

71 FLRA No. 125

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3960
COUNCIL OF PRISON LOCALS, C-33
(Union)

0-AR-5420

DECISION

April 2, 2020

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

I. Statement of the Case

This case represents another chapter in a long saga of disputes in which the union representing employees of the Bureau of Prisons has sought to limit the Agency's discretion to reassign employees, using a practice known as augmentation, under the parties' collective-bargaining agreement (CBA). Here, Arbitrator Dennis J. Campagna found a past practice, of non-augmentation, to have modified the CBA and a local agreement, such that when the Agency unilaterally implemented augmentation, it violated a duty to bargain imposed by both agreements. We set aside the entire award for failing to draw its essence from the parties' agreement.

¹ Award at 3.

² Exceptions, Attach. C, Master CBA.

³ Award at 20.

⁴ *Id.* at 20-21.

II. Background and Arbitrator's Award

Employees at the Agency, a federal prison, work in several departments, the largest of which is the Correctional Services Department, known as the "Custody Department."¹ While all employees are initially trained as correctional officers, many are assigned to non-custody departments such as the management and education departments. The parties' current CBA became effective July 21, 2014. Article 18 ("Hours of Work") of that CBA² sets forth detailed procedures for management officials, with employee and Union input, to create assignment rosters every three months for all the custody and non-custody shifts and posts. Nevertheless, on many days the Custody Department finds that it is short of staff.

Prior to 2016, when managers were faced with such a situation, they would either leave a post vacant or fill it with a custody employee working on an overtime basis. But starting in 2016, the Agency began assigning non-custody employees to fill in at the custody posts, to conserve resources. The Union requested bargaining over this alleged change in Agency practice, but the Agency refused, asserting that these reassignments, also called augmentation, were permitted under Article 18. When the Union's grievance could not be resolved, it was submitted to arbitration.

In an award dated September 14, 2018, the Arbitrator found that because the Agency had not augmented custody posts with non-custody employees prior to 2016, a binding past practice – an "unwritten contractual right" – had been established.³ Therefore, by resorting to augmentation in 2016 the Arbitrator reasoned that the Agency "breached" this practice.⁴ The Arbitrator examined the Agency's conduct in relation to Articles 3, 4, and 5 of the CBA, which address the Agency's duty to bargain over changes, and he found that the Agency had violated all three articles by unilaterally using augmentation.

Similarly, the Arbitrator ruled that the Agency's refusal to bargain violated the parties' Ground Rules for Supplemental Agreements and Memorandum of Understanding Meetings (MOU), negotiated in 2014 between the Warden of Federal Correctional Institution (FCI) Miami and the Union.⁵ This MOU requires that "all matters brought forward at FCI Miami will be negotiated in order based upon the date the Intent to Negotiate was filed."⁶ The Arbitrator focused on the words "all matters" in finding that the Agency had improperly rejected the Union's requests to negotiate the use of augmentation.⁷

⁵ Opp'n, Ex. 2, MOU.

⁶ *Id.* at 1, para. 2.

⁷ Award at 23 (emphasis omitted).

The Arbitrator also ruled that augmenting custody posts with non-custody employees without bargaining violated Article 27 of the CBA, which “provides, in relevant part that in dealing with the inherent hazards of a correctional environment, the Agency [a]grees to lower those inherent hazards to the lowest possible level without relinquishing its rights under 5 U.S.C. § 7106.”⁸

Finally, the Arbitrator ruled that augmentation deprived custody employees of overtime opportunities and violated the requirements of Article 18, Section p of the CBA that “qualified employees in the bargaining unit will receive first consideration” for overtime assignments and that overtime “will be distributed and rotated equitably among bargaining unit employees.”⁹

On October 15, 2018, the Agency filed exceptions¹⁰ to the Arbitrator’s award, and on November 19, 2018, the Union filed an opposition to the exceptions.

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

The Agency argues that the award fails to draw its essence from the CBA.¹¹ The Agency states that by requiring it to bargain before filling custody posts with non-custody employees, the Arbitrator ignored the clear language of Article 18, which gives the Agency broad discretion to assign and reassign employees.¹² We agree.

The lynchpin of the entire award, from which all of the agreement-violations flowed, was the Arbitrator’s determination that the Agency’s previous restraint from utilizing the reassignment or augmentation authority available to it amounted to a “past practice,” an “unwritten contractual right,” such that non-custody staff were “assured” that they would not be “directed” to fill vacant custody posts.¹³ This creation of an unwritten contractual right by the Arbitrator instead modified the clear terms of Article 18. For this reason, the entire award fails to draw its essence from the parties’ agreements.

In *U.S. Department of the Navy, Puget Sound Naval Shipyard & Intermediate Maintenance Facility, Bremerton, Washington*, we held that while arbitrators may look to parties’ past practices when construing an ambiguous contract provision, they may not rely on a past practice to create a new provision.¹⁴ Yet, after the Arbitrator determined that there existed a “past practice” to not use augmentation, he applied the “breach” of this past practice to ultimately find every one of the violations of the various Articles and the local MOU. This issue of augmentation is not new to this case or to these parties. The parties have been disputing the question of augmentation for years.¹⁵ Although these prior cases were decided under the “covered by” principle, neither the Authority nor the United States Court of Appeals for the District of Columbia Circuit has found management’s reassignment authority under Article 18 to be

⁸ *Id.*

⁹ *Id.* at 28 (quoting CBA Art. 18, § p).

¹⁰ The Agency did not file exceptions to the arbitrator’s procedural findings.

¹¹ The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the appealing 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 obligations of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *U.S. Dep’t of the Treasury, IRS, Office of Chief Counsel*, 70 FLRA 783, 785 n.31 (2018) (Member DuBester dissenting); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

¹² Exceptions at 6-12. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has twice examined Article 18, as was contained in the parties’ agreement executed in 1998, and ruled that it “covers and preempts challenges to all specific outcomes of the assignment process.” *See Fed. BOP v. FLRA*, 654 F.3d 91, 96 (D.C. Cir. 2011) (*BOP I*); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667, 670 (D.C. Cir. 2017) (*BOP II*); *id.* at 672-73 (noting the 1998 master agreement had expired, the parties executed a new agreement in 2014, and that the articles

before the court in *BOP II* were from the 1998 agreement). The Authority also has applied the court’s reasoning and set aside arbitration awards which found that Articles 4 and/or 7 of the CBA took precedence over Article 18 and required the Agency to bargain before assigning non-custody employees to custody posts, a practice known as augmentation. *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Phx., Ariz.*, 70 FLRA 1028, 1029-30 (2018) (*FCI Phoenix*) (Member DuBester dissenting); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 749 (2018) (*FCC Florence*) (Member DuBester dissenting). As well, we have set aside awards which found that Article 27’s safety provisions prohibit certain assignment practices. *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596 (2018) (Member DuBester dissenting); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442 (2018) (*FCI Big Spring*) (Member DuBester concurring).

¹³ Award at 20-21.

¹⁴ 70 FLRA 754, 755-56 (2018) (*Bremerton*) (Member DuBester dissenting); *see also U.S. Small Bus. Admin.*, 70 FLRA 525, 528-29 (2018) (Member DuBester concurring in part and dissenting in part); *U.S. Dep’t of the Navy, Navy Pub. Works Ctr., San Diego, Cal.*, 48 FLRA 679, 683-84 (1993).

¹⁵ Many historical decisions were listed in *FCI Phoenix*, 70 FLRA at 1028 n.2, and in *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Lompoc, Cal.*, 58 FLRA 301, 301 n.3 (2003).

ambiguous.¹⁶ And so, the Arbitrator may not find a past practice to create a new provision in the parties' agreements that restricted the Agency's broad discretion over the assignment process or created a duty to bargain over augmentation.

The facts of this case closely resemble those of *FCC Florence*,¹⁷ where an arbitrator ruled that the Agency violated the bargaining obligations of Articles 4 and 7 of the same CBA by augmenting non-custody officers in custody posts without giving the Union notice of the "change" or an opportunity to bargain. We held there that "the Agency's assignment of work, in compliance with Article 18, did not trigger a duty to bargain."¹⁸ We reached a similar conclusion, in similar circumstances, in *FCI Phoenix*.¹⁹

Unlike *FCC Florence* and *FCI Phoenix*, the Arbitrator here also ruled that augmentation violated Article 18 – specifically Section p, which requires overtime to be distributed and rotated equitably.²⁰ But his only explanation for this conclusion is that "bargaining unit members were denied overtime opportunities as a result of the Agency's decision to discontinue a binding past practice [and] . . . augment[] at FCI Miami."²¹ In other words, the Agency allegedly violated Article 18, Section p, only because it improperly changed an assignment practice without notice or bargaining – a conclusion that we have here found to be deficient.²² As the Arbitrator's interpretation of Article 18, Section p is based on a nonexistent bargaining obligation, it cannot in any rational way be derived from the CBA.

