70 FLRA No. 102

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
EL PASO, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 1929
(Union)

0-AR-5187

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DECISION

April 30, 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

Arbitrator Vicki Peterson Cohen issued an award finding that the Customs and Border Protection (CBP) violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] and Article 3A of the parties' collective-bargaining agreement (Article 3A) – which requires bargaining only to the extent required by law – by failing to bargain over matters related to immigration inspections conducted by border patrol agents.

We take the opportunity in this case to address the plain-language distinction between conditions of employment and working conditions as those terms are used in our Statute. Specifically, the issuance of a memorandum which affects working conditions, but not conditions of employment, does not constitute a change over which CBP must bargain. Under the circumstances of this case, CBP had neither a statutory nor a contractual duty to bargain. Therefore, we set aside the award.

[1] 5 U.S.C. § 7116(a)(1), (5).

II. Background and Arbitrator's Award

The border patrol agents in this case work at border checkpoints in the El Paso, Texas sector. Their primary job is to inspect all vehicles trying to gain entry into the United States.[2] The checkpoint has lanes where vehicles enter, stop, and are then inspected. The entry lanes are the "primary" inspection area.[3] When a vehicle enters the checkpoint, one or two agents inspect the vehicle, scan the vehicle's license plate number, and inspect any identifying documents carried by the vehicle's occupants. The primary goal of this stop is to intercept "fraudulent documents," "imposter cars," and narcotics, among other contraband.[4] Put simply, the agents are the first line of defense to prevent unauthorized vehicles or persons from entering the United States illegally.

Agents working in the primary inspection area have discretion to refer any vehicle to a "secondary" inspection area if the inspecting agent determines that the vehicle or occupants require a more thorough inspection.[5] Secondary area inspections tend to take longer because they are more thorough and often require verification of license plate information and identifying documents which are run through various databases and watch lists. There may also be a more thorough inspection for narcotics. The primary and secondary inspection areas are located adjacent to each other or, in some cases, the secondary area will be off to the side and to the front of the primary inspection area.[6]

On any given day, agents are assigned to work one or both areas, but the duties they perform are essentially the same regardless of which area they are assigned.[7]

At some point in 2014, the division chief for the El Paso sector became aware that some of the "agents were failing very badly" at intercepting fraudulent and imposter vehicles and documents.[8] Around the same time, CBP received specific "intelligence indicating people were using imposter and fraudulent documents in order to gain entry into the U.S. at checkpoints."[9] To address these deficiencies, on October 29, 2014, the division chief sent the memorandum at issue in this case (the inspection memo) to "make[] the agents more effective at intercepting fraudulent and imposter

[2] Award at 11; Exceptions, Ex. 9, Tab 8 at 1.
[3] Exceptions, Ex. 9, Tab 4 at 4.
[4] Award at 11.
[5] *Id.* at 8, 12.
[6] *See* Exceptions, Ex. 9, Tab 4 at 4; Exceptions, Ex. 9, Tab 13 at 1-11.
[7] Award at 8-9.
[8] *Id.* at 11.
[9] *Id.*

immigration documents."[10] In effect, the memorandum simply directed which vehicles and under what circumstances vehicles would be referred to a secondary inspection area.[11]

Communicating supervisory instructions in this manner was not a new practice for CBP and its employees. Between 2003 and 2014, CBP routinely issued similar instructions, guidelines, and directives to clarify how the checkpoint inspections should be conducted and prioritized.[12]

In response to the inspection memo, the Union filed a grievance alleging that CBP violated the Statute and Article 3A by unilaterally changing a condition of employment related to immigration inspections. CBP denied the grievance, and the parties submitted the matter to arbitration.

