

**71 FLRA No. 36**

UNITED STATES  
DEPARTMENT OF COMMERCE  
NATIONAL INSTITUTE  
OF STANDARDS AND TECHNOLOGY  
(Agency)

and

FRATERNAL ORDER OF POLICE  
(Union)

0-AR-5379

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DECISION

June 24, 2019

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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**

In this case, we revisit the factors which arbitrators must consider in determining whether a status-quo-ante (SQA) remedy is appropriate. Here, the Arbitrator did not consider the *Federal Correctional Institution (FCI)*<sup>1</sup> factors when he erroneously determined that an SQA remedy was warranted.

Arbitrator Sean J. Rogers found that the Agency violated the parties' collective-bargaining agreement when it implemented a senior corporal policy (policy) that entailed additional tasks for the most senior corporal when no supervisor was on shift. He ordered that the Agency rescind the policy and provide the Union with notice and an opportunity to bargain if the Agency were to decide to reintroduce the policy in the future.

In its exceptions, the Agency correctly argues that the Arbitrator erroneously failed to apply the *FCI* factors when he determined that an SQA remedy was warranted. Applying *FCI*, we find that the degree to which an SQA remedy would disrupt and impair the efficiency and effectiveness of the Agency's operations renders that remedy inappropriate. Therefore, we modify the award to vacate the SQA remedy, and, instead, order the Agency to engage in post-implementation bargaining.

<sup>1</sup> 8 FLRA 604, 606 (1982).

**II. Background and Arbitrator's Award**

In March 2017, the Agency did not have enough supervisors to cover each shift without incurring overtime. Accordingly, the police chief developed the policy, which established additional tasks and expectations for the most senior corporal to perform when no supervisor was on a shift—contacting supervisors if problems arose during the shift, “step[ping] up” in the absence of supervisors, and completing and certifying time and attendance forms.<sup>2</sup>

In April 2017, the Union filed a grievance over the policy.<sup>3</sup> It alleged that the Agency violated the parties' agreement because it implemented the policy prior to negotiating with the Union. The Agency stated that the policy's impact on staff would be de minimis but that it would be willing to “discuss the impact and implementation of this change” with the Union.<sup>4</sup> The Agency also argued that the Union never submitted negotiable proposals or met with the Agency. The grievance advanced to arbitration.

The Arbitrator sustained the grievance. He found that the Agency made a change to conditions of employment that was more than de minimis and that it failed to properly notify and bargain with the Union prior to implementation. Specifically, he found that the police chief only offered to “discuss” rather than “negotiate” the change, demonstrating a misunderstanding of the Agency's obligations under the agreement and the Federal Service Labor-Management Relations Statute (Statute).<sup>5</sup>

The Arbitrator also determined that the change was not de minimis because the policy “fundamentally pushe[d] supervisory duties and responsibilities, known and unknown, down into the bargaining unit and on to the [police officers] who are not supervisors.”<sup>6</sup> He found that the policy conflicted with

<sup>2</sup> Award at 11, 19-20.

<sup>3</sup> In *U.S. DHS, U.S. CBP, El Paso, Texas (El Paso)*, the Authority clarified the distinction between “conditions of employment” and “working conditions” and explained that conditions of employment are defined as “personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions.” 70 FLRA 501, 502 (2018) (Member DuBester dissenting) (quoting 5 U.S.C. § 7103(a)(14)). While not raised by the Agency, we take this opportunity to note that the changes enacted in the policy are changes to conditions of employment, not working conditions, in contrast to *El Paso, AFGE, Local 1633 (Local 1633)*, and *U.S. DOL (DOL), Local 1633*, 70 FLRA 752, 753 n.17 (2018) (Member Abbott finding no change occurred); *DOL*, 70 FLRA 903 (2018) (Member DuBester dissenting).

<sup>4</sup> Award at 10.

<sup>5</sup> *Id.* at 17-18.

