**70 FLRA No. 198**

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
PHOENIX, ARIZONA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3954
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5318

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DECISION

December 20, 2018

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

Decision by Member Abbott for the Authority

## I. Statement of the Case

This case concerns a matter that has been addressed and resolved by the U.S. Court of Appeals for the D.C. Circuit on two occasions.[1] But, here, AFGE continues to grieve for at least the seventeenth time,[2] the manner in which the Agency assigns work pursuant to Article 18 of the parties' collective-bargaining agreement, the very question already resolved by the D.C. Circuit.

Arbitrator David Gaba found that, although Article 18 permitted the Agency to "augment"[3] its non-custody officers in lieu of paying overtime to custody officers, the Agency violated the parties' agreement when it scheduled a small subset of non-custody officers to begin their shifts fifteen minutes early without providing notice.

The Agency argues that the award fails to draw its essence from the parties' agreement because Article 18 permits the Agency to change schedules in the manner it did here.

We find that because the Agency was acting within the broad discretion of Article 18 when it changed the subject employees' start times by fifteen minutes, the award fails to draw its essence from the parties' agreement. Accordingly, we vacate the award.

## II. Background and Arbitrator's Award

The Agency consists of a medium-security federal prison for male inmates and a satellite minimum-security prison camp for female inmates.

The Agency's (approximately 300) employees are all correctional officers and have received law enforcement training. They are either custodial (who guard the inmates) or non-custodial (who assist with the operation of the prison) officers.

In the spring of 2016, the Agency experienced a shortfall in its overtime budget. Therefore, from July to September 2016, the Agency decided to augment custodial shifts with non-custodial officers instead of paying overtime to custodial officers.

The Union filed a grievance arguing that the Agency, by these actions, violated Article 18 of the parties' collective-bargaining agreement, as well as a 2009 memorandum of understanding concerning augmentation during mandatory trainings, a memorandum concerning augmentation from the Director of the Bureau of Prisons, the Back Pay Act,[4] and past practice.

The Arbitrator found that Article 18(o) and the memorandum from the Director of the Bureau of Prisons "establish[ed] that the [Agency] had a right to make the

[1] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667, 676 (D.C. Cir. 2017) (*BOP II*) ("Article 18 . . . preempts challenges to all specific outcomes of the assignment process."); *Fed. BOP v. FLRA*, 654 F.3d 91, 96 (D.C. Cir. 2011) (*BOP I*) ("Because the parties reached an agreement about how and when management would exercise its right to assign work, the implementation of those procedures, and the resulting impact, do not give rise to a further duty to bargain.").

[2] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 748 (2018) (*Florence*) (Member DuBester dissenting); *AFGE, Local 3408*, 70 FLRA 638, 638 (2018) (Member DuBester concurring); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596, 596 (2018) (Member DuBester dissenting); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 342 (2017); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 69 FLRA 447, 454 (2016) (Dissenting Opinion of Member Pizzella).

[3] "Augmentation" is the process whereby the Agency assigns non-custody staff to vacant custody posts in lieu of scheduling overtime.

[4] 5 U.S.C. § 5596.

augmentation changes necessary to avoid paying overtime."[5] Nonetheless, he found that the Agency had a duty to bargain the impact of the proposed augmentation. On this point, the Arbitrator acknowledged that the Agency attempted to bargain (making a proposal that non-custodial officers would work shifts from 6:00 a.m. to 2:00 p.m.), and that the Union refused to meet.[6] However, the Arbitrator determined that the Agency violated Article 4(b) of the parties' agreement by changing the parties' "practices and understandings" when it directed a small subset of the non-custodial officers to begin work at 5:45 a.m. instead of 6:00 a.m.[7] He concluded that those employees were entitled to backpay.[8]

The Agency filed exceptions to the award on October 2, 2017, and the Union filed an opposition on November 8, 2017.[9]

## III. Analysis and Conclusion: The award fails to draw its essence from the parties' agreement.

The Agency argues[10] that the Arbitrator's finding—that the subset of non-custodial officers whose shifts began fifteen minutes earlier without notice violated the parties' agreement—fails to draw its essence from Article 18(o) of the parties' agreement.[11] As relevant here, Article 18(o) states that "[e]mployees shall be given at least twenty-four (24) hours[']notice when it is necessary to make shift changes . . . . For the purpose of this Agreement, a shift change means a change in the starting and quitting time of more than two (2) hours."[12]

In *U.S. DOJ, Federal BOP, Federal Correctional Complex, Coleman, Florida. v. FLRA*, the D.C. Circuit emphasized that Article 18 "is the last word"[13] on the "procedures by which a warden formulates a roster, assigns officers to posts, and designates officers for the relief shift."[14] Accordingly, the Authority has held that, in accord with the D.C. Circuit, the Agency's "broad assignment discretion" permits it to augment shifts, in order to avoid paying overtime, without triggering a duty to bargain.[15]

Article 18(o) only requires notice when a shift change is greater than two hours. Therefore, the Arbitrator erred when he found that the Agency violated the parties' agreement by moving the non-custodial officers' shifts by fifteen minutes without notice. Furthermore, the parties had never agreed to the Agency's "proposal" that the shifts begin at 6 a.m., and the Arbitrator provided no explanation as to how a "proposal" that was neither bargained nor agreed to[16] could bind the Agency.[17] And so, the Arbitrator's finding contradicts the express language of the parties' agreement – which permits the Agency to change shift start times by up to two hours without advance notice – and therefore,

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[5] Award at 26.

