) (Dissenting Opinion of Member Pizzella).

[15] *AFGE, Local 1547*, 67 FLRA 523 (2014), *rev'd U.S. Dep't of the Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F.3d 957 (D.C. Cir. 2016).

rights of unions into inspector-general investigations.[16]

- An arbitrator ordered that the U.S. Department of the Navy must purchase bottled water for its employees despite having no appropriations from Congress for that purpose.[17]

Until 1987, the Authority used two approaches: in some instances, the Authority ruled that any grievance which "interfere[d]" with a § 7106(a) management right was not arbitrable as a matter of law;[18] in other instances, the Authority ruled that arbitrators, while not precluded from considering substantive issues which may impact § 7106(a) rights, could not "impose requirements on [agencies] . . . over and above those specified by [applicable laws]."[19]

The Authority settled upon the latter approach in December 1987. In *Newark Air Force Station Activity*,[20] the Authority's two-Member quorum found that "the question of any impermissible arbitral interference with [§ 7106(a)] rights must be directed to the merits" of a grievance and that an arbitrator could determine *only* whether the agency acted "*in accordance with applicable laws*"[21] or whether the agency violated a specific provision negotiated into the parties' collective bargaining agreement.[22]

Four weeks later, in *Social Security Administration* (*SSA 1988*),[23] the Authority concluded that "the restrictions [found in § 7106(a)] on the remedial authority of arbitrators [were] not warranted" so long as an arbitrator found that the agency violated "*[any] law, [rule,] regulation, or . . . collective[-]bargaining agreement*." According to the Authority, at that time, "the management rights provisions of § 7106 [did] not trump § 7121," because any alleged "violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment"[24] were subject to grievance procedures. In other words, there was *little to no limit* on an arbitrator's authority "to substitute their judgment for that of management"[25] in fashioning a remedy for such violations.

But the Supreme Court "flatly" rejected that narrow interpretation of § 7106(a).[26]

Writing for the Court's majority in *Department of the Treasury, IRS v. FLRA* (*IRS v. FLRA*), Justice Antonin Scalia made crystal clear that, when an agency acts pursuant to a management right enumerated in § 7106(a), it is "insulated" from the grievance requirements of § 7121(c) and the agency's actions are removed "from the coverage of the *entire* [Statute] to the extent the decisions are in accordance *with applicable laws*."[27] According to the Court, "[t]he FLRA's position [that § 7106(a) does not 'supersede the grievance requirement of § 7121'[28]] is *flatly contradicted* by the language of § 7106(a)'s command that ***'nothing in this chapter'***—i.e., *nothing in the* ***entire [Statute]***[29]—shall affect the authority of agency officials to make [determinations concerning § 7106(a) rights] in accordance with applicable laws."[30] The Court concluded that "there are ***no*** '*external limitations*' on management rights,

[16] *U.S. DHS, U.S. CBP*, 66 FLRA 904, 905-06 (2012); *see also U.S. DHS, U.S. CBP v. FLRA*, 751 F.3d 665, 669 (D.C. Cir. 2014), *rev'g NTEU*, 66 FLRA 1028 (2012).

[17] *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R.I. v. FLRA*, 665 F.3d 1339, 1348-51 (D.C. Cir. 2012), *rev'g U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R.I.*, 64 FLRA 1136 (2010).

[18] *See Newark Air Force Station Activity*, 30 FLRA 616, 632-33 (1987) (discussing, *e.g.*, *BEP, Dep't of the Treasury*, 20 FLRA 380 (1985); *NTEU*, 13 FLRA 732, 734 (1983)).

[19] *Id.* at 635.

[20] *Id*.

[21] *Id.* at 634 (emphasis added).

[22] *Id.* at 632 (citing *Marine Corps Logistics Support Base, Pacific, Barstow, Cal.*, 3 FLRA 397, 398-99 (1980)).

[23] 30 FLRA 1156, 1160 (1988).

[24] *Dep't of the Treasury, IRS v. FLRA*, 494 U.S. 922, 927 (1990) (*IRS v. FLRA*) (quoting, in part, 5 U.S.C. § 7103(a)(9)(C)(ii)).

[25] *SSA 1988*, 30 FLRA at 1161.

[26] *IRS v. FLRA*, 494 U.S. at 928.

[27] *Id.* at 929.

[28] *Id.* at 928-29.

[29] Our dissenting colleague ignores the Supreme Court's ruling—as well as the decision of "that court" (the United States Court of Appeals for the District of Columbia Circuit) (Dissent at 3-4)—insofar as he argues that an arbitrator is free to ignore § 7106(a) even when the arbitrator's *interpretation of a negotiated provision* excessively interferes with one of the rights enumerated in § 7106(a). That cannot be. The "distinction" our colleague draws between collective bargaining and arbitral enforcement under our Statute, however, is of minimal significance because of the preeminent role of the management rights enumerated in § 7106(a). As noted in our decision, the Court clearly ruled that "nothing in the entire [Statute]" (including § 7121 grievance procedures, negotiated provisions, or an arbitrator's award and remedy) shall interfere with those rights. *IRS v. FLRA*, 494 U.S. at 928.

