

70 FLRA No. 182

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1592
(Union)

0-AR-5300

DECISION

October 31, 2018

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

I. Statement of the Case

In this case, we reject an arbitrator's attempt to carve out a unique telework arrangement for a single employee that could not, and would not, apply to any other employee in the Agency.

Arbitrator Marshall A. Snider found that the Agency violated the parties' agreement by providing an insufficiently specific justification for its denial of the grievant's request to telework full time from Las Vegas, Nevada, notwithstanding that the Agency is located in Ogden, Utah. Applying the framework articulated in *U.S. DOJ, Federal BOP (DOJ)*,¹ we find that the Arbitrator's awarded remedies do not reasonably and proportionally relate to the Agency's contractual violation, and we vacate the award as contrary to management's right to determine its organization under § 7106(a)(1) of the Federal Service Labor-Management Relations Statute (Statute).²

II. Background and Arbitrator's Award

The grievant was assigned to Hill Air Force Base (Hill AFB) in Ogden, Utah, and she teleworked full-time from her home in Ogden. After the grievant's

husband accepted a position at Nellis Air Force Base (Nellis AFB) in Las Vegas, Nevada, the grievant asked the Agency to change her duty station to Nellis AFB and allow her to telework full-time from Las Vegas. The Agency denied the request, and the Union filed a grievance challenging the denial.

In its grievance response, the Agency explained that it denied the grievance based on its management right, under § 7106(a)(1) of the Statute, to determine its organization. Further, Article 9 of the parties' agreement (Article 9) provides that "employees who [t]elework must be available to work at the traditional worksite on [t]elework days on an occasional basis if necessitated by work requirements."³ The Agency denied the grievant's request to telework full-time from Las Vegas because the grievant could not – consistent with Article 9 – report from Las Vegas to Hill AFB within a reasonable time if necessary. Accordingly, the Agency denied the grievance, and the grievant resigned.

The grievance went to arbitration where, as relevant here, the Arbitrator framed the issue as whether the Agency violated the parties' agreement, law, rule, or regulation when it denied the grievant's request to change her duty station and telework full-time from Las Vegas.

The Arbitrator concluded that the Agency did not violate the parties' agreement, law, rule, or regulation by denying the grievant's request to *change her duty station*. But he found that the Agency violated Article 9 by denying the grievant's request to *telework full-time from Las Vegas*. Article 9, Section 1 provides, in pertinent part, that eligible employees may participate in the telework program "to the maximum extent possible."⁴ Article 9, Section 4 states that management has the "sole discretion" to determine an employee's telework schedule, but also provides that, when denying a requested telework schedule, management will advise the employee of the specific – rather than "generic" – justification for the denial.⁵

The Arbitrator found that even though Article 9 requires teleworkers to be available to report to Hill AFB, the Agency's reliance on this requirement to deny the grievant's telework request was "arbitrary," "generic," and did not ensure that the grievant could participate in the telework program "to the maximum extent possible."⁶ Accordingly, the Arbitrator found that the Agency violated Article 9.⁷ The Arbitrator also found that, but for the Agency's contractual violation, the grievant would

¹ 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting).

² 5 U.S.C. § 7106(a)(1).

³ Award at 2 (quoting Collective-Bargaining Agreement (CBA) Art. 9, § 3).

⁴ *Id.* (quoting CBA Art. 9, § 1).

⁵ *Id.* (quoting CBA Art. 9, § 4).

⁶ *Id.* at 8-9.

⁷ *Id.* at 7.

not have resigned. As remedies, the Arbitrator directed the Agency to reinstate the grievant, allow her to telework full-time from Las Vegas, and provide her backpay and lost benefits.

On August 4, 2017, the Agency filed exceptions to the Arbitrator's award and, on September 11, 2017, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The Arbitrator's remedies do not reasonably and proportionally relate to the violation of Article 9.