The Arbitrator framed the issue as: Did CBP violate the Statute or Article 3A "when it implemented the [inspection memo]?"[13] Article 3A requires CBP to provide the Union with notice of, and an opportunity to bargain over, proposed "changes . . . to existing rules, regulations[,] and . . . practices."[14] It also states that "[n]othing in this article shall require either party to negotiate on any matter [that] it is *not obligated to negotiate under applicable law*."[15]

Before the Arbitrator, the parties disputed whether the inspection memo constituted a change in the agents' conditions of employment. CBP argued that it did not have a duty to bargain because the memo "did not require the agents to do something that was not previously required of them."[16]

The Arbitrator agreed with the Union and found that the inspection memo constituted a change. Specifically, she noted that the memo – by requiring agents to refer certain vehicles to the secondary inspection area – resulted in "fewer [primary-area] inspections" and "increase[d]" duties in the secondary area.[17] According to the Arbitrator, after CBP issued the inspection memo, agents in the secondary inspection area had to "direct[] additional traffic[] and . . . input[] more data."[18] After determining that those "change[s]" had more than a de minimis effect,[19] the Arbitrator concluded that CBP violated § 7116(a)(1) and (5) of the Statute and Article 3A by failing to give the Union notice and an opportunity to bargain over the inspection memo.

As a remedy, the Arbitrator directed CBP to return to the status quo ante "until the parties have bargained over the implementation and impact of the changes in conditions of employment proposed under the [inspection memo]."[20]

CBP filed exceptions to the award.[21]

III. Analysis and Conclusion: The Arbitrator erred in finding that CBP had a duty to bargain over the inspection memo.

CBP asserts that the Arbitrator erred in concluding that the inspection memo constituted a change in the agents' conditions of employment.[22] Because this exception challenges the award's consistency with law, we review the award de novo.[23]

An unfair labor practice charge, which alleges a violation of § 7116 of the Statute, may be raised either as a grievance or under Statutory procedures. Here, the Union alleged both a statutory and a contractual violation.

Our Statute requires that an agency must provide notice, and an opportunity to bargain, before it may change "conditions of employment."[24] "Conditions of employment" are defined, in § 7103(a)(14), as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, *affecting working conditions*."[25] Through a convoluted evolution, however, the Authority came to the erroneous conclusion that "there is no substantive difference between [the terms] 'conditions of employment' and 'working conditions.'"[26]

[10] *Id.*
[11] *Id.* at 2, 11-12, 24-25.
[12] *See* Exceptions, Ex. 8, Tabs 3-6; Exceptions, Ex. 9, Tabs 1, 4, 6, 8.
[13] Award at 3.
[14] Exceptions, Ex. 8, Tab 10, Collective-Bargaining Agreement (CBA) at 4.
[15] *Id.* (emphasis added).
[16] Exceptions, Ex. 4, CBP's Post-Hr'g Br. at 8.
[17] Award at 37.
[18] *Id.*
[19] *Id.* at 36.
[20] *Id.* at 39.
[21] After filing one set of exceptions, but before the deadline for filing exceptions had passed, CBP refiled its exceptions with some minor corrections. However, instead of refiling its exhibits, CBP asked the Authority to consider the exhibits that it had attached to its original exceptions. Because CBP timely filed both the original and the refiled exceptions, the Authority will consider the refiled exceptions *and* the exhibits attached to the original exceptions.
[22] Exceptions Br. at 9-10.
[23] *U.S. DHS, U.S. CBP*, 65 FLRA 870, 872 (2011).
[24] *E.g., U.S. DHS, U.S. Citizenship & Immigration Servs.*, 69 FLRA 512, 515 (2016).
[25] 5 U.S.C. § 7103(a)(14) (emphasis added).
[26] *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 90 (2009) (*Davis-Monthan*).

That notion, however, defies both judicial and commonsense rules of definition and is "support[ed] [by nothing more] than the Authority's own repetition of it."[27] It is imperative, therefore, that we take this opportunity to clarify that there is a distinction between those terms.

It is a basic canon of statutory interpretation that "Congress acts intentionally" when it "inclu[des] or exclu[des]" particular words in a statute.[28] Congress defined the term "***conditions of employment***" in § 7103(a)(14) as those "personnel policies, practices, and matters" which "affect[] ***working conditions***."[29] Under accepted rules of statutory interpretation, two different terms used in the same context cannot mean the same thing and therefore must mean something different. In the context of our Statute, the distinction between these two terms lies at the very foundation of differentiating between purported changes that are, and are not, subject to a duty to bargain.

To assert that the terms "conditions of employment" and "working conditions" mean the same thing[30] is to engage in a type of circular reasoning that has been criticized by the United States Supreme Court.[31] It is little different than trying to define a *rock* as a *rock-like object* or a *cellular phone* as a *phone that is cellular*. It means nothing.