[30] *IRS v. FLRA*, 494 U.S. at 928.

insofar as union powers under § 7106(a) are concerned, ***other than*** the limitations imposed by '***applicable laws***.'"[31]

The Authority seemingly ignored *IRS v. FLRA* for seven years until *U.S. Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C.* (*BEP*).[32] In *BEP*, the Authority attempted to make § 7106(b) work—where § 7121(d) had failed—to define a "*separate limitation* on, or *exception* to, management rights under [§] 7106(a)."[33]

In *BEP*, the two-Member quorum established a "revised" two-pronged framework to determine when an arbitrator's award adversely affects § 7106(a) rights.[34] Under its first prong, the Authority found that "an arbitration award that affects management rights . . . may provide a remedy only for a violation of either applicable law, within the meaning of § 7106(a)(2), or a contract provision that was negotiated pursuant to the exceptions to § 7106(a) that are set forth in § 7106(b)."[35] Then, under the second prong, the Authority decided it would analyze whether the remedy for such a violation (in the case of *BEP*, a violation of negotiated provisions requiring the agency to follow specific procedures concerning the application of performance standards[36]) reflected a "reconstruction" of what the agency would have done had it acted in accordance with the negotiated provisions.[37] If the remedy was not a "reconstruction" of what the agency would have done, the remedy would be found contrary to law.[38]

That analysis, however, was flawed in two critical respects and was later criticized by several Members.[39] First, the decision effectively circumnavigated *IRS v. FLRA* insofar as the Court held that "*nothing* in this entire Statute" may compromise § 7106(a) rights. Second, the Supreme Court in *IRS v. FLRA* rejected "reconstruction," as used in that case as a remedial tool, describing it as "entirely disconnected from the text of the Statute."[40]

The Authority nonetheless applied the flawed *BEP* framework for nearly thirteen years, until 2010 when the Authority finally jettisoned "reconstruction" altogether and replaced it with an entirely new approach to determine the outer limits of an arbitrator's "remedial authority."[41] Under the 2010 framework, the Authority explained (in two decisions issued on the same day) that arbitrators enjoy "broad discretion" to fashion remedies for contractual violations, even if they "affect[] management rights under § 7106(a),"[42] discretion which is limited only by the "*specific limitations* set forth in the *pertinent* contract" and by the remedies included in "a *properly negotiated* contract provision."[43]

In *FDIC, Division of Supervision & Consumer Protection, San Francisco Region* (*FDIC*), two Members declared that it was necessary to "reexamine the restrictions . . . placed on arbitrators' remedial powers in rendering awards that affect management rights under § 7106(a)."[44] Then, in *U.S. EPA* (*EPA*), two Members asserted that their "test [would determine] whether a contract provision [was] enforceable . . . under § 7106(b)(3)."[45]

EPA focused primarily on § 7106(b)—if a provision was negotiated pursuant to § 7106(b), then an arbitrator's award could be contrary to law only if the award entirely "abrogate[d]" [46] a § 7106(a) right.[47]

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[31] *Id.* at 931 (emphasis in original omitted; emphasis herein added).
[32] 53 FLRA 146 (1997).
[33] *Id.* at 152 (emphasis added).
[34] *Id.* at 153.
[35] *Id.* at 152-53.
[36] *Id.* at 153.
[37] *Id.* at 154.
[38] *Id.*
[39] *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 111 (2010) (*FDIC*) (Concurring Opinion of Chairman Pope) (quoting *SSA, Boston Region (Region I), Lowell Dist. Office. Lowell, Mass.*, 57 FLRA 264, 270 (2001) (*SSA, Boston*) (Dissenting Opinion of Member Wasserman)).
[40] *IRS v. FLRA*, 494 U.S. at 931; *see also SSA, Boston*, 57 FLRA at 271 (Dissenting Opinion of Member Wasserman) (After the "instruction of the Court, I think [the Authority] lost sight of some aspects of the Statute and the decision in *IRS* that would moderate or conceivably eliminate the *reconstruction* analysis.").
[41] *FDIC*, 65 FLRA at 106.
[42] *Id.*
[43] *Id.* (emphases added).
[44] *Id.* at 102.
[45] 65 FLRA 113, 113 (2010) (Member Beck concurring).
[46] *Id.* at 118.
[47] Abrogation was a standard which had been abandoned by the Authority eight years earlier because, effectively and in practice, it was impossible to prove. *U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 110 (2002) (Chairman Cabaniss and Member Armendariz concurring; Member Pope concurring as to result). The Authority has never been able to articulate what is required to establish that an award or remedy abrogates a § 7106(a) right, and no agency has been able to prove abrogation to

FDIC, on the other hand, focused on remedy. According to its two Members, if an arbitrator's award "provides a remedy for a violation of . . . a contract provision that was negotiated pursuant to § 7106(b),"[48] then the award is only contrary to § 7106(a) if the remedy was ***not*** "*reasonably related* to the negotiated provisions at issue and the harm being remedied"[49]—i.e., if it "impose[d] a constraint on a [§ 7106(a)] management right that was not agreed to by the parties."[50] Chairman Pope separately predicted that that the ruling would certainly "create[] ***[a] confusion*** that will promote litigation."[51] And she was right.

Following *FDIC* and *EPA*, subsequent decisions were not consistent and the Members continued to disagree on how to apply the *FDIC* framework.[52]

Then, in 2012, the United States Court of Appeals for the District of Columbia Circuit stepped in. In *U.S. Department of the Treasury, IRS, Office of Chief Counsel, Washington, District of Columbia. v. FLRA* (*IRS OCC*),[53] the court called for the Authority to abandon the abrogation standard altogether and called the Authority's abrogation standard an "atextual construction of [§] 7106(b)(3)."[54] But the court decided that it did not need to address the issue of "abrogation" in the context of arbitration awards *because* the Authority had "given no indication that it plan[ned] to abandon its '*excessive interference'* test"[55] in matters concerning § 7114. The court instructed, however, that it expected the Authority to act "consistent with [its] opinion" in future decisions.[56]

In accordance with the D.C. Circuit's implicit rejection of abrogation, we will no longer follow that standard. Instead, we will return to the excessive interference test in order that we may return to the flexibility inherent in that standard and required to address the varied contexts in which it will be applied.

