70 FLRA No. 120

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
LOMPOC, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3048
COUNCIL OF PRISON LOCALS
(Union)

0-AR-5306

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DECISION

May 23, 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 July 15, 2017, Arbitrator George E. Larney issued an award finding that the Agency violated the parties' collective-bargaining agreement by leaving cook-supervisor shifts vacant or assigning those shifts to non-bargaining-unit employees, rather than assigning the shifts to bargaining-unit employees (the grievants) on an overtime basis. As remedies, the Arbitrator ordered the Agency to: stop vacating shifts for the purpose of avoiding paying the grievants overtime; reinstate the established procedure used to fill vacated shifts; and pay the grievants for lost overtime opportunities.

The main question before us is whether the Arbitrator's determination that the Agency could not assign cook-supervisor shifts to non-unit employees or leave the shifts vacant based on "economic reasons" is contrary to management's right to assign work under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (Statute).[1] Applying the standard articulated in *U.S. DOJ, Federal BOP* (*DOJ*),[2] we find that the award excessively interferes with that right, and we vacate the award.

II. Background and Arbitrator's Award

The Agency assigns correctional officers to cook-supervisor posts on various shifts. For years, when officers were unavailable to work their scheduled shifts, the Agency had assigned other bargaining-unit employees to fill those shifts on an overtime basis. In January 2016, the Agency began, for economic reasons, to either leave those shifts vacant or assign them to non-unit employees. In response, the Union filed grievances alleging that the Agency violated Articles 18, 27, and 36 of the parties' agreement by failing to assign vacant shifts to the grievants on an overtime basis.

Article 18 of the agreement provides, as relevant here, that "when [the Agency] determines that it is necessary to pay overtime for positions/assignments normally filled by bargaining[-]unit employees, qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be distributed and rotated equitably among bargaining[-]unit employees."[3] Article 27 requires, in pertinent part, that the Agency reduce hazards to its employees "to the lowest possible level, without relinquishing its rights under . . . [§] 7106" of the Statute.[4] In addition, Article 36 provides, as relevant here, that the parties "endorse the philosophy that people are the most valuable resource of the [Agency]."[5] And the Arbitrator found that, in Article 36, the parties pledged to "make every reasonable consideration to fulfill the mission of the [Agency] . . . in a manner that fosters good communication among all staff[,] emphasizing concern and sensitivity in working relationships."[6]

The parties consolidated the grievances and submitted them to arbitration. As relevant here, the stipulated issues at arbitration were whether, since January 2016, the Agency violated: (1) Article 27 of the parties' agreement by vacating cook-supervisor shifts; and (2) Article 18 of the agreement "and/or the established past practice . . . with respect to overtime procedures and the assignment of work."[7]

The Arbitrator found that the Agency violated Articles 18 and 36 by leaving cook-supervisor shifts vacant or assigning them to non-unit employees "for the sole purpose of avoiding paying [the grievants]

[1] 5 U.S.C. § 7106(a)(2)(B).

[2] 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting).
[3] Award at 11.
[4] *Id.* at 12.
[5] *Id.* at 70.
[6] *Id.*
[7] *Id.* at 8.

overtime."[8] The Arbitrator further found that the Agency violated Article 27 because its actions "failed to lower the inherent hazards of the correctional environment for [the grievants]."[9] Additionally, the Arbitrator rejected the Agency's argument that sustaining the Union's grievance would be contrary to the Agency's rights, under § 7106 of the Statute, to assign work and to determine the Agency's budget and internal-security practices. As remedies, the Arbitrator directed the Agency to stop vacating shifts for "economic reasons" and reinstate the procedure that the Agency had used to fill vacated shifts before January 2016.[10] In addition, the Arbitrator found the Agency liable under the Back Pay Act[11] to pay the grievants for lost overtime opportunities.

On August 21, 2017, the Agency filed exceptions to the Arbitrator's award, and on September 12, 2017, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The award violates management's right to assign work under § 7106(a)(2)(B) of the Statute.

