72 FLRA No. 1

NATIONAL WEATHER SERVICE
EMPLOYEES ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF COMMERCE
NATIONAL WEATHER SERVICE
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
(Agency)

0-AR-5477

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DECISION

January 7, 2021

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, we reject a remedy that would violate management's right to determine its mission under § 7106(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute).

Arbitrator John Paul Simpkins issued an award finding that the Agency violated the parties' agreement and a 2011 Memorandum of Understanding (the MOU) by reducing the operating hours of several Weather Station Offices (WSOs).[1] As a remedy, he ordered the Agency to restore the operating hours at the affected WSOs to their pre-grievance status and to pay any affected employees backpay for overtime differentials they lost due to the Agency's actions.

The main question before us is whether the award is contrary to management's right to determine its mission under § 7106(a)(1) of the Statute.[2] Under the framework articulated in *U.S. DOJ, Federal BOP* (*DOJ*),[3] we find that the Arbitrator's remedy does not reasonably and proportionally relate to the Agency's violation of the parties' agreement and the MOU. Additionally, we deny the Union's exception because the Arbitrator did not exceed his authority by formulating the issues absent a stipulation. Accordingly, we vacate the award as contrary to § 7106(a)(1) of the Statute.

II. Background and Arbitrator's Award

In 2011, the parties negotiated the MOU to mitigate the impact, and improve the implementation, of the Agency's plan to (1) reduce its staff at five weather stations – Cold Bay, McGrath, Yakutat, Annette and St. Paul – and (2) to reduce the operating hours of three weather stations – Cold Bay, McGrath, and Yakutat – to sixteen hours per day, seven days a week. Additionally, paragraph fifteen of the MOU established a process whereby a local office team (LOT) would meet to discuss coverage of leave and vacancy related absences. Consequently, it was common for employees to use overtime to cover absences.

By late 2017, the Agency reduced the operating hours at eight weather stations – Cold Bay, McGrath, Yakutat, Annette, St. Paul, Barrow, Bethel, and Kotzebue – because it alleged that finding coverage for vacant shifts was overly burdensome and that the reduction in hours had a negligible effect on the Agency's forecasting mission.[4] Consequently, the Union filed grievances alleging that the Agency did not properly bargain over its decision to reduce the operating hours at the eight WSOs and, therefore, violated Article 8 of the parties' agreement, paragraph fifteen of the MOU, and § 7116(a)(1) and (5) of the Statute.[5] The Union also claimed that the MOU required the Agency to maintain sixteen hours per day, seven days a week operations at the WSOs named in the MOU. The grievances proceeded to arbitration.

On the merits, the Arbitrator found that the Agency violated the MOU and the parties' agreement because it failed to "engage [in] the LOT process to achieve management's intended result" of reducing the operating hours at the eight WSOs.[6] He found that the denial of overtime pay was not a de minimis event and that the Agency had a duty to bargain when reducing the grievants' overtime opportunities. The Agency argued

[1] All WSOs referred to in this opinion are located in Alaska.

[2] 5 U.S.C. § 7106(a)(1) ("Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency . . . to determine the mission, budget, organization, number of employees, and internal security practices of the agency").

[3] 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting).

[4] The affected WSOs are located in Cold Bay, McGrath, Yakutat, Annette, St. Paul, Barrow, Bethel, and Kotzebue. Award at 9.

[5] The two grievances were filed on September 11, 2017 and November 25, 2017. *Id.* at 1-2. The parties subsequently agreed to combine the grievances for arbitration. Union's Opp'n Br. at 21.

[6] Award at 10.

that it did not violate the MOU because it had the right to determine its mission under § 7106(a)(1) of the Statute. Specifically, the Agency argued that it reduced the hours at the WSOs because changes in technology reduced the need for extended operating hours and allowed the gathering of data to become automated. While the Arbitrator noted that the Agency had a right to determine its mission, he also found that this right did not obviate the Agency of its duty to bargain. Accordingly, the Arbitrator sustained the grievances. As a remedy, he ordered the Agency to restore the affected WSOs to their pre-grievance operating hours and to pay any affected employees backpay for overtime differentials they lost due to the Agency's actions.

The Union filed exceptions to the award on February 28, 2019.[7] The Agency filed exceptions to the award on March 4, 2019 and the Union filed an opposition on April 2, 2019.