<sup>6</sup> *Id.* at 18.

the officers' non-supervisory position descriptions and concluded that the Agency violated the parties' agreement and 5 U.S.C. § 7106(b). As a remedy, the Arbitrator ordered the Agency to rescind the policy, and to provide notice and an opportunity to bargain to the Union, if it reintroduced any form of the policy.

The Agency filed exceptions to the award on May 22, 2018.<sup>7</sup>

**III. Analysis and Conclusion: The Arbitrator failed to apply the *FCI* factors when determining that an SQA remedy was warranted.**

In its exceptions, the Agency argues that the award is contrary to law<sup>8</sup> because the Arbitrator failed to appropriately consider the factors outlined in *FCI* when he determined that an SQA remedy was warranted.<sup>9</sup> Specifically, the Agency argues that the Arbitrator failed to consider whether an SQA remedy would disrupt the efficiency and effectiveness of the Agency's operations, as it "would require the Agency to staff each shift with a supervisory employee," resulting in "substantial overtime."<sup>10</sup>

In ordering the Agency to rescind the policy, the Arbitrator ordered an SQA remedy without so much as a passing reference, or citation, to *FCI*.<sup>11</sup> In *FCI*, the

Authority outlined five factors to consider when determining whether an SQA remedy is appropriate when an agency violated its statutory duty to engage in impact and implementation bargaining.<sup>12</sup>

The Authority has held that an arbitrator who finds a violation of a contractual duty to bargain derives remedial authority from the violated agreement and is not required to apply the *FCI* factors.<sup>13</sup> However, this distinction between a contractual and a statutory duty to bargain is not warranted<sup>14</sup> unless the contract language indicates that the contractual bargaining obligations differ substantively from the obligations that the Statute imposes.<sup>15</sup>

<sup>7</sup> The Union's opposition was due June 21, 2018, but the Union did not file it until July 6, 2018. The Union concedes that its opposition is "belated" but did not demonstrate extraordinary circumstances warranting a waiver of the expired time limit. See Opp'n, Attach. 1, Union's Statement in Lieu of Brief at 1; 5 C.F.R. §§ 2425.3(b), 2429.21, 2429.23(b); *AFGE, Local 704*, 70 FLRA 676, 677 n.10 (2018); *SSA*, 66 FLRA 6, 7 (2011). Accordingly, we do not consider the Union's untimely opposition.

<sup>8</sup> When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo. In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the appealing party establishes that those findings are "nonfacts." *U.S. Dep't of State, Bureau of Consular Affairs, Passport Servs. Directorate*, 70 FLRA 918, 919 (2018); *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014).

<sup>9</sup> Exceptions Br. at 6-9.

<sup>10</sup> *Id.* at 8.

<sup>11</sup> See Award at 1-21 (no mention of *FCI*); *SSA, Office of Disability Adjudication & Review, Sacramento, Cal.*, 70 FLRA 759, 773-74 (2018) (SQA remedy involved rescinding new 'team model' staffing policy); *USDA, Food Safety & Inspection Serv., Boaz, Ala.*, 66 FLRA 720, 734-35 (2012) (SQA remedy involved rescinding new policy of assigning only one inspector

rather than two inspectors to work overtime); see also Award at 14 (referring to an SQA remedy when summarizing the Agency's position).

<sup>12</sup> 8 FLRA at 606 ((1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, an SQA remedy would disrupt or impair the efficiency and effectiveness of the agency's operations).

<sup>13</sup> See *U.S. Dep't of the Treasury, IRS*, 68 FLRA 145, 149 (2014) (*IRS*); *U.S. Dep't of VA, Montgomery Reg'l Office, Montgomery, Ala.*, 65 FLRA 487, 490 (2011) (*Montgomery*); *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010) (*Cuba*).

<sup>14</sup> Member Abbott agrees that the *FCI* factors should apply where a contractual bargaining obligation does not differ substantively from statutory obligations. However, Member Abbott would go further and apply the *FCI* factors regardless of whether the bargaining obligation arises out of a contract or the Statute.