Similarly, the Arbitrator's conclusions that the Agency violated the MOU and Article 27 cannot stand on

their own because they are based on the faulty premise that the Agency was required to negotiate when the Union objected to augmentation.²³ While Articles 3, 4, and 5 and the MOU set forth general obligations to negotiate, Article 18 has been found to provide management with broad discretion to assign and reassign employees to posts and shifts.²⁴ Since the Agency's decision to augment here constituted its implementation of the procedures authorized by Article 18, the Arbitrator's findings of myriad contract violations based on his imposition of further bargaining obligations fails to draw its essence from the agreements.²⁵ Accordingly, we grant the Agency's essence exception and set aside the award.²⁶

¹⁶ As noted by the D.C. Circuit, Article 18, entitled "Hours of Work," "represent[s] the agreement of the parties about the procedures by which a warden formulates a roster, assigns officers to posts, and designates officers for the relief shift." *BOP I*, 654 F.3d at 95. Although Article 18's provisions are too numerous to recite, Section o pertains to shift and work assignment changes. As relevant here, it provides that if a reassignment will change the "starting and quitting time [by] more than two (2) hours," the Agency will give employees at least twenty-four hours' notice, but that "[w]ork assignments on the same shift may be changed without advance notice." Exceptions, Attach. C, Master CBA at 46 (emphasis added). There is no allegation in this case that the challenged work assignments failed to comply with these notice requirements. As the D.C. Circuit observed in *BOP I*, "the Union's grievance is at bottom[,] a complaint about the discretion Article 18 affords to the wardens." 654 F.3d at 97. Although, previously, "[w]ardens had been exercising their approval authority favorably to the officers, by staffing more full-time posts than were needed and then paying overtime wages to meet the need for relief officers[,] . . . [d]eteriorating economic conditions made these practices unsustainable[.] [B]ut that change does not justify disregarding an agreement made when times were better." *Id.*

¹⁷ 70 FLRA at 748.

¹⁸ *Id.*

¹⁹ 70 FLRA at 1029-30.

²⁰ Award at 28.

²¹ *Id.*

²² See *FCC Florence*, 70 FLRA at 749.

²³ Award at 23-24; *id.* at 34-35 (finding Agency "violated . . . Article[] . . . 27 . . . in its failure to properly augment, negotiate augmentation, and by denying all eligible bargaining[-]unit members overtime opportunities and pay" (emphasis added)).

²⁴ *E.g.*, *BOP II*, 875 F.3d at 670; *BOP I*, 654 F.3d at 95-97; *FCI Phoenix*, 70 FLRA at 1028-30; *FCC Florence*, 70 FLRA at 749.

²⁵ *Cf.* *BOP I*, 654 F.3d at 97 (rejecting contention that the agency's alleged violation of its contractual bargaining obligation under Article 3 provided a separate and independent ground for imposing a duty to bargain over the agency's exercise of its Article 18 assignment authority).

²⁶ Because we set aside the award, we do not address the Agency's remaining exceptions. See *U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017) (setting aside award on exceeded-authority ground made it unnecessary to review remaining exceptions).

The dissent elevates the “*Steelworkers Trilogy*”²⁷ to mythological status within federal sector arbitrations. His argument that the “common law of the workplace” provides that an arbitrator is “not confined to the express provisions of the contract”²⁸ warrants further discussion. According to the dissent, no party, the Authority, or a court should ever be able to successfully challenge an arbitrator’s interpretation of any contract no matter how wrong or how many times other arbitrators, the Authority, or a federal court may have come to a different conclusion. The dissent’s oft-repeated claim,²⁹ which advocates for total deferential obeisance to arbitral interpretations, is flawed.³⁰

The grievance in this case was not a typical grievance that suddenly arose out of a simple disagreement over the meaning of a contract provision which needed to be submitted to an arbitrator to resolve the disagreement. The grievance was not new, novel or isolated. Rather, the Union has challenged the scope of Article 18 dozens of times beginning back in 2003.³¹ Many of those awards were appealed to the Authority which in most instances agreed with the arbitrators’ determinations. However, in 2011, in *BOP I*, the U.S. Court of Appeals for the District of Columbia Circuit explicitly rejected all of the prior arbitral and Authority interpretations which had been ascribed to Article 18 and determined that Article 18 “covers and preempts challenges to all specific outcomes of the assignment process.”³² But that did not stop the Union. The Union continued to file new grievances, and the Authority continued to affirm arbitral interpretations that ignored the Court’s ruling in *BOP I* (without even mention, let alone consideration, of the Court’s decision).³³ Therefore, once again in *BOP II*, the court chastised the Authority anew because its affirmation of those arbitral interpretations was “directly at odds with th[e] court’s [interpretation of Article 18] in *BOP I*.”³⁴ Since *BOP II*, however, this Authority has followed the

Court’s interpretation four times in cases which were initiated before the court made its determination, and in each our dissenting colleague continued to disagree with the court and side with contrary arbitral interpretations.³⁵

Thus, in this case, where the Union advances essentially the same arguments seeking a different arbitral interpretation of Article 18 (which is contrary to the court’s determinations in *BOP I* and *BOP II*), and points to additional contractual provisions to support its argument, we cannot conclude that – when the Arbitrator “ignored the clear language of Article 18” and, “created” an entirely new provision – the Arbitrator’s interpretation is entitled to any deference at all. Instead, it is clear to us that, to the extent the arbitrator’s interpretation of Article 18 runs counter to clear judicial and Authority precedent, this award does not represent a plausible interpretation of the parties’ agreement. It is in manifest disregard of Article 18 as that provision necessarily was interpreted by the court. Unlike the dissent, we cannot extend blind deference and ignore the history of prior grievances which required judicial intervention. To hold otherwise will only serve to encourage the filing of even more never-ending grievances as the Union strives to achieve a result that has been rejected by the Authority *and* the court.

It is also particularly important to note that the three *Steelworkers* cases³⁶ cited by the dissent are relevant to *private sector* labor-relations and collective bargaining. Those cases, however, were decided before the advent of Executive Order 11491 in 1964 and the enactment of the Federal Service Labor-Management Relations Statute (the Statute)³⁷ in 1978. The Statute alone established the parameters of collective-bargaining for the *federal public sector*. There is no doubt that, when first established under the Statute, the Authority looked to other sources (such as

²⁷ Dissent at 16, 20 (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (*Warrior & Gulf*)); see also *United Steelworkers of Am. v. Enter. Wheel & Car. Corp.*, 363 U.S. 593, 596 (1960) (*Enterprise Wheel*); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960) (*Am. Mfg.*).

²⁸ Dissent at 16.

²⁹ The dissent has raised the same argument in *U.S. Small Bus. Admin.*, 70 FLRA 885, 888-89 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep’t of the Treasury, IRS, Office of Chief Counsel*, 70 FLRA at 786-87 (Dissenting Opinion of Member DuBester); *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 412 (2018) (Dissenting Opinion of Member DuBester).

³⁰ Member Abbott finds that such flawed claims are similar to those found in cases regarding “abrogation,” *U.S. DOJ, Fed. BOP*, 70 FLRA at 403 (rejected because it established thresholds impossible to meet); see also *U.S. Dep’t of the Treasury, IRS, Office of Chief Counsel, Wash., D.C. v. FLRA*, 739 F.3d 13, 20-21 (D.C. Cir. 2014), and “incremental extension of benefits,” *U.S. Dep’t of the Air Force, Luke Air Force Base, Ariz. v. FLRA*,

844 F.3d 957, 962 (D.C. Cir. 2016) (rejected because it interjected our Statute into another which did not fall within our purview).

³¹ See *supra*, note 16.

³² *BOP I*, 654 F.3d at 96.

³³ It is curious that our dissenting colleague asserts that our decision constitutes “a fundamental misunderstanding” of the Court’s decisions in *BOP I* and *BOP II* when, prior to today, our colleague did not even acknowledge the existence, let alone the relevance of, those decisions. Dissent at 18 n.39. Our colleague joined in multiple majorities between 2011 and 2017 which affirmed (and since then drafted several separate opinions which would have affirmed) multiple arbitral interpretations of Article 18 which ran directly counter to the court’s ruling in *BOP I* without making any mention of that case. See *supra*, note 16.

³⁴ *BOP II*, 875 F.3d at 673.

³⁵ See *supra*, note 16.

³⁶ *Enterprise Wheel*; 363 U.S. 593; *Warrior & Gulf*, 363 U.S. 574; *Am. Mfg.*, 363 U.S. at 564.

³⁷ 5 U.S.C. §§ 7101-7135.

Executive Order 11491)³⁸ and private sector precedent (such as the *Steelworkers* cases) for guidance, when necessary, in order to establish review parameters and standards which would be applied to the collective-bargaining and grievance processes established by the Statute.

But the applicability of the *Steelworkers* cases in the federal public sector is limited in several key respects. The foundations which underlie collective bargaining in the private and public sectors are quite distinct. For example, the Supreme Court in *Warrior and Gulf* explained that in *private-sector* collective bargaining “the collective bargaining agreement” defines the entirety of “the rights and duties of the parties,” “covers the *whole* employment relationship,”³⁹ and creates “a system of industrial *self-government*.”⁴⁰

In contrast, although the Statute permits the Authority to find arbitral awards deficient “on other grounds similar to [not the same as] those applied by Federal courts in private sector [arbitrations],”⁴¹ the Statute explicitly creates a significantly more-limited collective-bargaining framework that is “designed to meet the special requirements and needs of the Government.”⁴² Thus, the Authority may not only vacate an award “on grounds similar to those applied by Federal courts in private sector” cases⁴³, it may vacate awards on any number of grounds not available in the private sector, including that the award is “contrary to any law, rule, or regulation”⁴⁴ or that the award “excessively interferes” with § 7106(a) rights.⁴⁵ The Statute does not address what degree of deference should be accorded to arbitrators.