Pursuant to the parties' agreement, the Union requested a clarification of the Arbitrator's award to determine whether he found the Agency violated a statutory duty to bargain under § 7116(a)(1) and (5) of the Statute. If the Arbitrator found a statutory violation, then the Union requested that the Arbitrator clarify whether the statutory violation and remedy applied to all eight WSOs. On March 2, 2019, the Arbitrator clarified that he did not find a statutory violation because the parties did not stipulate to him resolving that issue. He also clarified that his original award encompassed all eight WSOs that were cited in the Union's grievances.

The Agency filed supplemental exceptions to the Arbitrator's clarification on April 1, 2019 and the Union filed a supplemental opposition on April 15, 2019.[8]

III. Analysis and Conclusions

A. The Arbitrator did not exceed his authority by formulating the issues absent a stipulation.

The Union contends that the Arbitrator exceeded his authority by not determining whether the Agency's actions constituted an unfair labor practice under § 7116(a)(1) and (5) of the Statute.[9] Specifically, it argues that the Arbitrator was required to decide this issue because both parties submitted the unfair labor practice violation as an issue in their post-hearing briefs and both grievances alleged an unfair labor practice violation.[10] However, the record reveals that the parties did not stipulate to the issues that were before the Arbitrator.[11] Absent a stipulation of the issues by the parties, arbitrators are accorded substantial deference in the formulation of issues to be resolved in a grievance.[12] Therefore, the Arbitrator had the discretion to formulate the issues on the basis of the subject matter of the grievance.[13] The Authority has previously held that an arbitrator does not exceed his authority when he declines to consider unstipulated issues.[14] Consequently, the Arbitrator did not exceed his authority by not including the question of a statutory violation in his formulation of the issues and the Union's exception is denied.[15]

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[7] The Union filed a Motion to File Supplemental Authority requesting the Authority to consider the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Nat'l Weather Ser. Empls. Org v. FLRA.*, 966 F.3d 875, (D.C. Cir. 2020) (*NWSEO*). While we will supplement the record and take official notice of *NWSEO*, 5 C.F.R. § 2429.26(a), we note that *NWSEO* does not change the outcome of the instant case because we do not address the Agency's essence exception.

[8] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any argument that could have been, but was not, presented to the arbitrator. *U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 328 (2009). Where a party makes an argument before the Authority that is inconsistent with its position before the arbitrator, the Authority applies § 2429.5 to bar the argument. *Id.*
In the appendix to its opposition, the Union attaches two exhibits that were not before the Arbitrator. Union's Opp'n, Attach. 2 at 2-7. Because the Union did not present these exhibits to the Arbitrator, we do not consider this evidence. *AFGE, Nat'l INS Council*, 69 FLRA 549, 552 (2016).
Furthermore, the Agency argues that a LOT meeting occurred at all eight affected WSOs. Agency's Exceptions Br. at 14-15. However, the Agency stipulated at the hearing that LOT meetings did not occur at Cold Bay, McGrath, Yakutat, Annette Island, Barrow, and Kotzebue. Union's Opp'n, Attach. 1, Tr. (Tr.) at 11. Because the Agency's arguments are inconsistent with the arguments it made at the hearing, we find that § 2429.5 of the Authority's Regulations bars those parts of the Agency's nonfact exception. *AFGE, Local 3294*, 70 FLRA 432, 433-34 (2018) (Member DuBester concurring).

[9] Union's Exceptions Br. at 2.

[10] *Id.*

[11] *See* Award.

[12] *AFGE Local 1923, AFL-CIO*, 44 FLRA 911, 918 (1992).

[13] *U.S. Dep't of HHS, Food & Drug Admin. N.J. Dist.*, 61 FLRA 533, 535 (2006).

[14] *Office & Prof'l Emps. Int'l Union, Local 2001*, 65 FLRA 456, 459 (2011) ("Because the Authority grants arbitrators substantial discretion to decline to consider issues when the parties have not stipulated to the issues to be decided, the Arbitrator's failure to consider issues regarding the original selection process is not a basis for finding that the award is deficient.").

[15] The Union concedes that it only has one exception remaining before the Authority because the Arbitrator's clarification rendered one of its two exception moot. Union's Opp'n Br. at 24.