Just seven months after the court's rejection of abrogation, another two-Member quorum reduced *IRS OCC* to "law of the case" status, which effectively ensured that an agency could not successfully challenge an arbitrator's award on the grounds that an award is contrary to law in the manner it impacts a § 7106(a) right.[57]

Ironically, one of the few points on which all three Members in *FDIC* and *EPA* agreed was that the consensus framework, unlike the *BEP* framework, was intended to foster "flexibility." Despite that consensus, the two-Member quorum in *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, Louisiana*, (*SSA ODAR*) transformed the *FDIC*/*EPA* framework into one that was not just inflexible, but one that must be followed "in every case, no matter how inconsistent or illegal is the arbitrator's award."[58] The quorum in *SSA ODAR*, however, concluded that in order for an agency to argue that an arbitral award is contrary to § 7106(a), it must first "allege *not only* that the award affects a right under § 7106(a), *but also* that the agreement provision that the arbitrator has enforced is *not* the type of contract provision that falls *within § 7106(b) of the Statute*."[59]

There are two problems with *SSA ODAR*. First, that requirement is not supported by the Statute; and, second, neither *FDIC* nor *EPA* required such an assertion.

FDIC stated, quite simply, that when an agency "establishes that an award imposes a constraint on management rights that was not agreed

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the satisfaction of the Authority in thirty-nine years. *See AFGE, Council of Prison Locals, Local 4052*, 68 FLRA 38, 46 (2015) (Dissenting Opinion of Member Pizzella).

[48] *FDIC*, 65 FLRA at 104.

[49] *Id.* at 107.

[50] *Id.*

[51] *Id.* at 112 n.8 (Concurring Opinion of Chairman Pope) (emphasis added).

[52] *U.S. Dep't of the Army, Army Tank-Automotive Command*, 67 FLRA 14, 17 n.4 (2012); *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 603 n.103 (2014) (*SSA ODAR*) (Member Pizzella dissenting).

[53] 739 F.3d 13 (D.C. Cir. 2014).

[54] *Id.* at 20.

[55] *Id.* at 21.

[56] *Id.*

[57] *NTEU*, 67 FLRA 705, 707 (2014) (minimizing *IRS OCC* as "the law of the case"). We disagree with our dissenting colleague's attempt to ignore and minimize a binding decision from the United States Court of Appeals for the District of Columbia Circuit. While our colleague believes the court was "mistaken[]" (Dissent at 3), the court made the same determination, as did the Supreme Court in *IRS v. FLRA*, that arbitral awards arising out of § 7121 may not interfere with § 7106(a) management rights.

[58] 67 FLRA at 605 (Dissenting Opinion of Member Pizzella).

[59] *Id.* at 602.

to by the parties . . . the award will be set aside."[60] The Authority also explained that "*if* the award affects [a management] right, *then*, under the applicable legal framework, *the Authority examines*, as relevant here, whether the award provides a remedy for a contract provision negotiated under § 7106(b)."[61] But there simply was no mention that an agency must *first* allege that the provision "is not the type of contract provision that falls within § 7106(b) of the Statute,"[62] before it may argue that an award constrains a management right. To the contrary, *FDIC* and *EPA* only require a party to "*contend*[] that [the] *award* is contrary to a management right under § 7106(a) of the Statute"[63] and then the Authority "assesses whether the award affects the exercise of the asserted [management right]"[64] and "examines . . . whether the award provides a remedy for a contract provision negotiated under § 7106(b) of the Statute."[65]

Thus, it appears to us that requiring an agency to argue that a disputed provision was *not* negotiated pursuant to § 7106(b) in order to argue that an award violates a § 7106(a) right served but one purpose—to avoid reaching any question that would require a reexamination of the Authority's "abrogation" standard. On the one hand, if the agency argues that a provision *was* negotiated pursuant to § 7106(b) then the only question which the Authority will answer is whether the remedy is reasonably related to the violation. On the other hand, if the agency does not argue that the provision was negotiated pursuant to § 7106(b), its argument is summarily dismissed. Thus, the agency is always trapped in a proverbial catch-22.

It is quite telling that, since *FDIC* and *EPA*, no agency has been able to successfully navigate the procedural and substantive roadblocks that *FDIC*/*EPA* and their unfortunate progeny have imposed on the ability to successfully challenge and establish that an arbitrator's award impermissibly interferes with a § 7106(a) management right.

Such an absolute standard is not consistent with the basic construct of our Statute. Consequently, we do not agree that an agency is required, in all circumstances, to "allege" first that a contract provision as interpreted by an arbitrator "is *not* the type of contract provision *that falls within* § 7106(b) of the Statute" [66] in order to argue that the award impermissibly affects a § 7106(a) right or is otherwise contrary to law. And in the event the issue at hand requires a determination as to whether a provision was negotiated under § 7106(b), then the burden falls on the party making that assertion to prove that the provision was negotiated under § 7106(b).

Furthermore, the *BEP* and *FDIC*/*EPA* frameworks share at least one more critical flaw beyond those discussed above. Both frameworks effectively presume that most, if not all, provisions that make their way into a collective bargaining agreement must have been negotiated under § 7106(b) and thus constitute an exception to, or waiver of, an agency's § 7106(a) rights. But, contrary to that underlying presumption, the frameworks fail to recognize that some provisions, which make their way into negotiated agreements, have nothing whatsoever to do with § 7106(b).

Anyone who has engaged in the process of negotiating at the bargaining table is well aware that as a practical matter some provisions demonstrate nothing more than a common intent (i.e., to establish a means of regular communication), a common interest (i.e., to support general principles of equal employment opportunity), or a common commitment to try something different (i.e., adopting a best practice approach to a common recurring problem).[67] Other provisions make their way into collective bargaining agreements as an imposed agreement or order of the Federal Service Impasses Panel (FSIP) under § 7119(c)(5)(C).[68] And yet other provisions may be agreed to, not as a surrender of an agency's

[60] *FDIC*, 65 FLRA at 107.
[61] *EPA*, 65 FLRA at 115 (emphases added).
[62] *SSA ODAR*, 67 FLRA at 606 (Dissenting Opinion of Member Pizzella).
[63] *EPA*, 65 FLRA at 115 (citing *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 5 (2007) (emphasis added)).
[64] *Id.*
[65] *Id.* (citing *FDIC*, 65 FLRA at 104-05; *Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 313-14 (1990)).
[66] *SSA ODAR*, 67 FLRA at 602 (emphasis added) (erroneously citing *U.S. DHS, U.S. CBP*, 66 FLRA 634, 638 (2012)).
[67] *E.g. Matter of Dep't of the Army & Local 259*, 95 FSIP 106, 1995 WL 564878, *5 n.11 (1995) (noting provision where parties "committed themselves to teamwork, open communications and joint problem-solving in order to meet the mutual interests of the employees, labor and management").
[68] *AFGE Locals 225, 1504, and 3723 v. FLRA*, 712 F.2d 640, 646 n.24 (D.C. Cir. 1983) (*AFGE Locals*) (such provisions must be "regarded as part of [the parties' collective bargaining agreement] . . . during the term of the agreement.").