[6] *Id.* at 21; *see also id.* at 26 ("the Agency simply failed to follow its own proposal (that the Union refused to bargain)").

[7] *Id.* at 26.

[8] *Id.* at 30. He also found that these employees were entitled to attorney fees. *Id.* at 29-30.

[9] In its opposition, the Union argues that the Agency's exceptions are interlocutory and that the Agency failed to raise its arguments about the shift change to the Arbitrator. Opp'n at 6, 11. Because the Arbitrator resolved all issues submitted to arbitration and retained jurisdiction only to assist the parties in implementing the award, the Agency's exceptions are not interlocutory. *E.g., U.S. DHS, U.S. Citizenship & Immigration Servs.*, 68 FLRA 1074, 1076 (2015); *U.S. DOJ, Fed. BOP, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA 1168, 1170 (2010); *U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007). The Agency also raised its arguments at arbitration. *See* Exceptions, Attach. B, Agency's Closing Br. at 16. Accordingly, we decline to dismiss them under 5 C.F.R. §§ 2425.4(c), 2429.5.

[10] Exceptions at 6.

[11] The Authority will find that an arbitration award fails to draw its essence from a collective-bargaining agreement when the appealing party establishes that the award does not represent a plausible interpretation of the agreement. *Florence*, 70 FLRA at 749 n.9 (citing *AFGE, Local 2152*, 69 FLRA 149, 152 (2015) (*Local 2152*)).

[12] Exceptions, Attach. D (Master Agreement) at 46.

[13] 875 F.3d at 676.

[14] *Id.* at 671 (quoting *BOP I*, 654 F.3d at 95).

[15] *Florence*, 70 FLRA at 749 (citing *BOP II*, 875 F.3d at 676; *BOP I*, 654 F.3d at 96) (The Authority set aside an award that found that the increased use of augmentation was a change that triggered a bargaining obligation under Articles 4 and 7. The Authority found that the award failed to draw its essence from the parties' agreement—specifically the Agency's broad assignment discretion under Article 18.).

[16] Award at 21 (evidence "tends to show that the Union simply refused to meet to bargain over the impact[] of the proposed augmentation"), 26 (stating that "the Union refused to bargain" over the "proposal"); *see also id.* at 4 (Art. 4(b): "On matters which are not covered in supplemental agreements at the local level, all written benefits, or practices and understandings between the parties implementing this agreement, which are negotiable, shall not be changed unless agreed to in writing by the parties."); Opp'n at 9 ("While the Agency and the Union did meet to discuss the possibility of changing the Augmentation procedure, no agreement was reached and no change should have been made unless it was agreed to 'in writing by both parties.'" (quoting the parties' agreement)).

[17] Neither does the dissent explain how the augmentation change, which the Arbitrator found the Agency "had a right to make," both simultaneously established a "practice[] and understanding[]" and altered that same "practice[] or understanding[]" for a small subset of employees. Award at 26.

is not a plausible interpretation of the parties' agreement.[18]

Because the Agency acted under Article 18's broad assignment discretion when it changed the shifts of certain non-custodial officers by fifteen minutes,[19] the Arbitrator's contrary findings are not consistent with the parties' agreement.[20] Accordingly, we grant the Agency's essence exception[21] and set aside the award.[22]

## IV. Decision

We vacate the award.

[18] *U.S. DOD Educ. Activity*, 70 FLRA 937, 938 (2018) (*DODEA*) (Member DuBester dissenting); *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (*IRS*) (Member DuBester dissenting); *U.S. Dep't of the Treasury, IRS, Office of Chief Counsel*, 70 FLRA 783, 785-86 (2018) (*Chief Counsel*) (Member DuBester dissenting); *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 623, 624 (2018) (*El Paso*) (Member DuBester dissenting).

[19] *BOP II*, 875 F.3d at 676; *BOP I*, 654 F.3d at 95; *Florence*, 70 FLRA at 749.

[20] *DODEA*, 70 FLRA at 938; *IRS*, 70 FLRA at 808 n.31 (an arbitrator cannot rely on a past practice to modify the clear terms of a contract); *Chief Counsel*, 70 FLRA at 785-86; *Florence*, 70 FLRA at 749 (citing *Local 2152*, 69 FLRA at 152); *El Paso*, 70 FLRA at 624.