B. The Arbitrator's remedy violates management's right to determine its mission under § 7106(a)(1) of the Statute.

The Agency argues that the award excessively interferes with management's right to determine its mission under § 7106(a)(1) of the Statute.[16] Specifically, the Agency argues that the remedy – requiring it to maintain extended operating hours – interferes with its ability to accomplish its mission of providing weather forecasts using appropriately and efficiently collected data.[17]

The Authority has previously found that proposals which require an agency to set particular operating hours are outside the duty to bargain and violate an agency's right to determine its mission.[18] However, in each case, the agency provided unique services to the public and the proposal dictated when that agency could provide those services.[19] Here, the Agency's mission is to provide weather forecasts to the public by collecting weather data from satellites, weather stations, and radiosondes.[20] The Agency asserts that § 7106(a)(1) of the Statute reserves it with the ability to determine "when it is necessary and when it is not necessary to" collect weather data.[21] Because each WSO consists of only a small station for equipment and minimal staff, to require each WSO to remain open is to require, in effect, that the WSOs collect data the Agency no longer needs or wants.[22] In this regard, the Agency's operating hours and its unique mission are interrelated to the same extent as in agencies that provide other services to the public.[23]

Even though the Authority has found that an agency's right to determine its mission is affected only when "the award relates to what the Agency's mission will be, not how the Agency's mission will be carried out," the Authority has also found determinative whether the award "dictate[s] what the [a]gency's mission will or will not include."[24] In this case, the Agency reduced the operating hours at the WSOs because of changes in automated technology – which permit the Agency to more efficiently collect data.[25] Because the Agency's mission here is to provide weather forecasting to the public by collecting data and the Agency's ability to collect data uniquely shifts based on technological advances, we find that the Agency has established that the award affects how the Agency will complete its mission.[26] In particular, by ordering the Agency to maintain extended operating hours and, by extension,

[16] Member Abbott notes that while the award obviously affects the Agency's right to determine its budget and organization, the Agency elected to not raise these arguments in its exceptions. Agency's Exceptions Br. at 11-12.

[17] *Id.* at 11. The Union argues that the parties' agreement precludes the Agency from arguing that the award violates § 7106(a)(1) because the Agency did not "claim[] that the MOU was legally unenforceable" during step one of the grievance procedure. Union's Opp'n Br. at 25. However, the record reveals that the Agency asserted, in both of its responses to the Union's grievances, that it decided to not fill vacant shifts to "accomplish the *mission* of the [A]gency." Union's Opp'n, Attach. 1, Joint Ex. 4 at 2; Union's Opp'n, Attach. 1, Joint Ex. 6 at 1 (emphasis added). Furthermore, the Agency raised the management's right issue at the hearing, Tr. at 35 ("Operating hours are part of management's fundamental right to determine its mission"), and in its post-hearing brief. Union's Exceptions, Attach. 5 at 3. Moreover, the Agency does not argue that the provision of the MOU enforced by the Arbitrator – the LOT process – is unenforceable, per se. Rather the Agency argues that the Arbitrator's enforcement of the LOT-process provision *to prescribe the Agency's operating hours* excessively interferes with the Agency's § 7106(a) rights. *See* Agency's Exceptions Br. at 11 (arguing that an "[a]ward that prescribes the office hours of an agency" excessively interferes with management's right to determine its mission).

[18] *See NLRB Union, Local 21*, 36 FLRA 853, 858 (1990) (*Local 21*) ("Because the proposal in this case prescribes the office hours of the [a]gency's regional office, a matter which is reserved to management under [§] 7106(a)(1) of the Statute, we find that the proposal directly interferes with management's right under [§] 7106(a)(1) to determine the mission of the agency."); *AFGE, Local 3231*, 22 FLRA 868, 869 (1986) (*Local 3231*).

[19] *Local 21*, 36 FLRA at 857-58 ("The mission of the [a]gency in this case is to resolve labor disputes brought to it by members of the public, whether individual employees, unions, or employers. The decision by the management of the regional office as to when that office will be open to the public for the purpose of conducting business is directly linked to the [a]gency's mission."); *Local 3231*, 22 FLRA at 869 ("Since a part of the mission of the [a]gency in this case is to provide services to the public, a decision regarding the particular hours when a Social Security field office is to be open to the public is mission-related.").

[20] Agency's Exceptions Br. at 12. A radiosonde is a small "instrument package . . . that is suspended below a large balloon inflated with hydrogen or helium gas." *Radiosonde Observation*, National Weather Service, http://www.weather.gov/upperair/factsheet (last visited Jan. 4, 2021).