In this respect, federal collective-bargaining does not and cannot cover *the whole employment relationship*. Instead, under the Statute, collective bargaining extends only to “conditions of employment”⁴⁶ which arise from “personnel policies, practices, and matters . . . established by rule, regulation, or otherwise” which affect “working conditions.”⁴⁷ The Statute also carves out specific matters that *may not be* covered by a collective-bargaining agreement, including any number of “policies, practices, and matters” such as the classification of positions,⁴⁸ other matters which “are specifically provided for by Federal

statute,”⁴⁹ and, as noted above, any management rights defined by § 7106(a). Thus, the foundational principles of collective bargaining that the Supreme Court outlined for the private sector in the *Steelworkers* cases does not extend very far into the collective-bargaining framework that Congress established for the Federal Government.

We recognize that the *Steelworkers* cases have broad applicability in private-sector collective bargaining. They also provide valuable guidance in arbitration cases that come before us. However, we disagree with the dissent that the *Steelworkers* cases establish a mandate that requires us to ignore erroneous arbitral awards that run counter to the plain language, or judicial interpretations, of contractual provisions. Thus, to the extent prior Authority decisions have been interpreted as requiring blind deference to erroneous arbitral determinations, we choose to change that trajectory going forward. The *Steelworkers* cases do not demand that result in public-sector collective bargaining and neither does a commonsense reading of our Statute.

IV. Order

We vacate the award.

³⁸ *NFFE, Local 1453*, 23 FLRA 686, 689-90 (1986) (examining relevant case law regarding Executive Order 11491 to address for the first time the standard for determining whether an exclusive representative has breached its duty of fair representation under the Statute, and articulating a standard consistent with that used in the Executive Order cases).

³⁹ *Warrior and Gulf*, 363 U.S. at 578-79 (emphasis added).

⁴⁰ *Id.* at 580 (emphasis added).

⁴¹ 5 U.S.C. § 7122(a)(2) (emphasis added).

⁴² *Id.* § 7101(b).

⁴³ The term “grounds” as used in § 7122(a)(2) and the *Steelworkers* cases includes, for example, those which are

commonly referred to as “essence,” “manifest . . . infidelity,” “ambiguous,” and “exceeded the scope of [the authority granted by the parties].” *Enterprise Wheel*, 363 U.S. at 597.

⁴⁴ 5 U.S.C. § 7122(a)(1).

⁴⁵ *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 406 (2018) (Member DuBester dissenting).

⁴⁶ 5 U.S.C. § 7103(a)(12).

⁴⁷ *Id.* § 7103(a)(14).

⁴⁸ *Id.* § 7103(a)(14)(B).

⁴⁹ *Id.* § 7103(a)(14)(C).

Member Abbott, concurring:

Courts in the private sector are not the monolithic “amen corner”¹ for arbitrators’ awards that the dissent attempts to portray once again today. Just weeks ago, the United States Court of Appeals for the Third Circuit held that deference to arbitral awards is “not unlimited” particularly when the arbitrator “ignores the plain language of the contract” and creates a new provision “to which [one party] did not agree.”² In *Monongahela Valley*, the court held that an arbitrator exceeds his/her authority when they base their award on what they “believe[] *should* occur” rather than what the contract actually requires.³ Specifically, the court determined in that case that the arbitrator had no more authority to inject a restriction on the employer’s “final” and “exclusive” rights to schedule vacations⁴ any more than the Arbitrator here had “to create a new provision in the parties’ agreements that restricted the Agency’s broad discretion over the assignment process.”⁵

But such limitations on arbitral authority are hardly new and apply all the more in public sector arbitration. Federal courts and administrative bodies, state courts, and the Authority⁶ have consistently questioned how far *Steelworkers* deference translates more generally into the public sector.

For example, the court in *AFGE, Local 1617 v. FLRA*⁷ rejected the union’s arguments that “arbitra[tors] are to be given [the same] high degree of deference [under the Statute]” that arbitrators in the private sector are accorded.⁸ In that case, the court found that:

“[t]he *Steelworkers* Trilogy opinions . . . [address] federal court review of [private sector] employment arbitration decisions, not federal court review of FLRA decisions. The *Steelworkers Trilogy* opinions do not provide guidance on this court’s jurisdiction over FLRA decisions. Instead, this court must rely on the statutory language that specifically explains when review is appropriate.”⁹

The court in *Lodge 2424, IAMAW, AFL-CIO v. U.S. (Lodge 2424)*,¹⁰ similarly held that the *Steelworkers* cases were “made in the context of private labor disputes” and “Congressional intent, as reflected in the Labor-Management Relations[] Act¹¹ [was] that industrial labor disputes be settled by arbitration . . . which limit[s] judicial review and accord[s] finality to decisions.”¹² The court went on to hold, more specifically, that there is no similar deference (or application of *Steelworkers*) “to an arbitrator’s decision made pursuant to a collective[-]bargaining agreement between the Government and a union.”¹³

Even the Comptroller General, citing the court’s ruling in *Lodge 2424*, also held that the *Steelworkers* rulings were limited to private-sector labor disputes. Accordingly, the Comptroller General invalidated an arbitrator’s award, that was “based [] on a literal reading of one section of the collective bargaining agreement,” and that ordered a federal agency to continue an employee’s union-dues allotment even after the employee was promoted to a position outside of the bargaining unit’s recognition.¹⁴

The States had established various forms of public-sector collective bargaining long before the Federal Government did so in 1964 and 1978, have also evaluated the applicability of *Steelworkers* in public-sector collective bargaining, and courts in at least eighteen states and the District of Columbia have found there are grounds

¹ *Monongahela Valley Hosp. Inc. v. United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int’l Union, AFL-CIO CLC*, No. 19-2182, slip op. at 11 (3d Cir. 2019) (*Monongahela Valley*).

² *Id.* at 7, 8 (citation omitted), 11.

³ *Id.* at 10 (internal quotations omitted).

⁴ *Id.* (internal quotations omitted).

⁵ Majority at 4.

⁶ See, e.g., *Nat’l Ass’n of Air Traffic Specialists, NAGE, SEIU*, 61 FLRA 558, 559 (2006) (“*Steelworkers* addressed the discretion of arbitrators in private sector disputes. Unlike private sector arbitrators, it is well established that Federal sector arbitrators’ discretion . . . is limited.”).

⁷ 103 Fed. Appx. 802 (5th Cir. 2004).

⁸ *Id.* at 807.

⁹ *Id.*

¹⁰ 215 Ct. Cl. 125 (1977).

¹¹ 29 U.S.C. §§ 141-197; 61 Stat. 136.

¹² 215 Ct. Cl. at 135-36.

¹³ *Id.* at 136.

¹⁴ *Matter of: Headquarters XVIII Airborne Corps & Ft. Bragg – Recoupment of Union Dues – Arbitration Award*, B-180095 (Comp. Gen. Dec. 8, 1977).

for questioning arbitrators' decisions.¹⁵ While some courts have looked to the *Steelworkers* cases and generally affirmed the presumptions of coverage and arbitral deference,¹⁶ in practice other courts have entertained all sorts of challenges to and rejected arbitral findings that concerned arbitrability of or the interpretation of contract provisions.¹⁷

The courts have found that the *Steelworkers* presumption of arbitrability does not apply in the public sector context and instead have reasoned that there should be a narrower scope in the absence of clear, unequivocal agreement to the contrary.¹⁸ Still other courts declined to defer to arbitral findings which conflicted with statutory-excluded subjects (similar to the Statute's

¹⁵ *Univ. Sys. of N.H. Bd. of Trs. v. Dorfsman*, 130 A.3d 1219, 1227 (N.H. 2015) (finding that the arbitrator exceeded the scope of his authority in concluding that misconduct amounting to "moral turpitude" was insufficient to justify termination under the parties' agreement, and that the arbitrator "substituted his views . . . for the provisions of the contract.") (citation omitted); *Fraternal Order of Police, Dept. of Corr. Labor Comm. v. D.C. Pub. Emp. Relations Bd.*, 973 A.2d 174, 178-79 (D.C. 2009) (upholding decision to vacate arbitration award that was inconsistent with the Back Pay Act); *R.I. Council 94, AFSCME, AFL-CIO v. State*, 714 A.2d 584, 594 (R.I. 1998) (holding that the arbitrator exceeded her authority by classifying prison inmates as state employees and that her award failed to draw its essence from the parties' agreement. The court stated "We do not by this opinion endeavor to replace the arbitrator's interpretation of the CBA with our own. Rather we are constrained to recognize those instances in which an arbitrator reaches beyond the terms of the parties' CBA for the purpose of rendering what he or she believes is a more desirable result."); *City of Yakima v. Yakima Police Patrolmans Ass'n*, 199 P.3d 484 (Wash. Ct. App. 2009) (noted that arbitration awards receive great deference but found in this case that the arbitrator's conclusion that a police officer's termination was unjust was beyond the arbitrator's authority and was therefore erroneous); *Clearview Educ. Ass'n, OEA/NEA, v. Clearview Local Sch. Dist. Bd. of Educ.*, 751 N.E.2d 494, 498 (Oh. Ct. App. 2001) (finding that the arbitrator's interpretation of the parties' agreement to require a school board to award a coaching position to a member of the bargaining unit was made "with unmistakable disregard" of the agreement's express terms and that the court had "no choice but to conclude that the decision [was] irrational and illegitimate."); *Sw. Ohio Reg'l Transit Auth. v. Amalgamated Transit Union, Local 627*, 723 N.E.2d 645, 653 (Oh. Ct. App. 1998) (finding that the arbitrator's determination that an employee's termination was not for just cause "depart[ed] from the essence of the CBA because the award was without rational support.").

