70 FLRA No. 157

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
LOCAL 21
(Union)

0-AR-5293

_____

DECISION

August 28, 2018

_____

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

I. Statement of the Case

On May 12, 2017, Arbitrator Michael Hill issued an award finding that the Agency violated the parties' collective-bargaining agreement and a separate memorandum of understanding by failing to permit an employee (the grievant) to "opt out" of an involuntary reassignment to a different position (the new position).[1] The Arbitrator also found that another Agency employee (the volunteer) offered to take the grievant's place in the new position. As a remedy, the Arbitrator directed the Agency to permit the volunteer to work in the new position so that the grievant could return to her former position (the former position).

The main question before us is whether the Arbitrator's award is contrary to management's right to assign employees under § 7106(a)(2)(A) of the Federal Service Labor-Management Relations Statute.[2] Applying the standard set forth in *U.S. DOJ, Federal BOP* (*DOJ*),[3] we find that the award excessively interferes with that right, and we vacate the pertinent portions of the award.

II. Background and Arbitrator's Award

The Agency employs individuals who specialize in combatting identity theft and assisting identity-theft victims (the specialists). Previously, the specialists worked in several different Agency subdivisions, but the Agency decided to centralize the specialists' work in a new subdivision (the realignment). Before executing the realignment, the Agency and the Union entered into a realignment-specific memorandum of understanding (the MOU) that supplemented their collective-bargaining agreement.

After learning about the realignment, the grievant requested to "opt out" of participating.[4] The Agency asserted that, in order to opt out under the MOU, the grievant had to satisfy the conditions in Article 15 of the parties' agreement for a job swap or hardship relocation. Because the grievant did not satisfy those conditions, the Agency denied her opt-out request. The Union filed a grievance over the denial. The parties went to arbitration, where the stipulated issues were, as relevant here, "whether the Agency violated Article 15 of the parties' . . . [a]greement [(Article 15)] and/or the [MOU], when it denied the . . . grievant['s] request[] to opt out of reassignment into the" new subdivision, and, if so, "what shall be the remedy?"[5]

The Arbitrator noted that the MOU states that current Agency specialists "who are realigning into the [new subdivision] . . . may opt out of performing the work in accordance with [the realignment] initiative[,] consistent with workload and staffing needs and Article 15."[6] And the Arbitrator noted that Article 15 addresses reassignments and realignments.

The Arbitrator found that the MOU's "opt[-]out provisions . . . with references to Article 15 . . . are available to involuntarily reassigned employees if qualified volunteers are available to replace them."[7] Further, the Arbitrator determined that qualified volunteers must be "at the same grade level" of the General Schedule (GS) as an involuntarily reassigned employee in order to take the involuntarily reassigned employee's place in the new subdivision.[8]

In the grievant's case, the Arbitrator found that the Union had identified a volunteer with sufficient "identity[-]theft experience" to work in the new subdivision,[9] and that the volunteer worked at the

[1] Award at 12.
[2] 5 U.S.C. § 7106(a)(2)(A).
[3] 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting).
[4] Award at 12, 13.
[5] *Id.* at 1.
[6] *Id.* at 4 (quoting Exceptions, Attach. 3, Joint Ex. 3 (MOU) at 4).
[7] *Id.* at 12.
[8] *Id.*
[9] *Id.*

grievant's GS grade level. Thus, the Arbitrator held that the Agency's denial of the grievant's opt-out request violated the MOU and the parties' agreement. As a remedy, the Arbitrator directed the Agency to comply with the MOU and Article 15 by allowing the grievant to return to her former position.

On June 16, 2017, the Agency filed exceptions to the award, and on July 20, 2017, the Union filed an opposition to the Agency's exceptions.