It is obvious to us that Congress acted intentionally in § 7103(a)(14) when it used the one to help define the other.[32] It is therefore imperative that we respect that distinction and define the differences for the labor-management relations community.

The terms are related, but they are not synonymous.[33] On this point, the U.S. Supreme Court explained that while the term "conditions of employment" is susceptible to multiple interpretations, the term "working conditions," as used in § 7103(a)(14), "more naturally refers . . . *only* to the 'circumstances' or 'state of affairs' attendant to one's *performance* of a job."[34] In acknowledging the distinction between those terms, the Court cited with approval the U.S. Court of Appeals for the District of Columbia Circuit, which had earlier held that "working conditions" are "the day-to-day circumstances under which an employee *performs his or her job*."[35]

The Arbitrator determined that the memo constituted a "change" because it resulted in "fewer [primary-area] inspections" and "increase[d]" the duties of the agents assigned to the secondary inspection area.[36] We disagree for the following reasons.

First, the Authority has previously held that mere increases or decreases in normal duties do not constitute changes over which an agency must bargain.[37]

Second, the memorandum did not change the *nature of* or the *type of* duties the officers performed. In effect, the memorandum conveyed instructions from the division chief to his agents detailing how they were to perform inspections when it came to referring vehicles from the primary to secondary lane for additional scrutiny. Supervisors have the responsibility, and must have the prerogative, to direct, redirect, and even adjust how employees perform their jobs.[38] A supervisor does not have to negotiate with the union every time she adjusts or alters how employees will perform their duties.

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[27] *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 80 (2014) (*GSA*) (Dissenting Opinion of Member Pizzella).

[28] *E.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

[29] 5 U.S.C. § 7103(a)(14) (emphasis added).

[30] *See GSA*, 68 FLRA at 77 (there is "no substantive difference between 'conditions of employment' and 'working conditions' as those terms are practically applied" (citation omitted)); *Davis-Monthan*, 64 FLRA at 90 (same); *see also NTEU*, 66 FLRA 577, 580 (2012) (stating that an agency cannot change a condition of employment unless it makes a change "to a policy, practice, or procedure affecting conditions of employment").

[31] *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 444 (2003) (noting that a "completely circular [definition] explains nothing" (citation omitted)).

[32] *See United States v. Williams*, 340 F.3d 1231, 1236 (11th Cir. 2003) ("[A] deliberate variation in terminology within the same sentence of a statute suggests that Congress did not interpret the two terms as being equivalent.").

[33] *See U.S. Dep't of VA, Med. Ctr., Sheridan, Wyo.*, 59 FLRA 93, 95 (2003) (*Sheridan*) (Concurring Opinion of Chairman Cabaniss); *U.S. DOL, Occupational Safety & Health Admin., Region 1, Bos., Mass.*, 58 FLRA 213, 216 (2002) (Concurring Opinion of Chairman Cabaniss).

[34] *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 645 (1990) (emphasis added) (citing *DOD Dependents Sch. v. FLRA*, 863 F.2d 988, 990 (D.C. Cir. 1988) (*DOD*)).

[35] *Id.* at 645-46 (emphasis added) (citing *DOD*, 863 F.2d at 990).

[36] Award at 37.

[37] *See NTEU*, 66 FLRA 577, 579-80 (2012) (finding that an increased workload did not constitute a bargainable change), *pet. for review denied sub nom. NTEU v. FLRA*, 745 F.3d 1219 (D.C. Cir. 2014); *U.S. DHS, Border & Transp. Sec. Directorate, U.S. CBP, Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169, 173-74 (2004) (*CBP*) (noting that "even if" an increase in duties was attributable to the agency, it did not constitute a "change" "based on [Authority] precedent"); *see also Sheridan*, 59 FLRA at 94-95.

[38] *See* 5 U.S.C. § 7106(a)(2)(A), (B) (management has the right to "direct . . . employees," "assign work," and "determine the personnel by which agency operations shall be conducted").

Third, the directions contained in the memorandum did not change anything and they did not impact a condition of employment. Both before and after the memorandum, the agents continued to perform vehicular inspections at either the primary or secondary inspection areas using the same techniques.[39]

In sum, the Statute did not require CBP to bargain in these circumstances.