The Agency argues that the award excessively interferes with management's right to determine its organization under § 7106(a)(1) of the Statute because it effectively requires management to change the grievant's duty station to Las Vegas and permit her to telework from there.⁸ Specifically, the Agency contends that, although the award permits the Agency to maintain the grievant's duty station at Hill AFB, allowing the grievant to telework full-time from Las Vegas triggers a regulatory requirement⁹ that the Agency change the grievant's "official worksite" to Las Vegas.¹⁰ The Authority has recognized that management's right to determine its organization encompasses the right to determine the administrative and functional structure of the agency.¹¹

Evaluating the Agency's argument under the three-part framework set forth in *DOJ*, the first question is whether the Arbitrator found a violation of a contract provision.¹² Here, the Arbitrator found that the Agency's "generic" denial of the grievant's telework request violated Article 9.¹³ Thus, the answer to the first question is yes.

The second question under *DOJ* is whether the Arbitrator's remedy reasonably and proportionally relates to the violation of Article 9.¹⁴ If the answer to that question is no, then the arbitrator's award is contrary to law and must be vacated.¹⁵

As noted above, Article 9 provides that management has the "sole discretion" to approve or deny a requested telework schedule, but must provide a specific – rather than "generic" – justification for a denial.¹⁶ The Arbitrator found that the Agency's justification for its denial – that the grievant would not be able to fulfill her obligation to report to Hill AFB within a reasonable time if necessary – was "generic."¹⁷ Yet, as remedies, he ordered the Agency to reinstate the grievant, allow her to telework full-time from Las Vegas, and provide her backpay and lost benefits. Those remedies are disproportionate to the Agency's violation of Article 9. Because Article 9 affords management the "sole discretion" to determine an employee's telework schedule, the Agency's failure to provide the grievant with a specific justification for the denial of her telework request would entitle the grievant to, at most, a *more specific* justification for the denial. Thus, reinstatement – in addition to the other awarded remedies – is disproportionate here. Because the Arbitrator's remedies do not reasonably and proportionally relate to the Agency's violation of Article 9, the answer to the second question is no.

While we appreciate the dissent's veiled compliment,¹⁸ the dissent mischaracterizes (or misunderstands) the *DOJ* framework itself and how that framework applies here. The dissent criticizes our application of the *DOJ* framework because, "the first step in analyzing [a management-right] claim would be to determine whether the award affects in any way the asserted management right"¹⁹ and implies that this in some magical way creates a new fourth step. *DOJ* only applies in cases where the awards or remedies affected a management right, and we firmly reject the dissent's attempt to confuse the issue as it pertains to *DOJ*. That case (the relevant "on-point precedent"²⁰) and *IRS* left no ambiguity as to the steps for determining when an award impermissibly interferes with a management right. Here, if the Agency implemented the awarded remedies, then government-wide regulations would require the Agency to change the grievant's official duty station.²¹ And, as part of the Agency's "right to determine [its] administrative and functional structure,"²² the Agency has the right to determine "where[,] organizationally[,] certain functions shall be established and *where the duty stations of the positions* providing those functions *shall*

⁸ Exceptions Br. at 16-19.

⁹ *Id.* at 33-34 (citing 5 C.F.R. § 531.605(d)).

¹⁰ See 5 C.F.R. § 531.605(d)(1) (an employee "need not work at least twice each biweekly pay period at the . . . official worksite . . . as long as the employee is regularly performing work within the locality pay area for that worksite" (emphasis added)); *id.* § 531.603(b)(27) (Las Vegas, Nevada falls within a locality pay area that does not include Ogden, Utah).

¹¹ See *U.S. Dep't of Transp., FAA*, 58 FLRA 175, 178 (2002) (*FAA*).

¹² See *DOJ*, 70 FLRA at 405.

¹³ Award at 7.

¹⁴ *DOJ*, 70 FLRA at 405.

¹⁵ *Id.*

¹⁶ Award at 2 (quoting CBA Art. 9, § 4).

¹⁷ *Id.* at 7.