§ 7106(a) rights, but as a union-management partnership initiative (i.e., E.O. 13522 or E.O. 12871). The fact of the matter is that the vast majority of provisions are negotiated without any discussion as to the statutory authority under which a provision is being negotiated. The only point that may become an issue is when a dispute arises as to whether or not the agency must *negotiate* over a specific provision.

For purposes of determining whether an arbitrator's award or remedy adversely affects a § 7106(a) right, it does not matter why, how, or *under what section of the Statute* a provision makes its way into a collective-bargaining agreement, memorandum of understanding, or any other agreement. Quite simply—and a point that has been lost in *BEP*, *FDIC/EPA*, and their progeny—§ 7106(b) limits the subjects on which the agency may not "*negotiate*" or on which the agency may elect, or not, to *negotiate*.[69] In other words, the "[s]ubject to subsection (b) of this section" in § 7106(a) and the corresponding "[n]othing in this section shall preclude any agency and any [union] from negotiating" language in § 7106(b) do not create a standard to evaluate an arbitrator's award but have to do with what the agency must *negotiate* or may elect to *not negotiate*.[70]

Accordingly, when the Authority added to the *FDIC/EPA* framework in *SSA, ODAR* an absolute requirement—in order for an agency to argue that an arbitral award is contrary to § 7106(a) it must first argue that the provision in dispute is "*not* the type of contract provision that falls *within § 7106(b) of the Statute*"[71] and in order to avoid addressing the Court's implicit rejection of the abrogation standard in *IRS OCC*[72]—the Authority undercut the "delicate balance" that § 7106 was to play in balancing the rights between Federal unions and agencies, a central premise of the Statute.[73]

The Authority's unnecessary focus on whether a provision was negotiated pursuant to § 7106(b) in order to evaluate whether an arbitrator's award and remedy adversely affects a § 7106(a) right has caused the Authority to "los[e] sight of some aspects of the Statute and the [Supreme Court's] decision in [*IRS v. FLRA*]" as surely did the Authority's earlier focus on reconstruction in *BEP*.[74] As Chairman Pope noted in her concurring opinion in *FDIC*, "an agency's [§] 7106(a) rights are limited ***only*** *to the extent the parties bargained for*."[75]

As such, the test that we adopt today for determining whether an arbitrator's award and remedy adversely affects a § 7106(a) management right looks to the plain language of the Statute and the Supreme Court's guidance in *IRS v. FLRA*. The test we adopt will apply to an arbitrator's interpretation of *any* provision contained in a collective-bargaining agreement whether that provision is negotiated into the parties' agreement as a common interest, intent, or commitments, as the result of an agreement or order of the FSIP, as a labor-management partnership initiative, or under § 7106(b).

The first question that must be answered is whether the arbitrator has found a violation of a contract provision. If the answer to that question is yes, then the second question is whether the arbitrator's remedy reasonably and proportionally relates to that violation. If the answer to any of these questions is no, then the award must be vacated. But, if the answer to the second question is yes, then the final question is whether the arbitrator's interpretation of the provision excessively interferes with a § 7106(a) management right. If the answer to this question is yes, then the arbitrator's award is contrary to law and must be vacated.

It should be noted that this standard is not meant to be the sole method of challenging an award that affects a management right. For example, a party could challenge an arbitrator's interpretation of a contract provision as not being reasonable or plausible and thus as failing to draw its essence from the parties' agreement. The standard we outline today is for determining whether an arbitrator's interpretation of a provision excessively interferes with a management right reserved in § 7106 of the Statute.

[69] *See* 5 U.S.C. § 7106(b).
[70] *See AFGE Locals*, 712 F.2d at 645-49.
[71] 67 FLRA at 602 (emphasis added).
[72] 739 F.3d at 21.
[73] *AFGE Locals*, 712 F.2d at 646 n.26.
[74] *See SSA*, Boston, 57 FLRA at 270 (Dissenting Opinion of Member Wasserman).
[75] *FDIC*, 65 FLRA at 111 (emphasis added) (Concurring Opinion of Chairman Pope) (quoting *SSA, Boston*, 57 FLRA at 270 (Dissenting Opinion of Member Wasserman)).

To the extent, that prior decisions of the Authority, including *BEP*, *FDIC*, and *EPA* have held to the contrary, they will no longer be followed.[76]

Turning to the merits of the current case, the Agency argues that the award is contrary to its management rights under § 7106 to assign employees and to assign work.[77] Specifically, the Agency argues that the Arbitrator's interpretation of Section 18 requiring that all positions be made available to bargaining-unit employees before any other employees "completely abrogates management's right to assign work and assign employees."[78] The Agency argues that, under the Arbitrator's interpretation of Article 18, the Agency cannot assign anyone other than bargaining-unit employees to posts, including situations where the Agency might need some special expertise in a certain post for health or safety reasons. In short, the Agency argues that the Arbitrator's interpretation of Article 18 gives "unfettered preference and power to bargaining[-]unit employees."[79]

Looking to the standard established above, the answer to the first question—whether the Arbitrator found a violation of a provision—is yes.[80] As to the second question—whether the Arbitrator's remedy reasonably and proportionally relates to the violation—the Arbitrator ordered the Agency to "follow the bidding process set forth in Article 18."[81] Consequently, the remedy of adhering to Article 18 reasonably and proportionally relates to the violation of Article 18, and the answer to the second question is yes.

