

71 FLRA No. 117

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
TALLAHASSEE, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1570
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5485

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DECISION

March 6, 2020

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

I. Statement of the Case

Arbitrator Linda J. Eberenz found the Agency violated Article 18¹ of the parties' agreement when it assigned non-bargaining-unit employees to receive inmates who were being transferred from another facility. We find that the Agency fails to successfully challenge the Arbitrator's award on contrary-to-law or essence grounds. Consequently, we deny all exceptions.

¹ This is the latest of several cases the Authority has considered in recent years that involve Article 18. *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Phx., Ariz.*, 70 FLRA 1028, 1028 n.1 (2018) (*Phoenix*) (Member DuBester dissenting) (collecting cases). Even the U.S. Court of Appeals for the District of Columbia Circuit has weighed in twice. *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667, 676 (D.C. Cir. 2017) ("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) ("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.").

II. Background and Arbitrator's Award

Hurricane Maria damaged Metropolitan Detention Center, Guaynabo, in Puerto Rico (Guaynabo). As a result, inmates had to be relocated to other facilities. The Agency was notified that the transfer could occur within "several days,"² but the exact timing was unknown. When the inmates were actually transferred, the Agency received notice the same day.

The Agency assigned three non-bargaining-unit employees overtime to meet the inmates at the airport and transport them. The Union filed a grievance alleging that the Agency's selection of non-bargaining-unit employees violated Article 18, Section (p)(1) of the parties' agreement, which provides: "when [m]anagement 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."³ The parties were unable to resolve the grievance and proceeded to arbitration.

Before the Arbitrator, the Agency argued that it had acted pursuant to its right to assign work under § 7106 of the Federal Service Labor-Management Relations Statute (the Statute).⁴ The Agency also argued that Article 5, Section (a)(2)(d) of the parties' agreement ensured its authority "to take whatever actions may be necessary to carry[]out the Agency mission during emergencies."⁵

The Arbitrator sustained the grievance in an award dated February 18, 2019. As an initial matter, she found the Agency's emergency argument unavailing because the Agency had several days to prepare to receive the inmates. She also determined that the duties performed as part of the transfer were duties normally performed by bargaining-unit employees. In the absence of an emergency, the Arbitrator concluded that the Agency violated the parties' agreement when it assigned non-bargaining-unit employees, rather than bargaining-unit employees, to perform those duties because "the Agency should have followed the procedures already in place for these situations."⁶ As a remedy, she ordered the Agency to pay the bargaining-unit employees who would have received the assignment the amount they would have been paid.⁷

² Award at 6.

³ *Id.* at 3.

⁴ 5 U.S.C. § 7106.

⁵ Award at 4.

⁶ *Id.* at 11.

⁷ *Id.*

On March 20, 2019, the Agency filed exceptions to the award. On May 2, 2019, the Union filed an opposition to the Agency's exceptions.⁸

III. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law.⁹ Specifically, the Agency argues that the award excessively interferes with the Agency's management right to assign work under § 7106(a)(2)(B) of the Statute and its right under § 7016(a)(1) to determine internal security.¹⁰ We analyze these arguments under the three-part test articulated in *U.S. DOJ, Federal BOP (DOJ)*.¹¹

The parties agree that the first¹² and second¹³ questions under *DOJ* are not in dispute, but they disagree on the answer to the third part of the analysis.¹⁴

⁸ We note that on the exceptions form, the Agency answered in the affirmative to the query whether it was alleging the arbitrator exceeded her authority. *See* Exceptions Form at 6. Despite the comments directing the reader to see the "[a]ttached [b]rief," there was no argument in the attached brief addressing an exceeds authority argument. Accordingly, we deny this exception as unsupported. 5 C.F.R. § 2425.6(e)(1) (noting an exception may be subject to dismissal or denial if the excepting party fails to raise and support a ground for review); *NAGE, Local R3-10 SEIU*, 69 FLRA 510, 510 (2016) (denying exception where party alleged arbitrator exceeded his authority but did not support argument).

⁹ When an exception involves an award's consistency with law, the Authority reviews any question of law de novo. *NAIL, Local 5*, 70 FLRA 550, 552 (2018) (Member DuBester concurring) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 344 (2017)). In reviewing de novo, the Authority assesses whether an arbitrator's legal conclusions are consistent with the relevant legal standards. *Id.* Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *AFGE, Local 2338*, 71 FLRA 343, 344 (2019).

¹⁰ Exceptions Br. at 6-7; 5 U.S.C. § 7106(a)(1), (a)(2)(B).

¹¹ 70 FLRA 398 (2018) (Member DuBester dissenting) (establishing test for determining whether award excessively interferes with management rights).

¹² *Id.* at 405 ("The first question that must be answered is whether the arbitrator has found a violation of a contract provision.").

¹³ *Id.* ("[T]he second question is whether the arbitrator's remedy reasonably and proportionally relates to that violation.").

¹⁴ Exceptions Br. at 8 (conceding that the "answer to the first question is yes" because the Arbitrator found that the Agency violated Article 18, "the answer to the second question is also yes" because the Arbitrator awarded the backpay the unit employees would have earned if the Agency had complied with Article 18, and that "this case turns on [the third question]"); Opp'n at 5 ("the only question remaining here is [the third question]").