¹⁸ Dissent at 7 ("Bravo.").

¹⁹ *Id.* at 6.

²⁰ *Id.* at 7.

²¹ See 5 C.F.R. § 531.605(d)(1); *id.* § 531.603(b)(27).

²² *FAA*, 58 FLRA at 178.

*be maintained.*²³ Therefore, *DOJ* properly applies in this case. Having found the award deficient using that framework, we set aside the award as contrary to § 7106(a)(1).²⁴

In sum, the resolution of this case has little to do with telework. Instead, the Arbitrator's remedy, if implemented, would require the Agency to change the grievant's official duty station.^{25 26} The Agency has the right to determine "where[,] organizationally[,] certain functions shall be established and *where the duty stations of the positions* providing those functions *shall be maintained.*"²⁷ And because we find that the remedy is

not proportional to the contractual violation, we do not reach the third question under *DOJ*.²⁸

IV. Decision

We vacate the award.

²³ *U.S. Dep't of Transp., Maritime Admin.*, 61 FLRA 816, 822 (2006) (*DOT*) (emphases added) (quoting *AFGE, Local 3529*, 55 FLRA 830, 832 (1999)). To the extent that other Authority decisions selectively cited by the dissent have diverged from this clear test – under which determining an employee's *official duty station* necessarily affects management's right to determine the agency's organization – we will no longer follow them. *E.g., U.S. Dep't of Educ., Wash., D.C.*, 61 FLRA 307, 309-310 (2005) (*DOE*) (Chairman Cabaniss concurring); *NTEU*, 41 FLRA 1283, 1286-88 (1991); *AFGE, Local 3601*, 39 FLRA 504, 515-16 (1991); *NTEU, Chapter 83*, 35 FLRA 398, 411-413 (1990). Those decisions failed to recognize that, every time an employee's official duty station changes, that change *necessarily affects* an agency's "administrative structure." For example, an agency must administer locality-based payments using an employee's official duty station, but some decisions discounted these administrative effects without explanation. *See, e.g., DOE*, 61 FLRA at 310 (stating that *paying travel expenses*, which changed based on worksite location, affected agency's administrative structure, but holding that *paying salaries*, which changed based on worksite location, did not affect administrative structure). We may not ignore such significant effects.

²⁴ *See U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 573 (2018) (*CBP*) (Member DuBester dissenting) (setting aside award as contrary to § 7106(a)(2)(B) of the Statute where arbitrator's remedy did not reasonably and proportionally relate to the agency's contractual violation).

²⁵ *See* 5 C.F.R. § 531.605(d)(1); *id.* § 531.603(b)(27).

²⁶ Member Abbott notes that in addition to requiring a change to the grievant's duty station, the award, if permitted to stand, also would have required the Agency to establish a duty station that was unique *only to the grievant*. That result both failed to draw its essence from the parties' agreement and directly interfered with the Agency's right to determine its organization. It is preposterous to assume that an arbitrator has the discretion to carve out an exception for one employee, an exception that does not, and cannot, apply to any other employee in the Agency or the Federal government. Arbitrators may not simply craft awards that are based on their own notions of "industrial justice." *See U.S. Small Bus. Admin.*, 70 FLRA 745, 745 n.1 (2018).

²⁷ *DOT*, 61 FLRA at 822 (emphases added) (quoting *AFGE, Local 3529*, 55 FLRA at 832).

²⁸ Because we are setting aside the award as contrary to § 7106(a)(1), we need not address the Agency's remaining arguments. *E.g., CBP*, 70 FLRA at 574 n.17.