¹⁶ *See, e.g., In re Town of Little Compton*, 37 A.3d 85, 90 n.12 (R.I. 2012) (stating that there is a presumption of arbitrability if the collective-bargaining agreement contains an arbitrability clause); *Bd. of Educ. of Watertown City Sch. Dist. v. Watertown Educ. Ass'n*, 710 N.E.2d 1064, 1070 (N.Y. 1999) (stating that the court's decisions have "largely comported with the *Steelworkers* presumption with respect to CBA interpretation"); *Cedar Rapids Ass'n of Fire Fighters, Local 11 v. City of Cedar Rapids*, 574 N.W.2d 313 (Iowa 1998); *Iowa City Cmty. Sch. Dist. v. Iowa City Educ. Ass'n*, 343 N.W.2d 139 (Iowa 1983); *Niagara Wheatfield Adm'rs Ass'n v. Niagara Wheatfield Cent. Sch. Dist.*, 375 N.E.2d 37 (N.Y. 1978); *Jacinto v. Egan*, 391 A.2d 1173 (R.I. 1978); *Acting Superintendent of Schs. of Liverpool Cent. Sch. Dist. v. United Liverpool Faculty Ass'n*, 369 N.E.2d 746 (N.Y. 1977).

¹⁷ *See, e.g., R.I. Dep't of Corr. v. R.I. Bhd. of Corr. Officers*, 115 A.3d 924, 931 (R.I. 2015) (finding that the arbitrator manifestly disregarded the parties' agreement when he looked outside the agreement to rationalize his award); *Town of Marlborough v. AFSCME, Council 4, Local 818-052*, 75 A.3d 15 (Conn. 2013); *Bd. of Educ. of New Haven v. AFSCME Council 4, Local 287*, 487 A.2d 553 (Conn. 1985); *State, Dep't of Law & Pub. Safety, Div. of State Police v. State Troopers Fraternal Ass'n*, 453 A.2d 176 (N.J. 1982); *Policemen's & Firemen's Ret. Bd. v. Sullivan*, 376 A.2d 399 (Conn. 1977); *Bridgeport Bd. of Educ. v. NAGE, Local RI-200*, 125 A.3d 658 (Conn. App. Ct. 2015); *City Ass'n of Sup'rs & Adm'rs v. State Operated Sch. Dist. of Newark*, 709 A.2d 1328, 1333-34 (N.J. Super. Ct. App. Div. 1998) (finding that the arbitration panel exceeded its authority by relying on past practices and, therefore, ignored the terms of the parties' agreement); *Chenowith Educ. Ass'n v. Chenowith Sch. Dist. 9*, 918 P.2d 854 (Or. Ct. App. 1996); *PBA, Local 160 v. Twp. of N. Brunswick*, 640 A.2d 341, 345-46 (N.J. Super. Ct. App. Div. 1994) (finding that an award was invalid when the arbitrator ignored an explicit term of the agreement); *State v. AFSCME, Council 4*, 537 A.2d 517 (Conn. App. Ct. 1988); *Portland Ass'n of Teachers v. Portland Sch. Dist. No. 1, Multnomah Cnty.*, 625 P.2d 1336 (Or. Ct. App. 1981).

¹⁸ *See, e.g., City of L. A. v. Superior Court*, 302 P.3d 194, 200 (Cal. 2013) ("For disputes arising under collective[-]bargaining agreements, there is a 'presumption of arbitrability,' under which a court should order arbitration of a grievance 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'") (citations omitted); *see also United Teachers of L.A. v. L.A. Unified Sch. Dist.*, 278 P.3d 1204, 1215 (Cal. 2012) ("Just as *Warrior & Gulf Co.* recognized that a grievance is inarbitrable when it arises from a matter expressly excluded by the parties from the collective[-]bargaining agreement, the EERA makes clear that a grievance is inarbitrable when it arises from a matter, such as the reelection of probationary teachers, on which collective bargaining is statutorily preempted."); *Bd. of Educ. of Watertown City Sch. Dist. v. Watertown Educ. Ass'n*, 710 N.E.2d 1064, 1067 (N.Y. 1999) (finding that public sector collective[-]bargaining agreements are subject to a two-step analysis. Initially, the court must determine whether arbitration claims with respect to the particular subject matter are authorized by the terms of the Taylor Law. The second step involves a "determination of whether such authority was in fact exercised and whether the parties did agree by the terms of their particular arbitration clause to refer their differences in this specific area to arbitration"); *Acting Superintendent of Schs. of Liverpool Cent. Sch. Dist. v. United Liverpool Faculty Ass'n.*, 369 N.E.2d 746, 749 (N.Y. 1977); *SEIU, Local 614 v. Cnty. of Napa*, 99 Cal.App.3d 946 (1979).

7106(a) management rights),¹⁹ important government policies,²⁰ or added to, subtracted from, or modified public-sector contracts.

I write separately because, while I sincerely agree with the important clarification that we announce today, I would go even further. I would announce that to the extent prior Authority decisions have been interpreted as requiring

¹⁹ See, e.g., *City of Oswego v. Oswego City Firefighters Ass'n, Local 2707*, 988 N.E.2d 499, 500 (N.Y. 2013) (vacating arbitration award requiring contribution to firefighters' retirement plans because award was explicitly contrary to law); *In re Buffalo Police Benevolent Ass'n & City of Buffalo*, 830 N.E.2d 308, 310 (N.Y. 2005) (finding that the arbitrator's award was prohibited by the employer's right to promote the best qualified candidates); *In re Cnty. of Hennepin v. Law Enforcement Labor Servs., Inc., Local No. 19*, 527 N.W.2d 821, 824 (Minn. 1995) (vacating arbitration award despite *Steelworkers Trilogy* because "in the public sector an arbitrator lacks the authority to decide constitutional issues"); *Amalgamated Transit Union, Div. 1300 v. Mass Transit Admin.*, 504 A.2d 1132, 1136 (Md. 1986) (acknowledging public policy exception to deference given to arbitrators under *Steelworkers Trilogy*); *Brown v. Holton Publ. Schs.*, 258 N.W.2d 51 (Mich. 1977); *Cohoes City Sch. Dist. v. Cohoes Teachers Ass'n*, 358 N.E.2d 878 (N.Y. 1976); *Gogebic Med. Care Facility v. AFSCME, Local 992, AFL-CIO*, 531 N.W.2d 728, 731 (Mich. Ct. App. 1995) (vacating arbitrator's award because it would cause employer to reinstate employee who had violated law and engaged in unethical conduct); *Lake County Educ. Ass'n v. School Bd. of Lake County*, 360 So.2d 1280 (Fla. Dist. Ct. App. 1978); *Police Officers Labor Council v. City of Wyo.*, No. 258843, 2006 WL 2000136 at *3 (Mich. Ct. App. July 18, 2006) (vacating arbitrator's award because it would cause employer to retain employee who violated ethical standards for state police officers).

²⁰ See, e.g., *State, Dep't of Cent. Mgmt. Servs. v. AFSCME, Council 31*, 51 N.E.3d 738, 750 (Ill. 2016) ("For all the reasons discussed above, we hold that section 21 of the Act, when considered in light of the appropriations clause, evinces a well-defined and dominant public policy under which multiyear collective[-]bargaining agreements are subject to the appropriation power of the State, a power which may only be exercised by the General Assembly."); *Phila. Hous. Auth. v. AFSCME, Dist. Council 33, Local 934*, 52 A.3d 1117 (Pa. 2012); *Westmoreland Intermediate Unit No. 7 v. Westmoreland Intermediate Unit No. 7 Classroom Assistants Educ. Support Personnel Ass'n, PSEA/NEA*, 939 A.2d 855 (Pa. 2007); *Cnty. of Chautauqua v. Civil Serv. Emps. Ass'n*, 869 N.E.2d 1, 5-6 (N.Y. 2007) (finding that the arbitrator's award violated public policy because it prevented the employer from deciding which jobs to eliminate); *AFSCME, AFL-CIO v. Dep't of Cent. Mgmt. Servs.*, 671 N.E.2d 668, 678-79 (Ill. 1996) (finding that the arbitrator's award violated public policy because it forced employer to reinstate untrustworthy employee); *State v. State Troopers Fraternal Ass'n*, 453 A.2d 176 (N.J. 1982); *Bd. of Trs. of Cmty. Coll. Dist. No. 508 v. Cook Cnty. Coll. Teachers Union, Local 1600, AFT, AFL/CIO*, 386 N.E.2d 47 (Ill. 1979); *Bd. of Educ., Great Neck Union Free Sch. Dist. v. Areman*, 362 N.E.2d 943 (N.Y. 1977); *Wisc. Emp't Relations Comm'n v. Teamsters Local No. 563*, 250 N.W.2d 696 (Wis. 1977); *Neshaminy Sch. Dist. v. Neshaminy Fed'n of Teachers*, 171 A.3d 334 (Pa. Cmwlth. 2017); *S. Plainfield Bd. of Educ. v. S. Plainfield Educ. Ass'n ex rel. English*, 727 A.2d 71, 77 (N.J. Super. Ct. App. Div. 1999) ("We need not define the parameters of public interest and welfare consideration except to note that where a decision may result in a *bona fide* claim of layoffs and service reduction, the arbitrator must factor in such concerns in fashioning a remedy that balances the rights of the grievants with the public interest and welfare."), *cert. denied*, 736 A.2d 525 (N.J. 1999); *Musser v. Cnty. of Centre*, 515 A.2d 1027 (Pa. Cmwlth. 1986), *aff'd* 548 A.2d 1194 (Pa. 1988); *Cedarburg Educ. Ass'n v. Cedarburg Bd. of Educ.*, No. 2007AP852, 2008 WL 2812714 (Wis. Ct. App. July 23, 2008).