Therefore, we proceed to the third question, which "is whether the arbitrator's interpretation of the provision excessively interferes with a § 7106(a) management right."¹⁵ If the answer to this question is yes, then the arbitrator's award is contrary to law and must be vacated.¹⁶

The Agency argues that, based on the award, "management loses all right[s] to determine when it is necessary to pay overtime" and that the award precludes management from "all right[s] to determine where to assign employees and how to assign work."¹⁷

We do not agree. The Agency's argument is based on the faulty premise that the award requires the Agency "to always pay overtime instead of filling posts with other qualified employees."¹⁸ But the award imposes no such requirement. The Arbitrator simply concluded that there was no emergency and that the assignment of overtime under these circumstances violated the parties' agreement.¹⁹ Therefore, this argument does not provide a basis for finding the award deficient.²⁰

Nor do we find merit in the Agency's argument that the award excessively interferes with its right to determine internal security practices.²¹ The Agency argues that decisions addressing internal security are entitled to a higher standard of deference because internal security within a correctional facility constitutes a greater than normal management concern²² and, again, that the

¹⁵ *DOJ*, 70 FLRA at 405.

¹⁶ *Id.* at 405-06.

¹⁷ Exceptions Br. at 9-10.

¹⁸ *Id.* at 10.

¹⁹ Award at 10-11.

²⁰ *U.S. DOL*, 70 FLRA 27, 30 (2016) (Member Pizzella dissenting on other grounds) (finding contrary-to-law exception that relies on faulty premise does not provide basis for finding award deficient).

²¹ *See* Exceptions Br. at 9. The Authority has found that the right to determine internal security practices includes the right to determine the policies and practices that are part of an agency's plan to secure and safeguard its personnel and physical property and to prevent the disruption of the agency's activities and operations. *SSA, Balt., Md.*, 55 FLRA 498, 502 (1999) (citing *U.S. DOD, Def. Fin. & Accounting Serv., Indianapolis Ctr., Indianapolis, Ind.*, 48 FLRA 1124, 1126-27 (1993)). When there is a link or reasonable connection between an agency's goal of safeguarding personnel or property or of preventing disruption of agency operations and the disputed practice, the Authority will find that the disputed practice is part of the right to determine internal security practices under § 7106(a)(1). *Id.*

²² *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Fed. Satellite Low, La Tuna, Tex.*, 59 FLRA 374, 377 (2003) (Member Pope concurring) (discussing management right to determine internal security practices in prisons).

hurricane created an emergency situation.²³ But the Arbitrator's determination that there was no emergency is a factual finding²⁴ that was based on the paucity of evidence presented by the Agency at the hearing and the fact that the Agency did not challenge the Union's evidence that the transfer duties were routine. In effect, the Agency fails to establish a link or reasonable connection between its goal of safeguarding personnel or property or of preventing disruption of agency operations and the use of non-bargaining-unit employees under these circumstances.²⁵

Consequently, the answer to the third *DOJ* question is no, and we deny this exception.

B. The award draws its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement.²⁶ Specifically, the Agency contends that the Arbitrator's finding that the Agency violated the agreement when it assigned non-bargaining-unit employees to perform bargaining-unit duties shows a manifest disregard for the plain meaning of the agreement.²⁷ Additionally, the Agency argues that the award disregards procedures set forth in Article 18(p) of the parties' agreement.²⁸

The Agency's exceptions do not demonstrate that the award is deficient. As relevant here, Article 18 requires that the Agency give first consideration to qualified bargaining-unit employees. The Arbitrator simply found that, because there was no emergency, "the Agency breached the terms of [Article 18] when it assigned non-bargaining unit employees to perform

[routine] bargaining unit duties."²⁹ That interpretation of Article 18 is not irrational, implausible, or unconnected to the wording of the agreement. Therefore, this argument does not establish that the award fails to draw its essence from the agreement and provides no basis for finding the award deficient.³⁰ Accordingly, we deny this exception.

IV. Decision

We deny the Agency's exceptions.

²³ See *Exceptions Br.* at 9.

²⁴ *U.S. Dep't of State, Passport Servs.*, 71 FLRA 362, 363-64 (2019) (Member DuBester concurring; Chairman Kiko dissenting) (noting arbitrator's determination that no emergency existed was a factual finding).

²⁵ *U.S. Dep't of Transp., FAA*, 68 FLRA 402, 404-05 (2015) (denying exception arguing that award interfered with agency's right to determine internal security practices where excepting party did not challenge arbitrator's factual findings as nonfacts).

²⁶ The Authority will find an arbitration award is deficient as failing to draw its essence from a collective bargaining agreement 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 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. *AFGE Local 1738*, 71 FLRA 505, 506 n.11 (2019) (Member DuBester concurring).

²⁷ *Exceptions Br.* at 11.

²⁸ *Id.* at 15-16.

²⁹ Award at 10.

³⁰ *U.S. Dep't of the Navy, U.S. Marine Corps, Fin. Ctr., Kan. City, Mo.*, 38 FLRA 221, 228 (1990) (denying essence exception where it amounts only to disagreement with arbitrator's interpretation and application of parties' agreement).

Member DuBester, concurring:

I agree that the award draws its essence from the parties' collective-bargaining agreement and, therefore, I concur in the decision to deny the Agency's essence exception. While I also agree with the decision to deny the Agency's contrary-to-law exception, I continue to believe – for reasons I have expressed in previous cases – that the abrogation test is the appropriate test to determine whether an arbitrator's award impermissibly encroaches on a management right.¹ Applying that standard here, I would deny the Agency's contrary-to-law exception.

¹ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596, 598-99 (2018) (Dissenting Opinion of Member DuBester); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 445 (2018) (Concurring Opinion of Member DuBester); *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 409-12 (2018) (Dissenting Opinion of Member DuBester).