<sup>15</sup> See *Cuba*, 64 FLRA at 891 n.4 (noting that where a contract provision restates a provision of the Statute, the Authority must exercise care to ensure that arbitral interpretation of the contract provision is consistent with Authority precedent interpreting the statutory provision); *AFGE*, 59 FLRA 767, 769-70 (2004) (finding that the parties intended for a contractual provision that specifically referenced the Statute to be interpreted using statutory standards).

Here, the relevant articles<sup>16</sup> of the parties' agreement include references to the Statute,<sup>17</sup> and use wording that resembles or restates statutory wording.<sup>18</sup> The Arbitrator's analysis of the Agency's contractual bargaining obligation similarly referenced the Statute.<sup>19</sup> Accordingly, considering the contractual provisions at issue here as a whole, we find that the issue before us is statutory.<sup>20</sup>

The appropriateness of an SQA remedy is determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy.<sup>21</sup>

In his decision granting an SQA remedy, the Arbitrator did not apply *FCI*'s five factors. Most concerning, despite the Agency arguing that it would be adversely impacted, the Arbitrator failed to consider the impact an SQA remedy would have on the Agency's operations.<sup>22</sup>

<sup>16</sup> See Award at 20 (finding Agency "violated CBA Articles II, III, IV, [and] XVII").

<sup>17</sup> See *id.* at 3 (Art. II, § 4) ("In the administration of all matters covered by the [a]greement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities . . . ."); Exceptions, Attach. 2, Collective-Bargaining Agreement (CBA) at 38-39 (Art. XVII) (providing the Union with an opportunity to "present its views in writing" regarding any changes to "job description[s] [or] job requirement[s]" but reiterating management's "right to assign work in accordance with 5 U.S.C. [§] 7106(a)(2)(B)").

<sup>18</sup> Award at 3-4 (Art. II, § 4) (referring to the Agency's obligation to bargain using wording that mirrors 5 U.S.C. § 7103(a)(14)); *id.* at 4 (Art. III) (restating "[m]anagement [r]ights" using terminology similar to 5 U.S.C. § 7106); *id.* at 5 (Art. IV) (defining "[m]atters appropriate for negotiation between the parties" using terminology similar to 5 U.S.C. § 7103(a)(14)); CBA at 38-39 (reiterating management's "right to assign work in accordance with 5 U.S.C. [§] 7106(a)(2)(B)" and the Union's right "to negotiate over the impact and implementation of such changes to the extent required by Statu[t]e").

<sup>19</sup> Award at 16 (Arbitrator noted that the Statute is "[t]he law that defines the [p]arties' collective bargaining relationship, rights, duties, and obligations," referred to principles that apply in the statutory-bargaining-obligation context, such as impact-and-implementation bargaining, and stated that "[t]he resolution of this dispute turns on the provisions of 5 U.S.C. § 7106"), 20 (Arbitrator referred to 5 U.S.C. § 7106 as "a subsumed statutory provision of the [collective-bargaining agreement]" in concluding that the Agency violated the contract).

<sup>20</sup> *AFGE*, 59 FLRA at 770.

<sup>21</sup> *FCI*, 8 FLRA at 606 n.3 (Congress intends that "[t]he provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient government." (citing 5 U.S.C. § 7101(b))).

<sup>22</sup> *Id.* at 606 ("the appropriateness of a[n] SQA remedy must be determined on a case-by-case basis, carefully balancing the

We agree with the dissent that it is necessary for us to conduct a de novo review and to properly apply the *FCI* factors.<sup>23</sup> We find that ordering an SQA remedy, under these circumstances, will not effectuate the purposes and policies of the Statute.