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

The Agency argues that the award violates its management right to assign employees under § 7106(a)(2)(A) of the Statute[10] because the award does not allow the Agency to "determine the particular qualifications and skills needed to perform the work of a position" within the new subdivision.[11] Further, the Agency argues that, as a result of the realignment, the grievant's former position no longer exists, so returning the grievant to that position would require re-creating it.[12] The Agency also contends that the award fails to "reconstruct[]" what the Agency would have done if it complied with the MOU and the parties' agreement and that, consequently, the award fails to satisfy the second prong of the management-rights analysis that the Authority set forth in *U.S. Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.* (*BEP*).[13]

The right to assign employees includes the rights: (1) to decide "whether to fill positions";[14] and (2) "to determine the qualifications and skills needed to perform the work of a position, including job-related individual characteristics . . . , and . . . whether individual employees meet those qualifications."[15] In that regard, the Authority has held that a requirement to "transfer . . . an employee to a position in [a subdivision] of the employee's choice[,] regardless of whether [an a]gency intend[ed] to fill the position or whether the employee's qualifications satisfied the [a]gency's needs," placed a "significant limitation" on management's right to assign employees.[16]

As recently explained in *DOJ*, "the Authority has grappled with articulating a coherent, consistent, and understandable framework to determine when an arbitral award impermissibly interferes with § 7106(a) rights."[17] In particular, *DOJ* detailed how *BEP* – on which the Agency relies – and the Authority's later decisions in *FDIC, Division of Supervision & Consumer Protection, San Francisco Region* (*FDIC*)[18] and *U.S. EPA* (*EPA*)[19] created "***confusion***."[20] Against this background, we interpret the Agency's reliance on *BEP* as a request to reexamine the Authority's framework for resolving management-rights exceptions to arbitration awards. Further, because *DOJ* included such a reexamination and formulated a new framework to govern cases such as this one, we apply the *DOJ* framework here.

Under *DOJ*, the first question that must be answered is whether the arbitrator has found a violation of a contract provision.[21] If the answer to that question is yes, then the second question is whether the arbitrator's remedy reasonably and proportionally relates to the violation.[22] If the answer to either of these questions is no, then the award must be vacated.[23] 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.[24] If the answer to this question is yes, then the arbitrator's award is contrary to law and must be vacated.[25]

Here, the answer to the first question is yes because the Arbitrator found that the Agency violated contract provisions – specifically, the MOU and Article 15.[26] As to the second question, the Arbitrator directed the Agency to allow the grievant to exercise "the opt[-]out provision[] of the MOU with references to Article 15."[27] Consequently, the remedy of adhering to the MOU and Article 15 reasonably and proportionally relates to the violation of the MOU and Article 15, and the answer to the second question is yes.

Finally, we turn to the last question – whether the Arbitrator's interpretation of the MOU and Article 15 excessively interferes with the Agency's right

[10] 5 U.S.C. § 7106(a)(2)(A).
[11] Exceptions at 22 (citing *Buffalo VA Med. Ctr.*, 32 FLRA 601, 605 (1988) (discussing the right to assign employees)).
[12] *Id.* at 15-16, 19-21.
[13] *Id.* at 17, 22 (citing *BEP*, 53 FLRA 146, 151-54 (1997)).
[14] *AFGE, Local 2755*, 62 FLRA 93, 94 (2007) (*Local 2755*).
[15] *AFGE, Local 3295*, 47 FLRA 884, 907 (1993) (*Local 3295*).
[16] *Prof'l Airways Sys. Specialists*, 64 FLRA 474, 481 (2010) (*PASS*).
[17] 70 FLRA at 400.
[18] *Id.* at 402-03 (citing *FDIC*, 65 FLRA 102 (2010) (Chairman Pope concurring)).
[19] *Id.* (citing *EPA*, 65 FLRA 113 (2010) (Member Beck concurring)).
[20] *Id.* at 403 (emphasis added in *DOJ*) (quoting *FDIC*, 65 FLRA at 112 n.8 (Concurring Opinion of Chairman Pope)).
[21] *Id.* at 405.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 405-06.
[26] *See* Award at 12-14.
[27] *Id.* at 12.

to assign employees under § 7106(a)(2)(A). Here, the Agency asserts that the award is contrary to its right to assign employees under § 7102(a)(2)(A) because the award: (1) prevents the Agency from determining the qualifications necessary to work in the new subdivision, and from evaluating whether the volunteer meets those qualifications;[28] and (2) requires the Agency to re-create the grievant's former position, which no longer exists in her former subdivision, and reassign her to that re-created position.[29]