[21] Because we set aside the award, we do not address the Agency's remaining exceptions. *Florence*, 70 FLRA at 749 (citing *AFGE, Local 2145*, 69 FLRA 7, 9 (2015)).

[22] Because we vacate the award, including awarded backpay, we also set aside the Arbitrator's finding of attorney fees. *E.g.*, *AFGE, Council of Prison Locals, Local 1010*, 70 FLRA 8, 9 (2016) (without an award of backpay, attorney fees cannot be awarded under the Back Pay Act); *U.S. Dep't of the Army, U.S. Army Dental Activity Headquarters, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 62 FLRA 70, 72 (2007) (Authority set aside attorney fees because it vacated award).

**Member DuBester, dissenting:**

I disagree with the majority's decision that the award fails to draw its essence from the parties' agreement. "[C]ontinuing its non-deferential treatment of arbitrators and their awards,"[1] the majority's essence analysis ignores the contract violation on which the Arbitrator based his award. Instead, disregarding the Arbitrator's contract interpretation, the majority relies on its own assessment, rather than the Arbitrator's, of which contract provision is relevant to the non-custodial officer work-schedule issue the Arbitrator resolved.

The majority's non-deferential treatment of the award in this case ignores the Supreme Court's declaration that "[t]he federal policy of settling labor disputes by arbitration would be undermined if [a reviewing body] ha[s] the final say on the merits of [an] award[]"[2]; a reviewing body has "no business overruling" an arbitrator simply because "[its] interpretation of the contract is different."[3]

To the contrary, when reviewing an arbitrator's interpretation of a collective-bargaining agreement, Authority precedent applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[4] Under this standard, the Authority will grant an exception claiming that an arbitration award fails to draw its essence from the parties' agreement only when the excepting party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective-bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[5] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[6]

The Arbitrator's award in this case draws its essence from the parties' agreement. As the majority acknowledges in its background discussion before beginning its analysis, the Arbitrator awarded backpay to certain non-custodial officers because the Agency violated Article 4(b) of the parties' agreement.[7] The Arbitrator found that the Agency violated Article 4(b) when it changed the parties' "practices and understandings" about when those employees would begin work.[8]

Article 4(b) states in relevant part: "[A]ll . . . *practices and understandings* between the parties . . . shall not be changed unless agreed to in writing by the parties."[9] As the Arbitrator found, the parties had a "practice" or "understanding" concerning the work schedule for these non-custodial officers. Among other things, as the Arbitrator also found, the Union was at the meeting where the Agency, after notifying the Union of its intent, announced that it was implementing the schedule.[10]

But the Agency changed that schedule without notice, or an agreement "in writing by the parties."[11] The Arbitrator found that this violated Article 4(b). Addressing the change, the Arbitrator explained that "when the Agency simply failed to follow its own proposal [which it had implemented]," "[c]learly[] the parties' '*practices and understandings*' were changed."[12] And because the Agency "changed [the officers' schedules] without notice or notification,"[13] and without the Union's "agree[ment] . . . in writing,"[14] the Arbitrator found a contract violation and awarded the affected employees a remedy. The Arbitrator's interpretation and application of Article 4(b)'s "practices and understandings" language is clearly plausible, and accordingly draws its essence from the parties' agreement.

But the majority does not analyze the Arbitrator's interpretation and application of Article 4(b). Instead, the majority finds that the award fails to draw its essence from other contract provisions which the Arbitrator did not interpret or apply. In conducting this analysis, the majority non-deferentially, and without discussion, substitutes its own interpretation of the parties' agreement for the Arbitrator's determination that Article 4(b), by addressing the particular circumstances of the non-custodial officers' work-schedule change, is

[1] *U.S. Small Bus. Admin.*, 70 FLRA 885, 888 (2018) (Dissenting Opinion of Member DuBester); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 750 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of Transp., FAA*, 70 FLRA 687, 690 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 70 FLRA 680, 685-86 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of VA, Med. Ctr., Asheville, N.C.*, 70 FLRA 547, 549 (2018) (Dissenting Opinion of Member DuBester).

[2] *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (*Steelworkers*).

[3] *Id.* at 599.

[4] *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

[5] *Id.*

[6] *Id.* (quoting *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

[7] Majority at 3.

[8] Award at 26.

[9] *Id.* (quoting Art. 4(b)).

[10] *Id.* at 13.

[11] *Id.* at 26 (quoting Art. 4(b)).

[12] *Id.*

[13] *Id.* at 27.

[14] *Id.* at 26.

the contract provision most relevant to the parties' dispute. However, as discussed previously, a reviewing body has "no business overruling" an arbitrator simply because "[its] interpretation of the contract is different."[15]

Because the Arbitrator's interpretation of the parties' agreement is plausible, I would deny the Agency's essence exception and reach the Agency's remaining exceptions.

[15] *Steelworkers*, 363 U.S. at 599.