The Arbitrator also found that CBP violated Article 3A.[40] But Article 3A expressly states that the parties are not required to bargain over any matter that they are "not obligated to negotiate under applicable law."[41] Because we have determined that the Statute does not require CBP to bargain with the Union under these circumstances, CBP also was not obligated to bargain under Article 3A. Accordingly, the Arbitrator's finding of a contractual violation also cannot stand.[42]

IV. Decision

We grant CBP's exceptions and set aside the award.

Member DuBester, dissenting:

Contrary to the majority, I would uphold the Arbitrator's findings and conclude that based on its changes to conditions of employment, Customs and Border Protection (CBP) had an obligation to bargain over the new mandatory security inspections policy articulated by the memorandum. I would also uphold the Arbitrator's finding that CBP violated the parties' agreement by failing to "notify and discuss"[1] the new policy with the Union, and the Arbitrator's status quo ante remedy. Accordingly, I dissent.

CBP disseminated a memorandum addressing inspections of multi-occupant vehicles. In the memorandum, CBP directed certain grievants to send certain multi-occupant vehicles to a secondary inspections area staffed by other grievants. CBP asserts that the memorandum did not change conditions of employment because the mandatory inspections policy "only varied existing assignment practices."[2]

Rejecting CBP's assertion, the Arbitrator finds that implementation of the memorandum did change conditions of employment.[3] Specifically, the Arbitrator finds that CBP had an existing practice where certain affected grievants had discretion to determine which vehicles to direct to the secondary inspections area.[4] Based on this factual determination, the Arbitrator concludes that the memorandum established a *new* policy requiring the grievants to "automatically refer[] [certain vehicles] to the secondary [inspections] area,"[5] and this "imposed a significant change in the inspection[s] procedure" for certain multi-occupant vehicles.[6] The Arbitrator further finds that practices involving grievants assigned to both the primary and secondary inspections area "have changed":[7] those assigned to the primary inspections area no longer inspect certain occupants, and those assigned to the secondary inspections area are performing new duties.[8] Consistent with these factual findings – to which the Authority defers[9] – the Arbitrator properly finds that CBP had a duty to bargain over the memorandum, and imposes status quo ante relief.

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[39] *See* Exceptions, Ex. 8, Tab 8 at 517 (in the secondary inspection area, an agent may take "all of the enforcement actions he could have taken [in] the primacy inspection area"); Award at 32 (finding that "agent[s] can continue to refer vehicles to the secondary inspection area").
[40] Award at 35.
[41] CBA at 4.
[42] *See U.S. Dep't of the Treasury, U.S. Customs Serv., Port of N.Y. & Newark*, 57 FLRA 718, 722 (2002).

[1] Award at 35.
[2] Exceptions Br. at 9.
[3] Award at 31-32.
[4] *Id.* at 31.
[5] *Id.* at 32.
[6] *Id.* at 36.
[7] *Id.* at 35.
[8] *Id.* at 32.
[9] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

Contrary to the Arbitrator's findings, the majority concludes that CBP did not change conditions of employment.[10] And overturning established Authority precedent, the majority finds that "conditions of employment" are different than "working conditions."[11] The majority apparently reasons that although the actions the Agency took changed "working conditions," those actions did not change "conditions of employment."[12]

The majority's finding that "conditions of employment" and "working conditions" are distinguishable for purposes of finding a bargaining obligation "cannot withstand scrutiny."[13] As the Authority explained, at length, in *GSA, Eastern Distribution Center, Burlington, N.J.* (*GSA*), this claimed distinction is inconsistent with the Statute's legislative history, as well as Authority and judicial precedent.[14] In *GSA*, the Authority found that a broad reading of "conditions of employment" comports with the Statute's design and its legislative history.[15]

Contrary to the majority's claim, there are no "accepted rules of statutory interpretation" supporting the majority's determinations[16] that a statutory term cannot be defined by a synonymous term.[17] It follows that nothing about the Authority's long-standing ruling that the Statute defines "conditions of employment"[18] by a term that is substantially the same – "working conditions" – is contrary to "commonsense."[19] The D.C. Circuit agrees: "*We think this conclusion is reasonable*, given that both courts and the Authority have accorded [working conditions] a broad interpretation that encapsulates a wide range of subjects that is *effectively synonymous* with conditions of employment."[20]

Courts repeatedly recognize that Congress periodically promulgates laws containing redundancies.[21] But this is never an invitation to a court, or administrative