Finally, we turn to the last question—whether the Arbitrator's interpretation of the provision excessively interferes with a § 7106 management right. Although the Agency argues that the Arbitrator's interpretation of Article 18 abrogates its management rights to assign employees and to assign work, we will, as discussed above, apply the excessive interference standard. By restricting the Agency to a point where it is no longer able to assign work to employees outside of the bargaining unit, the Arbitrator's interpretation of Article 18 clearly excessively interferes with the Agency's right to assign employees and to assign work under § 7106. As such, the answer to the final question is yes. Consequently, the portions of the Arbitrator's award relying on this interpretation are contrary to law, and we vacate them.

Because we find portions of the award contrary to law and vacate those portions, we do not need to address the Agency's remaining exceptions[82] solely challenging the vacated portions of the award.

Although we vacate the portions of the award dealing with the Agency's practice of setting aside assignments, days off, and shifts for PHS officers, the Agency's management rights arguments above do not provide any arguments for setting aside the portions of the award dealing with the participation of PHS officers in any bidding process under the parties' agreement. As such, we now address the Agency's arguments pertaining, in whole or in part, to that finding.

B. The award is not inconsistent with the covered-by doctrine.

The Agency argues that we should set aside the award because "the change made by the Agency was 'covered by' the parties[']' agreement."[83] Under the Authority's covered-by doctrine, a party is not required to bargain over terms and conditions of employment that have already been resolved by bargaining.[84] In particular, the doctrine is "available to a party claiming that it is not obligated to bargain because it has already bargained over the subject at issue."[85] The covered-by doctrine is a defense to an alleged violation of a duty to bargain; however, it does not apply as a defense to an arbitrator's finding of a contractual violation.[86]

The Agency argues that "the change made by the Agency was 'covered by' the parties[']' agreement."[87] However, the Arbitrator did not find any violation of a duty to bargain. Instead, the Arbitrator found a contractual violation.[88] As such,

[76] *See, e.g.*, *U.S. DOJ, BOP, Fed. Med. Ctr., Lexington, Ky.*, 69 FLRA 10, 14 (2015) (Member Pizzella dissenting).
[77] Exceptions at 34.
[78] *Id.* at 39.
[79] *Id.* at 42.
[80] Award at 40.
[81] *Id.* at 41.
[82] Exceptions at 9 (arguing that the award fails to draw its essence from the parties' agreement); *id.* at 25 (arguing that the award is contrary to D.C. Circuit precedent).
[83] Exceptions at 46.
[84] *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1017-18 (1993).
[85] *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 12 (2000).
[86] *U.S. Dep't of HUD*, 66 FLRA 106, 109 (2011) (*HUD*).
[87] Exceptions at 46.
[88] Award at 40 (finding that the Agency's conduct violates the parties' agreement).

the Agency's covered-by defense is inapplicable here and does not demonstrate that the award is deficient.[89] Consequently, we deny this exception.

C. The Arbitrator did not base her award on a nonfact.

The Agency contends that the Arbitrator based her award on a nonfact.[90] To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[91] The Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[92]

The Agency states that "the central fact underlying the award that is clearly erroneous is the Arbitrator stating that '[f]or purposes of the present decision the controlling contractual language appears in Article 18(d)(2).'"[93] The Agency argues that the Arbitrator justified the scope of her decision by "completely ignor[ing] the language of Article 18(f)."[94] This argument challenges the Arbitrator's interpretation of the parties' agreement. However, parties cannot challenge an arbitrator's interpretation of the parties' agreement as a nonfact.[95] Consequently, we deny this exception.

D. The Arbitrator did not exceed her authority.

The Agency alleges that the Arbitrator exceeded her authority.[96] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[97]

The Agency argues that the Arbitrator exceeded her authority because she stated that "the controlling contractual language appears in Article 18(d)(2)."[98] The Arbitrator framed the issue as including whether the Agency violated the parties' agreement in its actions concerning scheduling, specifically the posting of a roster and commingling.[99] Article 18(d)(2) deals directly with this issue and was central to the issue before the Arbitrator. As such, the Arbitrator's consideration of Article 18(d)(2) was directly responsive to the issue as framed by the Arbitrator. Consequently, the Agency does not demonstrate how the Arbitrator exceeded her authority, and we deny this exception.[100]

E. The award is not contrary to USERRA.

The Agency argues that the award is contrary to USERRA because the award "requir[es] PHS employees to essentially be relegated to the status of second-class employees, simply because of their status as members of the Commissioned Corps."[101] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo.[102] 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.[103] In making this assessment, the Authority defers to the arbitrator's underlying factual findings.[104]

As relevant here, USERRA provides that current or former "members of . . . a uniformed service shall not be denied . . . any benefit of employment by an employer on the basis of that membership."[105] A "benefit of employment" is a "term[], condition[], or privilege[] of employment . . . that accrues by reason of an employment contract or agreement . . . and includes . . . the opportunity to select work hours or location of employment."[106] USERRA also provides that an employer can defeat a

[89] *HUD*, 66 FLRA at 109.
[90] Exceptions at 17.
[91] *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 172 (2015) (Member Pizzella dissenting); *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[92] *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 628 (2012) (citing *NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009)).
[93] Exceptions at 17 (quoting Award at 35).
[94] *Id.*
[95] *U.S. DOJ, Fed. BOP, Metro. Detention Ctr., Guayanbo, P.R.*, 70 FLRA 186, 187-88 (2017).
[96] Exceptions at 46.
[97] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[98] Exceptions at 47 (quoting Award at 35).
[99] Award at 32.
[100] *U.S. Dep't of Trans., FAA, Mike Moroney Aeronautical Ctr.*, 70 FLRA 256, 257-58 (2017).
[101] Exceptions at 32.
[102] *Chapter 24*, 50 FLRA at 332 (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[103] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[104] *Id.*
[105] 38 U.S.C. § 4311(a).
[106] *Id.* § 4303(2).

claim that it violated the statute by demonstrating that it would have taken the allegedly illegal action in the absence of the affected individual's uniformed-service membership.[107]

The Agency argues that "by only allowing PHS employees to bid on posts, schedules and leave . . . after other civil service employees, the Arbitrator's award is requiring the Agency to directly violate USERRA by causing it to deny those employees a 'benefit of employment' as defined by the statute."[108] However, the award found that PHS officers "are being denied this benefit on the basis of their non-bargaining[-]unit status, not on the basis of their status as members of the uniformed services."[109] As such, under these particular circumstances, the Agency has failed to demonstrate that the award is contrary to USERRA. Because the Agency provides no basis for finding the award contrary to USERRA, we deny this exception.[110]

Consequently, the Agency has failed to demonstrate that the Arbitrator erred in the portions of the award dealing with the commingling of PHS officers with bargaining-unit employees in any bidding process established by the parties' agreement. As such, this portion of the award still stands.