blind deference to erroneous arbitral determinations, those decisions would no longer be followed.²¹

²¹ *U.S. Dep't of VA, James N. Quillen VA Med. Ctr., Mountain Home, Tenn.*, 69 FLRA 144, 147 (2015) (Dissenting Opinion of Member Pizzella) (finding that the majority deferred to the arbitrator's erroneous finding that "the grievant was *senior* to the selectee" when in fact "the grievant was *junior* to the selectee" in dismissing the agency's nonfact exception); *U.S. DHS, U.S. CBP, U.S. Border Patrol, Yuma Sector*, 68 FLRA 189, 196 (2015) (Dissenting Opinion of Member Pizzella) (the majority went "out of its way" to accept the arbitrator's "faulty reliance" on provisions that were "never mentioned . . . in its grievance, at the hearing, or in its closing brief" to find a contractual violation) (emphasis omitted); *U.S. Dep't of VA, Med. Ctr. Perry Point, Md.*, 68 FLRA 83, 87 (2014) (Dissenting Opinion of Member Pizzella) (through "a tortured analysis," the majority accepted the arbitrator's award of a temporary promotion even though the arbitrator failed to find the grievant performed the necessary higher-graded work for the promotion as required by the plain language of the parties' agreement); *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, Red River, Texarkana, Tex.*, 67 FLRA 609, 616 (2014) (Dissenting Opinion of Member Pizzella) (majority's inference of what the arbitrator "really meant to say," instead of what the arbitrator found, in denying the agency's nonfact exception, was not supported by the undisputed facts); *U.S. Dep't of VA Med. Ctr., Tuscaloosa, Ala.*, 64 FLRA 379, 380 n.4 (2009) (Member Beck disagreed with the majority's decision to deny the agency's essence exception because the arbitrator's remedy was incompatible with the plain wording of the parties' agreement).

Member DuBester, dissenting:

I disagree with the majority's decision that the award fails to draw its essence from the parties' agreement. But more importantly, I vehemently dissent to correct the gross mischaracterization of the essence exception – and the principal role it plays in federal sector bargaining – that contaminates the majority's decision and my colleague's concurring opinion. If left unchecked, the majority's baseless assertions concerning the essence exception threaten to undermine the carefully balanced framework that Congress purposely built into our Statute to address the unique aspects of federal-sector labor relations.

A. The Agency's Essence Exception

By granting the Agency's essence exception, the majority continues its “non-deferential treatment of arbitrators and their awards,”¹ as well as its disregard for parties' past practices and “the legal and policy reasons for enforcing those past practices when interpreting the parties' collective-bargaining agreements.”² And the majority's conclusion that the Arbitrator's finding of a past practice improperly modified the terms of the parties' agreement is based on a fundamental misunderstanding of the court decisions and Authority precedent upon which it bases this conclusion. Indeed, the majority's decision is not even consistent with prior decisions in which it reformulated the Authority's treatment of past practice – decisions with which I strongly disagreed – and misconstrues judicial precedent addressing Article 18 of the parties' agreement.

In a thorough and well-reasoned award, the Arbitrator determined that the parties had an established practice of not filling vacant custody posts with non-custody staff before 2016.³ As part of this practice, vacant custody posts were filled through overtime assignments, primarily through the use of custody staff who volunteered for these assignments. Based on the undisputed facts, the Arbitrator found that the Agency knowingly acquiesced to the practice⁴ and that this practice existed, uninterrupted, for years.⁵ He also determined that

the parties' bargaining agreement “does not explicitly address the issue of augmentation.”⁶

Based on these findings, the Arbitrator concluded that the parties' practice “ha[d] risen to the level of an unwritten contractual right,”⁷ and that the Agency violated Articles 3 and 4 of the parties' agreement, as well as a local Memorandum of Understanding (MOU), by unilaterally augmenting custody positions with non-custody employees in 2016 without bargaining these changes with the Union.⁸ Significantly, the Arbitrator further concluded that the Agency violated: Article 27 of the parties' agreement by increasing the inherent hazards of the institution above the lowest possible level;⁹ Article 18, Section (p) of the parties' agreement by denying overtime opportunities to bargaining unit members affected by the augmentation;¹⁰ and Article 6, Section 2(b) of the parties' agreement by failing to augment in a fair and equitable manner among all non-custody bargaining unit members.¹¹

Finding that each of these conclusions flowed from the Arbitrator's determination that the Agency had an established past practice of not augmenting custody positions, the majority vacates the entire award because, in the majority's view, the Arbitrator improperly modified the “clear terms” of Article 18 of the parties' agreement.¹² This conclusion is flawed for several reasons.

First, the majority's decision improperly discounts the Arbitrator's findings regarding the parties' past practice and again ignores the “common law” of the workplace.¹³ As the Supreme Court has explained, the “arbitrator's source of law is not confined to the express provisions of the contract, *as the [workplace] common law – the practices of the [workplace] – is equally a part of the collective[-]bargaining agreement*, although not expressed in it.”¹⁴ Further, “[i]t is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices mutually accepted by the parties may attain the

¹ *U.S. Small Bus. Admin.*, 70 FLRA 885, 888 (2018) (Dissenting Opinion of Member DuBester) (quoting *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 810 (2018) (Dissenting Opinion of Member DuBester)).

² *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 750 (2018) (*FCC Florence*) (Dissenting Opinion of Member DuBester).

³ Award at 20.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 21, 35.

⁹ *Id.* at 27, 35.

¹⁰ *Id.* at 28, 35.

¹¹ *Id.* at 35.

¹² Majority at 4.

¹³ *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (*Warrior & Gulf Navigation*); see also *Air Line Pilots Ass'n, Int'l v. E. Air Lines, Inc.*, 869 F.2d 1518, 1522 (D.C. Cir. 1989) (quoting *Warrior & Gulf Navigation*, 363 U.S. at 579) (“a collective[-]bargaining agreement may include not only the terms of the written contract but also ‘the common law of a particular industry or of a particular [workplace]’” and “[c]onstruing the ‘common law of a particular [workplace]’ is a question of contract interpretation within the expertise and authority of an arbitrator, not the court”).

¹⁴ *Warrior & Gulf Navigation*, 363 U.S. at 581-82 (emphasis added).

status of contractual rights and duties.”¹⁵ And “[u]nquestionably, the custom and past practice of the parties constitutes one of the most significant evidentiary considerations in labor-management arbitration.”¹⁶

Second, the majority concludes that the “clear language” of Article 18 “gives the Agency broad discretion to assign and reassign employees” – and additionally finds that Article 18 is not ambiguous with respect to augmentation – without identifying the contractual language upon which it relies for these conclusions.¹⁷ This defect is not cured, as the majority suggests, by simply noting that “[t]he parties have been disputing the question of augmentation for years,”¹⁸ or contending that Article 18 has never been found to be “ambiguous” by the Authority or a reviewing court.¹⁹

Indeed, when pressed to identify this “clear language,” the majority is left to assert that “Article 18’s provisions are too numerous to recite,”²⁰ and then notes – without further explanation – that there is “no allegation in this case that the challenged work assignments failed to comply” with the notice requirements set forth in Article 18, Section (o) of the agreement.²¹ By failing to identify any “clear terms”²² of Article 18 which the award purportedly modified, the majority does not even satisfy the recently revised standard regarding past practices established in the two decisions upon which it now relies for this conclusion.²³

Specifically, in *U.S. Small Business Administration*,²⁴ the majority “reconsider[ed] Authority precedent and [found] that arbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations such as past practice – to modify an agreement’s *clear and unambiguous* terms.”²⁵ And in *U.S. Department of the Navy, Puget Sound Naval Shipyard and Intermediate Maintenance Facility, Bremerton, Washington*,²⁶ the majority held that, while arbitrators

“may consider parties’ past practices when interpreting an *ambiguous* contract provision,”²⁷ they “may not rely on past practices to *modify* the terms of a contract.”²⁸ While I strongly disagreed with both decisions, I would expect the majority to have at least identified the “clear and unambiguous” language in Article 18 which was purportedly offended by the Arbitrator’s past practice finding.²⁹

Instead, the majority appears to base its conclusion that the past practice conflicted with the “clear terms” of Article 18 upon the finding by the United States Court of Appeals for the District of Columbia Circuit that Article 18 “covers and preempts challenges to all specific outcomes of the assignment process.”³⁰ This constitutes a vital misunderstanding of the court rulings and Authority precedent upon which the majority relies.