The Agency argues that the award violates its management right to assign work under § 7106(a)(2)(B) of the Statute because the award precludes the Agency from: (1) assigning non-unit employees to cook-supervisor shifts or leaving the shifts vacant, and (2) determining when to assign overtime.[12] 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.[13] The right to assign work also includes the right *not* to assign work.[14] In addition, management's right to assign work includes the right to assign overtime and determine when employees will perform overtime.[15]

The Authority recently revised the analysis that it will apply when reviewing management-rights exceptions to arbitration awards.[16] Under the revised analysis articulated in *DOJ*, the first question that must be answered is whether the arbitrator has found a violation of a contract provision.[17] If the answer to that question is yes, then the second question is whether the arbitrator's remedy reasonably and proportionally relates to that contract violation.[18] If the answer to either of those questions is no, then we must vacate the award. But, if the answer to the second question is yes, then the final question is whether the arbitrator's interpretation of the contract provision excessively interferes with a management right under § 7106(a).[19] If the answer to that question is yes, then the arbitrator's award is contrary to law and we must vacate the award.[20]

Here, the answer to the first question is yes because the Arbitrator found that the Agency violated contract provisions including Article 18, which outlines procedures for assigning correctional officers to overtime work.[21]

As to the second question, the Arbitrator ordered the Agency to: stop vacating shifts for the purpose of avoiding paying the grievants overtime; reinstate the established procedure used to fill vacated shifts; and pay the grievants for lost overtime opportunities.[22] The awarded remedy, which requires the Agency to follow previously established procedures and Article 18 when assigning overtime work, reasonably and proportionally relates to the contractual violation. Therefore, the answer to the second question is yes.

Finally, we consider whether the Arbitrator's remedy or his interpretation of Article 18 excessively interferes with a management right under § 7106. The Authority has found that arbitration awards that require agencies to use overtime to avoid vacating shifts excessively interfered with management's right to assign work.[23] In addition, the Authority has found that arbitration awards excessively interfered with management's right to assign work where the awards precluded the Agency from vacating shifts: except in "emergency situations or for other good cause,"[24] or for "administrative convenience and without good reason."[25] The awarded remedy here requires the Agency to assign

[8] *Id.* at 66; *see also id.* at 71.
[9] *Id.* at 71.
[10] *Id.* at 73.
[11] 5 U.S.C. § 5596.
[12] Exceptions Br. at 25, 28.
[13] *See, e.g.*, *SSA*, 70 FLRA 227, 228 (2017); *U.S. Dep't of Commerce, Patent & Trademark Office*, 65 FLRA 13, 15 (2010).
[14] *See NLRB, Wash., D.C.*, 61 FLRA 154, 161 (2005) (citing *NAGE, Local R12-33*, 40 FLRA 479, 486 (1991)).
[15] *See, e.g., AFGE, Council 215*, 60 FLRA 461, 464 (2004) (citing *AFGE, Local 1302, Council of Prison Locals C-33*, 55 FLRA 1078, 1079 (1999); *SSA, S.E. Program Serv. Ctr., Birmingham, Ala.*, 55 FLRA 320, 321 (1999)).
[16] *DOJ*, 70 FLRA at 405-06.
[17] *Id.* at 405.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 405-06.
[21] Award at 73.
[22] *Id.*
[23] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Fed. Satellite Low, La Tuna, Tex.*, 59 FLRA 374, 377 (2003); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 58 FLRA 279, 283-84 (2003) (*Sheridan*) (Chairman Cabaniss concurring and Member Pope dissenting).
[24] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Lompoc, Cal.*, 58 FLRA 301, 303 (2003).
[25] *Sheridan*, 58 FLRA at 279, 283-84.

vacant cook-supervisor shifts to the grievants on an overtime basis and precludes the Agency from – for economic reasons – either assigning those shifts to non-unit employees or leaving the shifts vacant.[26] Therefore, we find that the remedy excessively interferes with the Agency's right to assign work under § 7106(a)(2)(B).[27] As such, the answer to the final question in the *DOJ* framework is yes, and we vacate the award. Consequently, we do not need to address the Agency's remaining arguments.[28]

IV. Decision

We vacate the award.