By requiring that the Agency re-create the grievant's former position and then reassign the grievant to that position,[30] the Arbitrator's interpretation of the MOU and Article 15 denies the Agency the ability to determine which positions exist, and which positions should be filled, in the grievant's former subdivision.[31] Further, the award places additional "significant limitation[s]"[32] on management's right to assign employees by: (1) determining that the volunteer is qualified to replace the grievant;[33] and (2) directing the Agency to transfer the grievant "regardless of whether . . . the [grievant]'s qualifications satisfied the Agency's needs"[34] in her former subdivision rather than the new subdivision.[35] Because of these significant limitations, the Arbitrator's interpretation of the MOU and Article 15 excessively interferes with the Agency's right to assign employees under § 7106(a)(2)(A).[36] As such, the answer to the final question in the *DOJ* framework is yes, and we vacate the portions of the award relating to the grievant's returning to her former position.[37]

Because we find those portions of the award contrary to law and vacate them, we do not need to address the Agency's remaining arguments[38] challenging the vacated portions of the award.

IV. Decision

We vacate the portions of the award concerning the grievant's returning to her former position.

[28] *See* Exceptions at 22.
[29] *Id.* at 21.
[30] Award at 14.
[31] *See Local 2755*, 62 FLRA at 94 (holding that right to assign employees includes the right to decide "whether to fill positions").
[32] *PASS*, 64 FLRA at 481.
[33] Award at 12; *see Local 3295*, 47 FLRA at 907 (right to assign employees includes right "to determine the qualifications and skills needed to perform the work of a position . . . and . . . whether individual employees meet those qualifications").
[34] *PASS*, 64 FLRA at 481.
[35] *See* Award at 14 (employees who opt out and have qualified volunteers of the same GS grade level to replace them "*will* be returned" to their former positions (emphasis added)); *see also id.*, Attach., Email from Arbitrator to Agency's Senior Counsel, with Carbon Copy to Union's Rep. (June 1, 2017, 3:16 PM) (Arbitrator affirming that, because the volunteer to replace the grievant worked at the same GS grade level, the grievant was "entitled to opt out").
[36] With regard to our dissenting colleague's claim that we are poorly applying the excessive-interference test from the negotiability arena, Dissent at 7-8, as we noted in *U.S. DOJ, Federal BOP, Federal Correctional Complex, Lompoc, California*, 70 FLRA 596, 598 n.27 (2018) (Member DuBester dissenting), the new excessive-interference test that we apply in the arbitration context is not a cookie-cutter version of the balancing test that the Authority applies to resolve § 7106(b)(3) claims in the negotiability context. *Id.* 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). *Id.*
[37] Our dissenting colleague confuses entirely the distinction between the FLRA's role in determining what matters are, or are not, negotiable *at the bargaining table* and the distinct role of the FLRA in determining whether an arbitrator's *interpretation of a negotiated contract provision* is consistent with or contrary to law. The dissent asserts that the new *DOJ* test is merely a back-door attempt to reassess the negotiability of settled contract provisions. But the dissent misses the point, entirely. *DOJ* focuses entirely on an arbitrator's interpretation and application of a contractual provision, not on whether or not the provision is negotiable. Rather, it is the arbitrator's unique award or remedy that is tested. Negotiation of a provision (and determination of its negotiability) occurs just once, but, during the course of an agreement's lifetime, one or many arbitrators may interpret the meaning of that provision. The purpose of *DOJ* was to set forth an effective and understandable test to determine whether or not an arbitrator's interpretation of such a provision or the awarded remedy excessively interferes with a management right. Questions of negotiability are made at the bargaining table.

The dissent seemingly sets out to complicate the simple, clear framework we set out in *DOJ*. The dissents seeks to resurrect the "abrogation" standard which was discarded by the D.C. Circuit Court of Appeals in 2014 and by the Authority in *DOJ* in 2018 while at the same time invoking an unrecognizable excessive-interference standard. In doing so, the dissent implicitly affirms the observation made in *DOJ*, that the Authority has struggled to find a proper, effective, and understandable test with which to weigh arbitration awards and to enforce our Statute's singular management-rights provision. As we explained in *DOJ*, and repeat herein, the FLRA's role in arbitration cases involving interference with management rights is to determine whether the arbitrator's *interpretation* of a negotiated provision excessively interferes with a management right.
[38] *See* Exceptions at 3 (arguing that award "violates management's right under § 7106(a)(1) to determine its organization and the employees necessary to accomplish its mission"), 22-30 (arguing that award fails to draw its essence from the MOU and collective-bargaining agreement).