V. Decision

We deny, in part, and grant, in part, the Agency's exceptions. We vacate the award as far as it pertains to reserving assignments, days off, and shifts for PHS officers.

[107] *Id.* § 4311(c)(1).
[108] Exceptions at 33.
[109] Award at 40.
[110] *U.S. DOJ, Fed. BOP, Fed. Med. Ctr. Lexington, Ky.*, 69 FLRA 10, 15 (2015).

Member DuBester, dissenting:

Today, the majority overturns Authority precedent that addresses two distinct aspects of the collective-bargaining process. One is the subject of *EPA*,[1] which addresses the practicalities of collective-bargaining negotiations. The other is the subject of *FDIC*,[2] which addresses practical aspects of the administration and enforcement of collective agreements. The distinctions these cases recognize are both readily understood by experienced labor-management practitioners, and rooted in the Statute's principles and policies. The majority discards the precedent established by both cases. Accordingly, I dissent.

I. The Abrogation Test – Deference to the parties' choices in collective-bargaining negotiations

One of the fundamental statutory principles the majority casts aside is the special deference the Authority has afforded to choices the parties make in collective-bargaining negotiations. As the Authority in *EPA* recognized, deference to those choices is an essential feature of the process of negotiating collective-bargaining agreements. To ensure that those choices receive the deference they deserve, the Authority adopted the "abrogation" test, which the majority now, erroneously, overturns.

The abrogation test fits the Statute's structure and the realities of collective bargaining. The Authority adopted this test in *EPA*, returning to precedent established by the Authority years earlier in *Customs Service*.[3] As experienced labor-management practitioners also understand, the Authority, quoting *Customs Service*, recognized in *EPA* that there are "fundamental differences . . . between the process for negotiation of a collective[-]bargaining agreement[,] and the process for enforcement of the collective[-]bargaining agreement."[4] Consequently, "[t]he issue and determination of whether an arbitration award is deficient under [§] 7122(a)(1) [of the Statute] is fundamentally different from the issue and determination of the extent of the duty to bargain under [§] 7117 of the Statute."[5]

The abrogation test applies only *after* the parties have made their choices at the bargaining table. And the parties have a vast array of permissible choices, including permissible choices that affect management rights. Thus, the Statute unequivocally provides that an agency and a union may choose to include in their contract, provisions that limit management rights. As § 7106(a) specifies, § 7106(a)'s management rights are "[s]ubject to"

[1] *U.S. Envtl. Prot. Agency*, 65 FLRA 113 (2010) (*EPA*).

[2] *FDIC, Div. of Supervision and Consumer Prot., San Francisco Reg.*, 65 FLRA 102 (2010) (*FDIC*).

[3] *Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309 (1990) (*Customs Service*).

[4] *EPA*, 65 FLRA at 117 (quoting *Customs Service*, 37 FLRA at 314-15). The abrogation test has its roots deep in the Statute's language and underlying policies. The Statute's language clearly indicates that different tests should be applied to arbitrators' interpretation and enforcement of agreed-upon contract provisions, and to duty-to-bargain disputes. Under the Statute, whether a proposal at the bargaining table is outside the duty to bargain, and whether an agreed-upon contract provision is contrary to law, are distinct issues. Regarding the duty to bargain, § 7117(c)(1) of the Statute provides that an exclusive representative may file a negotiability appeal "if an agency involved in collective bargaining with [the] exclusive representative alleges that *the duty to bargain* . . . does not extend to any matter[.]" 5 U.S.C. § 7117(c)(1) (emphasis added). This contrasts with the part of the Statute that sets forth the process for challenging arbitrators' awards. That part of the Statute, § 7122(a), does not make the duty to bargain over a provision the issue on review of an arbitration award. Rather, under § 7122(a), the issue as pertinent here is whether the award, interpreting and applying agreed-upon contract provisions, is contrary to law.

[5] *EPA*, 65 FLRA at 117 (quoting *Customs Service*, 37 FLRA at 314-15). The Authority's adoption of the deferential abrogation test is also supported by the Statute's policies. As the Authority recognized in *EPA*, deference to the parties' bargaining choices "is consistent with the statutory 'policies of: (1) promoting collective bargaining and the negotiation of collective bargaining agreements; and (2) enabling parties to rely on the agreements that they reach, once they have reached them."' *EPA*, 65 FLRA at 118 (citation omitted). Implicit in the statutory purpose of promoting collective bargaining is the need to assure bargaining parties "stability and repose with respect to matters reduced to writing in the agreement." *Dep't of the Navy, Marine Corps Logistics Base, Albany, Ga. v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992). Deference to the parties' choices at the bargaining table furthers that goal by ensuring parties that the deals they strike will be honored, unless those deals are contrary to law.

contract provisions negotiated under § 7106(b).[6] Mirroring this, § 7106(b) specifies that "[n]othing in" § 7106, including § 7106(a), precludes parties from negotiating such provisions.[7] Reading these parts of § 7106 together, it is clear that Congress viewed the parties' freedom to negotiate limitations on management rights to be at least as important as the preservation of management rights.[8]