[21] Agency's Exceptions Br. at 12.

[22] *See id.* at 4-5 (explaining that the number of WSOs and their operating hours were previously driven by the need to launch radiosondes, the data the Agency receives from radiosonde launches often duplicates data collected from other sources, and the Agency now uses alternative data-collection techniques that require drastically fewer hours of servicing by employees).

[23] *See, e.g.*, *Local 21*, 36 FLRA at 858; *Local 3231*, 22 FLRA at 869.

[24] *U.S. Dep't of Energy, Rocky Flat Field Office, Golden, Colo.*, 59 FLRA 159, 163 (2003) (*DOE*) (Chairman Cabaniss concurring) (award directing agency to cease collection efforts against grievants to recoup funds spent on their training did not dictate what the agency's mission would or would not include).

[25] Award at 5; *see* Agency's Exceptions Br. at 12.

[26] *See Local 21*, 36 FLRA at 858.

collect nonautomated data, the award "dictate[s] what the Agency's mission will or will not include."[27] Therefore, we now turn to the question of whether the award excessively interferes with the Agency's right to determine its mission.

Pursuant to the framework set forth in *DOJ*,[28] the first question is whether the Arbitrator found a violation of a contract provision.[29] The Arbitrator found that the Agency violated the parties' agreement and the MOU by unilaterally reducing the operating hours at the eight WSOs before participating in the LOT process.[30] Therefore, the answer to the first question is yes.

The second question under *DOJ* is whether the Arbitrator's remedy reasonably and proportionally relates to the violation of the parties' agreement and the MOU.[31] If the answer to that question is no, then the arbitrator's award is contrary to law and must be vacated.[32] In a short analysis, the Arbitrator did not cite to any specific provisions in the MOU or the parties' agreement in determining that the Agency was required to participate in the LOT process under the circumstances before him.[33] Rather, the Arbitrator generally found that the MOU and the parties' agreement required the Agency to participate in the LOT process prior to reducing the operating hours at the WSOs.[34] Consequently, the Arbitrator ordered the Agency to restore the eight WSOs to their pre-change operating hours and to pay any affected employees for overtime they lost as a result of the reduction in the eight WSOs' operating hours.[35]

Due to the general nature of the award, we conclude that the Arbitrator found that the Agency violated a duty to bargain over the impact and implementation of the reduction in operating hours at the WSOs.[36] However, because § 7106(a)(1) of the Statute protects the Agency's right to determine its mission by setting its operating hours, to dictate how many weather stations must be staffed and how many hours each station must be staffed goes far beyond the Agency's duty to bargain over impact and implementation.[37] Consequently, because the Arbitrator's remedy does not reasonably and proportionally relate to the Agency's violation of the parties' agreement and the MOU,[38] the answer to the second *DOJ* question is no.

Accordingly, we set aside the award as contrary to § 7106(a)(1).[39]

IV. Decision

We vacate the award and deny the Union's exception.

[27] *DOE*, 59 FLRA at 163.
[28] 70 FLRA at 405-06.
[29] *Id.* at 405.
[30] Award at 10.
[31] 70 FLRA at 405.
[32] *Id.*
[33] Award at 10.
[34] *Id.* We note that while the Union argues that the MOU is enforceable as a § 7106(b)(1) matter notwithstanding the effect it has on the Agency's management rights, Union's Opp'n Br. at 27 ("[a]greements which an agency voluntarily enters into affecting the 'the technology, methods, and means of performing work' are enforceable in arbitration"), the Arbitrator's enforcement of the MOU was limited to the use of the LOT process. Award at 10 (finding the Agency "breached the MOU by failing to engage the LOT process to achieve management's intended result"). The Union does not explain how the MOU's *LOT process* concerns the "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work, project, or tour of duty" or relates to the "the technology, methods, and means of performing work." 5 U.S.C. § 7106(b)(1); *see* Union's Opp'n Br. at 27 (focusing on "[t]he MOU's requirement that the WSOs be staffed [sixteen] hours a day"). Accordingly, we reject the Union's argument that the MOU provision enforced by the Arbitrator is a § 7106(b)(1) matter.
[35] Award at 10. Furthermore, while the Union argues that the awarded remedies are proper as status quo ante remedies, Union's Opp'n Br. at 35, the Arbitrator does not state in the award that he imposed a status quo ante remedy in accordance with the parties' agreement. Award at 10 ("The evidence is clear that the Agency violated the CBA and breached the MOU by failing to engage the LOT process to achieve management's intended result. It worked before and there is no reason to believe that it could not work in connection with the interests of the parties and the affected WSOs. The denial of pay albeit overtime pay to which an employee is entitled is not a *de minimis* event. The claim of the Union is sustained and the remedy requested is granted.").
[36] *See DOJ*, 70 FLRA at 405; *GSA*, 70 FLRA 14, 15 (2016) ("Where such a change to conditions of employment constitutes the exercise of a management right under § 7106 of the Statute, the agency is nevertheless obligated to notify the exclusive representative and negotiate over the impact and implementation of the change.").
[37] Award at 10.
[38] *See U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 933-34 (2018) (Member DuBester dissenting); *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 573 (2018) (*CBP*) (Member DuBester dissenting).
[39] *DOJ*, 70 FLRA at 405. Because we are setting aside the award as contrary to § 7106(a)(1), we need not address the Agency's remaining exceptions. *E.g.*, *CBP*, 70 FLRA at 573 n.18.