Member DuBester, dissenting:

For reasons expressed in my dissents in the *U.S. DOJ, Federal BOP* (*DOJ, BOP*)[1] and *U.S. DOJ, Federal BOP, Federal Correctional Complex, Lompoc, California* (*BOP, Lompoc*)[2] cases, and contrary to the majority's decision, the abrogation test is the appropriate test to determine whether the Arbitrator's award is contrary to law by impermissibly affecting a management right.[3] By failing to apply the Authority's abrogation test, the majority "disregard[s] the [parties'] assessment at the bargaining table of benefits and burdens, and appl[ies] its new [excessive-interference] test to summarily invalidate contract provisions accurately interpreted and applied by an arbitrator."[4]

Moreover, for reasons stated in my dissent in *BOP, Lompoc*, the majority acts arbitrarily by using a "lopsided"[5] version of the Authority's well-established "excessive-interference" test to determine that the award impermissibly affects management's right to assign employees under § 7106(a)(2)(A) of the Federal Service Labor-Management Relations Statute (Statute).[6] The Authority's established "excessive-interference" test, approved by the courts and still employed by the majority in negotiability cases,[7] balances a provision's or a proposal's benefits to employees against the provision's or proposal's burden on the agency's exercise of its management rights. Where the benefits outweigh the burdens, the matter does not impermissibly affect a management right, and is enforceable as an agreed-upon contract provision negotiated under § 7106(b) of the Statute.[8]

But the majority's lopsided version of this test, which I have called "excessive-interference-lite," is different. It does not employ balancing. As the majority clarifies, excessive-interference-lite "is not a cookie-cutter version of the 'balancing' excessive-interference test that the Authority applies . . . in the negotiability context . . . . 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."[9]

This concession by the majority, that it "does not matter" that a contract provision enforced by an arbitrator was properly negotiated and adopted under § 7106(b), confirms a fundamental flaw in the majority's new test. As I explained in *BOP, Lompoc*, "[a]pplying 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."[10]

This inconsistency is arbitrary and capricious. Inconsistently and without rationale, the majority uses one test, the original excessive-interference balancing test, to determine whether a contract proposal impermissibly affects management's rights. But then the majority uses a truncated version of that test, their lopsided excessive-interference-lite test, to resolve that same issue concerning that same proposal, now adopted by the parties and enforced by an arbitrator consistent with the proposal's meaning when declared negotiable.[11] Predictably, proposals determined to *not* impermissibly affect management's rights because their benefits outweigh their burdens, *will*, as contract provisions that an arbitrator enforces consistent with their negotiated meaning, be held to do just the opposite – impermissibly affect management's rights – when subjected to the majority's truncated test, which eliminates consideration

---

[1] 70 FLRA 398, 409-12 (2018) (Dissenting Opinion of Member DuBester).
[2] 70 FLRA 596, 598-99 (2018) (Dissenting Opinion of Member DuBester).
[3] *See U.S. EPA*, 65 FLRA 113 (2010) (*EPA*).
[4] *DOJ, BOP*, 70 FLRA at 411 (Dissenting Opinion of Member DuBester).
[5] 70 FLRA at 600 (Dissenting Opinion of Member DuBester).
[6] 5 U.S.C. § 7106(a)(2)(A).
[7] *See* Majority at 5 n.36.
[8] 5 U.S.C. § 7106(b). Contract provisions negotiated under § 7106(b) are an exception to management's rights set forth in § 7106(a), and may affect those rights. *See, e.g., 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.")); *see also AFGE, AFL-CIO, Local 2782 v. FLRA*, 702 F.2d 1183 (D.C. Cir. 1983).
[9] *BOP, Lompoc*, 70 FLRA at 598 n.27; *see also* Majority at 5 n.36.
[10] 70 FLRA at 600 (Dissenting Opinion of Member DuBester).
[11] *See* Majority at 5 n.37.
Admittedly, in the last few months, I am often confused by my colleagues' disregard for longstanding labor-management relations principles. However, I want to assure my colleagues that—while they may fairly disagree with my perspective—based on over four decades of negotiating and mediating collective bargaining disputes, working as an arbitrator and resolving dozens of matters, and serving on the FLRA where I have participated in a couple thousand decisions, I am not at all confused by the distinction between determining what is "negotiable" and reviewing an arbitrator's award.