Member DuBester, dissenting:

I disagree with the majority's decision to set aside the Arbitrator's award. The majority grants the Agency's management-rights exception based on the flawed analysis the majority adopted in *U.S. DOJ, Federal BOP (DOJ)*.¹ As I explained in *DOJ*, and in *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Michigan (DHS, CBP)*,² the majority's analysis is contrary to well-established statutory principles and policies, and lacks a foundation in the Statute.³

Regarding this particular case, as I have also explained, the majority's determination to set aside arbitral remedies that are "disproportionate" to an agency's contract violation, lacks any rational guidelines, and is arbitrary.⁴ Moreover, the majority's analysis departs, without explanation, from "the traditional, widely-recognized deference to arbitrators' remedial determinations."⁵ As I stated in *DHS, CBP*, "the analysis the majority employs, rests on what appear to be little more than the majority's 'vague' impressions of what parties and arbitrators may and may not do in creating and administering collective-bargaining relationships. Lacking discernible principles, vague decisional frameworks like the majority's 'invite the exercise of arbitrary power.'"⁶

The majority's decision in the current case once again confirms the validity of these objections, and casts further light on the arbitrary nature of the *DOJ* analysis. In this case, the majority applies its flawed analysis to resolve the Agency's contrary-to-law claim that the award "excessively interferes" with the Agency's right to determine its organization under § 7106(a)(1) of the Statute,⁷ by impermissibly affecting that right. Logically, the first step in analyzing such a claim would be to

determine whether the award affects in any way the asserted management right.⁸

The majority appears to have realized this, and amends its "three-part framework"⁹ to make it now a four-part framework. As the majority clarifies, the first question is now whether "the award[] or remed[y] affect[s] a management right."¹⁰ Bravo.¹¹

However, the majority incorrectly answers its new "first question" by finding that the Arbitrator's remedies affect the Agency's management right to determine its organization under § 7106(a)(1) of the Statute. Preferring the generality of boilerplate to the specificity of on-point precedent, the majority holds that the management right to determine organization includes "the right to determine . . . 'where the duty stations of the positions providing [agency] functions shall be maintained.'"¹² And because the grievant's telework location would also be her duty station, the majority holds that the award affects the Agency's management right.

Authority precedent developed over the Authority's forty-years of adjudicating cases, but which the majority now arbitrarily overrules, does not support the majority's overly broad assertion. On-point precedent, for example, *U.S. Department of Education, Washington, D.C. (DOE)*,¹³ addresses the relationship between extended telework situations and the management right to determine organization. This precedent provides a specific, clear explanation concerning why not all telework-related duty-station determinations affect the right.

In *DOE*, the Authority held that an award's requirement that an agency change an employee's duty station to her telework location did not affect the agency's right to determine its organization under § 7106(a)(1).¹⁴ Rejecting the agency's argument to the

¹ 70 FLRA 398, 409 (2018) (Dissenting Opinion of Member DuBester).

² 70 FLRA 572, 575 (2018) (Dissenting Opinion of Member DuBester).

³ *DOJ*, 70 FLRA at 409-12 (Dissenting Opinion of Member DuBester).

⁴ *DHS, CBP*, 70 FLRA at 575 (Dissenting Opinion of Member DuBester).

⁵ *DOJ*, 70 FLRA at 412 (Dissenting Opinion of Member DuBester); see also *U.S. DOD Def. Contract Audit Agency, Cent. Region*, 51 FLRA 1161, 1164-65 (1996) ("It is well established that . . . [a]n arbitrator is granted [substantial] broad discretion to fashion appropriate remedies for contract violations.").

⁶ 70 FLRA at 576 (Dissenting Opinion of Member DuBester) (quoting *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-24 (2018) (*Sessions*) (Concurring Opinion of Justice Gorsuch)).

⁷ Majority at 3.

⁸ The Agency recognizes this in its exceptions. See Exceptions Br. at 16 ("An exception alleging inconsistency with management's rights . . . is first analyzed to determine whether the award affects a management right.").

⁹ Majority at 3-4.

¹⁰ *Id.* at 4.

¹¹ E.g., *U.S. Dep't of Educ., Wash., D.C.*, 61 FLRA 307, 309 (2005) (Chairman Cabaniss concurring) (*DOE*) ("When resolving an exception alleging that an award violates management's rights under § 7106 of the Statute, the Authority first determines whether the award affects a management right under § 7106(a).").