In the two judicial decisions cited by the majority, the court did not address whether a past practice had modified Article 18. Rather, the court determined that the Agency was absolved of its statutory duty to bargain over changes it implemented to certain work-assignment matters because the subject matter of the changes was “covered by” Article 18. As I have previously noted, the court’s decisions do not absolve the Agency from its *contractual* duty to bargain over such matters.³¹ But it is equally true that the decisions do not compel, or even support, the conclusion that Article 18 unambiguously addresses these matters, including the practice of augmentation.

To the contrary, in *Federal BOP v. FLRA (BOP I)*,³² the court explained that “there need not be an ‘exact congruence’ between the matter in dispute and a provision of the agreement” for the matter to be “covered by” the agreement, “so long as the agreement expressly *or implicitly* indicates the parties reached a negotiated agreement on the subject.”³³ In *U.S. DOJ, Federal BOP*,

¹⁵ Elkouri & Elkouri, *How Arbitration Works*, 12-2 (Kenneth May ed., 7th ed. 2012) (*Elkouri*) (quoting Arbitrator Marlin M. Volz in *Metal Specialty Co.*, 39 LA 1265, 1269 (Volz, 1962)).

¹⁶ *Id.* at 12-1.

¹⁷ Majority at 3-4.

¹⁸ *Id.* at 4.

¹⁹ *Id.*

²⁰ *Id.* at 4 n.16.

²¹ Of course – as noted – the Arbitrator found that the Agency violated entirely different provisions of the parties’ agreement, including Article 18, Section (p), which *specifically governs* consideration and distribution of overtime for bargaining unit employees.

²² Majority at 4.

²³ *Id.* at 4 n.14.

²⁴ 70 FLRA 525 (2018) (*SBA*) (Member DuBester concurring, in part, and dissenting, in part).

²⁵ *Id.* at 528 (emphasis added).

²⁶ 70 FLRA 754 (2018) (Member DuBester dissenting).

²⁷ *Id.* at 755 (emphasis added).

²⁸ *Id.*

²⁹ *SBA*, 70 FLRA at 525.

³⁰ Majority at 4, 6 (noting that the court has “determined that Article 18 ‘covers and preempts challenges to all specific outcomes of the assignment process’”) (quoting *Fed. BOP v. FLRA*, 654 F.3d 91, 96 (D.C. Cir. 2011)); *see also id.* at 7 (concluding that the Arbitrator’s interpretation of the parties’ agreement is not “entitled to any deference at all” because it “runs counter to clear judicial and Authority precedent” addressing Article 18).

³¹ *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 69 FLRA 10, 13 n.39 (2015) (emphasis added) (Member Pizzella dissenting) (*FMC Lexington*). With respect to this point, I would note that the Arbitrator’s findings were all based upon the Agency’s *contractual* duty to bargain.

³² 654 F.3d 91 (D.C. Cir. 2011).

³³ *Id.* at 94-95 (emphasis added) (quoting *NTEU v. FLRA*, 452 F.3d 793, 796 (D.C. Cir. 2006)).

Federal Correctional Complex, Coleman, Florida v. FLRA (BOP II),³⁴ the court reiterated this principle, and clarified that – for purposes of the “covered by” doctrine – “[w]hat matters is whether a reasonable construction of the agreement indicates that the disputed subject is within the compass of the agreement.”³⁵

If anything is clear from this judicial authority, it is that a matter need not be specifically addressed in a bargaining agreement for it to be “covered by” the agreement for purposes of defining an agency’s statutory duty to bargain. And this is why the majority’s cursory reliance upon these decisions to vacate the Arbitrator’s finding of a past practice with respect to augmentation is flawed. While the court’s decisions absolve the Agency from its statutory duty to bargain over assignment matters falling within “the compass of” Article 18,³⁶ neither decision concludes that this contractual provision contained clear and unambiguous language addressing the augmentation practice.

And equally important, neither the Union’s previous grievances involving the Agency’s staffing decisions nor Authority decisions addressing those claims have, as the majority blithely asserts, “ignored the Court’s ruling” in *BOP I* “without even mention, let alone consideration, of the Court’s decision.”³⁷ Unfortunately, the majority fails to cite a single Authority decision to support its contention.

However, even a brief survey of Authority decisions addressing arbitration awards under Article 18 demonstrates that they not only addressed *BOP I*, but also carefully – and patiently – explained why the court’s decision did not govern the outcome of the union’s grievances, many of which involved the agency’s

contractual duty to bargain.³⁸ And the majority’s assertion that I have not, “prior to today . . . even acknowledge[d] the existence, let alone the relevance of,”³⁹ the court’s decisions is patently false.⁴⁰

Accordingly, the majority’s sweeping assertion that any grievance challenging an Agency’s staffing decision is barred by the court’s application of the “covered-by” doctrine to Article 18 of the parties’ agreement irresponsibly ignores both the court’s decisions and the claims actually raised in the grievances. It *certainly* does not sustain the majority’s conclusion that the award before us today fails to draw its essence from the parties’ agreement.⁴¹

In sum, the majority’s decision vacates the Arbitrator’s finding that the Agency had an established practice of not augmenting vacant custody posts with non-custody staff – as well as his conclusion that the Agency violated provisions of the parties’ agreement specifically governing the assignment of overtime – based upon “clear terms” of Article 18 that the majority never specifically identifies.⁴² Applying the well-established standards governing our consideration of essence exceptions to arbitration awards, I cannot join the majority’s conclusion that the award fails to draw its essence from the parties’ agreement.

The majority’s decision to vacate the Arbitrator’s finding that the Agency violated Article 27 of the parties’ agreement is flawed for an additional reason. The majority concludes that the Arbitrator’s finding “cannot stand on [its] own” because it is “based on the faulty premise that the Agency was required to negotiate when the Union objected to augmentation.”⁴³ But the Arbitrator’s award on this issue is not based on this premise.

³⁴ 875 F.3d 667 (D.C. Cir. 2017).

³⁵ *Id.* at 674; *see also id.* at 675 (noting that it has “rejected the Authority’s use of a ‘covered by’ standard that compelled bargaining ‘unless the collective bargaining agreement specifically addresses the precise matter at issue’”) (quoting *Dep’t of the Navy, Marine Corps Logistics Base, Albany, Ga. v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)).

³⁶ *Id.* at 674.

³⁷ Majority at 6.

³⁸ *See, e.g., U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Miami, Fla.*, 68 FLRA 61, 64 (2014) (Member Pizzella dissenting) (explaining that, because the arbitrator “resolved the grievance based on a finding of a violation of a contractual – not a statutory – obligation to bargain,” the “covered-by” doctrine in *BOP I* did not apply); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Terre Haute, Ind.*, 67 FLRA 697, 699-700 (2014) (Member Pizzella dissenting) (explaining that the “covered by” defense articulated in *BOP I* did not apply to the award, which “found only a contractual bargaining obligation”).

³⁹ Majority at 6 n.33.

⁴⁰ Should any doubt remain, my colleagues are referred to my extensive discussion on this very point in *FMC Lexington*,

69 FLRA at 13 n.39 (“Member DuBester notes the following: . . . the dissent’s conclusion ‘that the award is contrary to [*BOP I*]’ . . . reflects a fundamental misunderstanding of the court’s holding. The dissent fails to acknowledge, and apparently overlooks, that [*BOP I*] dealt exclusively with an agency’s statutory duty to bargain under the ‘covered-by’ doctrine. But the Agency’s statutory duty to bargain is not at issue here.”).

⁴¹ The majority’s reliance upon two prior Authority decisions addressing augmentation is similarly misplaced. Majority at 5 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Phx., Ariz.*, 70 FLRA 1028 (2018) (*FCI Phoenix*); *FCC Florence*, 70 FLRA 748). Both cases address awards finding that the agency had a *contractual* duty to bargain over their increased use of augmentation. While the majority mistakenly vacated both awards based upon the agency’s “broad [assignment] discretion” under Article 18, neither decision addresses an arbitral finding – as present in this case – that the agency’s augmentation *itself* violated the parties’ agreement. *Id.*

⁴² Compounding its errors, the majority simply ignores the Arbitrator’s finding that the parties’ agreement “does not explicitly address the issue of augmentation.” Award at 20.

⁴³ Majority at 5.

Instead, the Arbitrator concluded that the Agency's use of augmentation "increas[ed] the inherent hazards of the institution well above the lowest possible level permitted"⁴⁴ based on record evidence, including the testimony of non-custody employees "who described their experiences and difficulties when augmented."⁴⁵ More specifically, the Arbitrator found that non-custody employees who "held positions within FCI Miami including teacher, education specialist, maintenance worker supervisor, and financial programs specialist" were unprepared for their work in the custody positions.⁴⁶

In support of this finding, the Arbitrator noted employees' testimony that because they were normally not informed they were being augmented until they had already arrived at the facility in "business casual clothes," they were often required to work in housing units without a correctional officer's uniform, which "signals to the inmates that the employees are not regular correctional officers and prompts the inmates to try to take advantage of the situation."⁴⁷ He found that augmented employees had insufficient time to read the position's post orders before starting their shift, and were generally unfamiliar with the key system used by custody staff, a situation the Arbitrator found "can result in a life or death situation."⁴⁸ Additionally, he found that the "minimal degree of training" provided to the augmented employees "simply does not qualify [them] to work the most difficult posts in the facility."⁴⁹

The Arbitrator's well-supported conclusion that the Agency violated Article 27 by augmenting non-custody employees into custody positions clearly draws its essence from the parties' agreement. And because the majority's decision to grant the Agency's essence exception with respect to the remaining contract violations is fundamentally flawed, I would deny this exception in its entirety.