of the benefits side of the balance.[12] "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."[13]

Applying the abrogation test, I would find that the award does not impermissibly affect management's right to assign work. The Arbitrator's interpretation and application of the memorandum of understanding (the MOU) and Article 15 does not preclude the Agency from exercising that right.[14] The Arbitrator found that under Article 15 and the MOU, an opt-out request is "available to involuntarily reassigned employees if qualified volunteers are available to replace them."[15] He determined that under the parties' agreement, "qualified volunteers" means an employee at the same General Schedule (GS) grade level as the impacted employee.[16] The Arbitrator also found that the Union had identified a "qualified volunteer" with sufficient "identity[-]theft experience" to work in the new subdivision,[17] and that the volunteer worked at the grievant's GS grade level. The Arbitrator concluded, consequently, that the grievant could "opt out" of the reassignment.

Contrary to the majority's misinterpretation of the award, the award does not require the Agency "to re-create the grievant's former position" that the realignment eliminated.[18] Nor did the Union request this remedy. Further, the Agency acknowledges that if the opt-out request is granted, the "heads of office" would have to get together to determine a solution for an approved opt-out request under Article 15.[19] Moreover, contrary to the majority,[20] nothing in the award prevents the Agency from determining how to fill the realigned position after the grievant opts out, and whether to use the volunteer for that purpose. Read in context with the entire record, the award only requires the Agency to: (1) grant the grievant's opt-out request; (2) determine if a vacant position is available for the grievant; and (3) "[u]pon request . . . meet with local [Union] representatives concerning any disputes or issues related to opt-out opportunities for impacted employees"[21] under the MOU's Section 10.[22]

Because the award does not preclude the Agency from exercising its right to assign employees, it does not abrogate that right. I would therefore deny the Agency's contrary-to-law exception based on that right.[23] Accordingly, I would deny the Agency's contrary-to-law exception, and address the Agency's remaining essence exception.

[12] *See, e.g., U.S. Dep't of the Treasury, IRS, Office of Chief Counsel, Wash., D.C. v. FLRA*, 739 F.3d 13, 20 (D.C. Cir. 2014). Although I disagree with the D.C. Circuit's decision in the particular circumstances of that case, I agree with the principle that the Authority should not apply two different tests to resolve, what is in reality, only a single issue; here, whether a proposal or provision impermissibly affects a management right. That is precisely what the majority does in this case, by applying the original excessive-interference test in the negotiability context, but their lopsided excessive-interference-lite test in the arbitration context.

[13] *BOP, Lompoc*, 70 FLRA at 600 (Dissenting Opinion of Member DuBester); *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").

[14] *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 1040, 1044 (2011) (An award abrogates the exercise of a management right if the award precludes the agency from exercising the right.).

[15] Award at 12.

[16] *Id.* at 12-13.

[17] *Id.* at 12.

[18] Majority at 5.

[19] Exceptions, Attach. 4, Tr. at 187-88.

[20] Majority at 5.

[21] Exceptions, Attach. 3, Joint Ex. 3 (MOU) at 4.

[22] Award at 12-14.

[23] I would also deny the Agency's contrary-to-law exception based on its management right, under § 7106(a)(1), to determine its organization. Exceptions Br. at 19-21. I would find that the award does not affect that right. *See generally U.S. Dep't of Educ., Wash., D.C.*, 61 FLRA 307, 310 (2005). Further, even applying the Authority's established excessive-interference test, I would deny the Agency's contrary-to-law exception based on the right to assign employees. As discussed in the text above, the award's burden on management's exercise of its right to assign is extremely limited. And this burden is outweighed by the benefit to the affected employee, who would not be required to make the adjustments necessary if she were reassigned to a new work unit with different duties.