Member DuBester, dissenting in part:

I agree that the Arbitrator did not exceed his authority by not including the question of a statutory violation in his formulation of the issues. However, I disagree that the awarded remedy is contrary to law.

The Arbitrator concluded that the Agency violated the parties' collective-bargaining agreement (CBA) and a governing memorandum of understanding (MOU) by failing to engage in a contractually-mandated procedure (the "LOT process") before reducing the operating hours of several weather stations.[1] And noting a provision in the parties' CBA specifically requiring the Agency to "maintain the status quo" pending the completion of bargaining over Agency-initiated changes to conditions of employment,[2] the Arbitrator directed the Agency to restore operations at the weather stations in accordance with the agreement.[3]

The Authority has consistently held that "where an arbitrator finds that an agency's refusal to bargain violates a [CBA], the propriety of status quo ante (SQA) relief is governed by the arbitrator's remedial authority under the violated agreement."[4] And, applying this principle, the Authority has upheld awards imposing an SQA remedy where the agency is not able to "identify a provision in the [a]greement that limits the [a]rbitrator's authority in such a manner."[5]

Here, the CBA certainly does not limit the Arbitrator's authority in this respect. To the contrary, it specifically *requires* management to maintain the status quo until it fulfills its bargaining obligation to the Union. In ordering the Agency to restore operations at the stations, and to pay any affected employees for lost overtime differentials, the Arbitrator was simply holding the Agency to this agreement.

Nevertheless, the majority – applying the test it first articulated in *U.S. DOJ, Federal BOP (DOJ)*[6] – vacates the award because its SQA remedy "does not reasonably and proportionally relate" to the Agency's contractual bargaining violation.[7] As I have consistently cautioned, application of the "vague decisional framework" set forth in *DOJ* "'invite[s] the exercise of arbitrary power'" because it "lack[s] discernible principles."[8] Today's decision once again illustrates this principle.

The majority's analysis is flawed from the outset. In order to subject the award to scrutiny under *DOJ*, the majority first concludes that it affects the Agency's right to determine its mission. On this point, the majority acknowledges, as it must, that the Authority "has found that an agency's right to determine its mission is affected only when the 'award relates to what the Agency's mission will be, not *how* the Agency's mission will be carried out.'"[9] But then, purporting to apply this principle, the majority concludes that the award affects the Agency's right to determine its mission because it "affects *how* the Agency will complete its mission."[10]

The tortured logic of the majority's conclusion is not salvaged by the Authority precedent upon which it relies. Indeed, in *U.S. Department of Energy, Rocky Flat Field Office, Golden, Colorado*,[11] the Authority reiterated that an award does not affect an agency's right to determine what its mission will be where it merely "relates to how [its] mission will be carried out."[12] And in *NLRB Union, Local 21*,[13] the Authority found that a proposal dictating the hours the agency's regional offices would be open to the public affected the agency's mission, but only because the office hours were "directly linked" to its mission of resolving disputes "brought to it by members of the public."[14] Apart from asserting that the Agency's "operating hours and its unique mission are interrelated"[15] – a vague rationale that could arguably be applied to any agency – the majority fails to explain how either decision has any relevance to the case before us.