"Appropriate arrangements" are the most significant types of provisions authorized by § 7106(b). As the Authority has found, and the courts have reaffirmed, the appropriateness of an arrangement for bargaining under § 7106(b)(3) is determined by a balancing test. An arrangement is "appropriate" in the bargaining context – that is, it does not impermissibly affect management rights – when the arrangement's benefit to employees outweighs the arrangement's burden on management's exercise of its § 7106(a) rights.[9]

And as experienced labor-management practitioners also understand, balancing interests takes place primarily at the bargaining table. Consequently, after the parties have agreed on a contract provision, and the provision is being interpreted and enforced by an arbitrator, it is reasonable to conclude that the parties – in previously agreeing to the provision – have balanced the provision's benefits and burdens themselves. "In other words, employers and unions should determine, through the collective[-]bargaining process, what provisions best fit their working conditions and what arrangements are 'appropriate.'"[10] The Authority adopted the abrogation test to get the Authority out of the business, as part of the process of enforcing agreed-upon provisions, of *rebalancing* the parties' interests, and *substituting the Authority's judgment* for that of the parties at the bargaining table.[11]

The D.C. Circuit has rejected the abrogation test in agency-head-review circumstances under § 7114(c) of the Statute.[12] In that court's view, there should be only a single test for analyzing collective-bargaining-negotiation issues and for analyzing collective-agreement administration and enforcement issues. Respectfully, the court mistakenly ignores both the practical distinctions and the statutorily-based distinctions between those two aspects of collective-bargaining.

Especially instructive is the concurring opinion of former Chairman and Member Beck, an

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[6] 5 U.S.C. § 7106(a).

[7] *Id.* § 7106(b).

[8] Contrary to the majority's suggestion (Majority at nn.29 & 57), the Supreme Court's decision in *Department of the Treasury, IRS v. FLRA*, 494 U.S. 922 (1990) (*IRS*), does not even consider whether § 7106(a)'s management rights are, in the language of that section, "subject to" contract provisions negotiated under § 7106(b). Based on its mischaracterization of the breadth of *IRS'* holding, the majority claims that nothing in the entire Statute, including provisions negotiated under § 7106(b) and arbitrators' awards and remedies enforcing those provisions, may "interfere" with "the preeminent role of the management rights enumerated in § 7106(a)." Majority at n.29. But *IRS* is much narrower. Authored by Justice Scalia, *IRS* addressed only the negotiability of proposals negotiated solely under § 7121 of the Statute, dealing with grievance procedures. Quoting § 7106(a) with the bracketed omission of the section's prefatory "subject to subsection (b)" language, 494 U.S. at 926, Justice Scalia specifically did not include in *IRS* any consideration of whether § 7106(a)'s management rights are, in the language of that section, "subject to" contract provisions negotiated under § 7106(b).

However, while a judge on the D.C. Circuit, Justice Scalia did address this topic in his decision in *AFGE, AFL-CIO, Local* 2782 v. *FLRA*, 702 F.2d 1183 (D.C. Cir. 1983) (*AFGE, Local 2782*). In *AFGE, Local 2782*, then-Judge Scalia, speaking for the court, explained in detail the relationship between § 7106(a) and § 7106(b) – again, a subject that *IRS* does not address. Especially pertinent to the current discussion is the holding in Judge Scalia's opinion that contract provisions negotiated under § 7106(b) – specifically § 7106(b)(3), discussed in the text below – are "an *exception* to the otherwise governing management prerogative requirements of subsection (a)." *Id.* at 1187 (emphasis in original). As Judge Scalia's opinion expressed it somewhat differently, "negotiable provisions" under § 7106(b) "can contravene what would in other circumstances be management prerogatives." *Id.* at 1188. A contrary reading would, in Judge Scalia's opinion, "depriv[e] these provisions of all meaning." *Id.* at 1186.

Yet that appears to be precisely what the majority is intent on doing here; deprive § 7106(b)(3) of all meaning.

[9] *See NAGE, Local R14-87*, 21 FLRA 24, 31-32 (1986) (*NAGE*).

[10] *EPA*, 65 FLRA at 117-18.

[11] Even an agency head, conducting a review of a negotiated agreement under §7114(c) of the Statute, "is not given free reign to prune collective[-]bargaining agreements where local negotiators have come to legally viable arrangements." *Ass'n of Civilian Technicians, Montana Air Chapter, 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994). Why should the Authority have greater license to intervene and set aside bargains the parties have reached? And yet this is the effect of the majority's decision in this case.

[12] *U.S. Dep't of the Treasury, IRS, Office of the Chief Counsel, Wash., D.C. v. FLRA*, 739 F.3d 13 (D.C. Cir. 2014).

experienced labor-management practitioner, in *EPA*. While commending the *EPA* majority for removing the Authority from the bargaining table by abandoning the excessive-interference test for arbitrators' awards, Chairman Beck would have gone even further, asking why the Authority "should engage in *any* assessment of whether a contract provision that is being enforced by an arbitrator violates management rights."[13] Chairman Beck further explained: "The design of our Statute indicates that Congress intended for the evaluation of whether a given contract proposal impermissibly interferes with management rights to occur at the collective bargaining stage of the parties' labor relations – not at the much later stage where the proposal has been adopted by the parties as a binding contract provision and arbitration about that provision has occurred."[14]

Most significant is that in *EPA*, a unanimous Authority agreed with the important principle of deference to the parties' choices at the bargaining table. And, further, a unanimous Authority in *EPA* recognized that there is both a practical and a statutorily-based distinction between collective-bargaining negotiations and administering and enforcing collective agreements.