Member DuBester, dissenting:

For reasons expressed in the recent *U.S. DOJ, Federal BOP* (*DOJ*) decision,[1] I believe that the abrogation test is the appropriate test to determine whether the Arbitrator's award is contrary to law for impermissibly encroaching on a management right.[2] Failing to apply the abrogation test, the majority "disregard[s] the [parties'] assessment at the bargaining table of [the] benefits and burdens, and appl[ies] its new [excessive-interference] test to summarily invalidate contract provisions accurately interpreted and applied by an arbitrator."[3] In doing do, the majority "substitute[s] their own judgment, based on arbitrary standards" in determining that the award "excessively interferes" with management's right to assign work.[4]

Multiple challenges to an arbitrator's interpretation of Article 27, one of the contract provisions at issue here, have come before the Authority. Based on arbitrators' interpretations of Article 27, the Authority has found that an award did not abrogate management's rights to assign work where the agency is not precluded from leaving posts vacant.[5] And, the Authority has also found, most recently in *BOP, Big Spring*,[6] that this provision impermissibly affected the agency's management rights where it was interpreted and applied to effectively preclude the agency from leaving posts vacant.[7] This case is distinguishable from *BOP, Big Spring*.

Applying the abrogation test, I would find that the award is not deficient because it does not impermissibly affect management's right to assign work. Unlike *BOP, Big Spring*, the award here does not

[26] We note that this case highlights a systemic problem in many arbitral awards wherein arbitrators do not seem to recognize that Congress mandated that the negotiated grievance procedures established by our Statute are to "be interpreted in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. § 7101(b). For far too long arbitrators have felt free to ignore arguments that are based on economic realities and considerations. *See U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr.*, 69 FLRA 599, 599-600 (2016) (Member Pizzella dissenting); *U.S. Dep't of the Treasury, IRS*, 68 FLRA 1027, 1033 (2015) (Member Pizzella dissenting). In laymen's terms one might say that there is a misperception that economic concerns are irrelevant when the process and remedy is paid for by the Federal government. *See AFGE, Local 12*, 68 FLRA 1061, 1071-72 (2015) (Dissenting Opinion of Member Pizzella) (would have found proposal for transit benefits nonnegotiable based on evidence of significant cost increases to agency); *U.S. Dep't of HHS, Nat'l Inst. of Envtl. Health Sci.*, 68 FLRA 1049, 1054-55 (2015) (Dissenting Opinion of Member Pizzella) (criticizing award requiring payment of monetary awards during sequestration). *See generally AFGE, Local 1815*, 69 FLRA 621, 624-25 (2016) (Concurring Opinion of Member Pizzella) (noting costs incurred identifying and litigating leave abuse).

[27] Our dissenting colleague's discussion of the excessive-interference test that the Authority applies, in the negotiability context, to determine whether a union proposal is an appropriate arrangement under § 7106(b)(3) of the Statute is an excellent demonstration of what the new management-rights test does *not* include. As we discussed in *DOJ*, in the context of reviewing management-rights challenges to arbitration awards, it does not matter whether a contract provision was negotiated under § 7106(b) of the Statute. *See* 70 FLRA at 405. Therefore, this new excessive-interference test in the arbitration context is not a cookie-cutter version of the "balancing" excessive-interference test that the Authority applies to resolve § 7106(b)(3) claims in the negotiability context. Instead, the new test is a review of the measure of the impact of the arbitration award or remedy on the management rights that Congress provided in § 7106(a).

[28] *See* Exceptions Br. at 9 (arguing that the award fails to draw its essence from the parties' agreement), 21 (arguing that the Agency's overtime decisions are covered by Article 18 of the parties' agreement), 26 (arguing that award violates management's right under § 7106(a)(1) of the Statute to determine its internal security practices), 31 (arguing that the award is contrary to the Back Pay Act), 32 (arguing that the arbitrator exceeded his authority).

[1] 70 FLRA 398, 409-12 (2018) (Dissenting Opinion of Member DuBester).

[2] *See U.S. EPA*, 65 FLRA 113 (2010) (*EPA*).

[3] *DOJ*, 70 FLRA at 411.

[4] *Id.* at 412.