Conducting a de novo review of the entire record, we find the Agency's arguments (which are entirely ignored by the Arbitrator and the dissent) to be particularly compelling and most relevant here. An SQA remedy would result in substantial overtime costs. There are only two supervisors<sup>24</sup> and they would be required to provide adequate staffing during the twenty-four hour, seven-days-per-week schedule.<sup>25</sup>

Applying the relevant *FCI* factors, we conclude that an SQA remedy is not only unnecessary to enforce the purposes of the Statute but it would result in unnecessary overtime payments and would disrupt and impair the efficiency and effectiveness of the Agency's operations.<sup>26</sup> It is not difficult to surmise that one is the consequence of the other.

nature and circumstances of the particular violation *against the degree of disruption in government operations that would be caused by such a remedy*" (emphasis added); *id.* (factors that the Authority considers in determining the propriety of an SQA remedy include whether, and to what degree, an SQA remedy would disrupt or impair the efficiency and effectiveness of the agency's operations); Award at 14 (Agency arguing that the requested SQA remedy "would create significant hardship and unnecessary resource expenditures").

<sup>23</sup> *U.S. DOD, Def. Commissary Agency, Peterson Air Force Base, Colo. Springs, Colo.*, 61 FLRA 688, 694 (2006) (The Authority evaluates "[t]he appropriateness of a[n] SQA] remedy . . . on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy." (citations omitted)).

<sup>24</sup> Award at 6 n.3, 7.

<sup>25</sup> *Id.* at 7.

<sup>26</sup> *U.S. Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852, 857-58 (2002) (Member Pope dissenting) (finding an SQA remedy inappropriate that would adversely affect an agency's security level); *FCI*, 8 FLRA at 606.

Consequently,<sup>27</sup> we modify the award to eliminate the SQA remedy and to order the Agency to engage in post-implementation bargaining.<sup>28</sup>

#### IV. Decision

We grant the Agency's contrary-to-law exception and modify the award to remove the SQA remedy and to order the Agency to engage in post-implementation bargaining.

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<sup>27</sup> *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 60 FLRA 456, 457 (2004) (Authority ordered retroactive bargaining order rather than SQA remedy under its "broad discretion to fashion appropriate remedies for unfair labor practices," finding that a "bargaining order that gives retroactive effect to any agreement reached by the parties at this time is appropriate because it permits the parties to determine—through negotiations—the best way to provide relief for employees who were adversely affected by the [r]espondent's unlawful refusal to bargain."); *Headquarters, 127th Tactical Fighter Wing, Mich. Air Nat'l Guard, Selfridge Air Nat'l Guard Base, Mich.*, 46 FLRA 582, 586-87 (1992) (Authority found union had not clearly and unmistakably waived its right to "seek bargaining over safety concerns subsequent to implementation" and so ordered agency to bargain); *Dep't of the Air Force, Air Force Logistics Command, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 17 FLRA 394, 396 (1985) (agency was obligated to bargain impact and implementation over a change, but SQA remedy was not warranted when past practice conflicted with law); *U.S. GPO*, 13 FLRA 203, 206 (1983) (Authority found SQA remedy not warranted and instead, an order to bargain, upon request, best effectuated the purpose and policies of the Statute).

<sup>28</sup> Because we grant the Agency's contrary-to-law exception, it is unnecessary for us to address its nonfact exception. *U.S. DOD Educ. Activity*, 70 FLRA 937, 938 n.18 (2018) (Member DuBester dissenting) (citing *U.S. DOD, Def. Logistics Agency, Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017)); Exceptions Br. at 8-9.

**Member DuBester, dissenting:**

I agree with the majority that the Arbitrator should have articulated and applied the factors outlined in *Federal Correctional Institution*<sup>1</sup> (*FCI*) in determining that a status-quo-ante (SQA) remedy was warranted. However, I disagree with the majority's application of *FCI* to conclude that the Arbitrator's award of an SQA remedy was not appropriate in this case. The record contains sufficient evidence upon which to sustain the Arbitrator's remedy.

When an agency fails to bargain over the impact and implementation of a management decision, the Authority evaluates the appropriateness of an SQA remedy using the factors set forth in *FCI*.<sup>2</sup> Specifically, the Authority considers: (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, an SQA remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.<sup>3</sup>

Here, the Arbitrator found that the Agency did not give the Union prior notice before implementing the senior corporal policy,<sup>4</sup> and that the Union promptly requested bargaining after it learned about the Agency's new policy.<sup>5</sup> This satisfies the first two *FCI* factors.