¹² Majority at 4 (quoting *U.S. Dep't of Transp., Maritime Admin.*, 61 FLRA 816, 822 (2006) (quoting *AFGE, Local 3529*, 55 FLRA 830, 832 (1999)).

¹³ 61 FLRA at 310.

¹⁴ *Id.*

contrary, the Authority explained that Authority precedent “does not support the broad and indiscriminating conclusion that, whenever an agency chooses to call the specific location in which employees are assigned to perform their work ‘an official duty station,’ the choice of that location always constitutes an exercise of the right to determine organization under the Statute. *NTEU, Chapter 83*, 35 FLRA 398, 412 (1990). Rather, in order for its designation of “duty station” to come within the scope of the right to determine organization, the [a]gency must establish that the “duty station” of the grievant has a direct and substantive relationship to the [a]gency’s administrative or functional structure, including the relationship of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties. *See NTEU*, 41 FLRA 1283, 1286, 1287 (1991); *NTEU, Chapter 83*, 35 FLRA at 413.”¹⁵

The Authority held that the award did not affect the agency’s right to determine its organization because the award did not require the agency to change its organizational structure, change the agency’s lines of authority, or dictate the distribution of the agency’s responsibilities.¹⁶

Subsequent Authority precedent reinforces *DOE*’s holding. This precedent makes clear that management’s right to determine its organization refers to management’s ability to determine the administrative and functional structure of the agency, including lines of authority and the distribution of responsibilities for delegated and assigned duties. This right also encompasses the determination of how an agency will structure itself to accomplish its mission; including such matters as the geographic locations in which an agency will provide services or otherwise conduct its operations, how various responsibilities will be distributed among the agency’s organizational subdivisions, how an agency’s organizational grade level structure will be designed, and how the agency will be divided into organizational entities such as sections.¹⁷

But, contrary to the majority’s interpretation, the management right to determine organization does not include the right to unilaterally deny telework requests when none of the above rights are affected. Moreover, until the majority’s decision in this case, “no precedent [has] support[ed] a conclusion that the right to determine organization was intended to be read so broadly as to

encompass a designation of duty station [affecting] location-based pay.”¹⁸ Those matters have nothing to do with the relationship of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties.

The Arbitrator’s award here does not require the Agency to alter any of its organizational functions, responsibilities, or lines of authority. Rather, the award only requires that the Agency reinstate the grievant and allow her to telework from Nevada, a location where the grievant could continue to perform her duties as a full-time teleworker.¹⁹ Therefore, the award does not affect the Agency’s right to determine its organization under § 7106(a)(1). The Agency’s contrary-to-law exception, based on this premise, should be denied.

Because the majority’s analytical framework “invite[s] the exercise of arbitrary power,”²⁰ lacks a foundation in the Statute, and is irrational and arbitrary, and because the majority erroneously interprets the right to determine organization under § 7106(a)(1), I dissent from the majority’s disposition of this case, and I would reach the Agency’s remaining exceptions.

¹⁵ *Id.*

¹⁶ *See id.*

¹⁷ *See, e.g., U.S. Dep’t of Transp., FAA*, 63 FLRA 530, 532 (2009) (citing *U.S. Dep’t of Transp., FAA*, 58 FLRA 175, 178 (2002)); *see also NTEU, Chapter 83*, 35 FLRA 398, 409-10 (1990) (citations omitted).

¹⁸ *DOE*, 61 FLRA at 310; *see* Majority at 4 n.23 (finding that locality-based pay matters affect an agency’s “administrative structure.”).

¹⁹ *See* Award at 10.

²⁰ *DHS, CBP*, 70 FLRA at 576 (Dissenting Opinion of Member DuBester) (quoting *Sessions*, 138 S. Ct. at 1223-24 (Concurring Opinion of Justice Gorsuch)).