In this case, the majority, like the court, disregards the practical and statutorily-based distinction between collective-bargaining negotiations and arbitral enforcement of collectively-bargained agreements. In its place, the majority creates a test – which they label the "excessive-interference" test – bearing no relation to either the Statute's requirements, or the "excessive-interference" test developed in Authority and judicial precedent.[15] In fact, the majority's "excessive-interference" test is little more than a repackaging of the "direct-interference" test that the Authority once employed – decades ago – but which the Authority – with the urging of the courts – wisely abandoned.[16] Judicial reaction to the test was clear. The direct-interference test – examining the extent to which a contract provision's implementation would "directly interfere" with the agency's basic § 7106(a) rights – "drains the [S]tatute of all its meaning" when applied to "appropriate arrangement" issues.[17]

Moreover, the majority uses its new test, based simply on their own impressions of what is "excessive." Substituting their own judgment, the majority would disregard the agency's and the union's assessment at the bargaining table of benefits and burdens, and apply its new test to summarily invalidate contract provisions accurately interpreted and applied by an arbitrator.

II. Abrogation's corollary – Deference to arbitrators' broad remedial discretion in the administration and enforcement of collective agreements

In *FDIC*, the Authority reexamined the restrictions the Authority had placed on arbitrators' remedial powers in rendering awards that affect management rights under § 7106(a). In limiting those restrictions, the Authority decided to give arbitrators essentially the same scope of remedial authority in management-rights cases that arbitrators exercise in other cases.[18] And *FDIC*'s recognition of the broad discretion that should be accorded to arbitral remedies is in accord with longstanding

[13] *EPA*, 65 FLRA at 119 (Concurring Opinion of Member Beck).
[14] *Id.*
[15] *See* Majority at 9.
[16] *See NAGE*, 21 FLRA at 30.

[17] *AFGE, Local* 2782, 702 F.2d at1186. The majority points out – as an asserted defect of the abrogation test – that the Authority has not yet found that a contract provision, as interpreted and applied by an arbitrator, impermissibly affected a management right because the provision abrogated that right. Majority at 9 n.47 & 11. But if this observation proves anything at all, it is that agency negotiators are sufficiently aware of the agency's statutory management rights so as to not inadvertently agree to contract provisions that waive them. *NTEU*, 65 FLRA 509, 514-15 n.8 (2011). The lack, thus far, of decisions finding that agreed-upon provisions abrogate management rights simply reflects that negotiating parties know better than to agree to contract provisions that waive management rights; that is, that when parties enter into contract negotiations, they are, as the Statute anticipates, "prepared to discuss and negotiate on any condition[s] of employment." 5 U.S.C. § 7114(b)(2).

That does not mean, of course, that the Authority could never find that a provision abrogated a management right. A concurring Member would have done so. *See, e.g., U.S. Dep't of the Army, Army Signal Center, Fort Gordon, Ga.*, 58 FLRA 511, 514 (2003); *U.S. DOJ, Fed. BOP, Fed. Correctional Complex, Coleman, Fla.*, 58 FLRA 291, 296 (2003); *U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 117 (2002).
[18] *FDIC*, 65 FLRA at 106-07.

federal labor policy, including the Supreme Court's decisions in *The Steelworkers Trilogy*.[19]

One of the chief restrictions that *FDIC* eliminated was the requirement under prior precedent that, in rendering an award, arbitrators put themselves in the place of the agency and "reconstruct" what the agency would have done if it had not committed the contract violation found by the arbitrator. This "reconstruction" requirement was criticized by former-Member Wasserman, one of the original authors of the reconstruction standard.[20] Based on the Authority's experience with reconstruction, Member Wasserman later concluded that the reconstruction requirement was "bad law," was "not dictated by the Statute or [judicial precedent]," and "does not fit all cases."[21] In *FDIC*, the Authority, agreeing that the reconstruction requirement "is not required by the Statute and, indeed, unduly limits the appropriate remedial authority of arbitrators," eliminated it.[22]

Rejecting the traditional, widely-recognized deference to arbitrators' remedial determinations, the majority here is not content simply to require arbitrators to put themselves in the place of the agency and "reconstruct" what the agency would have done. According to the majority's truncated analysis, it is irrelevant that an arbitrator is awarding a remedy for a violation of a contract provision that the parties' negotiated under § 7106(b) as a limitation on management rights. Substituting its judgment for the parties' agreed-upon limitations on management rights negotiated at the bargaining table, the majority sets the parties' choices aside because the majority would not have made the same choices had it bargained the agreement. This renders arbitrators' remedial discretion to enforce the parties' bargaining-table choices irrelevant.

Contrary to the majority's views, the Authority said it best in *FDIC*. "[S]ubject to any specific limitations set forth in the pertinent contract and to the requirement that an award provide a remedy for a properly negotiated contract provision, an arbitrator enjoys broad discretion to remedy a meritorious grievance even if the remedy affects management rights under § 7106(a)."[23] After the parties have agreed on a contract provision that limits management rights, the issue for the Authority, reviewing an arbitrator's remedy enforcing that provision, is not whether the Authority should rebalance the interests the parties balanced when they agreed on the provision. The only issue is whether the arbitrator's remedy draws its essence from the parties' agreement.[24]

In sum, in *EPA* and *FDIC*, the Authority addresses two distinct aspects of the collective-bargaining process – collective-bargaining negotiations, and the administration and enforcement of collective agreements. In *EPA*, we give deference to the parties' choices at the bargaining table, a determination readily understood by experienced labor-management practitioners and rooted in the Statute's principles and policies. In *FDIC*, we recognize the longstanding deference given to arbitrators' remedial powers in cases involving awards affecting management rights, which is also rooted in the Statute and in longstanding practice.

The majority here has provided no reason for abandoning our commitment to the parties' choices in the negotiation of agreements, and to the broad discretion that should be accorded arbitrators in the administration and enforcement of agreements. Instead, the majority would substitute their own judgment, based on arbitrary standards, in both of these areas.

Accordingly, I dissent.

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[19] *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

[20] *See U.S. Dep't of the Treasury, BEP*, 53 FLRA 146, 154 (1997).

[21] *SSA, Boston Region (Region 1), Lowell Dist. Off., Lowell, Mass.*, 57 FLRA 264, 270, 272 (2001) (Dissenting Opinion of Member Wasserman).

[22] *FDIC*, 65 FLRA at 106.

[23] *Id.*

[24] *See EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck).