71 FLRA No. 135

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ALICEVILLE, ALABAMA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 573
COUNCIL OF PRISON LOCALS # 33
(Union)

0-AR-5475

_____

DECISION

April 22, 2020

_____

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, the Authority is called upon yet once again to interpret Article 18 of the parties' agreement. Although the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) has determined twice what the article means, this is at least the eighteenth time the Union has brought the same dispute to the Authority.[1] Here, Arbitrator Rochelle Kentov found that the parties had a past practice of assigning overtime to bargaining-unit employees in the Food Services Department and, therefore, the Agency violated Article 4[2] of the parties' agreement when it started assigning supervisors to vacant posts in order to avoid the payment of overtime without giving the Union notice and an opportunity to bargain.

The Agency argues that the award fails to draw its essence from the agreement because Article 18 provides the Agency with broad authority to assign and reassign work without triggering a separate obligation to provide notice and an opportunity to bargain.[3]

[1] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 660 (2020) (*FCI Miami*) (Member Abbott concurring; Member DuBester dissenting) ("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."); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Phx., Ariz.*, 70 FLRA 1028, 1028 (2018) (Member DuBester dissenting) ("AFGE continues to grieve for at least the seventeenth time, the manner in which the Agency assigns work pursuant to Article 18."); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748 (2018) (*Florence*) (Member DuBester dissenting); *AFGE, Local 3408*, 70 FLRA 638 (2018) (Member DuBester concurring); *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., Bennettsville, S.C.*, 70 FLRA 342 (2017). The U.S. Court of Appeals for the District of Columbia Circuit examined a previous version of Article 18 twice, and held 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*).

[2] Article 4 requires the Agency to provide notice and an opportunity to bargain over a change in conditions of employment. Award at 6.

[3] While the 2014-2017 CBA is a new agreement, the language of Article 18, Section p is essentially the same as the language analyzed in *BOP I* and *BOP II*. *Compare* Exceptions, Attach. C, 2014-2017 Master Agreement at 46 ("[W]hen Management 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, which will be distributed and rotated equitably among bargaining[-]unit employees."), *with U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 63 FLRA 191, 192 (2009) ("[W]hen Management determines that it is necessary to pay overtime for positions/assignments normally filled by bargaining[-]unit employees, qualified *bargaining unit* employees in the bargaining unit will receive first consideration for these overtime assignments, which will be distributed and rotated equitably among bargaining unit employees.") (emphasis added).

We find that because the Agency was acting within Article 18, and in accord with the D.C. Circuit's interpretation, when it assigned supervisors to vacant posts instead of assigning overtime to bargaining-unit employees, it had no obligation to provide additional notice and an opportunity to bargain. Therefore, the award fails to draw its essence from the parties' agreement. Accordingly, we vacate the award.

II. Background and Arbitrator's Award

The Agency operates the Federal Correctional Institution in Aliceville, Alabama (FCI Aliceville). The Union represents bargaining-unit employees at FCI Aliceville, including the employees in the Food Services Department. Sometime after August 5, 2015, the Agency started assigning supervisors to fill vacant posts normally filled by bargaining-unit employees in the Food Services Department to reduce overtime expenses.

The Union grieved this action and invoked arbitration.[4]

The Arbitrator found that the Agency created a past practice of assigning overtime to bargaining-unit employees to cover vacant shifts, and that the Agency changed this practice by assigning supervisors to vacant posts to avoid paying overtime to bargaining-unit employees. The Arbitrator also found that, even though the Agency's actions implicated management's right to assign work, that right did not relieve the Agency of its obligation to give notice and the opportunity to bargain prior to changing the practice of assigning overtime to bargaining-unit employees to cover vacant shifts. Based on the conclusions above, the Arbitrator found that the Agency violated Article 4 of the parties' agreement by failing to provide notice and opportunity to bargain, and she ordered the Agency to bargain over the impact and implementation of its exercise of management's right to assign work.[5]

On February 27, 2019, the Agency filed exceptions to the Arbitrator's award. The Union did not file an opposition.

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

The Agency argues[6] that the award fails to draw its essence[7] from the parties' agreement. Specifically, it argues that the award is not a plausible interpretation and shows a manifest disregard for the plain meaning of Article 18.[8]

In *U.S. Small Business Administration*, the Authority held 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."[9] As explained in more detail below, we find Article 18 to be clear and unambiguous. Therefore, the Arbitrator erred when she looked beyond Article 18 to the parties' "past practice" to find that the Agency violated the parties' agreement when it began assigning supervisors to vacant posts to avoiding paying overtime without giving the Union notice and an opportunity to bargain.

[4] At arbitration, the parties stipulated to the following issue: "Did the Agency violate the parties' [agreement], 5 U.S.C. [§ 7101], or any other laws, rules and regulations, when it assigned supervisors to duties normally performed by bargaining-unit employees?" Award at 2-3. The award only finds a violation of Article 4 of the parties' agreement. *Id.* at 24.

[5] *See* 5 U.S.C. § 7106(a)(2)(B).

[6] Exceptions at 7-8.

[7] 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. *Library of Cong.*, 60 FLRA 715, 717 (2005) (*Library*) (citing *U.S. DOL, OSHA*, 34 FLRA 573, 575 (1990)); *see also FCI Miami*, 71 FLRA at 661 (finding that an award requiring the Agency to bargain before filing custody posts with non-custody employees failed to draw its essence from the clear language of Article 18, which gives the Agency broad discretion to assign and reassign employees).

[8] Exceptions at 7-8. In its exceptions, the Agency also mentions that the award is contrary to *BOP I* and *BOP II*, Exceptions at 5 n.3, and that it does not have a duty to bargain over "working conditions," *id.* at 4 n.2. *See U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 503 (2018) ("working conditions" and "conditions of employment" are not synonymous). Because we set aside the award for failure to draw its essence from the agreement, we do not address the Agency's remaining exceptions. *See U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017) (*DOD*) (setting aside award on exceeded-authority ground made it unnecessary to review remaining exceptions).

[9] *U.S. Small Bus. Admin.*, 70 FLRA 525, 528 (2018) (Member DuBester concurring, in part, and dissenting, in part) (emphasis added).

As well, in 2017, the D.C. Circuit examined Article 18[10] and held:

> 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. Article 18 therefore covers and preempts challenges to all specific outcomes of the assignment process.[11]

Furthermore, in *U.S. DOJ, Federal BOP, Federal Correctional Complex, Florence, Colorado*, the Authority held that the Agency's broad assignment discretion afforded by Article 18 permits it to reassign employees, in order to avoid paying overtime, without triggering a duty to bargain.[12] As such, we find that the Agency acted within its assignment authority under Article 18 when it reassigned supervisors to vacant posts to avoid paying overtime to bargaining-unit employees and did not trigger a separate duty to bargain. Thus, the Arbitrator's award, imposing a contractual bargaining obligation based on a past practice despite the clear and unambiguous language of Article 18, is not a plausible interpretation of the agreement and fails to draw its essence from the parties' agreement.[13]

IV. Order

We vacate the award.

Member DuBester, dissenting:

For reasons expressed in my recent dissent in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida* (*BOP Miami*),[1] as well as my dissents in cases addressing similar grievances,[2] I disagree with the majority's decision that the award fails to draw its essence from the parties' agreement.

The Arbitrator found that the Agency had a past practice of assigning overtime to bargaining unit employees in the Food Services Department to cover vacant shifts, in accordance with Article 18, Section p of the parties' collective-bargaining agreement.[3] She further found that the Agency began assigning supervisors to cover these shifts, and that this represented a significant change to the unit employees' working conditions "because it ha[d] the effect of increasing employee workload and increasing employees' safety concerns, in addition to causing a loss of overtime opportunities."[4] And she concluded that the Agency violated Article 4, Section c of the parties' agreement because it failed to provide the Union with notice of this change and an opportunity to bargain over its impact and implementation.[5]

[10] It appears that the Master Agreement analyzed in *BOP I* and *BOP II* has effectively the same language as the agreement analyzed in this award. *Supra* note 2.

[11] *BOP II*, 875 F.3d at 670 (citing *BOP I*, 654 F.3d at 96).

[12] *Florence*, 70 FLRA at 749 (citing *BOP II*, 875 F.3d at 676); *see also FCI Miami*, 71 FLRA at 661-662 (finding an award preventing the agency from reassigning employees to avoid paying overtime failed to draw its essence from Article 18 of the parties' agreement).

[13] *Library*, 60 FLRA at 717.

[1] 71 FLRA 660, 669-76 (2020) (*BOP Miami*) (Dissenting Opinion of Member DuBester).

[2] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Phx., Ariz.*, 70 FLRA 1028, 1031-32 (2018) (Dissenting Opinion of Member DuBester); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 750-51 (2018) (*Florence*) (Dissenting Opinion of Member DuBester).

[3] Award at 22. Article 18, Section p states: "When Management 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, which will be distributed and rotated equitably among bargaining unit employees." *Id.* at 7.

[4] *Id.* at 23; *see also id.* at 21 (finding that there is "no dispute" that this change was made).

[5] *Id.* at 24. Article 4, Section c states: "The Employer will provide expeditious notification of the changes to be implemented in working conditions at the local level. Such changes will be negotiated in accordance with the provisions of this Agreement." *Id.* at 6.

Notwithstanding the Arbitrator's application of these plainly-worded provisions, the majority vacates the award because the Arbitrator's past practice finding impermissibly modified the "clear and unambiguous language of Article 18" of the parties' agreement.[6] Similar to its decision in *BOP Miami*, however, the majority fails to identify a single "clear and unambiguous" term in Article 18 to support this conclusion.[7]

Rather, the majority – once again – bases its conclusion upon the decision by the United States Court of Appeals for the District of Columbia Circuit in *U.S. DOJ, Federal BOP, Federal Correctional Complex, Coleman, Florida v. FLRA* (*BOP II*).[14] But as I explained in my dissenting opinion in *BOP Miami*, this decision – which absolved the Agency from its statutory duty to bargain over changes implemented to certain work-assignment matters because the subject matter of the changes was "covered by" Article 18 – neither compels nor supports a conclusion that Article 18 unambiguously addresses these matters.[8]

The majority's reliance on *U.S. DOJ, Federal BOP, Federal Correctional Complex, Florence, Colorado*[9] – which is based upon the same misinterpretation of *BOP II*[10] – is flawed for the same reason. Accordingly, even under the standard applied to arbitrators' past practice findings in *U.S. Small Business Administration*[11]– a decision with which I strongly disagreed – the majority's finding that the Arbitrator impermissibly modified the "clear and unambiguous" terms of Article 18 does not withstand scrutiny.

The fallacy of the majority's decision is highlighted by its conclusion that the award fails to draw its essence from the parties' agreement. As noted, Article 18, Section p of the parties' agreement plainly and unambiguously requires the Agency to afford qualified bargaining unit employees with first consideration for overtime assignments in positions they normally fill. And Article 4, Section c plainly and unambiguously requires the Agency to provide the union with notice and an opportunity to bargain over changes in the unit employees' working conditions. It is hard to imagine an award that could be more faithful to the plain wording and meaning of the parties' agreement. Nevertheless, the majority vacates the award based upon "clear and unambiguous" language in Article 18 that – as noted – it has yet to identify.[12]

In sum, the majority's decision is the latest example of its "non-deferential treatment of arbitrators and their awards,"[13] 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."[14] And repeating the mistakes evident in *BOP Miami*, the majority persists in misconstruing judicial precedent addressing Article 18 of the parties' agreement.

Accordingly, I dissent.

[6] Majority at 4-5.

[7] *See, e.g.*, *BOP Miami*, 71 FLRA at 670 (Dissenting Opinion of Member DuBester) (noting that the majority "finds that Article 18 is not ambiguous with respect to augmentation . . . without identifying the contractual language upon which it relies" for this conclusion).

[14] 875 F.3d 667 (D.C. Cir. 2017).

[8] *BOP Miami*, 71 FLRA at 670-71 (Dissenting Opinion of Member DuBester).

[9] 70 FLRA 748.

[10] *Id.* at 749 & n.11.

[11] 70 FLRA 525 (2018) (Member DuBester dissenting).

[12] Majority at 4-5. And as I have noted in previous dissenting opinions, the court's decision in *BOP II* – which related solely to the Agency's statutory duty to bargain – does not absolve the Agency from its *contractual* duty to bargain over work-assignment matters. *BOP Miami*, 71 FLRA at 670 & n.31 (Dissenting Opinion of Member DuBester); *see also U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 69 FLRA 10, 13 n.39 (2015) (Member Pizzella dissenting).

[13] *BOP Miami*, 71 FLRA at 669 (quoting *U.S. Small Bus. Admin.*, 70 FLRA 885, 888 (2018) (Dissenting Opinion of Member DuBester)).

[14] *Id.* (quoting *Florence*, 70 FLRA at 750 (Dissenting Opinion of Member DuBester)).