[5] *See U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atlanta, Ga.*, 57 FLRA 406, 410-11 (2001) (*BOP, Atlanta*) (the Authority did not find abrogation because agency permitted to leave post vacant for "good reason" or if post does not contribute to safety); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 57 FLRA 331, 334 (2001) (*BOP, Guaynabo*) (the Authority did not find abrogation because agency permitted to leave post vacant for emergency situations).

[6] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 445 (2018) (*BOP, Big Spring*) (Concurring Opinion of Member DuBester) (concurring in the result and finding abrogation where award did not leave any circumstance under which an agency may leave posts vacant).

[7] *See id.* at 443-44; *see also U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 111, 115, 116-17 (2002) (Concurring Opinion of Member Pope) (concurring with the result and finding abrogation where award did not leave any circumstance under which an agency may leave posts vacant).

preclude the Agency from vacating the posts at issue.[8] The award permits the Agency to leave posts vacant in "emergencies, for good cause, and under rare circumstances."[9] Addressing the Agency's violation of the overtime provisions of Article 18 and the health and safety provisions of Article 27, the award only orders the Agency to "cease and desist from vacating . . . posts for *economic reasons*," and to reinstate the established procedure to fill vacated posts with bargaining-unit employees.[10] Thus, I would find that the award does not abrogate the Agency's right to assign work.

Moreover, even assuming that the Authority's excessive-interference test, adopted by the Authority decades ago, is the appropriate test to apply in this case, I would still uphold the award. To determine whether there is excessive interference, Authority precedent requires balancing a provision's benefits to employees against the provision's burden on the agency's exercise of its management rights.[11]

Balancing the benefits to employees with the burden on the Agency, I would find that the provisions of the parties' agreement, as interpreted and applied in the award, do not excessively interfere with management's right to assign work. As the Arbitrator found, the benefit to employees is very significant. The award requires the Agency to fill certain posts with experienced bargaining-unit employees to ensure the health and safety of all personnel working at the prison's facilities and installations as required by Articles 18 and 27.[12]

In contrast, the burden on the exercise of management's right is limited. The award permits the Agency to vacate posts and leave them unassigned in "emergencies, for good cause, and in rare circumstances."[13] The award only restricts the Agency's work-assignment determinations where the sole purpose is to avoid paying overtime under Article 18.[14] Although economic considerations are not insignificant, I would find them outweighed by the safety issues involved, especially as they occur in a prison setting. As the Arbitrator found, the Agency identified these posts as critical to the prison's smooth and safe operation, and to the safety and well-being of its employees.[15]

The majority does not employ either of these analyses when it sets aside the award. Instead, confirming a defect with their analysis identified in my dissent in *DOJ*,[16] the majority clarifies that its new "excessive-interference" test, that the majority has decided to use in reviewing arbitrators' awards, is different from the original "excessive-interference" balancing test the Authority adopted in 1986 to determine whether contract proposals and provisions impermissibly affect management rights.[17] So the majority rejects the original excessive-interference test for use when reviewing arbitrators' awards. As the majority puts it, "it does not matter whether a contract provision was negotiated under § 7106(b) of the Statute. . . . [T]his new excessive-interference test in the arbitration context is not a cookie-cutter version of the 'balancing' excessive-interference test that the Authority applies to resolve § 7106(b)(3) claims in the negotiability context."[18]

Contrary to the majority's unexplained assertion, it *does* matter, where management's rights are concerned, "whether a contract provision was negotiated under § 7106(b)." As the Authority and the courts have made clear, in rulings the majority does not dispute, contract provisions negotiated under § 7106(b) may affect, and limit, management rights in ways that other negotiated contract provisions may not.[19]

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[8] *Cf. BOP, Big Spring*, 70 FLRA at 443-44 (holding that a provision impermissibly interfered with the agency's management rights where it was interpreted and applied to effectively preclude the agency from leaving posts vacant); *BOP, Atlanta*, 57 FLRA at 411 (the Authority did not find abrogation because agency permitted to leave post vacant for "good reason" or if post does not contribute to safety); *BOP, Guaynabo*, 57 FLRA at 334 (the Authority did not find abrogation because agency permitted to leave post vacant for emergency situations).