Moreover, even looking beyond the flawed nature of the *DOJ* test, the majority's conclusion that the

[1] Award at 9-10.
[2] *Id.* at 9 (quoting Art. 8, Sec. 6 of the CBA).
[3] *Id.* at 10.
[4] *U.S. Dep't of Treasury, IRS*, 68 FLRA 145, 149 (2014) (citing *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010)) (concluding that the arbitrator's "award of SQA relief falls within the great latitude afforded to arbitrators to fashion remedies in contractual violations").
[5] *U.S. Dep't of VA, Montgomery Reg'l Office, Montgomery, Ala.*, 65 FLRA 487, 490 (2011) (further holding that, "[i]n the absence of such a limitation, the [a]rbitrator's direction to the [a]gency is an appropriate exercise of his 'great latitude' in fashioning remedies") (citing *AFGE, Local 916*, 57 FLRA 715, 717 (2002)).
[6] 70 FLRA 398 (2018) (Member DuBester dissenting).
[7] Majority at 7.
[8] *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 576 (2018) (Dissenting Opinion of Member DuBester) (quoting *Sessions v. Dimiya*, 138 S.Ct. 1204, 1223-24 (2018) (Concurring Opinion of Justice Gorsuch)); *see also U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 393 (2019) (Dissenting Opinion of Member DuBester).
[9] Majority at 5-6 (quoting *U.S. Dep't of Energy, Rocky Flat Field Office, Golden, Colo.*, 59 FLRA 159, 163 (2003) (Chairman Cabaniss concurring)) (emphasis added).
[10] *Id.* at 6 (emphasis added).
[11] 59 FLRA 159.
[12] *Id.* at 163.
[13] 36 FLRA 853 (1990).
[14] *Id.* at 857-58.
[15] Majority at 5.

award does not "reasonably and proportionately relate" to the Agency's violation of the parties' agreement reflects a fundamental misunderstanding of the SQA remedy.[16] While acknowledging that the Arbitrator based his award on the Agency's failure to bargain over the impact and implementation of the reduction in the weather stations' operating hours, the majority concludes that the award "goes far beyond the Agency's duty to bargain" regarding this change because it "dictate[s] how many weather stations must be staffed and how many hours each station must be staffed."[17]

But this misses the point of an SQA remedy. While the award certainly requires the Agency to restore operations at the affected weather stations, this remedy – which merely enforces a provision in the parties' agreement requiring the Agency to maintain the status quo pending the completion of bargaining – *precisely relates* to the Agency's bargaining violation. And, as the Authority has consistently held, "the fact that management has the right to implement a change that adversely affects employees does not provide a basis for denying" an SQA remedy.[18]

In sum, the majority's decision misapplies Authority precedent governing management rights. And it mistakenly applies the ill-conceived *DOJ* test to conclude that the award does not sufficiently relate to the Agency's contractual violation based upon a misunderstanding of SQA remedies. Applying "the traditional, widely-recognized deference to arbitrators' remedial determinations,"[19] I would deny the Agency's managements' rights exception, and would uphold the Arbitrator's enforcement of the SQA remedy contained in the CBA.

Accordingly, I dissent.

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[16] *Id.* at 7.

[17] *Id.*

[18] *See, e.g.*, *Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 13 (2000) (citing *U.S. Dep't of HHS, SSA, Balt., Md.*, 36 FLRA 655, 673 (1990)). With respect to the majority's concerns regarding the impact of the remedy upon the Agency's mission, it is worth noting that an agency may be relieved of its obligation to bargain before implementing a change in conditions of employment if it can "establish, with evidence, that its actions were in fact consistent with the necessary functioning of the agency, such that a delay in implementing would have impeded the agency's ability to effectively and efficiently carry out its mission." *U.S. DHS, CBP*, 62 FLRA 263, 265-66 (2007). The majority's analysis requires no similar showing, and allows the Agency to effectively disregard its bargaining obligation with no adverse consequences.

[19] *DOJ*, 70 FLRA at 412 (Dissenting Opinion of Member DuBester); *see also U.S. DOD, Def. Contract Audit Agency, Cent. Region*, 51 FLRA 1161, 1164-65 (1996) ("It is well established that . . . [a]n arbitrator is granted [substantial] broad discretion to fashion appropriate remedies for contract violations.").