B. The Essence Exception as Applied in Federal Sector Labor Relations

Perhaps recognizing the flaws in its analysis, the majority is left to argue that application of the well-established principles governing the disposition of essence exceptions is "flawed" because it "elevates the

'Steelworkers' Trilogy' to mythological status within federal sector arbitrations."⁵⁰ And the majority warns that, "to the extent prior Authority decisions have been interpreted as requiring blind deference to erroneous arbitral determinations," it intends to "change that trajectory going forward."⁵¹

Where does one begin in responding to these assertions? Indeed, the mind reels.

I start by noting that no Authority or court decision applying the essence standard to federal arbitration awards has ever concluded that the standard requires "blind deference to erroneous arbitral determinations"⁵² or "total deferential obeisance to arbitral interpretations."⁵³ Similarly, neither I nor any reviewing tribunal has ever held that under the essence standard, "no party, the Authority, or a court should ever be able to successfully challenge an arbitrator's interpretation of any contract no matter how wrong or how many times other arbitrators, the Authority, or a federal court may have come to a different conclusion."⁵⁴ Hyperbolic "straw man" arguments of this sort do not promote the type of informed analysis of this important principle that our parties deserve.

The standard articulated by federal courts for addressing essence exceptions derives from the "federal policy of settling labor disputes by arbitration."⁵⁵ It is premised upon the principle that "the question of the interpretation of the collective bargaining agreement is a question for the arbitrator."⁵⁶ As the U.S. Supreme Court further explains in *United Steelworkers of America v. Enterprise Wheel & Car Corp. (Enterprise Wheel)*,⁵⁷ the logic of this principle is simple:

It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling [the arbitrator] because their interpretation of the contract is different from [the arbitrator's].⁵⁸

In one of its earliest decisions, the Authority recited this passage from *Enterprise Wheel* in resolving an

⁴⁴ Award at 27.

⁴⁵ *Id.* at 25, 27.

⁴⁶ *Id.* at 25, 26.

⁴⁷ *Id.* at 26.

⁴⁸ *Id.*

⁴⁹ *Id.* at 27.

⁵⁰ Majority at 6.

⁵¹ *Id.* at 8.

⁵² *Id.*

⁵³ *Id.* at 6.

⁵⁴ *Id.*

⁵⁵ *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (*Enterprise Wheel*). This decision – along with the Court's decision in *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960) and *Warrior & Gulf Navigation Co.*, 363 U.S. 574 – are commonly referred to as the "Steelworkers Trilogy."

⁵⁶ *Enterprise Wheel*, 363 U.S. at 599.

⁵⁷ 363 U.S. 593.

⁵⁸ *Id.* at 599.

exception alleging that an arbitrator's award failed to draw its essence from the parties' agreement.⁵⁹ And over the course of its forty-year history, the Authority has relied upon principles enunciated in the *Steelworkers* Trilogy to articulate its well-established standard for reviewing essence exceptions.⁶⁰

In today's decision, the majority concludes that the "foundational principles of collective bargaining" outlined in the *Steelworkers* Trilogy do "not extend very far into the collective-bargaining framework that Congress established for the Federal Government."⁶¹ And based upon this conclusion, it suggests that it will no longer adhere to these principles in future decisions. But this reflects a basic misunderstanding of our Statute's purpose, construction and legislative history.

I certainly take no issue with the majority that, in drafting our Statute, Congress endeavored to establish a collective-bargaining framework "designed to meet the special requirements and needs of the Government."⁶² This statutory purpose reflects the reality that federal sector bargaining affects at least three constituencies not directly affected by private sector bargaining: citizens who use the services provided by the agencies governed by our Statute; taxpayers who provide funding for these agencies; and, perhaps most significantly, the public officials whose responsibilities have some bearing on these agencies' operations, particularly those officials whose actions will affect or determine the agencies' budgets. Congress addressed these constituencies when it directed the Authority to interpret the Statute "in a manner consistent with the requirement of an effective and efficient Government."⁶³

But Congress effectuated this statutory purpose by placing significant limitations on federal sector bargaining that are not found in the private sector. For instance, the Statute excludes a number of matters from the scope of "conditions of employment" over which the parties must bargain, including matters "relating to the

classification of any position,"⁶⁴ and matters "specifically provided for by Federal statute."⁶⁵ And more significantly, the Statute prohibits federal employees from engaging in a "strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations,"⁶⁶ thereby divesting federal employees of significant rights enjoyed by private sector employees.

Unlike in the private sector, moreover, Congress provided for the direct review of arbitration awards enforcing the parties' bargaining agreements,⁶⁷ empowering the Authority to vacate an award because, among other reasons, it is "contrary to any law, rule, or regulation."⁶⁸ In addition, in the federal sector, an agency can challenge an award because it offends one of the management rights set forth in § 7106 of the Statute,⁶⁹ a provision that *further* distinguishes our Statute from private sector bargaining.

Congress also empowered the Authority to vacate awards "on other grounds similar to those applied by Federal courts in private sector labor-management relations."⁷⁰ Consistent with this provision, the Authority considers exceptions to arbitration awards alleging that the arbitrator exceeded his or her authority, was biased, or denied the excepting party a fair hearing.⁷¹ A party can also challenge an award on grounds that it is incomplete, ambiguous, or contradictory; because it is based on a non-fact; or because it is contrary to public policy.⁷² And, as in the case before us, a party may argue in exceptions that an award should be vacated because it fails to draw its essence from the parties' bargaining agreement.⁷³

It is beyond question that each of these provisions is "designed to meet the special requirements and needs of the Government."⁷⁴ Indeed, the majority primarily *relies upon* these distinct features of our Statute to observe that

⁵⁹ *U.S. Army Missile Materiel Readiness Command*, 2 FLRA 433, 438 (1980) (denying union's essence exception because "the union appears to be disagreeing with the arbitrator's interpretation and application of the provision of the agreement before him," and "[f]ederal courts in private sector cases have consistently held that this does not constitute a basis for reviewing arbitration awards").

⁶⁰ See, e.g., *AFGE, Local 2338*, 71 FLRA 371, 372 n.4 (2019) (citing *U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 104 & n.13 (2019); *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017)) (Applying the essence standard, the Authority will not disturb an award unless the excepting party can demonstrate 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.").

⁶¹ Majority at 8.

⁶² *Id.* (quoting 5 U.S.C. § 7101(b)).

⁶³ 5 U.S.C. § 7101(b).

⁶⁴ *Id.* § 7103(a)(14)(B).

⁶⁵ *Id.* § 7103(a)(14)(C). For instance, parties are prohibited from negotiating wages and benefits established by law.

⁶⁶ *Id.* § 7116(b)(7).

⁶⁷ *Id.* § 7122(a).

⁶⁸ *Id.* § 7122(a)(1).

⁶⁹ *Id.* § 7106.

⁷⁰ *Id.* § 7122(a)(2).

⁷¹ 5 C.F.R. § 2425.6(b)(1)(i–iii).

⁷² *Id.* § 2425.6(b)(2)(ii–iv).

⁷³ *Id.* § 2425.6(b)(2)(i).

⁷⁴ 5 U.S.C. § 7101(b).

it creates a “more-limited collective-bargaining framework” than what exists in the private sector.⁷⁵

But it simply does not follow that private sector principles governing essence exceptions to arbitration awards, including the standards set forth in the *Steelworkers Trilogy*, are not appropriately applied to federal sector arbitration awards. To the contrary, such a conclusion ignores – and upends – this carefully balanced framework designed to address the special needs and requirements of federal sector bargaining.