[10] Majority at 5. The majority disregards the Arbitrator's factual findings. The majority erroneously concludes "mere increases or decreases in normal duties do not constitute changes" requiring CBP to bargain. *Id.* This case does not involve "increases or decreases in normal duties" – rather, it involves an Agency-established *new* policy and *new* duties. For these reasons, the cases that the majority relies on, Majority at 5, are inapplicable. *NTEU*, 66 FLRA 577, 579-80 (2012) (holding that increased workload of *same* duties do not constitute changes in conditions of employment), *pet. for review denied sub nom. NTEU v. FLRA*, 745 F.3d 1219 (D.C. Cir. 2014); *U.S. DHS, Border & Transp. Sec. Directorate, U.S. CBP, Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169, 173-74 (2004) (holding that applying *existing* personnel policies did not constitute changes in conditions of employment); *U.S. Dep't of VA, Med. Ctr., Sheridan, Wyo.*, 59 FLRA 93, 94-95 (2003) (holding that increased workload of *same* duties do not constitute changes in conditions of employment).

The majority also mistakenly concludes that the memorandum did not change the *nature of* or *type of* duties that the agents performed. Majority at 6. But changing "the nature of or type of duties" is not the legal standard for determining whether an agency has a duty to bargain over conditions of employment. Nor has CBP, in its exceptions, raised that the award affects management's rights under the Statute.

[11] Majority at 4-6.

[12] *Id.*

[13] *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 75 (2014) (*GSA*).

[14] *Id.* at 75-77.

[15] *Id.*

[16] Majority at 4.

[17] Contradictory examples – particularly in labor and employment statutes – are legion. *See, e.g.*, *Bilski v. Kappos*, 561 U.S. 593, 622 (2010) (*Bilski*) (circularity of term "process" as a "process, art or method [that] includes a new use of a known process, machine, manufacture, composition of matter, or material" under Patent Act, 35 U.S.C. § 100(b), does not render term invalid or distinct from its definition); *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (*Nationwide Mutual Ins. Co.*) (term "employee" defined as "any individual employed by an employer" under Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(6)); *see also, Marie v. Am. Red Cross*, 771 F.3d 344, 352 (6th Cir. 2014) (term "employee" defined as "an individual employed by an employer" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (2012)); *Coleman v. New Orleans & Baton Rouge S.S. Pilots' Ass'n*, 437 F.3d 471, 479 (5th Cir. 2006) (term "employer" defined as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" under Age Discrimination in Employment Act, 29 U.S.C. § 630(b)); *Slingluff v. Occupational Safety & Health Rev. Comm'n*, 425 F.3d 861, 867 (10th Cir. 2005) (term "employee" defined as "an employee of an employer who is employed in a business of his employer which affects commerce" under Occupational Safety and Health Act, 29 U.S.C. § 652(6); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1538-39 (2d Cir. 1996) (term "employee" defined as "an individual employed by any employer" under 29 U.S.C. § 630(f)); *McCarthy v. The Bark Peking*, 716 F.2d 130, 134 (2d Cir. 1983) (term "vessel" defined as "any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment" under Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950).

[18] *See* 5 U.S.C. § 7103(a)(14).

[19] *See* Majority at 4.

[20] *U.S. DHS, CBP v. FLRA*, 647 F.3d 359, 365 (D.C. Cir. 2011) (internal quotations omitted). Contrary to the majority, Majority at 5 n.34-35, neither the Supreme Court in *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 645 (1990) (*Fort Stewart*), nor the D.C. Circuit in *DOD, Dependents Sch. v. FLRA*, 863 F.2d 988, 990 (D.C. Cir. 1988) held otherwise.

[21] *See* cases cited *supra*, n.4.

agency, to impose distinct meanings.[22] The proper exercise of the Authority's discretion in response to ambiguities or redundancies is to focus on the Statute; that is, on the "particular statutory language at issue, as well as the language and design of the statute as a whole."[23] The Authority did just that in *GSA*.