[9] Award at 66.

[10] *Id.* at 73 (emphasis added).

[11] *See NTEU*, 69 FLRA 355, 358 (2016) (quoting *NAGE, Local R14-87*, 21 FLRA 24, 31-32 (1986) (*KANG*) (The Authority makes an excessive-interference determination "by weighing 'the competing practical needs of employees and managers,' in order to ascertain whether the benefits to employees flowing from the proposal outweigh the proposal's burdens on the exercise of the management right involved.")).

[12] *See* Award at 68-71.

[13] *Id.* at 66.

[14] *Id.* at 73.

[15] *Id.* at 68-70.

[16] 70 FLRA at 411.

[17] *See KANG*, 21 FLRA at 31-32; *AFGE, AFL-CIO, Local 2782 v. FLRA*, 702 F.2d 1183 (D.C. Cir. 1983).

[18] Majority at 5 n.27.

[19] As I explained in *DOJ*, the Statute unequivocally provides that an agency and a union may choose to include in their contract, provisions that limit management rights. 70 FLRA at 409. As § 7106(a) specifies, § 7106(a)'s management rights are "[s]ubject to" contract provisions negotiated under § 7106(b). Mirroring this, § 7106(b) specifies that "[n]othing in" § 7106, including § 7106(a), precludes parties from negotiating such provisions. 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. *See DOJ*, 70 FLRA at 409-10.

Ignoring this undisputed precedent, the majority's unexplained adoption of its "new excessive-interference test," which might be referred to as "excessive-interference lite," reflects a fundamental misunderstanding of the collective-bargaining process. Applying the majority's analytical framework, a contract provision held to be fully negotiable in the negotiability context, through application of the original excessive-interference's balancing test, could nevertheless be held completely unenforceable in the arbitration context, through application of the majority's lopsided excessive-interference-lite test.

Why? Because excessive-interference lite, unlike the original excessive-interference test, does not employ balancing, and eliminates consideration of one side of the balance, a provision's benefits to employees. So an essential consideration in determining whether a proposal or provision impermissibly affects management rights, in the negotiability context, *i.e.*, benefits to employees balanced against burdens on management rights, is replaced by considering only a provision's burden on management rights when excessive-interference lite is applied in the arbitration context. Consequently, a provision determined *not* to impermissibly affect management rights in the negotiability context, and therefore adoptable by the parties as part of their agreement, could nevertheless be set aside as impermissibly affecting management rights when the provision was enforced by an arbitrator. This is an irrational interpretation of the Statute, and is also inconsistent with a fundamental tenet of the collective-bargaining process: that parties should be able to rely on the enforceability of contract provisions they have properly bargained and adopted.[20]

Because the majority employs an analysis that is inconsistent with the Statute's purpose and policies, and for other reasons discussed in this opinion, I would deny the Agency's contrary-to-law exception, and address the Agency's remaining exceptions. Accordingly, I dissent.

[20] *See, e.g.*, *SSA, Office of Disability Adjudication and Review, Region VI, New Orleans, La.*, 67 FLRA 597, 602 (2014) ("Congress intended to foster contractual stability and repose. In this regard, courts and the Authority have held that the Statute embodies policies of 'promoting collective bargaining and the negotiation of collective[-]bargaining agreements,' and 'enabling parties to rely on the agreements that they reach, once they have reached them.'" (citing *EPA*, 65 FLRA at 118 (quoting *NTEU*, 64 FLRA 156, 158 (2009) (Member Beck dissenting)); *see also W.R. Grace v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum and Plastic Workers of Am.*, 461 U.S. 757, 771 (1983) ("parties to a collective[-]bargaining agreement must have reasonable assurance that their contract will be honored"); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962) ("an effort [to promote collective bargaining] would be purposeless unless both parties to a collective[-]bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored"); *Hull v. Cent. Transp., Inc.*, 628 F. Supp. 784, 789 (N.D. Ind. 1986) (noting that "[p]arties to collective[-]bargaining agreements should be able to rely on their bargain").