Moreover, this conclusion contradicts both the language and legislative history of our Statute. The majority asserts that it must apply a less deferential standard to federal sector awards because “[t]he Statute does not address what degree of deference should be accorded to arbitrators.”⁷⁶ But § 7122(a)(2) of the Statute does *exactly* that, by directing the Authority to review arbitration awards “on other grounds similar to those applied by Federal courts in private sector labor-management relations.”⁷⁷

Any doubt on this point is resolved by the conference report accompanying the enactment of the Statute, which specifies that “[t]he Authority will only be authorized to review [an arbitration] award . . . on *very narrow grounds* similar to the scope of judicial review of an arbitrator’s award in the private sector.”⁷⁸ The report further explains that, “[i]n light of the *limited nature* of the Authority’s review, the conferees determined it would be inappropriate for there to be subsequent review by the court of appeals in such matters.”⁷⁹

And, unlike the majority, the U.S. Court of Appeals for the District of Columbia Circuit has had no trouble discerning that Congress intended the Authority to afford the same deference to arbitral awards as is afforded by courts to private sector awards. For instance, in *Griffith v. FLRA*,⁸⁰ the court held that, in enacting § 7122 of the Statute, Congress “intended that in the area of arbitral awards the Authority would play in federal labor relations *the role assigned to district courts in private sector labor law*.”⁸¹ The court further explained that this reading of the Statute

comports also with what we believe to have been a major object of the legislation: extending the benefits of arbitration in labor relations from the private to the public sector. In [t]he *Steelworkers Trilogy*, the Supreme Court *exalted the role of the arbitrator in labor-management disputes* and set out a general policy of judicial deference to the decisions of arbitrators. Moreover, the policies underlying judicial deference to arbitral decisions are *as important* for public as for private employment.⁸²

The court reiterated this conclusion in *U.S. Department of the Treasury, U.S. Customs Service v. FLRA (Customs Service)*,⁸³ finding that “Congress expected the FLRA’s review of arbitrators’ awards to *track closely* the federal courts’ limited review of arbitrators’ awards in the private sector.”⁸⁴ Notably, in *Customs Service*, the court expressly relied upon a case from the *Steelworkers Trilogy* in explaining how the Authority should apply the essence standard to awards.⁸⁵ Similarly, in *Overseas Education Ass’n v. FLRA*,⁸⁶ the court explained that the Authority’s “limited” review of arbitral awards, in combination with the “circumscribed judicial review of such cases,” is “firmly grounded in the strong Congressional policy favoring arbitration of labor disputes.”⁸⁷

The court’s reasoning on this point, however, is perhaps best summarized in its decision in *Devine v. White*.⁸⁸ In *Devine*, the court carefully considered arguments – including the specific rationales relied upon by the majority in today’s decision – regarding why arbitration decisions in the federal sector should be afforded less deference than that provided by federal courts in the private sector. Notably, the court *categorically rejected* each argument, concluding that “the possible grounds for treating arbitral decisions in the federal sector less deferentially than private sectors *cannot withstand careful scrutiny*.”⁸⁹

For instance, the court acknowledged that management rights “may deserve greater protection” in the federal sector.⁹⁰ But it found that this argument is

⁷⁵ Majority at 8.

⁷⁶ *Id.*

⁷⁷ 5 U.S.C. § 7122(a)(2).

⁷⁸ H.R. Rep. No. 1717, 95th Cong., 2d Sess. 153 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2860, 2887 (emphasis added).

⁷⁹ *Id.* (emphasis added).

⁸⁰ 842 F.2d 487 (D.C. Cir. 1988).

⁸¹ *Id.* at 491 (further concluding that the “conference report . . . confirms this view”).

⁸² *Id.* at 492 (citation omitted) (emphasis added).

⁸³ 43 F.3d 682 (D.C. Cir. 1994).

⁸⁴ *Id.* at 688 (emphasis added).

⁸⁵ *Id.* at 687 (citing *Enterprise Wheel*, 363 U.S. at 597).

⁸⁶ 824 F.2d 61 (D.C. Cir. 1987).

⁸⁷ *Id.* at 63.

⁸⁸ 697 F.2d 421 (D.C. Cir. 1983), *abrogated on other grounds, Cornelius v. Nutt*, 472 U.S. 648 (1985).

⁸⁹ *Id.* at 439 (emphasis added).

⁹⁰ *Id.* at 437.

addressed to “the propriety and scope of collective bargaining itself more than to the amount of deference due arbitral decisions,” and noted that “Congress *has already made* the determination that the advantages of collective bargaining in the federal sector outweigh its disadvantages.”⁹¹ The court further reasoned that, because management rights are “adequately protected by other sections” of the Statute, “limiting the deference due arbitrators’ decisions is *not necessary* to ensure that these rights are respected.”⁹²

The court also addressed the argument that less deference is appropriate because arbitration in the federal sector is intended “not only to ensure compliance with collective bargaining agreements, but also ‘to review [parties’] compliance with controlling laws, rules and regulations.’”⁹³ On this point, the court recognized that when a grievance implicates this arbitral role, “it is not clear that all of the assumptions underlying *Enterprise Wheel’s* ‘essence’ test . . . justify deference to the arbitrator’s decision.”⁹⁴

But it firmly rejected the argument that these concerns are present “when an arbitrator has performed the more traditional role of contract interpretation.”⁹⁵ And it found that, because parties in the federal sector control the selection of the arbitrator – and can also “return ‘an occasional aberrant arbitral decision’” to the negotiation process – “arbitration *is as much a part of the system of self-government in the federal service as in the private sector.*”⁹⁶

Simply put, the majority’s rationale for questioning application of the Authority’s well-established standards governing essence exceptions to federal arbitrators’ awards cannot – in the words of the court – “withstand careful scrutiny.”⁹⁷

Announcing that he would take the majority’s conclusions “even further,”⁹⁸ my concurring colleague asserts that “Federal courts and administrative bodies,

state courts, and the Authority have consistently questioned how far [the] *Steelworkers* [Trilogy] deference translates more generally into the public sector.”⁹⁹ But this proposition also does not withstand careful scrutiny.

At the outset, the state court decisions cited in the concurring opinion simply reflect decisions in which the courts – in the words of my colleague – “have entertained all sorts of challenges” to arbitral awards.¹⁰⁰ Because the courts address these challenges in the context of their respective states’ statutory schemes, their decisions’ relevance to the applicability of the *Steelworkers* Trilogy to our Statute’s carefully balanced framework is hardly evident. But more important, most of the cited decisions simply reflect the court’s consideration of challenges that are explicitly recognized by our Statute.¹⁰¹

And neither of the federal court decisions cited by the concurrence actually questions the extent to which the *Steelworkers* Trilogy should be applied to arbitration exceptions in the federal sector. In *AFGE, Local 1617 v. FLRA*,¹⁰² the court concluded that a federal district court lacked jurisdiction to review the Authority’s decision setting aside an arbitration award. And in the passage cited by the concurrence, the court simply found that this *jurisdictional* question was answered by § 7123 of the Statute, which governs judicial review of Authority orders.¹⁰³

The decision in *Lodge 2424, IAMAW v. United States*¹⁰⁴ is equally irrelevant. In that case, the Court of Claims dismissed a lawsuit brought by a union to enforce an arbitrator’s award because the award “ignored laws and regulations” governing the matter and was therefore “contrary to law.”¹⁰⁵ While the court indeed rejected the union’s invitation to “avoid th[is] difficult obstacle”¹⁰⁶ by deferring to the arbitrator’s conclusions under the essence standard, it rendered this decision *a year before our Statute was enacted*. As one might expect, the court’s ruling made no reference to the Statute or its legislative history.¹⁰⁷

they violated managements’ rights, were contrary to law, or violated public policy); *id.* at 12 n.20 (noting decisions vacating awards because they violated public policy or intruded upon powers held by the legislature).

¹⁰² 103 Fed. Appx. 802 (5th Cir. 2004).

¹⁰³ *Id.* at 807.

¹⁰⁴ 215 Ct. Cl. 125 (1977) (*Lodge 2424*).

¹⁰⁵ *Id.* at 136.

¹⁰⁶ *Id.* at 135.

¹⁰⁷ The relevancy of the Comptroller General decision cited by the concurrence – which was issued in December, 1977 – suffers from the same defect. And similar to *Lodge 2424*, the decision concludes that the award is unenforceable because it was “inconsistent with . . . applicable regulations.” *Matter of: Headquarters XVIII Airborne Corps & Ft. Bragg – Recoupment of Union Dues – Arbitration Award*, B-180095 (Comp. Gen. Dec. 8, 1977).

⁹¹ *Id.* (emphasis added).

⁹² *Id.* (emphasis added) (citing 5 U.S.C. § 7106(a)).

⁹³ *Id.* at 438 (quoting F. Elkouri & E. Elkouri, *Legal Status of Federal-Sector Arbitration* 6-7 (1980)) (additional citations omitted).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* (emphasis added).

⁹⁷ *Id.* at 439.

⁹⁸ Concurring Opinion of Member Abbott at 12.

⁹⁹ *Id.* at 9.

¹⁰⁰ *Id.* at 11.

¹⁰¹ *See, e.g., id.* at 10 n.15 (noting decisions finding that arbitrator “exceeded the scope of his authority” or that the award was inconsistent with a governing statute); *id.* at 11 n.18 (noting decisions in which a grievance was found to be precluded by statute); *id.* at 12 n.19 (noting decisions vacating awards because

When all of the brush is cleared, both my colleagues' assertions constitute nothing more than their "continue[d] . . . assault on arbitrators' reasonable interpretations of contractual language for which the parties have bargained"¹⁰⁸ by substituting their own interpretation of the parties' agreement for that of the arbitrator.¹⁰⁹ Congress could not have been clearer that this is not the role it intended the Authority to play in federal sector bargaining. And to the extent that my colleagues believe they are obligated to step into the shoes of arbitrators to ensure "an effective and efficient Government,"¹¹⁰ they need only read our Statute to see that Congress has already provided the Authority with the tools necessary to accomplish this important statutory purpose.

¹⁰⁸ *U.S. Dep't of the Army, Aberdeen Proving Ground Research, Dev. & Admin., Aberdeen Proving Ground, Md.*, 71 FLRA 54, 56 (2019) (Dissenting Opinion of Member DuBester).

¹⁰⁹ *FCI Phoenix*, 70 FLRA at 1031 (Dissenting Opinion of Member DuBester).

¹¹⁰ 5 U.S.C. § 7101(b).