In *GSA*, the Authority found that a broad reading of "conditions of employment" comports with the Statute's design and its legislative history.[24] There, the Authority's discussion recognizes, unlike the majority here, that the Statute[25] is a "Labor-Management Relations Statute."[26] One of the Statute's central tenets is Congress finding that "collective bargaining in the civil service [is] in the public interest."[27] And, as the Authority found in *GSA*, although Congress could have endorsed a distinction between the terms "working conditions" and "conditions of employment," it did not.[28] The Authority found that Congress replaced the term "working conditions" from Executive Order 11,491 with the term "conditions of employment" to signify an expansion of bargaining beyond the limited term "working conditions."[29] Congress did not make the change to establish a limited, bargainable subset of "working conditions."

Here, the majority reverses *GSA* by finding a distinction where none exists. As the majority acknowledges,[30] how the Authority interprets § 7103(a)(4)(14) is central to determining whether a change is "subject to [the] duty to bargain."[31] The majority fails to identify any textual, judicial, or logical basis for finding it "imperative"[32] to reverse existing precedent. The only "commonsense" conclusion that remains is that the majority's sole imperative here is to limit the scope of bargaining. By doing so, the majority unjustifiably hobbles the statutory duty to bargain.

Applying the Authority's longstanding construction of "conditions of employment," which is synonymous with "working conditions," I would defer to the Arbitrator's findings that CBP changed conditions of employment when it established the new mandatory security inspections policy, and that the Agency was required to bargain with the Union under the Statute.

Finally, I would uphold the Arbitrator's finding that the Agency violated Article 3A of the parties' agreement.[33] The majority's decision to set aside the Arbitrator's finding that the Agency violated Article 3A[34] misinterprets the award and ignores the relevant language in Article 3A.

The majority misinterprets the award as enforcing a contractual duty to bargain under Article 3A.[35] The majority sets the award's contract-violation finding aside because of Article 3A's language providing that the parties are not required to bargain over any matter that they are "not obligated to negotiate under applicable law."[36] The majority finds that because the Agency had no duty to bargain under the Statute, the Agency had no duty to bargain under Article 3A.

Contrary to the majority's interpretation, the Arbitrator did not find that the Agency violated Article 3A by failing to bargain. Rather, the Arbitrator found that the Agency violated Article 3A by failing to "*notify and discuss* the [Agency's new mandatory security inspections policy] with the Union prior to its implementation."[37] This finding is consistent with Article 3A's language requiring the Agency to "present the changes it wishes to make to . . . existing practices to the Union," and allowing "[t]he Union [to] present its views and concerns."[38] These Article 3A provisions are also distinct from Article 3A's provisions concerning the Agency's duty to bargain. And the majority does not find that the Arbitrator's contract-violation finding fails to draw its essence from the parties' agreement.

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[22] The majority's purported reason for departing from precedent, Majority at 1, – that they are simply relying on "plain meaning"– is false. It is apparent that there is not a clear, unambiguous distinction between "working conditions" and "conditions of employment." *GSA*, 68 FLRA at 76.

[23] *Fort Stewart*, 495 U.S. at 644-45; *cf. Bilski*, 561 U.S. at 622, 626 (finding meaning of "process" "circular," the Court found it "necessary" to "review the history of our patent law in some detail"); *Nationwide Mutual Ins. Co.*, 503 U.S. at 322-23 (focusing on common law as touchstone for defining "employer").

[24] *GSA*, 68 FLRA at 76.

[25] 5 U.S.C. §§ 7101-7135.

[26] Titled the "Federal Service Labor-Management Relations Statute"; *GSA*, 68 FLRA at 76.

[27] 5 U.S.C. § 7101(a).

[28] *GSA*, 68 FLRA at 76.

[29] *Id.* (citing 124 Cong. Rec. 38,715 (1978)).

[30] Majority at 4.

[31] *Id.* Parties have also relied on this longstanding interpretation of the Statute in drafting their collective bargaining agreements. The majority should not impose its newly created definition retroactively.

[32] *Id.*

[33] Award at 35.

[34] *Id.*

[35] Majority at 6.

[36] Exceptions, Ex. 8, Tab 10, Collective-Bargaining Agreement (CBA) at 4.

[37] Award at 35 (emphasis added).

[38] CBA at 4.

Thus, because the Arbitrator did not enforce a contractual duty to bargain under Article 3A, the majority's rationale for setting aside the Arbitrators finding of an Article 3A violation is incorrect. Consequently, the Arbitrator's contract-violation finding stands separately and independently of the Arbitrator's statutory-bargaining-violation finding.

Accordingly, I dissent.