Regarding the third factor, the Arbitrator found that the Union requested to negotiate the new policy both before and after its implementation. The Agency, however, ignored the Union's requests based on its belief that it was only obligated to *discuss* implementation of the policy with the Union.<sup>6</sup> If an agency's actions "are otherwise intentional," then the agency's "erroneous belief that it had no duty to bargain does not support a conclusion that the [agency's] actions were not willful for the purposes of *FCI*."<sup>7</sup> Since there is record evidence that the Agency failed to engage in bargaining

with the Union before implementing the policy, and there is no record evidence that the Agency's actions were unintentional, the Arbitrator's finding on this point supports an SQA remedy.<sup>8</sup> The fourth *FCI* factor is also met because the Arbitrator found that the impact on employees affected by the change was more than *de minimis*, insofar as it required unit members to be tasked with supervisory responsibilities.<sup>9</sup>

The majority's decision does not even address the first four *FCI* factors, and instead concludes that the SQA remedy was not appropriate because the remedy would disrupt and impair the efficiency and effectiveness of the Agency's operations.<sup>10</sup> It bases this conclusion upon its finding that the SQA remedy would require supervisors to work "substantial overtime."<sup>11</sup>

But the conclusion that an SQA remedy would be disruptive to the operations of an agency must be based on specific evidence in the record concerning how, and to what degree, such disruption would occur.<sup>12</sup> Here, the majority's finding that the SQA remedy would require the Agency to incur "substantial overtime" is based solely on the Agency's testimony at the arbitration hearing that it implemented the new policy because it did not have enough supervisors to work every shift unless they worked overtime.<sup>13</sup> There is no basis in the record upon which to find that this obligation would be "substantial," much less to conclude that the overtime obligation would disrupt or impair the efficiency and effectiveness of the Agency's operation with the meaning of *FCI*.<sup>14</sup>

<sup>1</sup> 8 FLRA 604, 606 (1982).

<sup>2</sup> *U.S. DHS, U.S. CBP*, 65 FLRA 88, 89 (2010).

<sup>3</sup> *FCI*, 8 FLRA at 606.

<sup>4</sup> Award at 15, 17-18.

<sup>5</sup> *Id.* at 17-18.

<sup>6</sup> *Id.*

<sup>7</sup> *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 13 (2000).

<sup>8</sup> *Id.*

<sup>9</sup> Award at 18-20; *see, e.g., U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*, 63 FLRA 406, 408 (2009) (finding that change had more than *de minimis* impact supports SQA remedy).

<sup>10</sup> Majority at 5-6.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *U.S. Dep't of the Treasury, IRS Nat'l Distribution Ctr., Bloomington, Ill.*, 64 FLRA 586, 593 (2010); *see also Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 856 (1999) (Authority "bases its findings on specific evidence in the record concerning how, and to what degree, such disruption would occur").

<sup>13</sup> Majority at 5 n.25 (citing Award at 7).

<sup>14</sup> *See, e.g., U.S. DOD, Def. Commissary Agency, Peterson Air Force Base, Colo. Springs, Colo.*, 61 FLRA 688, 695 (2006) ("While the evidence indicates that the RIF was the result of budget considerations, this alone does not explain how a *status quo* remedy would disrupt or impact the efficiency and effectiveness of the [agency's] operations.").

Applying the findings contained in the record to the factors set forth in *FCI*, I would find that an SQA remedy is appropriate.<sup>15</sup> I therefore dissent from the majority's decision, and would uphold the Arbitrator's order that the Agency rescind the policy and provide the Union with notice and an opportunity to bargain if it reintroduces the policy in the future.

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<sup>15</sup> Additionally, I would deny the Agency's nonfact exception. *See, e.g., AFGE, Local 12*, 70 FLRA 582, 583 (2018) (denying nonfact exception as challenging the arbitrator's evaluation of the evidence); *U.S. Dep't of the Treasury, IRS*, 69 FLRA 122, 124 (2015) (finding that assertion that an arbitrator "failed to consider" an argument was a challenge to the arbitrator's evaluation of the evidence).